

THE LAW OF PRESIDENTIAL IMPEACHMENT

By THE COMMITTEE ON FEDERAL LEGISLATION

For only the second time in the history of our nation, Congress and public are giving serious attention to the possibility of impeachment and removal of a President. The Executive Committee of this Association, among others, urged that Congress proceed to "investigate whether or not impeachment proceedings should be instituted" against President Nixon.* Yet there is little general knowledge of the substance and procedure of this seldom used constitutional authority.

In the interest of informing the Bar and the public, and without taking any position on the evidentiary matters involved in the current impeachment controversy, we have undertaken to prepare this brief analysis of the applicable law. The report expresses our views on the controverted legal issues concerning proper grounds for impeachment and the availability of judicial review of the proceedings in Congress. (We shall use the term "impeachment" primarily in the technical sense, to refer to the action by the House of Representatives stating charges against a public official, rather than in the common parlance, by which the term refers to the entire process of impeachment, trial and removal.)

The analysis which follows is divided into five sections. After an initial review of the pertinent constitutional language, we consider the substantive standards for impeachment and removal, as found in the language of the Constitution and illuminated by historical evidence. The third and fourth sections discuss the respective procedures applicable to an impeachment in the House of Representatives, and to the trial of an impeachment in the Senate. Finally, we consider the propriety of judicial review of an ultimate decision for removal.

I. THE CONSTITUTIONAL TEXT

The Constitution deals with the subject of impeachment and conviction at six places. The scope of the power is set out in Article 11, Section 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.

Other provisions deal with procedures and consequences. Article 1, Section 2 states:

The House of Representatives... shall have the sole Power of Impeachment.

Similarly, Article I, Section 3, describes the Senate's role:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The same section goes on to limit the consequences of judgment in cases of impeachment:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

In a provision pertinent to the impeachment and removal of federal judges, Article III, Section 1 provides: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour" Another provision of secondary relevance is Article II, Section 2: "The President ... shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

Similarly, Article III, Section 2, states: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury . . ."

II. THE SUBSTANTIVE GROUNDS FOR IMPEACHMENT AND REMOVAL

The most significant constitutional question about impeachment and removal is what the appropriate grounds for those actions are; in other words, defining the proper scope of the phrase in Article II: "Treason, Bribery, or other high Crimes and Misdemeanors." "Treason" and "Bribery" are terms of relatively precise meaning, with the former being defined in the Constitution itself (Article III, Section 3). The phrase "other high Crimes and Misdemeanors," however, raises a number of questions. Is that phrase limited to acts which would be indictable as criminal offenses, or was it intended to reach abuses of office or breaches of trust not constituting criminal acts? If impeachment and removal may properly rest on activities which do not constitute crimes, are there any limits in principle on the type of conduct which can be the basis for impeachment and removal, or should the exercise of these powers be governed solely by the free play of our political system?

We believe the intention of the Framers of the Constitution, the history of the actual use of impeachment and removal, and considerations of sound public policy all strongly support construction of "high Crimes and Misdemeanors" as not limited to offenses under the ordinary criminal law. But considerations of original intention, historical usage, and sound public policy likewise caution against a wholly unrestricted reading of the phrase. The concept of "high Crimes and Misdemeanors" should not be taken to mean anything and everything around which political expediency might momentarily organize a majority in the House and two-thirds in the Senate.

We submit that Congress may properly impeach and remove a President only for conduct amounting to a gross breach of trust or serious abuse of power, and only if it would be prepared to take the same action against any President who engaged in comparable conduct in similar circumstances. Although the responsibility for giving content to the constitutional grounds for impeachment is, in our opinion, solely that of Congress, our conclusion is that Congress should exercise these powers subject to a firm sense of constitutional restraint.

It has been argued, especially by persons facing impeachment charges, that criminal acts alone justify resort to the unusual processes of impeachment and removal.¹ The main support for this position lies in the terminology employed in the Constitution, in particular that the words "Crimes", and "Misdemeanors" are terms of art in legal usage, referring to criminal acts. Since treason and bribery are both traditional criminal offenses, proponents of this view contend that the modifier "other" describes acts of the same criminal character. As further support for this interpretation, proponents of the view that "high Crimes and Misdemeanors" encompasses only indictable offenses point out that references to impeachment in the pardon and jury-trial provisions suggest that for other purposes "Cases of Impeachment" are within the criminal categories of "Offenses against the United States" and "all Crimes," respectively.

While the constitutional text thus gives some support to the view that only indictable offenses can be "high Crimes and Misdemeanors," it also contains provisions inconsistent with so narrow an interpretation. Such provisions, together with historical evidence and precedents in the few impeachment proceedings which have taken place, all point toward the conclusion that the grounds for impeachment are not limited to indictable offenses.

Article I, Section 3 expressly distinguishes impeachment from proceedings of a criminal nature in two important respects. First, the consequences of impeachment are limited to removal and disqualification from office. Normal criminal sanctions may not be imposed in impeachment proceedings. Second, impeachment does not bar subsequent criminal prosecution of a person who has been impeached and removed from office. (See page 2, above.) Taken together, these provisions of Article I suggest that impeachment and removal were not viewed by the Framers as criminal proceedings.²

The implication that the grounds for impeachment are not limited to criminal offenses is strongly supported by history and by evidence of the intention of the Constitutional Convention. Our constitutional processes of impeachment and removal had their roots in the English parliamentary practices. The words "high Crimes and Misdemeanors" were lifted bodily from English law, where they were routinely used to describe the variety of conduct for which Parliament removed and punished executive and judicial officers.³ A large number of the best known of these English impeachment precedents were based on official conduct not criminal in nature, but rather amounting, in Parliament's view, to gross failures to carry out legislative or other governmental obligations. The English practice of impeachment for "High Crimes and Misdemeanors" was not predicated on criminal acts.⁴ "High misdemeanor" was a catch-all term covering serious political abuses of various kinds, used only in parliamentary impeachment proceedings, and without roots in the normal English criminal law.⁵

The genesis of the provisions relating to impeachment in the United States Constitution suggests that the Framers followed the English practice summarized above and did not intend that impeachment be predicated only on criminal offenses. The initial constitutional proposal, the "Virginia Plan" mainly drafted by James Madison, provided for impeachment of "National officers" with trial of impeachments to take place in the judiciary,⁶ but did not specify substantive grounds for impeachment. During the debates on this proposal, the provision dealing with impeachment of the President was amended by adding the words "to be removable on impeachment and conviction of malpractice or neglect of duty."⁷

When the Convention decided to make the Virginia Plan the basis for its deliberations, Pinckney and Morris moved to strike the clause providing for the President's removal. At this point, the Convention engaged in its most extensive discussion of impeachment of the President.⁸ The effort to render the President unimpeachable was soundly defeated, and most speakers assumed that grounds for impeachment were not limited to criminal acts. Randolph, for example, spoke of the need to impeach a President for "abusing his power" in connection with the public purse and the military. and Franklin argued that impeachment was necessary to prevent the drastic remedy of assassination where a President "rendered himself obnoxious." Davie also spoke broadly of impeachment as "an essential security for the good behaviour of the Executive." Madison then contributed a substantial and well-known statement of his own views:

[Madison] thought it indispensable that some provision should be made for defending the Community ag[ain]st the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of speculation or oppression.... In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.

During the debate, Morris shifted and finally reversed his position. Midway in the debate, Morris had admitted that a few enumerated offenses by a President ought to be impeachable, but by the end of the discussion he had concluded that impeachment was necessary to deal with betrayals of trust, adding: "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." Following Morris's important change of view, the clause providing for the President's removal for "malpractice or neglect of duty" was approved with only two states opposed. In this debate, Madison and Morris spoke to the impeachment clause with greatest precision, and it is clear from their statements that they did not envision the grounds for impeachment as being limited to criminal acts. During this exchange, only one person, Mason, spoke as if impeachment could be predicated exclusively upon crimes, and it is fair to say that he did not speak to the question with the care reflected in the comments of Madison and Morris.

The Committee of Detail amended the language of the adopted resolution to "treason, bribery, or corruption"⁹ and the Committee of Eleven reduced it still further to "Treason or bribery."¹⁰ The Committee of Eleven also provided that the Senate, rather than the Supreme Court, would try all impeachments, with a two-thirds vote required for conviction. When this version was debated, Mason proposed adding "Maladministration" (thereby repudiating the possible implication of his earlier remarks that impeachment was appropriate only for crimes), but Madison objected that this proposal was "so vague as to be equivalent to a tenure during the pleasure of the Senate." Mason then altered his proposal to the addition of "high Crimes and Misdemeanors against the State." It seems probable that he borrowed the phrase from the English impeachment usage noted earlier (see pages 3-4, above). His modified proposal was accepted by the Convention without discussion.¹¹

The Convention then added "the vice-President and other Civil officers of the U.S." to the coverage of the impeachment provision, and changed the phrase "against the State" to "against

the United States." Madison sought to change the forum for trying impeachments from the Senate to the Supreme Court, as in his original Virginia Plan, on the ground that trial in the legislative forum made the President "improperly dependent." But this effort was decisively rejected, mostly out of fear that a President might improperly influence the Supreme Court through the appointment power.¹² The final stage of the drafting process came when the Committee on Style and Arrangement, charged with revising and arranging the resolutions without making substantive changes, eliminated the phrase "against the United States." In other respects, the impeachment provision remained unchanged and was adopted.¹³ Thus, in addition to suggesting that the substantive grounds for impeachment were not intended to be limited to criminal acts, the debates also support limiting impeachment to misconduct constituting injury to the government in a broad sense, since the elimination of the limiting phrase "against the United States" was not intended to alter the substance of the provision.¹⁴

Contemporary discussion of impeachment after the Constitutional Convention was not extensive, but the few references support a broad understanding of the substantive grounds for impeachment. Hamilton adopted a broad reading in a well-known passage from Number 65 of *The Federalist*:

The subject of its [the Senate's] jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.¹⁵

A similar and weighty viewpoint was expressed by Madison in the First Congress, in the vital early debates concerning the status of Executive Branch officials. In arguing against the wisdom of requiring Senate concurrence for the removal of executive officials, Madison stated:

I think it absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses. On the Constitutionality of the declaration I have no manner of doubt.¹⁶

Madison's premise that the President would be properly subject to impeachment and removal for neglecting to check the excesses of his subordinates was not contradicted in this extensive debate.

The Framers thus did not provide for impeachment and removal only for instances of criminal conduct by a President or other officials. They saw impeachment and removal as an appropriate response to non-criminal abuses of official power. But the Framers also rejected an open-ended, purely political reach for the impeachment power. The Convention refused to adopt Mason's proposed "maladministration" ground for impeachment, and leading members of the Convention--Madison, Morris and Franklin--insisted on the seriousness of the sort of misconduct which should trigger impeachment. As James Wilson said in a related context, in opposition to a proposal for removal of judges by the President with the concurrence of a simple majority of

Congress: "The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches...."¹⁷

The record of the infrequent use of impeachment and removal is consistent with the conclusion that proper grounds for impeachment are not limited to criminal offenses, but also are not satisfied by purely partisan disaffection. Some fifty impeachment proceedings have been initiated in the House since 1789, and Articles of Impeachment have been approved against twelve individuals. Of these twelve cases to reach the Senate, two were dismissed for lack of jurisdiction, six resulted in acquittals, and four persons were convicted and removed from their offices.

Only once in our history has a President been impeached, in an episode which must be viewed against the background of the aftermath of the Civil War. Andrew Johnson's struggle with the Congress over Reconstruction policies toward the former Confederate States led to his impeachment on charges that he illegally removed Secretary of War Stanton from office and that certain of his speeches were disrespectful of Congress.¹⁸ The firing of the Secretary was a violation of the Tenure of Office Act, a recently-enacted statute which defined removal of certain officials without the advice and consent of the Senate as a "high misdemeanor" (see pages 10-11, below).¹⁹ The charges involving the speeches alleged not only that they had been inflammatory and reflected badly on Congress, but that the thrust of at least one speech was to attack the validity of congressional legislation and deny that it was binding on the President.

The Senate, as is well known, failed by one vote to convict Johnson, and the verdict of history is that the Johnson impeachment demonstrates the perils of treating impeachment as an invitation to purely political retribution. It seems highly doubtful that Johnson had engaged in conduct which Congress could conclude as a matter of principle should be the basis for removing any President who engaged in it. The Tenure of Office Act was almost certainly unconstitutional when enacted, as an invasion of presidential power over executive officials, and would be so held today.²⁰ Moreover, even vituperative criticism of Congress should not be grounds for impeachment. Consistent and blatant refusal to carry out the mandate of duly enacted legislation, held constitutional by the courts, would be another matter. But Johnson's reluctance about the Reconstruction legislative program does not fall within this category.²¹

The four Senate convictions have involved federal judges. Of these, only one, Judge Humphreys, who accepted appointment as a Confederate judge during the Civil War without resigning his federal judgeship, was clearly guilty of a criminal offense.²² Two other judges, impeached in this century, were acquitted in the Senate of criminal charges, but convicted and removed for conduct falling short of criminal offenses. Judge Archbald was not found guilty of corruption or other criminal impropriety in any case before him, but it was clear that he was engaging in profitable business arrangements with railroads which almost certainly would appear before his court as litigants.²³ Judge Ritter was convicted by the Senate of bringing his court into scandal and disrepute, the grounds being the particular criminal charges of which he was acquitted.²⁴ Although these judges, especially Ritter, engaged in conduct rather close to the line of criminal offenses, Congress clearly acted on the premise that an impeachable offense need not necessarily be criminal if it is of sufficient gravity. The other convicted judge, the unfortunate John Pickering, was removed in 1804 for insanity and drunkenness.²⁵ More clearly than the other

three cases of removal, the Pickering case illustrates that indictable crimes have not been thought to be the sole basis for impeachment, so long as the conduct of the respondent is such that Congress should remove any person engaging in such conduct from office.

With this background of constitutional history and practice in mind, certain conclusions may be drawn. First, the substantive grounds for impeachment are not limited to criminal offenses. The phrase "high Crimes and Misdemeanors" was historical terminology which encompassed breaches of public trust not amounting to crimes. On the other hand, since the deletion of the additional phrase "against the United States" was one of those stylistic changes made in the final drafting of the Constitution that were not intended to alter the meaning of the underlying provisions, it is fair to conclude that the Framers had in mind that only conduct which in some broad fashion injures the interests of the country as a political entity be the basis for impeachment and removal. The phrase "other high Crimes and Misdemeanors" should accordingly be construed as referring only to acts which, like treason and bribery, undermine the integrity of government. Finally, the debates at the Constitutional Convention contain many statements of concern lest the powers of impeachment and removal be used as a purely political weapon by a Congress which wished to embarrass and punish a president with whom it was at odds. While none of the most influential members of the Convention succeeded in demarcating clear-cut boundaries on the impeachment power, the tenor of the discussion was clearly to the effect that these extraordinary powers should be used only in response to gross misconduct.

It is our conclusion, in summary, that the grounds for impeachment are not limited to or synonymous with crimes (indeed, acts constituting a crime may not be sufficient for the impeachment of an officeholder in all circumstances). Rather, we believe that acts which undermine the integrity of government are appropriate grounds whether or not they happen to constitute offenses under the general criminal law. In our view, the essential nexus to damaging the integrity of government may be found in acts which constitute corruption in, or flagrant abuse of the powers of, official position. It may also be found in acts which, without directly affecting governmental processes, undermine that degree of public confidence in the probity of executive and judicial officers that is essential to the effectiveness of government in a free society. What specific acts meet this test will vary with circumstances, including the particular position in government held by the person charged. At the heart of the matter is the determination--committed by the Constitution to the sound judgment of the two Houses of Congress--that the officeholder has demonstrated by his actions that he is unfit to continue in the office in question.

The American constitutional system is one of fixed and overlapping tenures of office. Impeachment was not intended as a method by which a President could be turned out of office because Congress dislikes his policies. But the Framers granted the remedy of impeachment because they were unwilling to rely solely on periodic elections as the method of removing the unworthy from office. The debates clearly show that impeachment was regarded as a way of removing those whose misconduct in office, whether criminal or not, was serious enough to warrant prompt removal. Our system handles purely political differences primarily by the system of fixed and frequent elections, and also by the various checks and balances built into the ongoing relations among the three Branches. Where, however, serious elements of misconduct are involved, the Framers thought it necessary to provide a direct and immediate remedy.

The constitutional intention that impeachment not be treated as a partisan political weapon cannot be effectuated by attempting to limit to specific categories the range of presidential misconduct which would justify impeachment. The seriousness with which the Constitution impresses resort to these procedures should be respected in a different way. Congress should not impeach and remove a President except for conduct for which it would be prepared to impeach and remove any President. We emphatically disagree with the casual view of impeachment recently put forth by then-Congressman Gerald Ford, that "an impeachable offense is whatever a majority of the House of Representatives considers it to be...." And we likewise reject the view of impeachment suggested in the challenge of former Attorney General Kleindienst, testifying before a Senate committee, that "you don't need facts, you don't need evidence" to impeach the President, "all you need is votes." These statements bear no resemblance to the considered judgments of the Founding Fathers; they do not reflect their commitment to a government of constitutional principle. That the grounds for impeachment may not be limited to criminal acts, or otherwise defined by predetermined categories of conduct, does not mean that Congress should ignore its responsibility to principle in exercising its quasi-judicial powers of impeachment and removal.

III. THE ROLE OF THE HOUSE OF REPRESENTATIVES

The constitutional provision giving the role of accuser and prosecutor-- "the sole Power of Impeachment" --to the House of Representatives was patterned after the English practice. Since the 14th Century, the House of Commons had taken it upon itself to present to the House of Lords charges against "high officers of the Crown, who might avoid, through their influence, punishment unless Parliament was in a position to inflict punishment."²⁶ This had proven an effective tool in the struggle for a more responsible government and quite naturally the architects of the new American nation saw fit to adapt the process to their infant republic.

Although the Constitution is clear in granting the impeachment power to the House, it leaves to that body the development of mechanisms for exercising the power. As in the Constitution itself, the early legislators went to English parliamentary law and for the most part duplicated the English procedure.

A variety of methods have been employed to institute impeachment proceedings: Charges may be made orally on the floor by a Member of the House; a Member may submit a written statement of charges; one or more Members of the House may offer a resolution and place it in the legislative hopper; a presidential message to the House may initiate proceedings. The House has also received charges from a state legislature, from a territory, and from a grand jury. Finally, there may be a report of a committee of the House which may submit facts or charges that will lead to impeachment. Under the rules governing the order of business in the House a direct proposition to impeach is a matter of highest privilege and supersedes other business. Similar privileged treatment is given to propositions relating to a pending impeachment.

Before voting to impeach, the House has always had a committee examine the charges. When an impeachment charge has been initiated, the House either calls for the appointment of a select

committee to investigate the charge or refers the charge to one of its standing committees. Once the matter is referred to a committee, the rules of the particular committee come into play. In some cases where the matter has been referred to a standing committee, it has been assigned to a subcommittee for study. Some inquiries have been made *ex parte*, but the usual practice has favored permitting the accused to explain, present witnesses, cross-examine and be represented by counsel.

Committee hearings may be open or closed and, after the committee investigation is completed, the committee may recommend dismissal of the charges or recommend impeachment. In the latter case, the usual practice is for Articles of Impeachment setting forth the grounds for impeachment to be adopted by the committee and included in its report to the House, which becomes the basis for the formal resolution upon which the House votes. Since 1900, in four of the five impeachment resolutions reported out of a House committee after investigation, Articles of Impeachment have been included in the impeachment resolution that was submitted to the House.²⁷

The committee resolution recommending impeachment, being a matter of privilege, is then promptly placed before the House for debate and vote. It is subject to usual parliamentary procedures during the House debate. After adoption by a majority vote, Articles of Impeachment are signed by the Speaker and the House selects one or more Members to act as "managers" to conduct and prosecute the impeachment in the Senate. The managers may be elected by the House or appointed by the Speaker.

If a resolution recommending impeachment is adopted by the House, the Senate is immediately informed. When the Senate notifies the House that it is ready to receive the Articles of Impeachment, the House managers go to the bar of the Senate, orally present the impeachment, and demand that the Senate issue process to require the attendance of the respondent in the Senate. The managers return and report to the House while the Senate issues a writ of summons fixing the return date on which the respondent is to appear in the Senate. After the Articles of Impeachment are presented to the Senate, the managers act as prosecutor in the subsequent proceedings conducted in the Senate.

The historical record of the impeachment of President Andrew Johnson, in addition to the light it sheds on the substantive grounds (see pages 6-7, above), exemplifies the proceedings conducted by the House and the manner in which Articles of Impeachment are brought before the Senate.²⁸

It is seldom noted that two attempts were made in the House to impeach Johnson. Early in January 1867, two Congressmen introduced a pair of resolutions calling for a Judiciary Committee investigation and impeachment of the President. The Committee conducted hearings which resulted in much general testimony critical of Johnson. The Committee recommended impeachment, but on December 7, 1867 the House rejected a resolution impeaching the President.

A few weeks later, January 22, 1868, the House adopted a resolution authorizing the Committee on Reconstruction to "inquire what combinations have been made or attempted to be made to obstruct the due execution of the laws. . . ." To assist the Committee, the House referred to it the

evidence gathered during the prior investigation. While this second study was going on, Johnson dismissed Secretary of War Stanton. This action violated the Tenure of Office Act, which had been enacted over Johnson's veto the previous March, while the earlier impeachment resolutions were pending. The Act, no doubt with an eye to its potential as affording a ground for impeachment, provided that violation thereof was a "high misdemeanor." On February 22, 1868, the day after Stanton's discharge, the Committee recommended Johnson's impeachment and two days later the House voted adoption of the Committee's resolution. A separate vote appointed a committee to draw up Articles of Impeachment. In a series of votes on March 2 and 3, the House adopted eleven Articles charging Johnson with violation of the Tenure of Office Act and related violations of the Constitution, as well as with disrespectfully attacking Congress in a series of political speeches.

Immediately after the House had adopted the impeachment resolution, it sent a message to the Senate on February 25, by a committee of two Congressmen, informing the Senate of the action by the House, even though the Articles of Impeachment remained to be drafted and voted in the House. The House message to the Senate advised that the House "will, in due time, exhibit particular articles of impeachment against him [President Johnson], and make good the same" The resolution continued with a statement requiring the committee of two House Members to demand that the Senate order the appearance of President Johnson to answer the impeachment.

After the actual Articles of Impeachment were adopted a week later, they were presented to the Senate on March 4. Early that afternoon, the Senate's Sergeant at Arms announced the presence at the door of the Senate Chamber of the managers who had been appointed by the House to prosecute the impeachment. Seven Congressmen had been selected by the House to act as managers, and one of them addressed the President of the Senate, stating that the managers were ready to proceed on behalf of the House to exhibit the Articles of Impeachment against President Johnson.

The dramatic trial in the Senate, as will be described below, commenced the next day.

IV. THE SENATE'S ROLE IN TRYING IMPEACHMENTS

The Senate's part in the impeachment process-- "the sole Power to try all Impeachments" --is patterned after the historic role of the English House of Lords as the trier of impeachments brought by the House of Commons.

As noted earlier, preliminary drafts of the Constitution in the Constitutional Convention would have provided a judicial forum for the trial of impeachments. It was not until near the end of the Convention that the trial of all impeachments was placed in the Senate, with the Chief Justice named to preside at the trial of a President. There seems to have been no particular discussion of making the Chief Justice the presiding officer at the trial of a President; it seems to have been conceded that it would be unfair to have the Vice President preside at a trial that would determine whether he should succeed to the Presidency.

The Senate takes official cognizance of impeachment when formal notification by the House is delivered, though the Senate in the Johnson impeachment moved ahead with preliminary actions after the House had voted to impeach though the Articles had not yet been voted.²⁹

Once the Articles of Impeachment are delivered to the Senate, according to the view that has prevailed, the Senate acts as a court, although in the impeachment of President Johnson many Senators and Members of the House tried to avoid any idea that the Senate was acting in a judicial capacity. When Chief Justice Chase, on March 4, 1869, wrote to the Senate, "That when the Senate sits for the trial of an impeachment it sits as a court seems unquestionable,"³⁰ he was stating what many indeed questioned. Thus, there was objection to captioning the proceedings "In the High Court of Impeachment," and they were not so captioned. Similarly, during the trial the managers on the part of the House always addressed the Chief Justice as "Mr. President," implying that he was merely a presiding officer, while defense counsel addressed him as "Mr. Chief Justice," implying that he was sitting in a judicial proceeding.³¹

The chronology of the beginning of the trial of President Johnson, partly outlined above, is interesting for the light it throws on the conflicting views of the conduct of impeachment trials:³²

On February 25, 1868, the Senate received from the House a message that the House had impeached the President and would thereafter exhibit Articles of Impeachment. But meanwhile the Senate eagerly got to work and on March 2 adopted rules for the trial. On March 4, Chief Justice Chase sent a letter to the Senate in which, in deferential but unmistakable language, he stressed that the Senate was required to act as a court in the trial of an impeachment, and that it could not organize itself for the trial until the House had exhibited Articles of Impeachment to it. The Chief Justice also stated his views of his position at the trial: ". . .the Constitution has charged the Chief justice with an important function in the trial of an Impeachment of the President. . . ."

That afternoon the House exhibited the Articles of Impeachment to the Senate, which set the next day as the start of the trial and requested the attendance of the Chief Justice. On March 5 the Chief Justice entered the Senate Chamber in his robes, accompanied by Justice Nelson, senior Associate Justice of the Supreme Court, and had Justice Nelson administer to him an oath to "do impartial justice according to the Constitution and laws" in the trial of the impeachment. The rules adopted on March 2 had not provided for an oath by the Chief Justice. He then administered the same oath to the Senators.

The next day the Chief Justice took the position that the Senate, sitting as a court of impeachment, would have to readopt its rules of March 2, because it was now not sitting in a legislative capacity. The Senate did so.

The Senate's rules for the trial of impeachments continue in effect today, substantially in the same form as adopted for the Johnson impeachment trial.³³ They vary in certain important respects from the usual rules of procedure in civil and criminal trials.

There is no requirement that a Senator be disqualified for bias or interest, although on occasion Senators have voluntarily declined to vote. In the trial of President Johnson, Senator Wade, the

President *pro tempore* of the Senate, who would have succeeded to the Presidency had President Johnson been convicted, was allowed to vote, and voted for conviction, while Senator Patterson of Tennessee, President Johnson's son-in-law, voted for acquittal. And Senator Sprague, who was Chief Justice Chase's son-in-law, took part in the trial, and voted for conviction.³⁴

The person impeached, referred to in the proceedings as the respondent, is not required to be present. President Johnson did not attend, but was represented by counsel. On the other hand, the entire House of Representatives is privileged to attend and take seats in the Senate chamber and in some cases has done so. The managers from the House of Representatives, who prosecute the impeachment, are seated at tables and chairs prepared for them between the rostrum and the first row of Senators' desks, on one side of the center aisle. Counsel for the Respondent are seated similarly on the other side of the aisle.³⁵

Oral testimony may be given before the full Senate, but the rules now provide that testimony may be taken before a committee of twelve Senators.³⁶ When the trial proceeds before the full Senate, the Senators act as both judge and jury. As such, they have the power to rule on objections to the admissibility of evidence and may question the witnesses. Since the Senate trying an impeachment consists, today, of up to one hundred judges, it would be too cumbersome if they all were free to question witnesses at any time. Accordingly, the rules provide that Senators may put questions to a witness only in writing and through the presiding officer.³⁷

The role of the Chief Justice as presiding officer in the trial of a presidential impeachment is an anomalous one, but Chief Justice Chase gave it a strong imprint in the Johnson trial. At one point the Senate was considering how much time to allow President Johnson to answer the Articles of Impeachment, and it was voted that the Senate retire and deliberate on the question. The Chief Justice went with the Senators to their conference room, thus making it clear that he did not intend to be left out of anything the Senate was doing.³⁸ On a subsequent occasion, although Rule VII of the Senate's rules of March 2 merely provided:

"The presiding officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions . . . " ,

the Chief Justice ruled that certain evidence was competent, subject to a contrary decision by the Senate. Senator Drake objected that the Chief Justice could not make initial rulings but had to submit them to the Senate. The Chief Justice stated that it was his duty to rule in the first instance, subject to the decision of the Senate. Senator Drake appealed to the Senate, and it was moved that the Senate retire to the conference room to consider the ruling of the Chief Justice. On this simple procedural question there was a tie, and the Chief Justice proceeded to break it by voting to sustain his ruling, thus asserting a power, belonging to the Vice President as presiding officer of the Senate, of voting in the case of a tie.³⁹

The matter was resolved in favor of the Chief Justice on both questions. The Senate specifically rejected a motion stating that the tie-breaking vote of the Chief Justice "was without authority under the Constitution of the United States." And Rule VII was amended to provide as follows:

"And the presiding officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereupon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance, submit any such question to a vote of the Members of the Senate."

Thereafter Chief Justice Chase ruled on all questions of evidence in the first instance, although during the trial the Senate overruled him 17 times.⁴⁰

Testimony is taken in open session, but deliberations before the final vote on the Articles of Impeachment are held in closed session. The vote on the Articles is then taken in open session, with the question being put to each Senator individually on each Article of Impeachment.⁴¹

If less than two-thirds of those present and voting (assuming the presence of a quorum, now 51 Senators) find the respondent guilty, he is acquitted of the charge and a judgment of acquittal is automatically entered. A final adjournment of the Senate as a court of impeachment without voting on an Article of Impeachment acts as an acquittal. Of the eleven Articles of Impeachment against President Johnson, only three were brought to a vote, and the President was acquitted on all three. The Senate then adjourned without further consideration of the rest of the Articles.

If two-thirds or more find the respondent guilty, he is removed from office. Thereafter, by a majority vote, the Senate decides whether to disqualify the respondent from ever holding any other office of trust or profit under the United States. Judge Archbald, removed from office in 1912, was so disqualified, but Judge Ritter, who was removed in 1936, was not disqualified.

The Senators may file opinions explaining their votes. In the impeachment of President Johnson, 18 of the 35 Senators voting guilty, and 12 of the 19 Senators voting not guilty, filed opinions.⁴²

The Senate does not altogether forsake its legislative duties while it is sitting to try an impeachment. Before or after a day's session, or during recesses, it may consider legislative matters.⁴³

V. JUDICIAL REVIEW OF IMPEACHMENT AND REMOVAL

A question of great importance is whether the federal judiciary will review impeachment judgments of removal for errors either of procedure or substance. For example, if the House and Senate should adopt then-Congressman Ford's argument that a proper substantive ground for impeachment is anything the House "considers it to be," and a federal official were impeached and removed on patently frivolous grounds, should the federal courts reinstate him or award him a salary claim on a judicial finding that the grounds for removal did not constitute "high Crimes and Misdemeanors"? Or if clearly relevant and probative evidence had been ruled inadmissible, by the Senate, should the Supreme Court reverse the judgment as a violation of fundamental procedural fairness?

The most recent case of impeachment and removal, that of Judge Ritter in 1936, was the only instance in which an impeached federal officer sought judicial review. Judge Ritter sued for his salary in the Court of Claims, challenging the Senate's conviction of him primarily on the ground that the single article upon which his removal was voted did not charge "high Crimes and Misdemeanors." The Court of Claims held that neither it nor any other court has constitutional authority to review impeachment proceedings or set aside the final judgment of the Senate.⁴⁴ The Supreme Court declined to review that decision. We believe the constitutional text, and implications deduced from the constitutional framework, support the soundness of the position taken by the Court of Claims in 1936.

Most constitutional scholars, before and since, have concluded that Congress should have the last word in matters of impeachment and removal. Mr. Justice Story, in his *Commentaries on the Constitution*, stated, "There is also much force in the remark, that an impeachment is a proceeding purely of a political nature." He went on to say that impeachment questions "may be reasonably left to the high Tribunal constituting the court of impeachment"⁴⁵ In the same vein, Professor Herbert Wechsler has regarded the possibility of judicial review of impeachment judgments as not even arguable:

"Who... would contend that the civil courts may properly review a judgment of impeachment when article I, section 3 declares that the 'sole Power to try' is in the Senate? That any proper trial of an impeachment may present issues of the most important constitutional dimension. . . is simply immaterial in this connection."⁴⁶

Raoul Berger, on the other hand, contends in his recent book on impeachment that the federal courts should review challenges to judgments of impeachment, on substantive as well as procedural grounds.⁴⁷ Berger places primary reliance for this view on the Supreme Court's 1969 holding that the exclusion from the House of Congressman Adam Clayton Powell was subject to judicial review on the merits.⁴⁸ In our opinion, the *Powell* case does not support judicial review of impeachment and removal.

The *Powell* decision does illustrate that the courts, if presented with an otherwise justiciable case arising out of an impeachment, will have to determine whether judicial review of congressional impeachment actions is barred by characterization of the issues involved as "political questions" that are beyond judicial competence for review on the merits. The principal issue to be analyzed on this basis is likely to be whether the scope of "high Crimes and Misdemeanors" is limited to indictable crimes or, as we have argued (pages 2-9, above), is a concept of broader and not categorically definable content. In *Powell*, the result of such an analysis was a holding that the issue there presented was not one precluded from judicial review by the political question doctrine. However, there are two respects in which the *Powell* case is distinguishable from impeachment and removal in terms of political question analysis.

First, the Court in *Powell* did not find in the applicable language of the Constitution-- "Each House shall be the judge of the . . .Qualifications of its own Members" (Article I, Section 5)--a "textually demonstrable commitment" of a discretionary power of exclusion to each House. The Court held that this language, in light of the relevant historical materials, did not give each House authority to determine the qualifications for membership and then to judge whether a newly-

elected Member met those qualifications. Therefore, the "textual commitment" formulation of the political question doctrine did not bar judicial review of Mr. Powell's exclusion. However, both the constitutional text and the Framers' intentions are quite different as to impeachment and removal.

The Constitution gives the House and Senate "the sole Power" of impeachment and removal, respectively. The word "sole," in our view, was intended to give the Legislative Branch the autonomous constitutional authority for impeachment and removal. So the only judicial precedent on the point squarely holds.⁴⁹ This interpretation is bolstered by the fact that the Framers explicitly rejected entrusting judgments in impeachment cases to the Supreme Court. That responsibility was given to the Senate, despite Madison's influential view to the contrary. Moreover, by limiting the consequences of removal to essentially political sanctions-removal from the office held, and possible further disqualification from other federal offices-the Framers prevented the Legislative Branch from imposing the criminal law type of punishments (which had been utilized in some English parliamentary impeachments). Accordingly, we conclude that impeachment and removal are powers allocated by the Constitution exclusively to the authority of Congress. On this basis, the propriety of the exercise of these powers in a particular case would present a political question, regardless of whether "high Crimes and Misdemeanors" is given a broad or a narrow meaning.

We also conclude that judicial review of an impeachment proceeding on the merits would run afoul of the political question barrier on another view of that doctrine, which bars judicial review of those controversies whose resolution turns on factors of political discretion rather than on judicially cognizable principles. Application of this view of the political question doctrine to impeachment controversies turns on the breadth of the scope allowed by the Constitution to Congress in determining the grounds for impeachment and removal. This is the second respect in which the result of the constitutional analysis made in *Powell* is distinguishable as regards impeachment. Critical to the Court's decision in *Powell* was its holding that the only constitutionally permissible basis for refusing to seat an elected Congressman would be his failure to satisfy the express constitutional standards of eligibility--age, citizenship, and residency. Hence the power to determine what are proper grounds for exclusion was not one "committed" by the Constitution to the discretion of each House. This meant, in turn, that the contrary decision of the House of Representatives respecting the seating of Mr. Powell was not beyond the reach of what the Court has come to call "judicially manageable standards"; that is, standards susceptible of principled application by courts.

The standards for impeachment and removal, by contrast, are not "judicially manageable," in our view.⁵⁰ Once the phrase "high Crimes and Misdemeanors" is interpreted to encompass more than ordinary criminal acts, it is hard to see how a court could review the substantive grounds for impeachment in accordance with standards like those generally applied by courts in reviewing governmental actions. As Hamilton said of impeachment proceedings, in explaining why the Supreme Court was not given the responsibility:

"This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security."⁵¹

Thus, both because the Constitution is explicit and the intent of the Framers plain that the Legislative Branch exclusive of the courts should judge impeachments, and because the standards applicable to the basic issues in an impeachment are not "judicially manageable," we believe it would be unconstitutional for the courts to review judgments of impeachment, even if Congress sought to escape its "sole" responsibility by enacting a statute conferring such jurisdiction on the courts.⁵²

Our conclusion applies equally to judicial review of the procedures utilized by Congress in impeachment proceedings. In carrying out this unique constitutional function, procedural decisions will inevitably be tied to judgments on the merits. Congress should not be forced by the courts to operate in accordance with rules of procedural due process which have been developed to govern judicial or administrative proceedings.

The inappropriateness of judicial review of impeachment proceedings would be magnified in the situation of a presidential impeachment.⁵³ Interposition of the courts to pass upon the legal sufficiency of Articles of Impeachment following their adoption by the House would considerably prolong the period of uncertainty in the leadership of government that impeachment of a President would necessarily produce; while judicial review after a judgment of conviction and removal by the Senate would cast doubt, with the gravest potential repercussions, on the fundamental question of who is entitled to hold the office of President of the United States in the period following the final vote in the Senate. These considerations support our basic conclusion, that the Constitution has committed exclusively and finally to the measured discretion of elected representatives the unique, quasi-judicial function of determining whether an elected or appointed officer of the United States must be removed from office on grounds of unfitness.

VI. CONCLUSION

The power of impeachment and removal is a drastic one, not to be lightly undertaken in any case. It is particularly sensitive with reference to the President of the United States, the only official in our system of government who is chosen by the vote of the people of the entire nation. We have tried in this report to outline the scope of that power--the grounds for impeachment that are indicated, albeit without precise definition, by the Constitution and the historical practice, the procedures applicable to the respective roles of the House and the Senate, and the complete and ultimate responsibility placed upon the Members of Congress by the absence of judicial review. In so doing, our purpose is to contribute to public understanding of this exceptional constitutional authority that has been committed to the principled judgment of Congress.

January 21, 1974

COMMITTEE ON FEDERAL LEGISLATION

MARTIN F. RICHMAN, Chairman

STEPHEN E. BANNER	ARTHUR H. KROLL
BORIS S. BERKOVITCH*	JEROME LIPPER
ERIC BREGMAN	STANDISH F. MEDINA, JR.
JACK DAVID	
EVAN A. DAVIS	LYDIA E. MORGAN
FRANCIS K. DECKER, JR.	ROBERT G. MORVILLO
DAN L. GOLDWASSER	EUGENE H. NICKERSON
MURRAY A. GORDON	STANLEY PLESENT
GEORGE J. GRUMBACH, JR.	BRUCE RABB
ELIZABETH HEAD	BENNO C. SCHMIDT, JR.
WILLIAM JOSEPHSON	THOMAS J. SCHWARZ*
FRANCIS E. KOCH	BRENDA SOLOFF
	DAVID G. TRAGER

LEONARD W. WAGMAN

* Messrs. Berkovitch and Schwarz dissent in part from the conclusions relating to judicial review, for the reasons stated in their individual views set forth at pages 22-24, below [[Individual Views](#)].

FOOTNOTES

*The Executive Committee adopted the following resolution on November 7, 1973 (together with resolutions favoring legislation for court appointment of a Watergate Special Prosecutor):

RESOLVED that The Association of the Bar of the City of New York approves and supports the action taken by the judiciary Committee of the House of Representatives to investigate whether or not impeachment proceedings should be instituted against the President of the United States. Because of the public importance of this issue, we urge that the Committee report its conclusions at the earliest practicable time.

¹ See, *e.g.*, Irving Brant, *IMPEACHMENT: TRIALS AND ERRORS*, 3-23 (1972) (hereinafter cited as BRANT). This was also the position taken by counsel for Mr. Justice Douglas in 1970. See *Memorandum on Impeachment of Federal Judges* filed with the Special Subcommittee of the House Committee on the Judiciary on H. Res. 920 Cong., 2d Sess., 116 CONG. REC., 29756 (1970).

² The question whether a President is subject to criminal prosecution without impeachment and removal, and the related questions as to what immunities or defenses arising out of his official position would be available in a criminal proceeding brought during or after his tenure as President, are beyond the scope of this report on the process of impeachment.

³ A. Simpson, *A TREATISE ON FEDERAL IMPEACHMENTS*, 81-188 (1916).

⁴ Raoul Berger, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS*, 59 *et seq.* (1973) (hereinafter cited as BERGER). Berger refers to thirteen impeachments in which no criminal offense was present, and states that this "by no means exhausts the list. . . ." *Id.* at 69.

⁵ *Id.* at 61.

⁶ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21-23 (Farrand ed. 1937) (hereinafter cited as FARRAND).

⁷ FARRAND at 88.

⁸ FARRAND at 64 *et seq.* This instructive debate is set out in *Impeachment, Selected Materials Published by the House Judiciary Committee, 93rd Cong., 1st Sess.*, at 3-6 (1973) (hereinafter cited as *Selected Materials*).

⁹ FARRAND at 185-86. The proceedings at the Convention relating to impeachment are carefully reviewed in Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 *FORDHAM L. REV.* 1, 15-23 (1970) (hereinafter cited as *Feerick*).

¹⁰ FARRAND at 495.

¹¹ FARRAND at 550 *et seq.*

¹² *Ibid.*

¹³ *Feerick* at 23.

¹⁴ This view was supported by comments in the state ratifying conventions. See, *e.g.*, the comments of Samuel Johnston and James Iredell discussed in *Feerick* at 24-25.

¹⁵ *The Federalist*, No. 65 (emphasis in original).

¹⁶ This extensive debate is set out in full in *Selected Materials* at 7 *et seq.* Madison's statement appears there at page 11.

¹⁷ FARRAND at 429.

¹⁸ The House passed eleven Articles of Impeachment against Johnson, of which the first nine and part of the eleventh concerned his firing of Stanton. The tenth and the remainder of the eleventh article related to the speeches. The Johnson Articles are set out in full in *Selected Materials* at 154-60.

¹⁹ The story of the Johnson impeachment is told in BERGER ch. IX, and BRANT ch. VII.

²⁰ See *Myers v. United States*, 272 U.S. 52 (1926).

²¹ See the discussions in BERGER and BRANT, *supra* note 19, and in A. Schlesinger, Jr., *THE IMPERIAL PRESIDENCY*, 71 *et seq.* (1973).

²² *Selected Materials* at 140.

²³ *Id.* at 174.

²⁴ *Id.* at 188.

²⁵ *Id.* at 129; BRANT ch. III.

²⁶ *Selected Materials* at 689.

²⁷ *Id.* at 717-18.

²⁸ See *Id.* at 203 *et seq.*, 715-16.

n *Powell* (and an explicit statement in the concurring opinion of Mr. Justice Douglas) to the effect that the power of each House under Article I, Section 5 to expel a Member during his term, in contrast to the power under that Section to exclude hipower as construed in *Powell*. The Framers seem to have provided, in lieu of defined standards of misconduct, that the check on the legislature's powers of removal from office would be the political protection of requiring an extraordinary occurrencachment and removal, for the reasons indicated above in the text of the report. Further, to the extent that the power of impeachment and removal bears characteristics of a judicial power, the Committee believes that the Constitution, particularly in its grant to the Senate of "the sole Power to try" an impeachment, has conferred on the legislature rather than the judiciary that aspect of the judicial power under the Constitution. Error in the exercise of any power is possible, of course, but we f such a trial either by the Supreme Court or by inferior courts in the federal judicial system.

INDIVIDUAL VIEWS

We respectfully dissent from the Committee's report insofar as it concludes that the feder, if a President were impeached for a non-indictable offense, the Court would define the standard to be applied, as it did in *Powell*, and finding that the Congress had acted outside its authority, set aside the impeachment.

In contrast, if the Court were to find that "high Crimes and Misdemeanors" includes conduct not indictable but manifesting a gross abuse of trust and misuse of office, a less clear situation for judicial review would be presented. Although an argument could be mustered that under the broader standard "high Crimes and Misdemeanors" could mean, in the words of then Congressman Gerald Ford, anything the House "considers it to be," it would seem that the Court would first have to determine whether the conduct of the President could, under any reasonable interpretation, come within the Framers' intended meaning of "high Crimes and Misdemeanors." Once that determination was made in the affirmative, the Court would then find that there existed a political controversy and that there had been a "textually demonstrable constitutional commitment" of the issue to the Congress. No review of procedure or of the weight of the evidence would be proper. On the other hand, if the President had been impeached and removed on patently frivolous grounds, the Court would not be faced with a situation any more difficult or unmanageable than was presented in *Powell*, or than would be presented if the narrower definition of "high Crimes and Misdemeanors" were adopted. Only if the Court were to adopt the Ford definition of the phrase would the question of review become a political question in all cases. The limitation of the power to impeach to "high Crimes and Misdemeanors" constitutes, in effect, a

qualification for the President's tenure in office. If he could be removed by an antagonistic Congress without having committed, under any reasonable interpretation, a high crime or misdemeanor, the Executive Branch would become totally subservient to the legislature's whim, and the Framers' intention to limit the situations calling for impeachment, recognized by the Committee, would be defeated. As was said by Madison in a speech to the Constitutional Convention, objecting to giving the legislature power to establish qualifications for its members (and quoted by the Court in *Powell*, 395 U.S. at 533-34):

"The qualification of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect.... It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of [a weaker] faction."

As recent events have shown, the judiciary acts as the arbiter where the question involves a construction of the Constitution or a confrontation between the Executive and Legislative Branches. Its place should be no less important in the case of impeachment. As was reiterated by the Court in *Powell*:

" 'Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.' " 395 U.S. at 56, quoting from *Kilbourn v. Thompson*, 13 U.S. 168, 199 (1881).

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