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## "High Crimes and Misdemeanors": Recovering the Intentions of the Founders

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# “High Crimes and Misdemeanors”: Recovering the Intentions of the Founders

Gary L. McDowell\*

## *Introduction*

The most interesting and important question involved in the constitutional process of impeachment is the meaning of “high Crimes and Misdemeanors” as understood by those who framed and ratified the Constitution. What follows is an effort to shed some light on that original meaning and thereby to provide some guidance to those who must determine if, in the instant case, the President of the United States has committed impeachable offenses as that phrase might have been understood by the Founders.

The importance of attempting to answer this question of the Founders’ original intention in creating the impeachment provisions has been underscored by the recent open letter from a scholarly coalition calling itself “Historians in Defense of the Constitution.”<sup>1</sup> In that letter the historians correctly point out that the impeachment of any President is “a grave and momentous step”; but they also insist that the current inquiry is not simply grave and momentous but “ominous”—an effort to remove this President by a “novel” and “unprecedented” theory of impeachment.<sup>2</sup>

The threat posed by this “dangerous new theory of impeachment,” the signatories to the open letter insist, is that it will undermine the basic constitutional principle of separated powers and its attendant system of checks and balances that truly is our “chief safeguard against abuses of public power.”<sup>3</sup> This new view of the impeachment power, they argue, is the result of abandoning the intentions of the Founders who “explicitly reserved [impeachment] for high crimes and misdemeanors in the exercise of executive power.”<sup>4</sup> The crux of the argument is this: “Impeachment for anything else

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\* Professor of American Studies and Director of the Institute of United States Studies in the University of London. This version of my written statement submitted on November 9, 1998, to the Subcommittee on the Constitution of the Judiciary Committee of the House of Representatives during hearings on “The Background and History of Impeachment” has been slightly edited to incorporate certain comments made during my oral presentation and further comments solicited by Congressman William Delahunt.

I am deeply indebted to Raoul Berger, John Bolton, James McClellan, and Brenda Evans McDowell for their guidance and assistance in the preparation of this statement on the history and background of impeachment. I owe a special note of appreciation to Dr. McClellan for sharing with me his encyclopaedic knowledge of Joseph Story and the common law sources upon which he depended.

1 *Historians in Defense of the Constitution*, N.Y. TIMES, Oct. 30, 1998, at A17.

2 *See id.*

3 *See id.*

4 *Id.*

would, according to James Madison, leave the President to serve 'during pleasure of the Senate.'<sup>5</sup>

Such serious charges by so many distinguished historians demand a careful consideration of what the Founders meant by "high Crimes and Misdemeanors": Were they only indictable crimes or did they include what one of the Framers called "political crimes and misdemeanors?"<sup>6</sup> Were they offenses that a President would commit only in "the exercise of executive power" or did they also include a President's malfeasance committed in his private capacity? Were they subject to a reasonably fixed meaning or were they to be determined simply by the exercise of the "awful discretion" of those in Congress called upon to impeach and to try impeachments?<sup>7</sup> If it is true that this new theory of impeachment will indeed "leave the Presidency permanently disfigured and diminished [and] at the mercy as never before of the caprices of any Congress,"<sup>8</sup> then a return to the proper understanding of the Founders' intentions will avert nothing less than a constitutional catastrophe.<sup>9</sup>

### I. *Impeachment and Republican Government*

The Framers and Ratifiers understood the Constitution's grant to the House of Representatives of "the sole Power of Impeachment" to be one of enormous significance for the republican form of government they were creating.<sup>10</sup> The Framers knew that some means of "displacing an unfit magistrate [was] rendered indispensable by the fallibility of those who choose, as

<sup>5</sup> *Id.* It is not at all clear that the historians have given an accurate glimpse of Madison's view on this matter. His fear that the President could find himself reduced to serving merely "during pleasure of the Senate" derived from the fact that he thought George Mason's suggested term "maladministration" was too "vague." It does not follow from that concern that Madison demanded that impeachment be "explicitly reserved . . . for high crimes and misdemeanors in the exercise of executive power." Madison never spoke to this issue and none of his statements on impeachment and the standards for impeachability seem to suggest that he sought to limit impeachment to merely abuses in the exercise of executive power. See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND].

<sup>6</sup> See 1 THE WORKS OF JAMES WILSON 425 (Robert Green McCloskey ed., 1967) [hereinafter WORKS].

<sup>7</sup> See THE FEDERALIST NO. 65, at 441 (Alexander Hamilton) (Jacob Cooke ed., 1961).

<sup>8</sup> *Historians in Defense of the Constitution*, N.Y. TIMES, Oct. 30, 1998, at A17.

<sup>9</sup> Philip B. Kurland, writing in the constitutional shadows cast by Watergate, argued that in seeking to "rely only on the words of the Constitution, their purpose and function, and their history, both before and after their inclusion in the basic document" it is essential that "we . . . look not merely to the words of the document, but to what those words meant to those who wrote them, to the function that they were intended to serve, to the history of their use before, during, and after their composition." PHILLIP B. KURLAND, WATERGATE AND THE CONSTITUTION 105, 107-08 (1978).

<sup>10</sup> See U.S. CONST. art. I, § 2, cl. 5. It cannot be emphasized too strongly that impeachment is the *only* means granted to the Congress to censure or to punish what Arthur M. Schlesinger, Jr. has called "presidential delinquency."

The current suggestion that Congress might opt for a censure of the President is to grant to this body a power not given by the Constitution. Moreover, a mere declaration of censure would be nothing more than a "slap-on-the-wrist approach" to the problem. See ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 411-12 (1973). A motion of censure that would seek more, such as a fine as punishment, would be strictly unconstitutional because it would be a "bill

well as by the corruptibility of the man chosen."<sup>11</sup> On the other hand, they were keenly aware of the danger of any process that would make the President "the mere creature of the Legislature."<sup>12</sup> Such an arrangement would constitute nothing less than "a violation of the fundamental principle of good Government."<sup>13</sup>

It was essential that the arrangements for impeachment be able to resist, as far as possible, introducing the "malignity of party" into this most serious of constitutional processes.<sup>14</sup> The dangers were so severe that Thomas Jefferson remained convinced that impeachment constituted "the most formidable weapon for the purposes of a dominant faction that ever was contrived."<sup>15</sup> The deepest problems facing those who undertook to create within the Constitution the means of dealing with delinquency in high office stemmed from the very nature of impeachment. As James Wilson would later put it, "[i]n

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of attainder," a legislative power to punish that is clearly prohibited by the Constitution. See U.S. CONST. art. I, § 9, cl. 3.

The most significant precedent for a presidential censure from Congress came during the administration of Andrew Jackson in the midst of a political battle over the Bank of the United States. The argument was a classic separation of powers conflict with Congress asserting that it had the power to control the Secretary of the Treasury when it came to administering the bank and Jackson insisting that under the constitutional design for a unitary executive such powers were exclusively those of the President. In a fit of pique, Congress voted to "censure" Jackson; he responded with a "protest" defending his theory of the office.

The censure was nothing more than a resolution of congressional displeasure with no real effect. Jackson stood up to his political foes in his protest arguing that the resolution voted by the Senate was "wholly unauthorized by the Constitution and in derogation of its entire spirit." *Jackson Protests the Senate's Censure, April 15, 1834*, in LIBERTY AND JUSTICE 153, 153 (James Morton Smith & Paul L. Murphy eds., rev. ed. 1965) [hereinafter *Jackson's Protest*]. Should a President submit to such an action, the power of the presidency would be undermined and, in effect, transferred to the Senate. The very idea of a censure was "subversive of that distribution of the powers of government which [the Constitution] has ordained and established, [and] destructive of the checks and safeguards by which those powers were intended on the one hand to be controlled and on the other to be protected." *Id.* at 155.

Jackson showed that this notion of "censure as a halfway house on the road to impeachment" makes "little sense, constitutional or otherwise." SCHLESINGER, *supra*, at 33, 412. Jackson's logic was "unassailable." See *id.* at 33. As Professor Schlesinger put it: "The continuation of a lawbreaker as chief magistrate would be a strange way to exemplify law and order at home or to demonstrate American probity before the world." *Id.* at 412. When it comes to serious presidential wrongdoing, it is either impeachment or nothing.

<sup>11</sup> 1 FARRAND, *supra* note 5, at 86.

<sup>12</sup> See *id.*

<sup>13</sup> *Id.* James Wilson summed up the problem best in his law lectures:

The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. No one should be secure while he violates the constitution and the laws: every one should be secure while he observes them.

1 WORKS, *supra* note 6, at 425.

<sup>14</sup> See 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 at 127 (William S. Hein & Co. reprint 1996) (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (statement of James Iredell).

<sup>15</sup> Letter from Thomas Jefferson to James Madison (Feb. 8, 1798), in 8 THE WORKS OF THOMAS JEFFERSON 368-69 (Paul Leicester Ford, ed. 1904).

the United States . . . impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments."<sup>16</sup>

Because impeachment is designed to address "the misconduct of public men" and their possible "abuse or violation of some public trust" it is inevitable that any impeachment proceeding, especially one that involves the President of the United States, will suffer the propensity to degenerate into the lowest impulses of party and faction.<sup>17</sup> Such proceedings, said Alexander Hamilton, "will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused."<sup>18</sup> As a result, there will always be the danger that "the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt."<sup>19</sup>

The primary way in which the Founders sought to tame the unruly political passions that an impeachment would likely unleash was to divide the process between the two great houses of the legislature, so that as the House was given the sole power to impeach, the Senate was given "the sole Power to try all Impeachments."<sup>20</sup> The Founders deemed that the Senate, constituted as it was, would be the safest repository for the "awful discretion" that would have to be exercised by the court trying impeachments, the power "to doom to honor or to infamy the most confidential and the most distinguished characters of the community."<sup>21</sup>

There was no doubt, however, that the House, in exercising its power to impeach, would be called upon to exercise a discretion no less awful than that consigned to the Senate in trying an impeachment. For to be impeached by the House, even if not convicted and removed by the Senate, would constitute an "indelible reproach"<sup>22</sup> on the character of the person in question, and doom him to "infamy" if not to "perpetual ostracism from the esteem and confidence, and honors and emoluments of his country."<sup>23</sup> The terrible power to impeach was thus not given without the restrictions deemed necessary to reconcile it with the demands of the separation of powers and the republican form of government.

When the Americans turned their attention to fashioning procedures for impeachment they clearly had the history of Great Britain in mind.<sup>24</sup> Yet in the instance of impeachment as in so many other things, the Founders often saw such historical examples as furnishing "no other light than that of beacons, which give warning of the course to be shunned, without pointing out that which ought to be pursued."<sup>25</sup> Although they were willing to borrow

16 1 WORKS, *supra* note 6, at 426.

17 See THE FEDERALIST NO. 65, at 439 (Alexander Hamilton) (Jacob Cooke ed., 1961).

18 *Id.*

19 *Id.* at 440.

20 U.S. CONST. art. I, § 3, cl. 6.

21 See THE FEDERALIST NO. 65, at 441-42 (Alexander Hamilton) (Jacob Cooke ed., 1961).

22 THE FEDERALIST NO. 63, at 425 (James Madison) (Jacob Cooke ed., 1961).

23 THE FEDERALIST NO. 65, at 442 (Alexander Hamilton) (Jacob Cooke ed., 1961).

24 Alexander Hamilton was explicit in stating the debt to England in THE FEDERALIST NO. 65. See *id.* at 440; see also RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 84-85 (1973).

25 THE FEDERALIST NO. 37, at 233 (James Madison) (Jacob Cooke ed., 1961).

from Britain the notion that the lower house ought to “prefer the impeachment” and the upper house would “decide upon it,” there was little else from British experience that made its way into the provisions of the Constitution. The reason was, as Jefferson noted, that “history shows, that in England, impeachment has been an engine more of passion than of justice.”<sup>26</sup> The only other British practice adopted, as will be seen below, was the use of the phrase “high crimes and misdemeanors” in setting a standard for impeachable offenses.

Unlike impeachment in Britain, the Americans restricted the reach of the power to “civil officers” thus excluding private citizens; made clear impeachment would not be a criminal process but a political one that did not demand a trial by jury or permit a presidential pardon; emphasized that impeachment was no bar to further prosecutions in the ordinary courts for criminal actions; and established that punishment would extend no further than removal from office and disqualification from holding office again. By the time of the Federal Convention it was clear that American thinking about impeachment had shifted “from the orbit of English precedent to a native republican course.”<sup>27</sup> The provisions that finally were adopted “reflected indigenous experience and revolutionary tenets instead of English tradition.”<sup>28</sup> Impeachment was rendered, to borrow a phrase from James Madison, “a republican remedy for the diseases most incident to republican government.”<sup>29</sup>

The most important restriction placed on the power to impeach was the catalogue of offenses listed in the Constitution: “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.”<sup>30</sup> These words were not mindlessly crafted or chosen because the Founders thought they were vague and open to endless interpretation. Rather in this, as in all the other provisions of the Constitution, the Founders sought to be precise and limiting in the powers granted. As Rufus King recalled, “it was the intention and honest desire of the Convention to use those expressions that were most easy to be understood and least equivocal in their meaning.”<sup>31</sup> The reason for this desire for clarity was rooted in the founding generation’s firm belief that a written constitution was essential to a free, republican government.

## *II. The Necessity of Recurring to the Intentions of the Founders*

Early in the Revolutionary period a consensus began to emerge among American political leaders that “in all free States the Constitution is fixed” and that “vague and uncertain laws, and more especially constitutions, are the very instruments of slavery.”<sup>32</sup> Experience had taught the colonists the

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26 BERGER, *supra* note 24, at 79 n.130 (quoting Jefferson).

27 PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA* at xi (1984).

28 *Id.*

29 THE FEDERALIST NO. 10, at 65 (James Madison) (Jacob Cooke ed., 1961).

30 U.S. CONST. art. II, § 4.

31 3 FARRAND, *supra* note 5, at 268.

32 This section draws from Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism*, 55 WM. & MARY Q. 375, 396 (1998).

harsh lesson that governors without restraint could make “mere humour and caprice” the most fundamental “rule and measure” of the administration of political power.<sup>33</sup> Protection lay in maintaining the “essential Distinction” between a “civil constitution,” which was fundamental, and the form of government and the exercise of its powers, which was not.<sup>34</sup>

As Americans moved closer to the call for independence, their thinking about constitutions hardened. For a constitution to be deemed fundamental, it had to be able to “survive the rude storms of time” and to remain constant, “however . . . circumstances may vary.”<sup>35</sup> The most likely way to achieve such permanence was to embody the constitution in a “written Charter.”<sup>36</sup> And for such charters to serve as a brake on government, it was further necessary that they be “plain and intelligible—such as common capacities are able to comprehend, and determine when, and how far they are, at any time, departed from.”<sup>37</sup> Constitution draftsmen should take care that “not a single point . . . be subject to the least ambiguity.”<sup>38</sup> Such a “fixt” constitution was the only means whereby the people could safely make their way between the “arbitrary claims of Rulers, on one hand, and a lawless license, on the other.”<sup>39</sup>

In 1787, the Framers thus sought to craft the new Constitution carefully, pulling their words from sources they believed clear and common. They endeavored “to form a fundamental constitution, to commit it to writing, and place it among their archives, where every one should be free to appeal to its text.”<sup>40</sup> They understood that language is the essence of law and that law is the essence of liberty. At the most basic level, there would be neither place nor need in such a constitution, as Joseph Story would later point out, for

<sup>33</sup> See Letter from Samuel Adams, House of Representatives of Massachusetts, to the Speakers of Other Houses of Representatives (Feb. 11, 1768), in 1 THE WRITINGS OF SAMUEL ADAMS 184, 185 (Henry Alonzo Cushing ed., 1904); Jonathan Mayhew, *Concerning Unlimited Submission and Nonresistance to the Higher Powers*, in PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 215, 241-42 (Bernard Bailyn ed., 1965).

<sup>34</sup> See *Berkshire's Grievances* (Pittsfield, 1778), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 455, 457 (Charles S. Hyneman & Donald S. Lutz eds., 1983) [hereinafter AMERICAN POLITICAL WRITING]; Daniel Shute, *An Election Sermon*, in 1 AMERICAN POLITICAL WRITING, *supra*, at 109, 117; see also *Four Letters on Interesting Subjects*, in 1 AMERICAN POLITICAL WRITING, *supra*, at 368, 385; Philodemus [Thomas Tudor Tucker], *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice*, in 1 AMERICAN POLITICAL WRITING, *supra*, at 606, 627.

<sup>35</sup> [Theophilus Parsons], *The Essex Result*, in 1 AMERICAN POLITICAL WRITING, *supra* note 34, at 480, 491; see also *Rudiments of Law and Government Deduced from the Law of Nature*, in 1 AMERICAN POLITICAL WRITING, *supra* note 34, at 565, 567.

<sup>36</sup> See *Four Letters*, *supra* note 34, at 368, 382.

<sup>37</sup> Gad Hitchcock, *An Election Sermon*, in 1 AMERICAN POLITICAL WRITING, *supra* note 34, at 281, 294. This same point was stressed repeatedly. See *Rudiments of Law*, *supra* note 35, at 565, 588-89; John Tucker, *An Election Sermon*, in 1 AMERICAN POLITICAL WRITING, *supra* note 34, at 158, 164.

<sup>38</sup> Thomas Jefferson, *Albemarle County Instructions Concerning the Virginia Constitution*, in 6 THE PAPERS OF THOMAS JEFFERSON 284, 286 (1952).

<sup>39</sup> Tucker, *supra* note 37, at 169.

<sup>40</sup> Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), in 16 THE WRITINGS OF THOMAS JEFFERSON 42, 45-46 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).



“metaphysical or logical subtleties.”<sup>41</sup> A written and ratified constitution of enumerated and limited powers was to be understood to be the “fundamental law,” the embodiment of “the intention of the people.”<sup>42</sup>

John Marshall spoke the sense of his generation of Founders when he insisted that a written constitution was nothing less than “the greatest improvement on political institutions.”<sup>43</sup> Those who framed such constitutions took them seriously as “the fundamental and paramount law of the nation,” the foundation of all governmental powers delegated by the people by which those powers would be “defined, and limited.”<sup>44</sup> Constitutions are written, Marshall argued, so “that those limits may not be mistaken, or forgotten.”<sup>45</sup> Such was the logic of his generation that Marshall could presume that anything the people intended to include in their Constitution “they would have declared . . . in plain and intelligible language.”<sup>46</sup> Thus was the logic of the Founders that the most fundamental rule of interpretation was to determine the intention of the lawgiver.<sup>47</sup>

The evolution in the Federal Convention of the constitutional text concerning impeachable offenses began at the outset when Edmund Randolph presented the Virginia Plan on May 29, 1787, which included the proposal that a national judiciary be empowered, among other things, to deal with “impeachments of any National officers.”<sup>48</sup> The issue was considered again on June 2, when John Dickinson proposed that “the Executive be made removable by the National Legislature on the request of a majority of the Legislatures of individual States.”<sup>49</sup> After some discussion, Hugh Williamson of North Carolina moved to insert in the emerging text the provision that the chief magistrate “be removable on impeachment & conviction of mal-practice or neglect of duty.”<sup>50</sup> On June 18, Alexander Hamilton added to the discussion his view that “[t]he Governour[,] Senators and all officers of the United States [should] be liable to impeachment for mal — and corrupt conduct; and upon conviction to be removed from office, & disqualified for hold-

41 See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 451 (photo. reprint 1994) (Melville M. Bigelow ed., 1891).

42 THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob Cooke ed., 1961).

43 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

44 *Id.* at 176-77.

45 *Id.* at 176. As he sketched it:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric had been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

*Id.*

46 *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

47 In his pseudonymous defense of his opinion in *McCulloch v. Maryland*, Marshall was blunt: “The object of language is to communicate the intention of him who speaks, and the great duty of a judge who construes an instrument, is to find the intention of its makers.” JOHN MARSHALL’S DEFENSE OF *McCulloch v. Maryland* 168-69 (Gerald Gunther ed., 1969).

48 See 1 FARRAND, *supra* note 5, at 22.

49 *Id.* at 85.

50 *Id.* at 88.

ing any place of trust or profit.”<sup>51</sup> The most substantive discussions on impeachment occurred on July 19 and 20. By this time the mix of possible impeachable offenses now included “corruption,” schemes of “peculation or oppression,” “loss of capacity,” malversation, bribery, treachery, corrupting his electors, “negligence,” and “perfidy.”<sup>52</sup> The resolution that “the Executive be removeable on impeachments” carried eight votes to two.<sup>53</sup> Through the entire discussion the primary concern was where to lodge the power to try impeachments; there seemed a general sense of what would constitute impeachable offenses.

By the time the issue returned to the floor of the Convention on August 27, the power to impeach had been lodged in the House of Representatives for “Treason, Bribery or corruption” with the trial to be conducted by the Supreme Court. But further consideration of the clause was postponed.<sup>54</sup> By September 4, the language was changed to provide for the removal of the President “on impeachment by the House of Representatives, and conviction by the Senate, for Treason, or bribery.”<sup>55</sup> On September 8, the Convention returned to the problem of impeachment and this time the debate focused on what were properly impeachable offenses. George Mason thought it imprudent that the provision be “restrained to Treason & bribery only” and suggested that the power be expanded to include “maladministration.”<sup>56</sup> His concern was that treason and bribery were insufficient to reach such political offenses as the subversion of the Constitution. Madison insisted that “maladministration” was so “vague” a term as to have the effect of reducing the term of the President “to a tenure during pleasure of the Senate.”<sup>57</sup> At this point Mason willingly moved to withdraw the suggested “maladministration” and substituted “other high crimes & misdemeanors.”<sup>58</sup> His motion was accepted by a vote of eight to three.<sup>59</sup>

It may well be worth noting that Mason’s original proposal for this new standard of impeachable offenses was for “‘other high crimes & misdemeanors’ <agst. the State’>.”<sup>60</sup> This was quickly amended by striking out “State” after the word “against” and substituting “United States,” “in order to remove ambiguity.”<sup>61</sup> When the draft from the Committee on Style was laid before the Convention all references to “high crimes and misdemeanors against the United States” was dropped in favor of what would become the version that today appears in the Constitution: “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

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<sup>51</sup> *Id.* at 292.

<sup>52</sup> 2 *id.* at 65-66.

<sup>53</sup> *Id.* at 69.

<sup>54</sup> *See id.* at 427.

<sup>55</sup> *Id.* at 499.

<sup>56</sup> *Id.* at 550.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *See id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 551.

and misdemeanors.”<sup>62</sup> Thus as finally adopted, the standard of “high Crimes and Misdemeanors” seems to have a broader, less restricted meaning than merely a narrow interpretation of crimes against the government. This meaning seems to reflect the general sense of the Convention that impeachment was intended to reach political abuses, such as maladministration or malversation, as well as indictable crimes. Moreover, it also seems to undermine the claim that impeachment is limited only to what one might call official duties and does not reach what Joseph Story would later call simply “personal misconduct.”<sup>63</sup>

What is most striking about the inclusion of “high Crimes and Misdemeanors” is how little discussion it caused; there was virtually no debate at all. One searches in vain in the rest of the records of the Federal Convention, in the ratifying conventions of the several states, in such obvious writings during the ratification struggle as *The Federalist* and the essays written by the leading Anti-Federalists and “other” Federalist penmen, and in the correspondence among the Founders written at the time. One can only draw the conclusion that the phrase was indeed one of those expressions, as Rufus King said, that the Convention adopted because they “were most easy to be understood and least equivocal in their meaning.”<sup>64</sup>

What was obviously clear and unequivocal to the Founders has been to subsequent generations a matter of some confusion.<sup>65</sup> Nowhere has that confusion been more clearly expressed—or the implicit dangers of departing from the original meaning of the Constitution more powerfully exposed—than in the argument by then-Congressman Gerald Ford in 1970 during his quest to impeach Justice William O. Douglas. In Ford’s view (one which, unfortunately, he continues to espouse) “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.” The reason, said the Republican Congressman, is that “there are few fixed principles among the handful of precedents.”<sup>66</sup> To fol-

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<sup>62</sup> See *id.* at 600. It was understood by the Convention that the Committee on Style was not to make any changes that would alter the sense of the draft being considered. However, the Committee chairman was Gouverneur Morris for whom the line between simple editorial adjustments and substantive alterations was always a thin one. On this point, see the oral testimony of Forrest McDonald, November 9, 1998: “Gouverneur Morris, who wrote the final Constitution . . . took a number of liberties with the resolutions to the Convention, and when he took too great a liberty, they checked him. In this instance, they said, okay, we will go along with it.” *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 213 (1998) (testimony of Forrest McDonald).

<sup>63</sup> See 1 STORY, *supra* note 41, § 764. George Ticknor Curtis observed that the purpose of impeachment is simply

to ascertain whether cause exists for removing a public officer from office. Such cause may be found in the fact that, either in the discharge of his office, or aside from its functions, he has violated a law, or committed what is technically denominated a crime. But a cause for removal from office may exist where no offense against positive law has been committed, as where the individual has, from immorality or imbecility or maladministration, become unfit to exercise the office.

2 GEORGE TICKNOR CURTIS, *HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES* 260-61 (New York, Harper & Bros. 1858).

<sup>64</sup> 3 FARRAND, *supra* note 5, at 268.

<sup>65</sup> See HOFFER & HULL, *supra* note 27, at 116-17.

<sup>66</sup> As quoted in BERGER, *supra* note 24, at 53 n.1. More recently, in an October 4, 1998

low Ford's position would be to render unlimited precisely what the Founders sought to limit. The idea that the question of impeachable offenses should be left simply to the "arbitrary discretion" of those in Congress, Joseph Story observed,

is so incompatible with the genius of our institutions, that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice, which might make that a crime at one time, or in one person, which would be deemed innocent at another time, or in another person.<sup>67</sup>

Impeachments are not to be carried out for any reason that may occur to the House of Representatives; they can only be pursued for "Treason, Bribery or other high Crimes and Misdemeanors." There is thus an obligation to determine exactly what "high Crimes and Misdemeanors" meant to those who framed and ratified the Constitution. For, as Raoul Berger has shown, if that phrase did indeed have "an ascertainable content at the time the Constitution was adopted, that content furnishes the boundaries of the power."<sup>68</sup>

### III. *English Antecedents*

It is helpful in trying to determine the original meaning of "high Crimes and Misdemeanors" to consider the impeachment provisions of the Constitution in the context of those other powers either granted or denied by the Founders that had been associated with impeachment in the English tradition. In England, impeachment had been both a political and a criminal process; it was often used to prosecute high treason; and it was not far removed from bills of attainder and the corruption of blood as punishments. One of the Founders' most significant departures from the English way of doing things was to limit rather severely what would constitute treason and to restrict Congress in what punishments it could devise.

In England, treason was a wide-ranging offense intended to put a protective ring around the monarch.<sup>69</sup> In the Constitution of the United States, the Founders reduced the scope of what Blackstone had called "the highest civil crime, which (considered as a member of the community) any man can possibly commit"<sup>70</sup> to this: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."<sup>71</sup> The Founders were too aware of how malleable a crime treason could become in the hands of a legislature prone to punish political enemies. So too, did they establish a constitutional standard for determining guilt in order to convict someone of treason: "No Person shall be convicted

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essay in *New York Times*, Ford continued to insist that Congress is left to fill in the blanks in what he sees as "those deliberately imprecise words 'high crimes and misdemeanors.'" Gerald R. Ford, *The Path Back to Dignity*, N.Y. TIMES, Oct. 4, 1998, § 4 (Week in Review), at 15.

67 1 STORY, *supra* note 41, § 797.

68 BERGER, *supra* note 24, at 87.

69 See 4 WILLIAM BLACKSTONE, COMMENTARIES \*74-93.

70 *Id.* at \*75.

71 U.S. CONST. art. III, § 3.

of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."<sup>72</sup>

When it came to punishing treason, the Constitution also provides that Congress could never pass the old English punishment of an "Attainder of Treason" that would have the effect of inflicting a "Corruption of Blood or Forfeiture except during the Life of the Person attainted."<sup>73</sup> This restriction was motivated by the Founders' desire to keep political passions from leading to charges of crime and severe punishments imposed by the legislature. The logic of limited power here was the same as that which led the Founders to prohibit both bills of attainder generally, and *ex post facto* laws.<sup>74</sup>

These concerns were also present in the Founders' decisions regarding the process of impeachment. As indicated above, it was essential to their way of thinking to make clear that impeachment was a political process dealing with political wrongdoing and not a part of the criminal justice process. Thus, they made clear that punishment for impeachment could 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."<sup>75</sup> But they emphasized that impeachment was not a bar to prosecuting criminal acts that the person impeached may have committed by noting that "the Party convicted [of impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."<sup>76</sup> Thus, although an indictable crime may be deemed an impeachable offense, impeachable offenses are not simply limited to indictable crimes.

To underscore the inherently political nature of impeachment, the Founders went further and provided that the right to a jury trial was to be secured for "all Crimes, except in Cases of Impeachment."<sup>77</sup> When it came to the President, unlike his powers to interfere with ordinary crimes, the Founders sought to limit his power to interfere with impeachments. His "Power to grant Reprieves and Pardons for Offences against the United States" was granted broadly "except in Cases of Impeachment."<sup>78</sup>

By the restrictions they devised, the Founders made clear that the process under the new Constitution was based more on the problems they had seen operating in English impeachments than on institutional arrangements they thought they should adopt. "Impeachments, and offenses and offenders impeachable," James Wilson lectured his students, "come not, in those descriptions, within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects."<sup>79</sup> And it is in light of this understanding that sense can be made of the Founders' adoption of the term "high Crimes and Misdemeanors" from their English forebears.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See id.* art. I, § 9, cl. 3.

<sup>75</sup> *Id.* art. I, § 3, cl. 7.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* art. III, § 2, cl. 3.

<sup>78</sup> *Id.* art. II, § 2, cl. 1.

<sup>79</sup> 1 WORKS, *supra* note 6, at 324.

Although there is some disagreement as to when the first impeachment occurred in English history, it seems reasonably clear that the first one along recognizably modern lines of procedure was against Michael de la Pole, Earl of Suffolk, in 1386.<sup>80</sup> In any event, the phrase “high crimes and misdemeanors” makes its first appearance in the 1386 impeachment of the Earl of Suffolk, with its next use occurring in the 1450 impeachment of William de la Pole, Duke of Suffolk and a descendant of the earlier Michael de la Pole. The charges of “high crimes and misdemeanors” against Michael de la Pole in 1386 included common law offenses as well as other charges that were more clearly political in nature. William de la Pole’s charge of “high crimes and misdemeanors” was in addition to several charges of high treason. The “high crimes and misdemeanors” included “Advising the King to grant liberties and privileges to certain persons, to the hindrance of the due execution of the laws,” “Procuring offices for persons who were unfit, and unworthy of them,” and “Squandering away the public treasure.”<sup>81</sup> From those earliest cases through the impeachment of Warren Hastings that was occurring at the same time as the Federal Convention, “high crimes and misdemeanors” continued to be a common charge in the impeachments that were brought.<sup>82</sup>

In the mid-seventeenth century the notion of what constituted “high crimes and misdemeanors” was expanded to include such things as negligence and improprieties while in office. Chief Justice William Scroggs, for example, was impeached in 1680 for, among other things, browbeating witnesses, cursing and drinking to excess, and generally bringing “the highest scandal on the public justice of the kingdom.”<sup>83</sup> By the eighteenth century it was clear that impeachable offenses under the rubric “high crimes and misdemeanors” were not limited to indictable crimes in common law but reached more purely political offenses. In 1701 the Earl of Oxford was charged with “violation of his duty and trust.”<sup>84</sup> And Warren Hastings was charged with maladministration, corruption in office, and cruelty towards the people of India.<sup>85</sup> By the time of the Federal Convention, English law on impeachments was clear that such “misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper, and have been the most usual grounds for this kind of prosecution.”<sup>86</sup>

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80 The other dates suggested include 1283 and 1376. See 1 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 380 (3d ed. 1936); ALEX SIMPSON JR., *A TREATISE ON FEDERAL IMPEACHMENTS* 5 (1916). See generally BERGER, *supra* note 24, at 53-73.

81 4 JOHN HATSELL, *PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS* 60, II.\* (London 1796).

82 For a complete listing of the English impeachments see SIMPSON, *supra* note 80, at 81-190; and BERGER, *supra* note 24, at 7-73.

83 *A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS* 197, 200 (T.B. Howell ed., London 1816).

84 SIMPSON, *supra* note 80, at 144.

85 See *id.* at 168-70.

86 RICHARD WOODDESON, *A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND* 601 (London 1792). Wooddeson, Blackstone’s successor as Vinerian Professor of Law at Oxford University, made the obvious point: “It is certain that magistrates and officers intrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community, and at the same time in a manner not properly cognizable before the ordinary tribunals.” *Id.* at 596.

In all of the English cases the political nature of the offenses charged in impeachments was revealed by the use of the word "high" to modify both "crimes" and "misdemeanors." The use of "high" in "high crimes and misdemeanors" did not refer to the substantive nature of the offense, that it was a particularly serious offense, but that it was a "crime or misdemeanor" carried out against the commonwealth itself. This use of "high" to distinguish crimes and misdemeanors against the society as a whole derived from its use in distinguishing "high" treason from "petit" treason.<sup>87</sup> Alexander Hamilton summarized this understanding of "high Crimes and Misdemeanors" as adopted by the Federal Convention in his explanation of the impeachment process created by the Constitution. The objects of impeachment, he noted, "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."<sup>88</sup>

During the Federal Convention, Gouverneur Morris suggested that those offenses that were to be deemed impeachable "ought to be enumerated and defined."<sup>89</sup> In a sense, Mason's move to include the phrase "high crimes and misdemeanors" was an attempt to achieve some sense of definition when it came to those offenses for which the President, Vice President, and all civil officers under the new Constitution might be impeached. All of the Founders understood the political perils involved if Congress was left with a "dangerous latitude of construction" in so important a power.<sup>90</sup> Yet, short of a clear list of impeachable offenses, there had to be some method to ascertain what, exactly, "high crimes and misdemeanors" might be. The answer was to be found in the common law itself.<sup>91</sup>

As has been seen, the phrase "high crimes and misdemeanors" was one in common usage in English impeachments for four centuries leading up to the Federal Convention. It had become a term of legal art, a technical term. In approaching such terms, John Marshall noted in considering another such phrase, the interpretive process is simple:

It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substra-

<sup>87</sup> See 4 BLACKSTONE, *supra* note 69, at \*75, \*203.

<sup>88</sup> THE FEDERALIST NO. 65, at 439 (Alexander Hamilton) (Jacob Cooke ed., 1961). Holdsworth has argued that

the greatest services rendered by this procedure [of impeachment] to the cause of constitutional government have been, firstly the establishment of the doctrine of ministerial responsibility to the law, secondly its application to all ministers of the crown, and, thirdly and consequently the maintenance of the supremacy of the law over all.

HOLDSWORTH, *supra* note 80, at 382.

<sup>89</sup> 2 FARRAND, *supra* note 5, at 65.

<sup>90</sup> See 4 ELLIOT'S DEBATES, *supra* note 14, at 50 (statement of Timothy Bloodworth in the North Carolina ratifying convention).

<sup>91</sup> See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 210 (Philadelphia, Philip H. Nicklin, 2d ed. 1829) ("Impeachments are . . . introduced as a known definite term, and we must have recourse to the *common law of England* for the definition of them.").

tum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it.<sup>92</sup>

Joseph Story made the best case for the common law construction of “high Crimes and Misdemeanors” in his *Commentaries on the Constitution of the United States*.<sup>93</sup> In Story’s view the necessity of recourse to the common law to shed light on the meaning of “high Crimes and Misdemeanors” stemmed from the nature of impeachment, which has an

enlarged operation, and reaches what are aptly termed political offences, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty.<sup>94</sup>

When it came to the details set forth in the Constitution, it was clear that there was no need to turn to the common law for a definition of treason; whatever it may have meant in the common law, that meaning was superseded by the definition the Founders spelled out in the Constitution itself. But in the case of the other named offense, bribery, which the Constitution does not define, said Story, it is clear that “resort [was] naturally and necessarily had to the common law . . . [which] as the common basis of our jurisprudence, can alone furnish the proper exposition of the nature and limits of this offence.”<sup>95</sup> As with “bribery” so also must the common law be consulted with respect to “high Crimes and Misdemeanors.”

It is because such “political offences 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

<sup>92</sup> *United States v. Burr*, 25 F. Cas. 59, 159 (C.C.D. Va. 1807) (No. 14,693). This view of the relationship between the common law and those common law terms that the Founders explicitly adopted has continued to inform the jurisprudence of the Supreme Court of the United States. The provisions of the Constitution “are framed in the language of the English common law, and are to be read in light of its history.” *Smith v. Alabama*, 124 U.S. 465, 478 (1888). The Constitution “must be interpreted in light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.” *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898).

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They . . . expressed [their conclusions] in terms of the common law, confident that they could be shortly and easily understood.

*Ex Parte Grossman*, 267 U.S. 87, 108-09 (1925). I am much indebted for these citations to BERGER, *supra* note 24, at 203 n.51.

<sup>93</sup> See STORY, *supra* note 41.

<sup>94</sup> 1 *id.* § 764.

<sup>95</sup> *Id.* § 796.



attempt it.”<sup>96</sup> The choice, short of a legislative list, was either to resort to “parliamentary practice and the common law” or be doomed to the “arbitrary discretion of the Senate.”<sup>97</sup> To Story, there was no question how to proceed: “The only safe guide in such cases must be the common law, which is the guardian at once of private rights and public liberties.”<sup>98</sup> Like Marshall, Story did not suggest that the common law was a source of “a jurisdiction not given by the Constitution or laws” but that it was simply the “great basis of American jurisprudence.”<sup>99</sup> As a result, it was not only prudent but appropriate to use the common law “as a guide and check and expositor in the administration of the rights, duties, and jurisdiction conferred by the Constitution and laws.”<sup>100</sup>

The most basic sources of the common law included the great treatises upon which the early Americans had depended for their legal learning. That generation of Founders thus moved easily amongst such authorities as Sir Edward Coke’s *Institutes of the Laws of England* (1628-1644) and *Reports* (1600-1615); Sir Thomas Wood’s *An Institute of the Laws of England* (1720); Richard Wooddeson’s *A Systematical View of the Laws of England* (1792-94); William Hawkins’s *A Treatise of the Pleas of the Crown* (1717); and a variety of other tracts such as John Selden’s *Of the Judicature in Parliaments* (1681), Giles Jacob’s *A New Law Dictionary* (1729), and William Paley’s *Principles of Moral and Political Philosophy* (1785). But the most dominant source of authority on the common law for those who wrote and ratified the Constitution was Sir William Blackstone and his justly celebrated *Commentaries on the Laws of England* (1765-69), described by Madison in the Virginia ratifying convention as nothing less than “a book which is in every man’s hand.”<sup>101</sup>

Blackstone made clear that of the “high misdemeanors” under English law, the

first and principal one is the *mal-administration* of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment; wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability.<sup>102</sup>

Although Blackstone did not speak of “high crimes and misdemeanors” in any thorough fashion, he did devote a considerable section of the *Commentaries* to “Public Wrongs,” in which he defined public wrongs simply as “crimes and misdemeanors.”<sup>103</sup> His definition bears a striking resemblance to Hamilton’s discussion of impeachable offenses in *The Federalist*:

<sup>96</sup> *Id.* § 797.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* § 799.

<sup>100</sup> *Id.* § 798.

<sup>101</sup> 3 ELLIOT’S DEBATES, *supra* note 14, at 501.

<sup>102</sup> 4 BLACKSTONE, *supra* note 69, at \*121.

<sup>103</sup> *Id.* at \*1.

[P]ublic wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's social aggregate capacity . . . . [C]rimes . . . besides the injury done to individuals, . . . strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.<sup>104</sup>

Of greatest interest for trying to understand how these grave offenses against the commonwealth might be included within the phrase "high Crimes and Misdemeanors" is Blackstone's chapter entitled "Of Offenses Against Public Justice."<sup>105</sup>

In that chapter Blackstone explained that "of offenses against public justice, some . . . [are] felonious, whose punishment may extend to death; others only misdemeanors."<sup>106</sup> He then set out to catalogue those offenses against public justice by beginning "with those that are most penal, and descend[ing] gradually to such as are of less malignity."<sup>107</sup> All of these offenses fall short of treason, "the highest civil crime . . . any man can possibly commit," but share with that most serious offense the fact that each constitutes an assault on the "*common-wealth*, or public polity of the kingdom."<sup>108</sup> Included in Blackstone's catalogue are offenses against public justice that may shed some light on the questions currently confronting the House of Representatives as to the nature and extent of any impeachable offenses committed by the President in the present inquiry.

There are two offenses of special relevance in determining if the President has indeed committed "high Crimes and Misdemeanors." The third item in Blackstone's list is "*obstructing* the execution of lawful process." "This," says the author, "is at all times an offence of a very high and presumptuous nature . . . ."<sup>109</sup> Such obstructions of public justice, he argues, can be of both "the civil and criminal kind."<sup>110</sup> Although his primary example is of obstruction of an arrest upon a criminal process, the offense is clearly not limited to that and seems to include any effort to keep the processes of the law from functioning properly.<sup>111</sup>

The second offense of some significance to the matter at hand "is the crime of wilful and corrupt *perjury*; which is defined by Sir Edward Coke, to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *willfully*, *absolutely*, and *falsely*, in a matter *material* to the issue or point in question."<sup>112</sup> Materiality lies in whether the false testimony is essential to the determination of the issue at hand or merely related to "some trifling collateral circumstance, to which no regard is

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104 *Id.* at \*5.

105 *See id.* at \*127-141.

106 *Id.* at \*128.

107 *Id.*

108 *Id.* at \*75, \*127.

109 *Id.* at \*129.

110 *Id.*

111 *See id.*

112 *Id.* at \*137 (footnote omitted).

paid.”<sup>113</sup> Closely related in Blackstone’s account to perjury proper is the “*Subornation* of perjury [which] is the offence of procuring another to take such a false oath, as constitutes perjury in the principal.”<sup>114</sup> Blackstone found perjury and subornation of perjury to be crimes both odious and “detestable,” but far from being capital offenses.<sup>115</sup> Although at one point such offenses were punishable by death, it had since Elizabethan days been “punished with six months imprisonment, perpetual infamy, and a fine . . . , or to have both ears nailed to the pillory.”<sup>116</sup> In attempting to understand where perjury comes in the descending order Blackstone sets up, and how it might thus fit into an understanding of “high Crimes and Misdemeanors” based upon the common law, it is striking that perjury is *followed* immediately by the crime of bribery.<sup>117</sup> The fact that Blackstone deemed perjury to be a more serious offense against public justice than bribery would not have been lost on the Founders. The possibility that perjury by a high civil officer might indeed be an impeachable offense under “high Crimes and Misdemeanors” merits a more thorough consideration.

#### IV. Oaths and Perjury

The use of oaths in legal proceedings in which evidence is given is an ancient part of the common law. Sir Edward Coke noted that the “word oath is derived from the Saxon word *eoth*.”<sup>118</sup> The oath is nothing less, said Coke, than “an affirmation or denial by any Christian of anything lawfull and honest, before one or more, that have the authority to give the same for advancement of truth and right, calling Almighty God to witness, that his testimony is true.”<sup>119</sup> Yet there is evidence that the use of oaths extends back to Roman times when the law of the Twelve Tables provided that “Whoever gives false evidence must be thrown from the Tarpeian rock.”<sup>120</sup> And Cicero in *De Officiis* argues that

in taking an oath it is our duty to consider not what one may have to fear in case of violation but wherein its obligation lies: an oath is an

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at \*137-38.

<sup>115</sup> *See id.* at \*139.

<sup>116</sup> *Id.* at \*138.

<sup>117</sup> *See id.* at \*139.

<sup>118</sup> EDUARDO COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 164 (London 1817).

<sup>119</sup> *Id.* This view has been expanded upon by John Wigmore in his treatise on evidence in which he notes that the idea of an oath came from Germanic law: “The employment of oaths takes our history back to the origins of Germanic law and custom where, as in all early civilizations, the appeal to the supernatural plays an important part in the administration of justice.” 6 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1815 (Chadbourn rev. 1976). James Bradley Thayer observed that the “Normans . . . found that much of what they brought [to England] was there already; for the Anglo-Saxons were their cousins of the Germanic race, and had, in a great degree, the same legal conceptions and methods, only less worked out.” James B. Thayer, *The Older Modes of Trial*, 5 HARV. L. REV. 45, 45 (1891). This extended to the use of oaths. *See id.* at 58.

<sup>120</sup> 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 11 (London, MacMillan & Co.1883).

assurance backed by religious sanctity; and a solemn promise given, as before God as one's witness, is to be sacredly kept.<sup>121</sup>

As Samuel Pufendorf emphasized, oaths were not simply the preserve of Christians:

An *Oath* the very *Heathens* look'd on as a thing of so great Force, and of so sacred Authority, that they believ'd the Sin of Perjury to be pursued with the severest Vengeance; such as extended itself to the Posterity of the Offender, and such as might be incurr'd by the bare Thought and Inclination, without the Act.<sup>122</sup>

The significance of the oath in courts of law was explained by James Wilson in his law lectures:

The courts of justice, in almost every age, and in almost every country, have had recourse to oaths, or appeals to heaven, as the most universal and the most powerful means to engage men to declare the truth. By the common law, before the testimony of a witness can be received, he is obliged to swear, that it shall be the truth, the whole truth, and nothing but the truth.<sup>123</sup>

The purpose, Wilson concluded, is to secure truthful evidence:

Belief is the end proposed by evidence of every kind. Belief in testimony is produced by the supposed veracity of him who delivers it. The opinion of his veracity . . . is shaken, either when, in former instances, we have known him to deliver testimony which has been false; or when, in the present instance, we discover some strong inducement which may prevail on him to deceive.<sup>124</sup>

Wilson took his moral and historical bearings on the necessity of oaths to getting at the truth from William Paley whose *Principles of Moral and Political Philosophy* was an influential work of considerable prominence among the early Americans.<sup>125</sup> Wilson praised Paley as an authority of "high reputation," a "sensible and ingenious writer" who was "no undiscerning judge of the subject" of the administration of justice.<sup>126</sup> Joseph Story was similarly impressed with Paley as a writer of "practical sense" whose analyses of polit-

121 CICERO, *DE OFFICIIS* 383 (Walter Miller trans., Harvard University Press 1990).

122 SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 333 (Basil Kennet trans., London, 4th ed. 1729).

123 2 WORKS, *supra* note 6, at 703-04. Wilson was not alone in his view of the importance of oaths. For example, Justice Jacob Rush, the brother of Benjamin Rush, expressed views much like those of Wilson: "An oath is a very serious transaction [the nature of which] is the solemn appeal to God—it is engaging to speak the truth, and calling upon him to witness our sincerity, that constitute the oath and obligation." A Charge, delivered by Judge Rush, at Easton Court, on the 8th Sept. 1796, to the Grand Jury of the County of Northampton, in Pennsylvania, in 2 AMERICAN POLITICAL WRITING, *supra* note 34, at 1015, 1017. It is thus important that civil society maintains a due attention to "the religious sentiment upon which an oath is founded"; to allow that sentiment to relax will be "injurious to society." *Id.* at 1018.

124 2 WORKS, *supra* note 6, at 704.

125 See WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* (London, 5th ed. 1788).

126 1 WORKS, *supra* note 6, at 240, 310, 325.

ical institutions displayed “great skill and ingenuity of reasoning.”<sup>127</sup> Throughout his celebrated *Commentaries on the Constitution of the United States*, Story relies often on the “excellent writings” of Paley.<sup>128</sup>

For Paley, the issue of oaths and perjury was one of morality as well as of law; he expressed views not unlike that of Cicero who warned that “people overturn the fundamental principles established by Nature, when they divorce expediency from moral rectitude.”<sup>129</sup> In Paley’s view, the entire question of perjury rested on the definition of a lie: “A lie is a breach of promise: for whoever seriously addresses his discourse to another, tacitly promises to speak the truth, because he knows that the truth is expected.”<sup>130</sup> And the effects of lying are not simply private; they are public in the deepest and most important sense:

[T]he direct ill consequences of lying . . . consist, either in some specific injury to particular individuals, or in the destruction of that confidence, which is essential to the intercourse of human life: for which latter reason, a lie may be pernicious in its general tendency, and therefore criminal, though it produce no particular visible mischief to any one.<sup>131</sup>

Given this public aspect to the damages that come from lying, it is necessary that oaths never be made “cheap in the minds of the people.”<sup>132</sup> Because “[m]ankind must trust to one another” there is no more efficacious means than through the use of oaths: “Hence legal adjudications, which govern and affect every right and interest on this side of the grave, of necessity proceed and depend upon oaths.”<sup>133</sup> As a result, lying under oath is far more serious than merely lying; perjury is, Paley notes, “a sin of great deliberation,” an act that “violates a superior confidence.”<sup>134</sup>

Because a witness swears that he will “speak the truth, the whole truth, and nothing but the truth, touching the matter in question,”<sup>135</sup> there is no place where a person under oath can cleverly lie and not commit perjury. The witness cannot legitimately conceal “any truth, which relates to the matter in agitation” because to so conceal “is as much a violation of the oath, as to testify a positive falsehood; and this whether the witness be interrogated to that particular point or not.”<sup>136</sup> It is not enough, Paley observed, for the witness afterward to say that he was not forthcoming “because it was never asked me’”;<sup>137</sup> an oath obliges to tell all one knows whether asked or not. As Paley notes, “the law intends . . . to require of the witness, that he give a complete and unreserved account of what he knows of the subject of the trial,

127 1 STORY, *supra* note 41, §§ 588 n.1, at 436, 585 n.2, at 439.

128 *See id.* § 1603; *see also id.* §§ 522, 548, 558, 573, 576, 580, 582, 585, 588; 2 *id.* § 1338.

129 CICERO, *supra* note 121, at 379.

130 1 PALEY, *supra* note 125, at 184.

131 *Id.*

132 *Id.* at 193.

133 *Id.* at 197.

134 *Id.*

135 *Id.* at 200.

136 *Id.*

137 *Id.* at 201.

whether the questions proposed to him reach the extent of his knowledge or not."<sup>138</sup>

Nor is it a sufficient excuse that "[a] point of honour, of delicacy, or of reputation, may make a witness backward to disclose some circumstance with which he is acquainted."<sup>139</sup> Such a sense of shame or embarrassment cannot "justify his concealment of the truth, unless it could be shewn, that the law which imposes the oath, intended to allow this indulgence to such motives."<sup>140</sup>

Similarly, linguistic contortions with the words used cannot legitimately conceal a lie or, if under oath, perjury. Paley's argument on this point merits a complete hearing:

As there may be falsehoods which are not lies, so there may be lies without literal or direct falsehood. An opening is always left for this species of prevarication, when the literal and grammatical signification of a sentence is different from the popular and customary meaning. It is the wilful deceit that makes the lie; and we wilfully deceive, when our expressions are not true in the sense in which we believe the hearer apprehends them. Besides, it is absurd to contend for any sense of all words, in opposition to usage, for all senses of words are founded upon usage, and upon nothing else.<sup>141</sup>

Thus the most common terms of oaths sworn include a promise not only to tell the truth, but the broader promise to tell the whole truth and nothing but the truth. Willful deceit is the key to whether a witness commits perjury or not, whatever the means chosen.<sup>142</sup> The moral and legal inheritance of the founding generation included the belief that the violation of an oath was nothing less than "treachery."<sup>143</sup>

None of the major writers with whom the Founders were intimately conversant saw perjury as anything but one of the most serious offenses against the commonwealth.<sup>144</sup> In his widely cited *Treatise of the Pleas of the Crown*, for example, William Hawkins explained that there were certain kinds of offenses that were "infamous, and grosly scandalous, proceeding from Principles of downright Dishonesty, Malice or Faction",<sup>145</sup> and it was under this

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.* at 188-89. Pufendorf was of a similar mind. Witnesses, he said, should not "have an opportunity, by insidious or equivocal Expressions, to evade the force of [their] Obligation[s]." PUFENDORF, *supra* note 122, at 337. Should they so break their oath, they will discover the truth that God is the "Avenger of our Perjury." *See id.* at 335.

142 As Thomas Wood put it, "it cannot be presum'd that one should commit Perjury without design." THOMAS WOOD, A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW 288 (London, 4th ed. 1730).

143 *See* ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 225 (Thomas West ed., 1990).

144 For a helpful compilation of many of the common law sources on "oaths" and "perjury" see under those heads in GILES JACOB, A NEW LAW DICTIONARY (Owen Ruffhead & J. Morgan eds., London, 9th ed. 1772).

145 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 171 (London, 2d ed. 1724).

rubric that he included “perjury and subornation of perjury.” Indeed he went further arguing that “perjury . . . is of all Crimes whatsoever the most Infamous and Detestable.”<sup>146</sup>

Perjury was, in the first instance, tied to jurors who might give a false verdict and “for several centuries no trace is to be found of the punishment of witnesses for perjury.”<sup>147</sup> And even after it originated in the Star Chamber, it was only by “slow degrees [that] the conclusion that all perjury in a judicial proceeding is a crime was arrived at.”<sup>148</sup> In 1562-1563 the first statute providing penalties for those who committed both perjury and subornation of perjury was enacted.<sup>149</sup> Thus human punishments were made to augment the fear of divine vengeance for lying under oath.<sup>150</sup> This was, in Pufendorf’s view, absolutely essential, as he noted by quoting Demosthenes: “*Those who escape your Justice, leave to the Vengeance of the Gods; but those on whom you can lay hands, never consign over to Providence, without punishing them your selves.*”<sup>151</sup> It was by this joint power of the sacred and the secular that men could put their faith in oaths as a means of securing truthful testimony from those sworn to give it. And by such oaths and the punishments to be meted out for perjury, the commonwealth could secure the proper administration of justice within the courts of law. Perjury was no longer just a sin; it was a crime.

Based on the foregoing analysis and review of the historical record, the conclusion seems inescapable, based on the expressed intent of the Framers, the wording of the Constitution, the writings of the principal legal authorities known to the Framers, and the common law, that perjury would certainly be included as a “high crime and misdemeanor” in an impeachment trial under the U.S. Constitution. Further, the record fails to support the claim that impeachable offenses are limited to only those abuses that occur in the official exercise of executive power.

### Conclusion

There is no power granted to the House of Representatives more formidable than “the sole power of impeachment.” Knowing as they did the dangers of subjecting those in high office to the mere passion and caprice of the moment, the Founders sought to create a power to impeach that would be capable of “displacing an unfit magistrate”<sup>152</sup> but within the confines of a written and ratified Constitution of enumerated and limited powers. They

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<sup>146</sup> *Id.* at 172. Pufendorf put it even more strikingly: “Perjury appears to be a most monstrous Sin, in as much as by it the forsworn Wretch shews, that he at the same time contemns the Divine, and yet is afraid of human Punishment; that he is a daring Villain towards God, and a sneaking Coward towards Men.” PUFENDORF, *supra* note 122, at 334.

<sup>147</sup> 3 STEPHEN, *supra* note 120, at 242.

<sup>148</sup> *Id.* at 247.

<sup>149</sup> See 4 HOLDSWORTH, *supra* note 80, at 518.

<sup>150</sup> “The two expedients of the oath and the perjury penalty are similar in their operation; that is, they influence the witness subjectively against conscious falsification, the one by reminding him of ultimate punishment by a supernatural power, the other by reminding him of speedy punishment by a temporal power.” 6 WIGMORE, *supra* note 119, § 1815, at 432.

<sup>151</sup> PUFENDORF, *supra* note 122, at 334.

<sup>152</sup> 1 FARRAND, *supra* note 5, at 86.

thus limited the reasons for which an impeachment could be undertaken to "Treason, Bribery, or other High Crimes and Misdemeanors."

The success of the Founders in creating the impeachment power to be both politically safe and constitutionally effective in meeting the demands of republican government is seen most clearly in how few have been the instances of its use. Lord Bryce described the power of impeachment over a century ago as "the heaviest piece of artillery in the congressional arsenal" and thus "unfit for ordinary use."<sup>153</sup> The process seeking to remove a President, he said, "is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at."<sup>154</sup> The constitutional provisions for impeachment were intended, in part, to secure the chief executive from being driven from office for mere partisan reasons. To get rid of a President—or to try to—Congress must have good cause. As Bryce said, one does not use impeachment for light and transient causes, "as one does not use steam hammers to crack nuts."<sup>155</sup>

In light of the Founders' concern that the President not be subject to political molestation by Congress, it cannot be emphasized too strongly that impeachment is the *only* means granted to Congress to censure or to punish "presidential delinquency." When it comes to serious presidential wrongdoing, it is either impeachment or nothing. The current suggestion that Congress might censure the President assumes a power not given by the Constitution and thus violates one of the Constitution's most basic principles, the separation of powers.

The Founders understood better than do many today that the most potentially pernicious branch of our constitutional order is the legislature. As James Madison correctly observed in *The Federalist No. 48*, history had demonstrated that the "legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."<sup>156</sup> The reason this is a danger, Madison noted, is that a legislature is all too often "inspired by a supposed influence over the people with an intrepid confidence in its own strength."<sup>157</sup> Thus, Madison concluded, "it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions."<sup>158</sup>

A primary reason for the Founders' efforts to curb the tendency of Congress to draw all power into its "impetuous vortex" was to protect the executive branch from being molested by it. Those who framed and ratified the Constitution had seen in their own state constitutions the debilitating effect of having a dominant legislature and a servile executive. By establishing a clear separation of powers and by giving each branch the means of resisting the encroachments of the others, they sought to create that energy in the executive that they deemed essential to good government. Alexander Hamil-

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153 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 212 (MacMillan 1941) (1893).

154 *Id.*

155 *Id.* at 213.

156 *THE FEDERALIST* NO. 48, at 333 (James Madison) (Jacob Cooke ed., 1961).

157 *Id.* at 334.

158 *Id.*



ton summed it up powerfully in *The Federalist No. 70*: "A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; And a government ill executed, whatever it may be in theory, must be in practice a bad government."<sup>159</sup>

Recognizing as they did that "[e]nlightened statesmen [would] not always be at the helm,"<sup>160</sup> the Founders also knew there had to be some means available to remove from office those who might violate their sacred public trust and abuse their positions. But such a means had to be created within the context of the necessary separation of the coordinate powers. The solution was giving the sole power of impeachment to the House of Representatives and giving the sole power to try such impeachments to the Senate. By such a device the principle of a bicameral legislature would temper the impulses of the legislature to censure and to punish those with whom the most numerous branch might disagree.

Andrew Jackson understood well the unconstitutionality of a censure. The very idea of a censure, he wrote, is "subversive of that distribution of the powers of government which [the Constitution] has ordained and established, [and] destructive of the checks and safeguards by which those powers were intended on the one hand to be controlled and the other to be protected." It was for this reason that Jackson argued, as should Congress, that censure was "wholly unauthorized by the Constitution and in derogation of its entire spirit." Jackson's logic was, as Arthur Schlesinger has said, "unassailable."<sup>161</sup>

Impeachment is the only power the Constitution grants to Congress to deal with errant executives. It is the only means whereby the necessarily high walls of separation between the two branches may be legitimately scaled. Had the Founders intended some other means of punishment to be available to the legislative branch they would have said so, as Chief Justice John Marshall once said in another context, "in plain and intelligible language."<sup>162</sup> That they did not do so should be the only guide in this grave and sensitive matter.

The temptation to do anything possible to avoid exercising the awful constitutional power of impeachment is obviously and understandably great. But such a temptation to take the easy way out by assuming a power not granted should be shunned. Should President Clinton, as a result of bad advice or political pressure, agree to such an unconstitutional punishment as a censure, that would be a breach of his constitutional obligations as great as anything else of which he has been accused. The great office he is privileged to hold deserves his protection against any ill-considered censorious assault from Congress.

In short, censure would be a coward's way out, both for those in Congress who might suggest it and any President who would accept it. Impeachment is the only legitimate power available to Congress by grant of the

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<sup>159</sup> THE FEDERALIST NO. 70, at 471-72 (Alexander Hamilton) (Jacob Cooke ed., 1961).

<sup>160</sup> THE FEDERALIST NO. 10, at 60 (James Madison) (Jacob Cooke ed., 1961).

<sup>161</sup> For a more complete discussion of this point, and for the citations to the quotations mentioned here, see *supra* note 10.

<sup>162</sup> *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

Constitution to deal with presidential wrongdoing. Neither a President nor the American people should accept anything less.

In the end, the determination of whether presidential misconduct rises to the level of “high Crimes and Misdemeanors,” as used by the Framers, is left to the discretion and deliberation of the House of Representatives. No small part of that deliberation, guided as it must be by the history and meaning of “high Crimes and Misdemeanors,” must address what effect the exercise of this extraordinary constitutional sanction would have on the health of the Republic, as weighed against the necessity of making clear that in America no one—not even a popular President—is above the law. In the end, that is what matters most and must bear most heavily on the members of the House of Representatives as they consider what they must do in the weeks ahead. For what is decided—one way or the other will echo through our history.