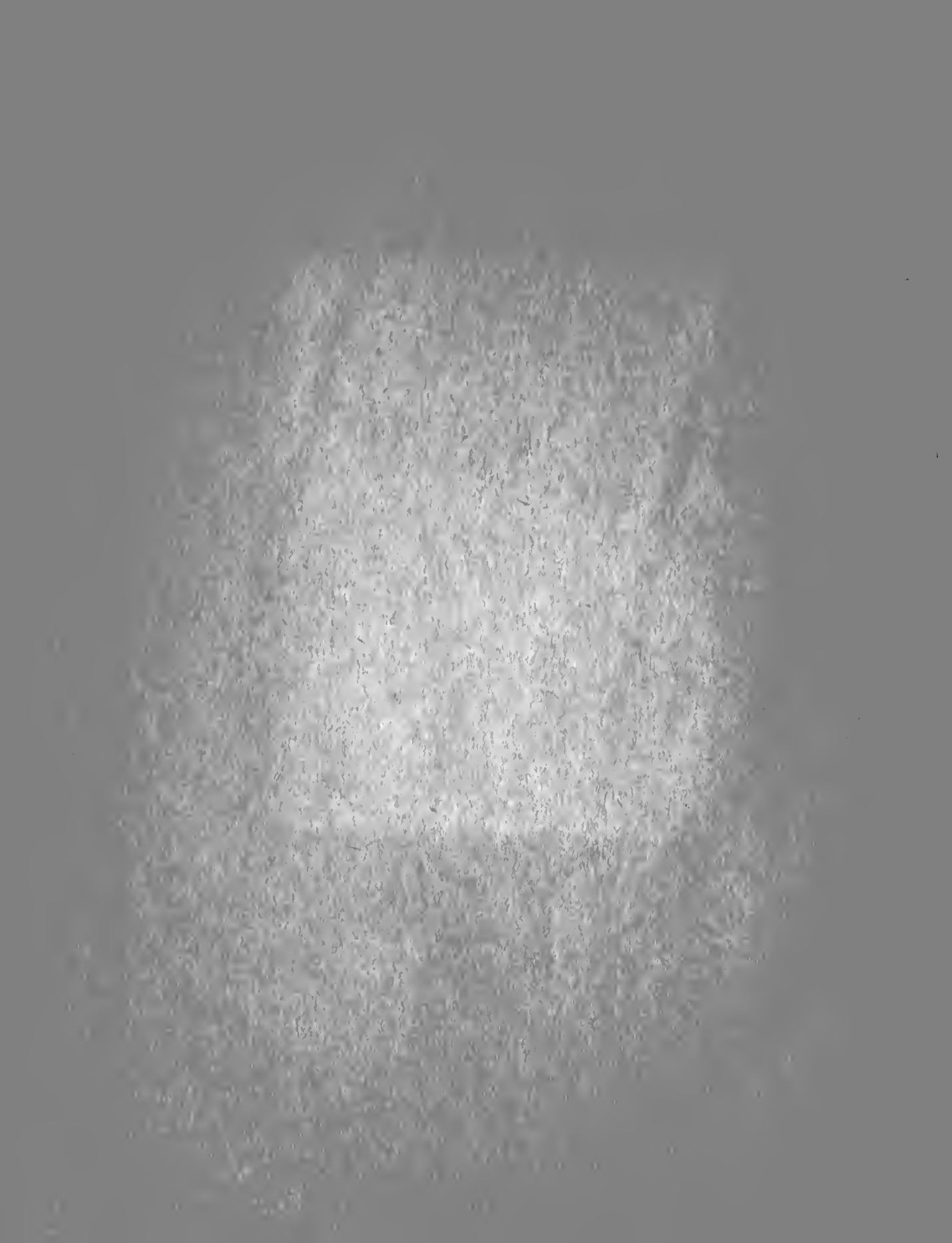

AN ANALYSIS OF THE CONSTITUTIONAL STANDARD FOR PRESIDENTIAL IMPEACHMENT

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SUMMARY

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THE ENGLISH BACKGROUND OF THE CONSTITUTIONAL IMPEACHMENT PROVISIONS

The English impeachment precedents represent the context in which the Framers drafted the constitutional impeachment provision. In understanding this context and what it implies two things should be remembered. First, the Framers rejected the English system of government that existed in 1776; namely, absolute parliamentary supremacy. Instead, they opted for limited government with a finely devised system of separated powers in different branches.

Second, throughout the history of English impeachment practice, (beginning in 1376 and ending in 1805) there were two distinct types of impeachments in England. One type represented a well-established criminal process for reaching great offenses committed against the government by men of high station -- who today would occupy a high government office. The other type of impeachments used this well-established criminal process in the 17th and early 18th century for the political purpose of achieving the absolute political supremacy of Parliament over the executive.

It is clear from the context of the constitutional commitment to due process that the Framers rejected the political impeachments. They included in the impeachment provisions the very safeguards that had not been present in the English practice. They narrowly defined the grounds for

impeachment, required various procedural safeguards and eliminated the non-legal processes like bills of attainder and address that had worked hand-in-hand with the English political impeachments.

The language of the Impeachment clause is derived directly from the English impeachments. "High Crimes and Misdemeanors" was the standard phrase used by those impeachments from 1376 onwards. To the Framers it had a unitary meaning, like "bread and butter issues" has today. It meant such criminal conduct as justified the removal of an office holder from office. In light of English and American history and usage from the time of Blackstone onwards, there is no evidence to attribute anything but a criminal meaning to the unitary phrase "other high Crimes and Misdemeanors."

THE CONSTITUTIONAL CONVENTION

The only debate at the Constitutional Convention that is relevant to the Impeachment clause is that which occurred subsequent to agreement by the Framers on a concept of the Presidency. Before September 8, 1787, the debates were general and did not focus on a conclusive plan for the chief executive. If, as Hamilton suggested, the Executive were to to serve during good behavior a very different standard for removal would be more feasible than for a President elected for a four-year term.

The September 8 impeachment debate, the only one based on a clear concept of the actual Presidency, emphatically rejected "maladministration" as a standard for impeachment. Madison and Morris vigorously noted the defects of "maladministration" as an impeachment standard. Maladministration would set a vague standard and would put the President's tenure at the pleasure of the Senate. Moreover, it could be limited by the daily check of Congress, and the adoption of a four-year term. Col. Mason then withdrew the term "maladministration" and substituted the current phrase in response to the criticisms of Madison and Morris. The debates clearly indicate a purely criminal meaning for "other high Crimes and Misdemeanors."

THE LEGAL MEANING OF THE IMPEACHMENT PROVISION

The words "Treason, Bribery, or other high Crimes and Misdemeanors," construed either in light of present day usage or as understood by the Framers in the late 18th century, mean what they clearly connote -- criminal offenses. Not only do the words inherently require a criminal offense, but one of a very serious nature committed in one's governmental capacity. This criminality requirement is reinforced by judicial construction and statutory penalty provisions. It is further evidenced by the criminal context of the language used in the other constitutional provisions concerning impeachment, such as art. III, sec. 2, cl. 3, which provides in part, "the trial of all crimes, except in cases of impeachment, shall be by jury; (emphasis added).

THE AMERICAN IMPEACHMENT PRECEDENTS

A careful examination of the American impeachment precedents reveals that the United States House of Representatives has supported different standards for the impeachment of judges and a President since 1804. This is consistent with judicial construction of the Constitution as defined by the United States Supreme Court, and the clear language of the Constitution which recognizes a distinction between a President who may be removed from office by various methods and a judge who may be removed only by impeachment. In the case of a judge, the "good Behavior" clause [Article III, section 1] and the removal provision [Article III, section 4] must be construed together, otherwise the "good Behavior" clause is a nullity. Thus, consistent with House precedent, a judge who holds office for a life tenure may be impeached for less than an indictable offense. Even here, however, senatorial precedents have demonstrated a reluctance to convict a judge in the absence of criminal conduct, thus leaving the standard for judicial impeachment less than conclusive.

The use of a pre-determined criminal standard for the impeachment of a President is also supported by history, logic, legal precedent and a sound and sensible public policy which demands stability in our form of government. Moreover, the constitutional proscription against ex post

facto laws, the requirement of due process, and the separation of powers inherent in the very structure of our Constitution preclude the use of any standard other than "criminal" for the removal of a President by impeachment.

In the 187 year history of our Nation, only one House of Representatives has ever impeached a President. A review of the impeachment trial of President Andrew Johnson, in 1868, indicates that the predicate for such action was a bitter political struggle between the executive and legislative branches of government. The first attempt to impeach President Johnson failed because "no specific crime was alleged to have been committed." The Senate's refusal to convict Johnson after his impeachment by the House, has, of course, become legendary.

His acquittal strongly indicates that the Senate has refused to adopt a broad view of "other high Crimes and Misdemeanors" as a basis for impeaching a President. This conclusion is further substantiated by the virtual lack of factual issues in the proceeding. The most salient lesson to be learned from the widely criticized Johnson trial is that impeachment of a President should be resorted to only for cases of the gravest kind -- the commission of a crime named in the Constitution or a criminal offense against the laws of the United States.

CONCLUSION

The English precedents clearly demonstrate the criminal nature and origin of the impeachment process. The Framers adopted the general criminal meaning and language of those impeachments, while rejecting the 17th century aberration where impeachment was used as a weapon by Parliament to gain absolute political supremacy at the expense of the rule of law. In light of legislative and judicial usage, American case law, and established rules of constitutional and statutory construction, the term "other high Crimes and Misdemeanors" can only have a purely "criminal" meaning. Finally, in our review of the American impeachment precedents, we have shown that while judges may be impeached for something less than indictable offenses -- even here the standard is less than conclusive -- all evidence points to the fact that a President may not. Thus the evidence is conclusive on all points; a President may only be impeached for indictable crimes. That is the lesson of history, logic, and experience on the phrase "Treason, Bribery and other high Crimes and Misdemeanors."

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TABLE OF CONTENTS

I. INTRODUCTION

To seek the true standard of what constitutes an impeachable offense we can do no better than to focus on the language set forth in Article II , Section 4 of the United States 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.

This language is clear, but the light of history, reason and experience are useful in eliminating any doubts about the authors' intent. An examination of English history and the common law show what the Framers used as a model and the way in which they modified it. The debates at the Constitutional Convention of 1787 and the post-Convention statements of those unique individuals evidence their intent as to the scope of the clause, "Treason, Bribery, or other high Crimes and Misdemeanors." And, of course, the experience of past American impeachments will be of utmost importance in illustrating the correct practice and interpretation.

II. THE ENGLISH BACKGROUND OF THE CONSTITUTIONAL IMPEACHMENT PROVISIONS

A. Relevance of English Impeachment Precedents

If we are to understand the relevance of the English impeachment precedents to the meaning of that section of our own Constitution

dealing with impeachable offenses, we must look carefully at the English theory of Government, the role of impeachment in English history and the American divergence from English philosophy. Otherwise, there is no basis for judging the relevance or significance of English practice. For, if we seek to compare the role of the automobile in modern society with the role of the covered wagon in 19th century America, we must be sure that the two are relatively equivalent in their respective functions. When dealing with an institution as complex as the impeachment process and periods as diverse as England from 1376-1787 and America from 1787-1974 we can ill afford a shallow analysis that would fail to disclose essential differences.

B. English vs. American Theory of Government

The place to begin is clearly with the nature of the English system as contrasted with the American. Here the essential difference is indeed clear. The genius of the American Constitution and the men whose sacrifice made it possible lies in a commitment to two central and interrelated ideas. The first is the theory of limited government and the second is the mechanism of separation of powers. Both of these concepts must be placed in the framework of 1787 and the

Framers' immediate practical purpose; to change the unworkable situation that existed as a result of the lack of an effective central government under the Articles of Confederation. The origins and nature of the English system are different and must be found in English history, a history familiar to all of the Framers.

The history of English politics can be seen as a long struggle between King and Parliament over sovereignty. As the English governmental system changed from feudalism into the modern national state, the central governmental question was: Who will ultimately make governmental decisions? With the Magna Carta in 1215 we can see the beginnings of this process in a redistribution of power between the King and the nobility. The Glorious Revolution of 1688 marked the decisive modern shift of power in favor of the Parliament over the King. This ultimate resolution in favor of parliamentary supremacy was fully operative by the time of the American Revolution. Parliamentary absolutism had replaced monarchical absolutism. The American tradition, however, preferred neither. It has been correctly noted that "illimitable power is alien to a Constitution that was designed to fence all power about." R. Berger, Impeachment 53 (Harvard

University Press, 1973). In this regard James Iredell, a key figure in the North Carolina Ratification Convention and a later appointee of President Washington to the United States Supreme Court, stated in 1786:

> It was, of course, to be considered how to impose restrictions on the legislature...[to] guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language from Great Britain, of the omnipotent power of the British Parliament, but had severely smarted under its effects. We...should have been guilty of...the grossest folly, if in the same moment when we spurned at the insolent despotism of Great Britain, we had established a despotic power among ourselves. Id.

Walter Bagehot in The English Constitution first published in 1867 notes that America "is the type of composite Governments, in which the supreme power is divided between many bodies and functionaries, so the English is the type of simple Constitutions, in which the ultimate power upon all questions is in the hands of the same persons." He goes on to note that this "ultimate power" in England is the House of Commons, which "can despotically and finally resolve" any question of government. W. Bagehot, The English Constitution 219-220 (Cornell University Press, 1963).

One final illustration will support the proposition of a fundamental difference between our system and the English and a clear recognition that our system sought to prevent any branch from achieving absolute power, as occurred with English parliamentary supremacy. In The Federalist No. 48, Madison wrote:

> But in a representative republic, where the executive magistracy is carefully limited; both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.
>
> The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. The Federalist No. 48 339-340 (M. Walter Dunn ed., 1901) (J. Madison).

As was stated earlier, while the great English political and constitutional struggle centered on Who should make governmental decisions the American focus was on How these decisions should be made. In doing away with the Articles of Confederation, with their single branch of weak powers, the Framers opted for a finely balanced system of separated powers where ultimate sovereignty could be had by no one branch. The Framers opted as much against the absolutism of Parliament as that of the King.

C. The English Impeachments

What then can we say of the role of impeachment in the English system and its relevance to the American Constitution? There are three points to be made. First, the actual role of the impeachment process in the English system must be considered. Second, we must look to the constitutional constraints placed by the American system on the language and context of the impeachment clause. And third, we must then focus on what the Framers meant when they used the words of the English impeachments, "high crimes and misdemeanors," in defining impeachable offenses. With this approach we can understand the real influence and significance of the English practice in interpreting the Framers' meaning of that term.

1. Actual Role of English Impeachments

What role did impeachment play in the English system of government? In answering this we must keep in mind that the English system as we know it began with a conquest in 1066 that placed a politically absolute monarch upon the throne. Parliament was in its origins a feudal institution representing the advice of the King's chief feudal tenants. The great struggles of the years between 1066 and the early part of the 18th century were not concerned with constitutional principles per se but with which "side" should exercise such and such a power. Given this context of an intense struggle for power rather than liberty we should look at impeachment as both a process and at times a weapon.

In his monumental history of the English law Sir William Holdsworth begins a section on impeachment with this sentence: "An impeachment is a criminal proceeding initiated by the House of Commons against any person." W. Holdsworth, 1 A History of English Law 379 (Methuen & Co. Ltd. 6th ed. rev., 1938) (emphasis added). The first English impeachment occurred in 1376. Lord Latimer at that time was impeached for criminal conduct and the term "high crimes and misdemeanors" was used according to the 19th century English historian Henry Hallam. I. Brant, Impeachment 10 (Knopf, 1972).

Holdsworth notes with respect to the nature of impeachment:

> Firstly, at that period, and indeed all through the Middle Ages, political thinkers and writers throughout Western Europe taught that the ideal to be aimed at by all rulers and princes and their officials was government in accordance with law. Secondly, the House of Commons and the House of Lords were united in desiring to limit the activities of the royal officials or favourites and to prevent them from breaking the law. Thirdly, the limits of the jurisdiction of the House of Lords were ill defined. It was open to receive petitions and complaints from all and sundry; and it could deal with them judicially or otherwise as it saw fit. It was essentially a court for great men and great causes; and it occasionally seems to have been thought that it could apply to such causes a lex Parliamenti -- a law which could do justice even when the ordinary law failed. Holdsworth, supra, at 380 (footnotes omitted).

He further notes:

> Probably therefore the practice of impeachment arose partly from the prevalent political ideal -- government according to law, partly from the alliance of the two Houses to secure the sanctity of the law as against royal officials or favourites, and partly from the wide and indefinite jurisdiction which the House of Lords exercised at that time. Id. at 381.

Thus to the extent that the early impeachment experience of England is relevant to the American practice two points are significant. First, the English practice was designed to prevent

officials and other powerful individuals from breaking the law (committing indictable crimes). At this stage impeachment was not yet a weapon to achieve parliamentary supremacy but only a process to obtain compliance with the law.

Second, impeachment was a judicial proceeding for "great men and great causes." It was designed to make the great nobles and favorites of the King responsive to the criminal law. At this time these individuals by their power and prestige were more powerful than the courts and hence not amenable to the law. Sir Thomas Erskine May, in discussing the English grounds for impeachment stated in this same vein "impeachments are reserved for extraordinary crimes and extraordinary offenders..." T. May, Law, Privileges, Proceedings and Usage of Parliament 734 (Butterworths, 1883).

In 1459 the last of the medieval English impeachments occurred. 1 Holdsworth, supra, at 381. With the great political struggles that began with the War of the Roses, impeachments (criminal actions to restrain the great men of the nation from committing crimes) were no longer useful. There were "better" weapons like the bill of attainder

and the Star Chamber than the legalistic process of impeachment to impose criminal sanctions upon individuals for one reason or another.

America, remember, rejected the approach of this English period. It prohibited bills of attainder, procedurally prevented the hated Star Chamber (even to the extent that this retarded the growth of equity jurisdiction), constitutionally defined treason and specifically limited impeachment of the President by commonly understood criminal language. The American authors of the Constitution saw impeachment as a residual check on the President since he was, while President, unindictable by ordinary criminal process. This, of course, is why some members of the Constitutional Convention, Mr. Pinckney, for example, thought impeachment was wholly unnecessary. Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess., Impeachment—Selected Materials 5 (Comm. Print, 1973) (Hereinafter cited as Impeachment—Selected Materials). It was only designed to be a residual check against grave criminal offenses committed by the President.

In the turbulent and blood-stained 17th century, the century that laid the modern foundations of the English constitutional system, the impeachment process again came into use. In 1621 the first impeachment of this second epoch began with the impeachment and conviction of Sir Giles Mompesson and Sir Francis Mitchell for gross fraud, violence and oppression. Taswell-Langmead, English Constitutional History 542. (Houghton, Mifflin, & Co., 1890).

These individuals were private citizens and their cases reflected the use of impeachment to reach the criminal acts of "great" men. It should also be noted that their crime had the dimensions of a crime with respect to government office since the gross fraud involved an officially granted monopoly to manufacture gold and silver thread and also to license inn and ale-houses. Id. In 1621 impeachment was also revived against the King's ministers when Lord Chancellor Bacon was impeached for receiving bribes. Id.

During this period from 1621 until 1805, when the last recorded English impeachment occurred, 54 impeachments took place. 39 Cong. Rec. 3029 (1905). A detailed analysis of these

cases reveals almost exclusively only two motives for impeachment. First, most were for crimes committed against the laws relating to the individual's official position, or activities which we would today define as governmental. These, for the most part, consisted of treason and bribery -- crimes that relate almost exclusively to an official in his official capacity as opposed to his personal capacity. This was particularly true of the English use of treason.

Other crimes for which impeachments were brought included the misappropriation of government funds, participation in various plots against the government (today it would be conspiracy), and voicing religious beliefs prohibited by the laws of that period. The American Constitution by the First Amendment specifically rejected the English precedents of impeaching individuals for their religious beliefs or for what they said.

An understanding of the second major motive for the English impeachments of the period 1621-1805 is most critical in interpreting the precedential value of those impeachments. Many of the impeachments between 1621 and 1715 had as their main purpose the achievement of parliamentary supremacy. 1 Holdsworth, supra, at 382.

The old criminal process was distorted and turned into a weapon to remove ministers and judges for supporting policies disliked by the Commons, although even here the criminal nature of impeachment was so obvious that criminal language was still used to support such political impeachments. Some individuals during this period were impeached merely because they belonged to the opposite party or were favorites of the King and hence rivals of the Parliament in setting State policy. This struggle became bloody and in 1642 erupted into a Civil War that ended with the beheading of Charles I. In the years immediately after the Glorious Revolution of 1688 the non-criminal impeachments were used to confirm the Parliamentary ascendency. By the early 18th century the supremacy of Parliament had been clearly established and the last four English impeachments were all purely criminal in the old medieval mold.

Holdsworth notes that "The four last impeachments -- those of Lord Macclesfield (1724), Lord Lovat (1746), Warren Hastings (1787), and Lord Melville (1805) -- were not occasioned by the political conduct of the accused, who were all charged with serious breaches of the criminal law." Id. at 384. The first three are of

primary concern to us in that they represented to the Framers the contemporary English practice and the meaning of the process. It should be noted that Lord Melville was impeached for misappropriation of public funds, clearly a crime pertaining to office. He was acquitted.

Lord Macclesfield's impeachment was a judicial impeachment for bribery. 39 Cong., Rec., supra, at 3029. He was Lord Chancellor. Lord Lovat was impeached for high treason for being involved in the rebellion of 1745. Again, this clearly constituted a crime against the State. Id. Warren Hastings, the Governor General of India, whose impeachment in 1787 was primarily motivated and initiated by Edmund Burke, was impeached for criminal conduct.[1/] 1 Holdsworth, supra, at 384.

On the third day of Hastings' impeachment trial, Burke stated:

> We say, then, not only that he governed arbitrarily, but corruptly -- that is to say, that he was a giver and receiver of bribes, and formed a system for the purpose of giving and receiving them....In short, money is the beginning, the middle, and the end of every kind of act done by Mr. Hastings: pretendly for the Company, but really for himself...P. Stanlis, Edmund Burke, Selected Writings and Speeches 400 (Doubleday & Co., 1963).

1/ A state court in Parsons v. Parsons, 167 Va. 526, 189 S.E. 441, (1937), in discussing misdemeanor stated: "When Hastings stood before the House of Lords, charged with high crimes and misdemeanors, certainly that tribunal did not for seven years mill over inconsiderable offenses." 189 S.E. at 443.

2. American Context of Impeachment

The Framers felt that the English system permitted men, be they King, Parliament, or judge, to make arbitrary decisions, and one of their primary purposes in creating a Constitution was to replace this arbitrariness with a system based on the rule of law. We must bear this intent in mind when we consider the relevance of the English common law to the American impeachment process and the definition of an impeachable offense. In this connection we must pay particular attention to the Declaration of Independence and the Preamble of the Constitution of the United States. As will be noted later in this analysis, the Framers, in the light of English experience, circumscribed and limited the old remedy against office holders who failed to obey the laws. They felt impeachment was a necessary check on a President who might commit a crime, but they did not want to see the vague standards of the English system that made impeachment a weapon to achieve parliamentary supremacy.

The amount of time the Framers spent on defining impeachable offenses certainly makes this clear. The whole clause is circumscribed by limits. It is limited to holders of public office. Narrow and technical language is used. A conviction by the Senate may not reach beyond removal from office and a bar to future office.

Conviction also shall not interfere with other criminal processes of the law. The integrity and judicial character of the process is guaranteed by an oath or affirmation of the members of the Senate when sitting in trial of impeachments. When the President is to be tried the chief judicial officer in the Constitution, the Chief Justice of the United States Supreme Court, shall preside. An extraordinary (2/3) majority is required for conviction of an impeachment. The process requires two separate actions by the Congress, "Impeachment for, and Conviction of," the stated crimes. The pardon power is explicitly excluded for impeachment convictions. These extensive limits can only be understood as a reaction to and rejection of the English political impeachments.

Other sections of our Constitution certainly reinforce the opposition of the Framers to the abuse in the English legal tradition of criminal process and parliamentary supremacy. A favorite parliamentary alternative to impeachment, the bill of attainder, was explicitly denied to Congress. 1 Holdsworth, supra, at 381. The Constitution further expressed this deep commitment to the rule of law by prohibiting ex post facto laws, by specifically

defining treason in the text, by limiting the English practice of corruption of blood and forfeiture for treason, and by limiting the suspension of the Writ of Habeas Corpus. All these provisions express the deep commitment to due process which permeates the Constitution. This due process would be emasculated if the impeachment process were not limited to indictable offenses.

As an interesting footnote to this discussion it should be observed that in 1812 the United States Supreme Court stated in United States v. Hudson and Goodwin 7 Cranch (2 U.S.) 32 (1812) that the courts of the United States had no common law criminal jurisdiction. This is the same type of jurisdiction that had been used by Parliament and the English courts to find actions criminal that were not so before an impeachment or a criminal trial. The court stated:

> The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence. 7 Cranch (2 U.S.) 32, 34 (1812)

To argue that the President may be impeached for something less than a criminal offense, with all the safeguards that definition implies, would be a monumental step backwards into all those old

English practices that our Constitution sought to eliminate. American impeachment was not designed to force a President into surrendering executive authority (Congress has more than adequate legislative authority under the Constitution and the amendment process to redirect any administrative policy) but to check overtly criminal actions as they are defined by the law. The centuries of political, religious, and personal misuse of criminal process, whether impeachment, bill of attainder, Star Chamber or common law judges overbroadly defining treason, were a precedent the Framers rejected with both blood and ink.

This overriding purpose should not be read out of any aspect or clause of our Constitution. Latter day experience and constitutional amendments have, in fact, only strengthened it. It certainly should not be read out of the impeachment clause, without clear and convincing evidence to the contrary. In the absence of such clear evidence, it should not be inferred that the impeachment provisions were intended to be used by Congress at their discretion, rather than limited by criminal standards. Such evidence has yet to surface while evidence to the contrary is abundant. Absolutely nothing in

the Constitutional Convention debates indicates that impeachment was to be used to make Congress supreme or to reject the rule of law as a guiding standard of the Republic.

3. English Impeachment Language

In summarizing the vast weight of English constitutional history upon our impeachment provision, several other points are noteworthy. The terminology "high crimes and misdemeanors" should create no confusion or ambiguity. It was the standard phrase that was used by most of the parliamentary impeachments over the four hundred years of English impeachment practice before our own Constitution was drafted. It was a unitary phrase meaning crimes against the state, as opposed to those against individuals, which justified criminal punishment before the greatest Court of England, the House of Lords.

The phrase used in the United States Constitution reads: "Treason, Bribery, or other high crimes and misdemeanors" (emphasis added). The use of the word "and" between the phrase "other high crimes" and the word "misdemeanors" supports this proposition, in light of the fact that the word "or" follows the word

"bribery" and precedes the phrase "other high crimes and misdemeanors." "Other" in this context denotes similarity between Treason and Bribery, on the one hand, and high crimes and misdemeanors on the other. If misdemeanors were to be considered separately, the word "or" rather than "and" would undoubtedly precede it and the phrase would read "Treason, Bribery, or other high crimes or misdemeanors." In this regard it is significant to note that in the Constitutional Convention's August 6 draft the proposed term was "Treason, bribery or corruption." M. Farrand, 2 The Records of the Federal Convention of 1787 186 (Yale University Press, 1966) (emphasis added). (Hereinafter cited as Farrand).

Whether the word "misdemeanors" is considered in its 18th century common law sense as part of a unitary phrase "high crimes and misdemeanors" as shown above, or is considered autonomously in its present day context as a distinct class of crime, it unequivocally connotes criminal activity.

Some have argued that the use of "misdemeanors" in the phrase "other high crimes and misdemeanors," indicates that the Framers did not intend to confine impeachment to indictable crimes.

In support of this argument, it is suggested either that "crimes" comprehends all crime or that "misdemeanor" was not fully distinguishable from certain civil actions. This contention goes on further to say, correctly, that no word in the Constitution is superfluous. The contention is on false ground, however, when it argues that misdemeanor would be superfluous unless it meant something other than a crime.[2/] This argument ignores the way and the context in which the Framers used the phrase. It was a phrase from English impeachment practice used for a single meaning. It is as ridiculous to say that "misdemeanor" must mean something beyond "crime" as it is to suggest that in the phrase "bread and butter issues" butter issues must be different from bread issues. Historically, the phrase defined those crimes that are of like quality to treason and bribery (the most common specific basis for English impeachments) for which the President could be impeached.

We need look only to the English and American use of the term for further support of this proposition. In Blackstone we find "high misdemeanors" defined as a certain type of misprisions. Blackstone, 4 Commentaries 800 (Washington Law Book Co., 1941). Blackstone defines misprisions thusly:

2/ See discussion p.34 infra.

> Misprisions is a term derived from the old French, mespris, a neglect or contempt. It means such high offenses against the king and the government, as are bordering on the degree of capital. Id.

1 The Shorter Oxford English Dictionary 1259 (1933) defines "high misdemeanour" thusly:

> "a crime of a heinous nature, next to high treason."

The American definition as understood by the Framers is also clear on this point. There is absolutely no doubt about this purely criminal meaning of high misdemeanor when we note how it was used in the Articles of Confederation.

The articles' extradition clause stated:

> If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense. Articles of Confederation, art. IV, para. 2, (emphasis added).

The language of the constitutional impeachment clause differed from the language of the extradition clause because it relied upon the procedural language of the English impeachments. The English impeachments used the language "high crimes and

misdemeanors" because the words "felony" and "crime" were not synonymous in the medieval period. At an early stage felony was a crime for which one could lose his lands.[3/] J. G. A. Pocock, The Ancient Constitution and the Feudal Law 107 (Norton & Co., 1967). A felony, according to Sir Henry Spelman, was "that dereliction of duty for which the vassal forfeits his fee." Id. at 107. On the other hand, "crime," according to Blackstone, is a generic term for the violation of any public law. He goes on to indicate that "'crimes' implies the more atrocious offense, while smaller faults and omissions are termed 'misdemeanors.'" Blackstone, supra, at 748. This was a very important distinction in a society where all one's rights and obligations were related to the holding of land. Thus, crimes and misdemeanors covered the gamut. This is further reflected on one of the early English impeachments. The Duke of Buckingham was impeached in 1626 for "high crimes and misdemeanors." Howell, 2 State Trials 1269 (1816). In his answer to that charge the Duke stated, "The said duke of Buckingham being accused, and sought to be impeached before your lordships, of the many misdemeanors,

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3/ This was recognized by the United States Supreme Court when it stated: "No crime was considered a felony which did not occasion a total forfeiture of the offender's lands, or goods, or both. 4 Bl. Com. 94, 95; Ex parte Wilson, 114 U.S. 417, 423," Kurtz v. Moffitt, 115 U.S. 487, 499 (1885).

misprisions, offences, and crimes, wherewith he is charged by the commons house of parliament..." Id. at 1422. This language clearly indicates that the Duke is responding to a comprehensive charge of criminal offenses that covers the full spectrum of criminal activity.

Also of great importance is the use of the word "high" in this impeachment phrase. Blackstone notes the meaning of the word "high" with reference to "high treason." Blackstone, supra, at 685. "High" indicated treason committed against the King (in modern terms "the State"), as opposed to treason against one's master or feudal overlord. Id. It must always be remembered that the medieval mind conceived of "the State" as only another personage in a grand hierarchy. A crime could be committed against the Church, the Parliament, the Baron, one's wife, etc. Not all crimes were against society as they are today. T. Plucknett, A Concise History of the Common Law, 456-458 (Little, Brown & Co., 1956). Thus petty treason was defined as an offense against some entity other than the State.

By 1787, feudalism was an anachronism in most of western Europe. Moreover, feudalism had never existed in the United

States. Thus, to the Framers all treason was high treason. However, with regard to misdemeanors the distinction still has relevance, since crime can still be committed against either the state or private individuals. In modern usage, "high" refers to official conduct, conduct relating to one's functions with respect to the State. Impeachment—Selected Materials, supra, at 622. That the definition of "high crimes and misdemeanors" was related to an offense committed in one's official capacity is borne out by the use of the phrase in English and American history, id., and by the fact that the Constitution limits impeachment to government officials. It relates exclusively to governmental or quasi-governmental actions of a criminal nature. It should also be remembered that to the Framers the term "political" referred to the state or government rather than to partisan factions, which did not exist as we know them today. The Federalist No. 10 at 56-65 (Wesleyan University Press, 1961) (J. Madison).

III. THE CONSTITUTIONAL CONVENTION

In our attempt to understand what constitutes an impeachable offense we must, of course, look to the intent of the Framers as

demonstrated by their statements at the Convention. If we are to understand the words chosen by the Framers in their proper context, it is imperative that we comprehend how the Constitution developed.

Early in the Convention the Framers turned their attention to the general principles upon which a free government should be founded. In this phase they used the resolutions of the Virginia delegation, known as the Virginia Plan, as a starting point. They were presented by Governor Edmund Randolph. 1 Farrand xxii. On July 26, 1787, after more than two months of discussion dealing with the general nature of the proposed government, the Convention was ready to produce a draft Constitution, though several different general schemes were still before the body. 2 Farrand 134. The Convention adjourned on July 26 for ten days, to allow such a draft to be prepared by the Committee on Detail, which reported a draft back on August 6, 1787. 1 Farrand xxii-xxiii.

The August 6 draft listed three grounds for the impeachment of the President, "treason, bribery, or[4/] corruption." 2 Farrand 186 (emphasis added). To further reinforce the criminal nature

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4/ The use of the word "or" in this phrase, which was later rejected reaffirms the unitary concept of the phrase "other high crimes and misdemeanors" as discussed, pp. 20-21 supra.

of the process, an impeachment was to be tried before the Supreme Court. Id. In the final draft of the Constitution, the Senate replaced the Supreme Court as the forum for the trial. In this respect Gouverneur Morris noted that:

> [N]o other tribunal than the Senate could be trusted. The Supreme Court were too few in number and might be warped or corrupted. He was agst. [sic] a dependence of the Executive on the Legislature, considering the Legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out. -- 2 Farrand 551.

Thus, not only did he express the sentiments of the Convention, but also harkened back to the English tradition that the House of Lords in impeachments was a great court for "great men and great causes."5/

Some have speculated that "other high crimes and misdemeanors," the final choice of the Framers, must mean something other than indictable crimes. This proposition is ill-conceived because it places undue emphasis on the language which occurred early in the debates (pre-August 6). In the early debates, May, June, and July, the Framers were merely dealing with general

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5/ See discussion at p. 9 supra.

concepts since the nature of the executive branch was still unclear and remained so until later in the Convention. On May 29 the "Virginia Plan" suggested a "National Executive" to be chosen by the National Legislature for an undecided term and to succeed to the "Executive rights vested in Congress by the Confederation." 1 Farrand 21. On June 15 the "New Jersey Plan" called for "a federal Executive to consist of several persons" all of whom were to be elected by the Congress. 1 Farrand 244. On June 18, Hamilton proposed a plan which favored an executive called "Governour" who would "serve during good behaviour." 1 Farrand 292. Moreover, the continued uncertainty of the Framers with respect to the proper form to be adopted for the executive is reflected in Col. Mason's comments of July 26:

> Col. Mason. In every Stage of the Question relative to the Executive, the difficulty of the subject and the diversity of the opinions concerning it have appeared. Nor have any of the modes of constituting that department been satisfactory. 1. It has been proposed that the election should be made by the people at large; that is that an act which ought to be performed by those who know most of Eminent characters, & qualifications, should be performed by those who know least. 2. that the election should be made by the Legislatures of the States. 3. by the Executives of the States. Agst [sic] these modes

> also strong objections have been urged. 4. It has been proposed that the election should be made by Electors chosen by the people for that purpose. This was at first agreed to: But on further consideration has been rejected. 5. Since which, the mode of Mr Williamson, requiring each freeholder to vote for several candidates has been proposed. This seemed like many other propositions, to carry a plausible face, but on closer inspection is liable to fatal objections. A popular election (in any form), as Mr. Gerry has observed, would throw the appointment into the hands of the Cincinnati, a Society for the members of which he had a great respect; but which he never wished to have a preponderating influence in the Govt. 6. Another expedient was proposed by Mr. Dickenson, which is liable to so palpable & material an inconvenience that he had little (doubt) of its being by this time rejected by himself. It would exclude every man who happened not to be popular within his own State; tho' the causes of his local unpopularity might be of such a nature as to recommend him to the States at large. 7. Among other expedients, a lottery has been introduced. But as the tickets do not appear to be in much demand, it will probably, not be carried on, and nothing therefore need be said on that subject. After reviewing all these various modes, he was led to conclude -- that an election by the Natl Legislature as originally proposed, was the best. 2 Farrand 118-119.

At this point it should be obvious to all why the pre-August 6 discussions of the grounds to be used for impeachment tell us so little. They were not premised on a clear concept of who would

be impeached. Subsequent to August 6, the Framers were able to discuss impeachment with a better perspective of the Executive Office. Nevertheless, they did not address the issue until after a committee draft on September 4 established the final mode of Presidential election and defined "treason and bribery" as impeachable offenses. 2 Farrand 495. This draft established that the Presidential term would be four years and the President eligible for reelection at the end of that period. 2 Farrand 493. The process of election or reelection would be a strong guarantee against maladministration or any other policy or practice considered inconsistent with the public good. When the issue was discussed for the last time on September 8 the following debate took place.

> Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined -- As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He movd. to add after "bribery" "or maladministration". Mr. Gerry seconded him --
>
> Mr. Madison So vague a term will be equivalent to a tenure during pleasure of the Senate.

> Mr Govr Morris, it will not be put in force & can do no harm -- An election of every four years will prevent maladministration.
>
> Col. Mason withdrew "maladministration" & substitutes "other high crimes & misdemeanors" 2 Farrand 550 (emphasis added).

It is evident from the actual debate and from the events leading up to it that Morris' remark that "An election of every four years will prevent maladministration," id. expressed the will of the Convention. Thus, the impeachment provision adopted was designed to deal exclusively with indictable criminal conduct. The relevant constitutional debates support nothing to the contrary.

One further point should be mentioned. The Convention rejected all non-criminal definitions of impeachable offenses. Terms like "mal-practice,"[6/] "neglect of duty,"[7/] "removeable by Congress on application by a majority of the executives of the several states,"[8/] and "misconduct"[9/] were all considered and discarded by the Framers. To distort the clear meaning of the phrase "Treason, bribery, or other high crimes and misdemeanors" by including non-indictable conduct would thus most certainly violate the Framers' intent.

6/ 1 Farrand 88.
7/ Id.
8/ 1 Farrand 244.
9/ 2 Farrand 68-69.

IV. THE LEGAL MEANING OF THE IMPEACHMENT PROVISION

As shown above, the Framers, in their concern for maintaining the independence of the executive and judiciary, specifically rejected such standards as "maladministration" and other broad concepts in favor of the more limited term "high crime and misdemeanors." They also rejected such a process as "address." Address was an English practice by which an executive or judicial officer could be removed from office by a majority of the legislative branch. Thus, they manifested their intention to narrow the scope of impeachable offenses.

But is it necessary to look beyond the words "treason, bribery, or other high crimes and misdemeanors," which are so clear and unequivocal in and of themselves? It was stated in the trial of Andrew Johnson by one of his counsel with some effect:

> In my apprehension, the teachings, the requirements, the prohibitions of the Constitution of the United States prove all that is necessary to be attended to for the purposes of this trial. I propose, therefore, instead of a search through the precedents which were made in the times of the Plantagenets, the Tudors, and the Stuarts, and which have been repeated since, to come nearer home and see what provisions of the Constitution of the United States bear on this question, and whether they are not sufficient to settle it. If they are, it is quite immaterial what exists elsewhere. Rives & Bailey, Proceedings in the Trial of Andrew Johnson before the United States Senate on Articles of Impeachment 273-274 (Washington, 1868).

"Treason" is a crime defined by the Constitution[10] and statute.[11] "Bribery" is a crime, defined by statute.[12] Both "treason"[13] and "bribery"[14] were common law crimes. That "crime" means criminal offense is obvious, as is the fact that a "misdemeanor" is "generally used in contradistinction to felony, misdemeanors comprehending all indictable offenses which do not amount to felony." Black's Law Dictionary 1150 (West Publishing Co., 4th ed., 1951).[15] And in common parlance a misdemeanor is considered a crime by lawyers, judges, defendants, and the general public. As Alexander Simpson pointed out on behalf of Judge Archbald:

> ***notwithstanding what some text writers have said, I venture the assertion that if you go out into cars or on the streets or in your homes and ask the people you meet what is meant by the words "treason, bribery, or other high crimes and misdemeanors," you will not find one in a thousand but will say that every one of those words imports a crime. 6 Cannon's Precedents of the House of Representatives, 646 (Hereinafter cited as Cannon).

Further, it is obvious that the word "high" modifies "misdemeanors" as well as "crimes," as it would be illogical to conclude that one

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10/ U.S. Const., art. III, sec. 3, cl. 1.
11/ 18 U.S.C. 2381.
12/ 18 U.S.C. 201.
13/ Blackstone, Commentaries on the Law 785, (Washington Law Book Co., 1941).
14/ Id. at 808.
15/ See also 22 C.J.S. Criminal Law§ 7 (1961).

could be impeached for only high crimes but for any misdemeanors. This is further evidenced by the use of the word "and" rather than "or" before "misdemeanors," as discussed more fully at pp. 19-20 supra. If considered in its present day context, the purpose of the inclusion of the word "misdemeanor" is to include lesser criminal offenses that are not felonies.16/ But if considered in its common law context as discussed at pp. 21-22 supra, it is meant to exclude non-criminal actions fitting into the broad category of maladministration. At the Convention the phrase "other high crimes and misdemeanors" was adopted because it had a technical meaning more narrow in scope than "maladministration." The latter term was specifically rejected in the debates as it was thought of as an unwise and dangerous invitation to make overly broad interpretations.

Not only do the words, "other high crimes and misdemeanors" inherently connote criminal offenses, but according to the well-established maxim of noscitur a sociis, criminal offenses of such a serious nature to be akin to treason and bribery. The presence and position of the words "other" and "high" reinforces this kinship.

16/ See, e.g. 28 U.S.C. 454 which makes it a "high misdemeanor" for any justice or judge to engage in the practice of law.

In addition as noted earlier, such violations must be of a "political" nature, meaning committed against the State.

A Hawaii court in discussing the general nature of the offenses covered by the term "high crimes and misdemeanors," stated:

> This earlier article, after specifying five offenses, i.e., theft, bribery, perjury, forgery and embezzlement, the conviction of any of which disqualifies from holding any office of honor, trust or profit under the Government adds "or other high crime or misdemeanor," thus classifying these five offenses as "high crimes and misdemeanors..." We find, however, that "high misdemeanors" do not belong to that class of offenses called misdemeanors, but, according to the common law authorities, are misprisions -- a higher grade of offenses than misdemeanors -- and which are of a public character and indictable at common law. (1 Russell on Crimes, 79-80; 4 Wendell's Blackstone, 121; Coke, 3d Inst., 36.). In some cases persons charged with felony were, under the artificial and arbitrary subterfuges of the common law, relieved of the charge of felony and proceeded against for a high misdemeanor. (4 Wendell's Blackstone, 119.) It will be seen, therefore, that high misdemeanors were offenses of public importance, and were sometimes felonies, or closely related thereto.
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> As our law only recognizes felonies and misdemeanors, high misdemeanors must be classed as felonies, which conclusion we adopt. In re Qualification of Voters, 8 Haw. 589, 590-591 (1892) (emphasis added).

The severity of the punishment provisions for crimes found in our early American jurisprudence clearly indicates the seriousness attributed to "high misdemeanors." In 1794, seven years after the Constitutional Convention, the Third Congress passed a statute which was later utilized in the trial of Aaron Burr in 1807. He was tried for a "high misdemeanor" pursuant to the statute which provided:

> And be it further enacted and declared, that if any person shall within the territory or jurisdiction of the United States begin or set on foot or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace, every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor, and shall suffer fine and imprisonment at the discretion of the court in which the conviction shall be had, so as that such fine shall not exceed three thousand dollars nor the term of imprisonment be more than three years. Act of June 5, 1794, Ch. 50, § 5, 1 Stat. 384 (emphasis added).

Another statute enacted in 1797 prevented United States citizens from privateering against friendly nations or citizens of the United States. It provided, in pertinent part:

> [S]uch person or persons so offending shall, on conviction thereof, be adjudged guilty of a high misdemeanor, and shall be punished by a fine not

exceeding ten thousand dollars and imprisonment not exceeding ten years: ...Act of June 14, 1797, Ch. 1, § 1, 1 Stat. 520 (emphasis added).

It is clear from these statutes, which were enacted shortly after the drafting of the Constitution, that a "high misdemeanor" was a serious crime, such as a felony is today. Additionally, it applied to crimes relating to official governmental functions, in these two cases, the war power.

It should also be noted that the Tenure of Office Act was enacted by Congress in 1867 specifically as a vehicle for impeaching President Johnson. A violation of this act was denominated as a "high misdemeanor;" and provided that anyone found "guilty thereof shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court: ..." Act of March 2, 1867, Ch. 154, § 6, 14 Stat. 430, 431.

That an impeachable offense is limited to criminal conduct is clear not only from the explicit meaning of the actual words utilized, but also from the criminal context of the terms utilized in the other phrases of the Constitution concerning impeachment.

Such terms as "to try,"[17]/ "convicted,"[18]/ "pardons for offenses... except...impeachment,"[19]/ "conviction of...,"[20]/ "trial of all crimes except...impeachment, shall be by jury,"[21]/ "the party convicted,"[22]/ are all terms limited in context to criminal matters.

In considering the legal and widely understood meaning of the phrase "other high crimes and misdemeanors"[23]/ it is clear that it is limited solely to criminal conduct. Moreover, it is consistent with the well-established rule of construction stated in McPherson v. Blacker, 146 U.S. 1, 27 (1892):

> The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained contemporaneous and subsequent practical construction are entitled to the greatest weight.

Just as statutes are to be construed to uphold the intent of the drafters, United States v. Wiltberger, 5 Wheat. (18 U.S.) 76, 95 (1820), so should we uphold the intent of the drafters of the

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17/ U.S. Const., art. I, sec. 3, cl. 6.
18/ U.S. Const., art. I, sec. 3, cl. 6.
19/ U.S. Const., art. II, sec. 2, cl. 1.
20/ U.S. Const., art. II, sec. 4.
21/ U.S. Const., art. III, sec. 2, cl. 3.
22/ U.S. Const., art. I, sec. 3, cl. 7.
23/ 18 U.S.C. 1.

Constitution that impeachable offenses be limited to criminal violations. Also, as penal statutes have been strictly construed in favor of the accused, id., so should we construe the impeachment provisions of the Constitution. To do any less would violate the Due Process Clause and the prohibitions against ex post facto laws, concepts deeply rooted in our Constitution. Clearly, the Framers did not envisage the emasculation of such fundamental principles to implement the impeachment provision.

V. THE AMERICAN IMPEACHMENT PRECEDENTS

Some of the proponents of presidential impeachment place great emphasis on the cases involving federal judges to support the proposition that impeachment will lie for conduct which does not of itself constitute an indictable offense. This view is apparently most appealing to those broad constructionists who favoring a severely weakened Chief Executive argue that certain non-criminal "political" offenses may justify impeachment. Yet, when subjected to the scrutiny of history, reason, and legal precedent, this thesis fails for a number of reasons that are manifest. In addition, careful examination of the provisions of the Constitution, the uniform

practice adopted thereunder, and the records in the actual impeachment proceedings clearly demonstrate otherwise. Moreover, considerations of sound and sensible public policy, which demand stability in our form of government, assist us in understanding the intent of the Framers that a President may not be impeached for anything short of criminal conduct. The constitutional proscription against bills of attainder, the prohibition against ex post facto laws, the requirements of due process, and the separation of powers preclude the use of any other standard.

A. Constitutional Provisions For Removal

The United States Constitution, Article II, Section 4, provides that "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." Article III, Section 1, states that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior...." The relationship of these provisions has been the subject of much controversy in virtually every impeachment proceeding brought against a federal judge which has resulted in a Senate trial. In attempting to fashion a standard as to what is

an impeachable offense, the provisions give rise to the threshold question: Does the "good behavior" provision of Article III furnish a lesser ground for impeachment in the case of judges?

It has been argued that the provisions of Article III, Section 1, of the Constitution and Article II, Section 4, must be construed together. This proposition finds strong support in judicial construction of the Constitution. "It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it." Marbury v. Madison, 1 Cranch (5 U.S.) 137, 174 (1803). It was also aptly stated in Holmes v. Jennison, 14 Peters (38 U.S.) 540, 570-571 (1840):

> In expounding the constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident, from the whole instrument that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and [have] shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning....

The inescapable conclusion that follows is that the Framers, having in mind the difference in tenure, distinguished between the President and judges concerning the standard to be employed for an impeachment. Otherwise the "good Behavior" clause is a nullity as there is no other constitutional method for the removal of a federal judge.

B. Judicial Impeachment Precedents

In determining what constitutes an impeachable offense, recourse must also be had to the previous impeachment proceedings. The first extensive debate concerning the nature of the impeachment power occurred during the trial of Associate Supreme Court Justice Samuel Chase in 1804. In that case Chase was charged with eight articles of impeachment; six concerned his actions while presiding on circuit at treason and sedition trials and two concerned addresses delivered to grand juries. Luther Martin, who had been a delegate at the Constitutional Convention, represented Chase. He maintained that under the Constitution impeachment would only lie for "indictable offenses." In supporting this contention, he stated on behalf of Justice Chase:

> There can be no doubt that treason and bribery are indictable offenses. We have only to inquire, then, what is meant by high crimes and misdemeanors? What is the true meaning of the word "crime?" It is the breach of some law which renders the person who violates it liable to punishment. There can be no crime committed when no such law is violated.
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> * * *
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> Thus it appears crimes and misdemeanors are the violations of a law exposing the person to punishment, and are used in contradistinction to those breaches of law which are mere private injuries, and only entitle the injured to a civil remedy. 3 Hinds' Precedents of the House of Representatives 762 (Hereinafter cited as Hinds).

The second assertion supporting the proposition that impeachable offenses must be "indictable" was that all the provisions of the Constitution relating to impeachment are couched in the terminology of the criminal laws. 3 Hinds 767-768. The third point raised by Chase's counsel was that the Framers of the Constitution intentionally restricted impeachment to indictable offenses to safeguard the independence of the judiciary. His counsel contended that the stability and integrity of the Supreme Court demanded a strict interpretation of the impeachment clause. It is virtually undisputed that the impeachment of Justice Chase was motivated, to a large degree, by political factors. Justice Chase was a Federalist who had incurred the wrath of the Jeffersonian Republicans by many of his rulings.

In response to the position advanced by the counsel for the Justice, the House Managers contended that with respect to judges impeachable offenses were not limited to indictable crimes. The argument advanced was that a judge may be impeached for misbehavior without resort to the impeachment clause. 3 Hinds 740. This argument was based on the proposition that the Constitution draws a distinction between judges and other civil officers. Both judges and the President may be impeached for "Treason, Bribery, or other high Crimes and Misdemeanors." But judges may also be impeached for "misbehavior." This additional ground for impeachment is required in the case of judges because of their life tenure while the President is subject to periodic removal for misbehavior through the ballot box.

Notwithstanding the misbehavior argument, the Senate voted to acquit Chase after voting on whether a high crime or misdemeanor had been committed.[24/] It cannot be conclusively stated that this trial set a precedent that only indictable offenses are impeachable, since it is impossible to ascertain upon which precise factors the vote of each senator turned. Nevertheless, the proposition that Chase's acquittal was influenced by the arguments

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24/ It is interesting to note Chief Justice John Marshall's opinion expressed in a letter to Chase dated January 23, 1804 that there was no ground for impeachment. Rhodes, 1 The Papers of John Marshall 506 (University of Oklahoma Press, 1969).

that offenses must be indictable to convict must be given serious weight. In any event, the argument is important because it supplied the basis for other arguments which were raised in subsequent impeachment proceedings.

The impeachment trial in which Judge Robert W. Archbald was convicted in 1912 was the first proceeding resulting in removal in which the nature of the impeachment power was extensively debated. In adopting the Articles of Impeachment, the House of Representatives took the position that a breach of judicial "good Behavior," regardless of its criminality, was impeachable. 6 Cannon 637. In the Senate, counsel for the judge adhered to the argument, which had been made previously on behalf of the counsel for Justice Chase, that an impeachable offense must be, by the very terms of the Constitution, an indictable offense, or, at the very least, must have the characteristics of a crime. 6 Cannon 633.

The most illuminating argument advanced by the House Managers was based upon a construction of the judicial tenure provision [Article III, section 1] and the removal provision [Article II, section 4]. 6 Cannon 643. Thus, the Managers contended that the

Constitution adopted one standard for the judiciary and another for the executive, saying:

> In other words, our forefathers in framing the Constitution have wisely seen fit to provide for a requisite of holding office on the part of a judge that does not apply to other civil officers. The reason for this is apparent. The President, Vice President, and other civil officers, except judges, hold their positions for a definite, fixed term, and any misbehavior in office on the part of any of them can be rectified by the people or the appointing power when the term of office expires. But the judge has no such tenure of office. He is placed beyond the power of the people or the appointing power and is, therefore, subject only to removal for misbehavior. Since he cannot be removed unless he be impeached by the House of Representatives, tried and convicted by the Senate, it must necessarily follow that misbehavior in office is an impeachable offense. 6 Cannon 650.

Thus the precedent formerly asserted by the House in 1804 that a judge may be impeached for a breach of good behavior was reasserted again with full force over one hundred years later in 1912. And, unless the precedents of the House of Representatives have no precedential value at all, this principle is valid today.

Archbald was found guilty on five articles and was removed from office. In commenting on the outcome of the Archbald trial,

one of the House Managers subsequently wrote:

> [The Archbald] case has forever removed from the domain of controversy the proposition that the judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application. 6 Cannon 638.

The fact that the House of Representatives felt it necessary to make a distinction in the impeachment standards between the Judiciary and Executive reinforces the obvious -- that the words "Treason, Bribery, and other high Crimes and Misdemeanors," are limited solely to indictable crimes and cannot extend to misbehavior. However, this statement of House precedent, that judges may be impeached for misbehavior, must be examined in light of the opinions filed by a number of Senators following their votes:

> Some stated that they thought criminality was the standard for removal; some only voted guilty where they thought the offenses, as proven, constituted 'high crimes or misdemeanors,' and had voted not guilty where the charge involved only misconduct. Others said that they had voted not guilty on charges in which proof of evil intent was lacking, and yet a few others said they had voted guilty on any charge involving less than good behavior. Feerick, Impeaching Federal Judges: A Study Of The Constitutional Provisions, 39 Fordham Law Review 42-43 (1970).

Thus senatorial precedents have demonstrated a reluctance to convict a judge in the absence of criminal conduct, leaving the standard for judicial impeachment less than conclusive.

An examination of all impeachment cases involving judges reveals that the charges have ranged from mere intemperate behavior to serious criminality. In those cases in which an acquittal was rendered by the Senate it may mean that the charges were not proven or, if proven, did not amount to impeachable offenses. Thus, the convictions are apparently more instructive than the acquittals since an adjudication by the Senate means that the accused has been proven guilty of conduct that, in the opinion of the Senate, warrants removal under the Constitution.

Impeachment proceedings have been initiated in the House some 50 times since 1789, but only 12 cases have reached the Senate. Of these 12, two were dismissed for lack of jurisdiction, six resulted in acquittal and four ended in conviction. All of the convictions involved Federal judges: John Pickering of the district court of New Hampshire, in 1804; West H. Humphreys of the eastern, middle and western districts of Tennessee, in 1862; Robert W. Archbald of the Commerce Court, in 1913; and Halsted L. Ritter of the southern district of Florida, in 1936. Impeachment-Selected Materials 705.

In reviewing the four cases resulting in convictions, it can be noted that Judge Pickering was convicted for violating non-criminal statutes. These non-indictable violations of conduct were committed in the exercise of official duties. 3 Hinds 690-692. Judge Humphreys was convicted of treason-like conduct. 3 Hinds 810-811. The value of either case as precedent is diminished in light of the fact that neither accused defended himself, either in person or by counsel.

Nevertheless, the impeachment and conviction of Judge Pickering again highlights the Congressional utilization of separate standards for the impeachment of judges and a President. And, indeed, the facts of the case illustrate the necessity for the dual standards. Since Judge Pickering was charged in the Articles of Impeachment with violating three non-criminal statutes and with intemperance, there was no indictable basis for his impeachment. Nevertheless, his demeanor as a judge was considered less than exemplary. Faced with this dilemma, Congress pragmatically chose to convict Pickering for offenses other than "high crimes and misdemeanors" by specifically striking those words from the charge voted upon by

the Senate. This was done despite the strong objections of some Senators, including Senator Alexander White of Virginia who argued that to remove a judge without a judgment that the acts constituted high crimes and misdemeanors would destroy the "good Behavior" provision and place judges at the mercy of a majority of Congress. 13 Annals of Cong. 366 (1803).

The convictions of Judges Archbald and Ritter have been regarded as senatorial precedents for impeaching judges for misconduct, whether or not indictable. Impeachment-Selected Materials 709. But Archbald was charged by the House with extorting bribes from litigants before his court, with interferring in cases before the Interstate Commerce Commission for a monetary compensation, and other corrupt conduct for personal gain. Thus it has also been suggested that the Archbald case is subject to a much more narrow interpretation and stands simply for the proposition that a judge who willfully, corruptly, and improperly uses the power of his office for personal gain is subject to impeachment. See, e.g., Feerick, supra, at 53.

Judge Ritter, on the other hand, was formally charged with receiving illegal kickbacks, with the statutory high misdemeanor of practicing law while on the bench,[25] and with willful income tax evasion. He was convicted under an article which incorporated criminal statutory violations.

While the notion that judges can be impeached solely for misbehavior has been criticized, it is clear from an examination of past impeachments that the proceedings against judges have been noticeably influenced by this factor. Thus matters that would not be considered high crimes and misdemeanors as to a President have been deemed appropriate for inclusion in the articles of impeachments against judges.

C. Presidential Removal By Impeachment

Turning to the question of Presidential impeachment, one must review the four methods provided by the United States Constitution for the removal of a President. First, after a President has served his first term in office, he may be removed through defeat at the polls when he seeks reelection. Second, after a President serves

25/28 U.S.C. 454.

a second term he will automatically be removed at the end of that term by the operation of the twenty-second amendment. Third, if a President cannot discharge the powers and duties of his office he may be replaced through the procedures set forth in the recently adopted twenty-fifth amendment. Lastly, under Article II, section 4, a President may be impeached and removed from office upon conviction for "Treason, Bribery, or other high Crimes and Misdemeanors." In sum, the clear language of the Constitution recognizes a distinction between a President who may be removed from office by various methods and a judge who may only be removed by impeachment. This distinction is of paramount importance in determining for what substantive offenses a President can be held accountable in an impeachment proceeding. In arriving at that conclusion, we can look for guidance to the impeachment trial of President Andrew Johnson. In the 187-year history of the United States, it has been the only impeachment of a President and for that reason alone it is an important precedent.

Following his succession to the Presidency on April 15, 1865, Andrew Johnson became enmeshed in a bitter struggle between the executive and legislative branches of government over Reconstruction

policy. Johnson favored a lenient attitude; the Radicals favored repressive tactics. Finally on January 7, 1867, two Representatives (Radicals) introduced a pair of resolutions calling for Judiciary Committee investigations and impeachment of the President. The Judiciary Committee gathered a mass of general testimony highly critical of Johnson and recommended impeachment. However, the House by a 57-108 vote rejected the Committee resolution to impeach the President. "The resolution was defeated primarily because no specific crime was alleged to have been committed." Impeachment-Selected Materials 716 (emphasis added).

Radical opposition to Johnson continued to run high, and on January 22, 1868, the House by a 99-31 vote 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...." Id. To help the Committee, the House on February 10, 1868 referred to it the impeachment evidence gathered in 1867. Then on February 21, 1868, Johnson formally dismissed Secretary of War Edwin M. Stanton, a leading Radical sympathizer. The dismissal allegedly violated the Tenure of Office

Act of March 2, 1867, which required Senate concurrence in the removal, as well as the appointment, of certain officers, and which made violation of the Act a "high misdemeanor." Id.

The day after Johnson moved against Stanton, the Committee on Reconstruction recommended the impeachment of the President. And on February 24, the House by a 128-47 vote adopted a Committee resolution impeaching Johnson, and by a 124-42 vote appointed a committee to draw up articles of impeachment. Id.

The first article charged that Stanton's removal was unlawful as an intentional violation of the Act and the Constitution. Johnson believed the Act was unconstitutional.[26] Articles two and three were variations of the first. Articles four through eight, referred to as the "Conspiracy Articles," also pertained to Stanton's removal. Article nine concerned a statute requiring all orders to pass through a General of the Army. Johnson had stated that the statute was unconstitutional and, accordingly generals of lesser rank should take orders directly from him. Article ten charged that Johnson ridiculed Congress by intemperate harangues against it. The last article charged that Johnson had declared, in an August 18, 1866

26/ Johnson's assessment was later confirmed by the Supreme Court in Myers v. United States, 372 U.S. 72 (1926).

speech, that the thirty-ninth Congress was not a Congress of the United States authorized to exercise legislative powers, but only a Congress of part of the states, and that its legislation was not binding upon him. The article stated that in pursuance of this declaration and in violation of his oath of office, Johnson attempted to prevent the execution of the Tenure Act and two other statutes, such being a high misdemeanor in office. 3 Hinds 863-869.

Johnson's trial began on March 5, 1868. At the outset of the trial, the Managers broadly defined an impeachable offense as:

> [O]ne in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for any improper purpose. 1 Trial of Andrew Johnson 88 (Da Capo Press, 1970).

Representative Butler, a House Manager, admitted that the definition asserted by the House Managers exceeded the common law definition, but argued that the Senate was bound by no law, being a law unto itself and "bound only by the natural principles of equity and justice." Id. at 90.

President Johnson did not appear at the trial. But he did file an answer through his counsel, which denied, in essence, that his actions violated the Act or the Constitution or that the acts charged were high crimes and misdemeanors. In addition, he noted that the charges in Articles ten and eleven were protected by the freedom of speech guaranteed by the Constitution. 3 Hinds 882-885.

Benjamin Curtis, a former Justice of the United States Supreme Court and counsel for the President, summarized Johnson's successful defense as resting on the proposition:

> That when the Constitution speaks of 'treason, bribery, and [sic] other high crimes and misdemeanors' it refers to, and includes only, high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment. 1 Trial of Andrew Johnson, supra, at 409.

He further stressed that:

> [I]t is impossible to come to the conclusion that the Constitution of the United States has not designated impeachment offenses as offenses against the United States. It has provided for

> the trial...established a tribunal for...trying them...directed the tribunal...to pronounce a judgment and to inflict a punishment, and yet the honorable manager tells us that this is not a court, and that it is bound by no law. Id. at 410.

Curtis correctly noted that if every senator was a law unto himself, able to declare an act criminal after its commission, the constitutional prohibition against ex post facto laws would be violated. In addition, he pointed out that Senate support for the Manager's argument amounted to acceptance of a bill of attainder, and asked: "Of what use would be [the] prohibition in the Constitution against passing bills of attainder if it is only necessary for the House of Representatives, by a majority, to vote articles of impeachment, and for two-thirds of the Senate to sustain the articles?" Id. at 411. Curtis declared that it was the duty of the Senate, having taken an oath to apply the law according to the Constitution, to find that a law existed, construe and apply it to the case, and find criminal intention to break it before it could convict on any article. Id.

After weeks of argument and testimony the Senate voted on Article eleven thought by the House Managers most likely to produce a vote for conviction. Conviction failed by one vote short of the

two-thirds majority, 35-19. 3 Hinds 897-898. Votes were later taken on Articles two and three relating to the Tenure Act with the same result. The Managers did not call for a vote on the remaining articles and the proceeding was adjourned. 3 Hinds 900-901.

One summary of the Johnson impeachment proceeding characterized the generally accepted view:

> The verdict of history is that the Johnson impeachment demonstrates the perils of treating impeachment as an invitation to purely political retribution. The Law of Presidential Impeachment, Association of the Bar of the City of New York 7 (1974).

The trial has also been described as "a gross abuse of the impeachment process, an attempt to punish the President for differing with and obstructing the policy of Congress." Berger, supra, at 295. It was also characterized as "the most insidious assault on Constitutional government in the nation's history" and an attempt to set up a "Congressional dictatorship." Brant, supra, at 4.

The acquittal of President Johnson over a century ago strongly indicates that the Senate has refused to adopt a broad view of "other high crimes and misdemeanors" as a basis for impeaching a

President. The most salient lesson to be learned from the Johnson trial is that impeachment of a President should be resorted to only for cases of the gravest kind -- the commission of a crime named in the Constitution or a criminal offense against the laws of the United States. If there is any doubt as to the gravity of an offense or as to a President's conduct or motives, the doubt should be resolved in his favor. This is the necessary price for having an independent Executive.

VI. CONCLUSION - THE PROPER STANDARD FOR PRESIDENTIAL IMPEACHMENT

The English impeachment precedents clearly demonstrate the criminal nature and origin of the impeachment process. The Framers adopted the general criminal meaning and language of those impeachments while rejecting the 17th century aberration where impeachment was used as a weapon by Parliament to gain political supremacy at the expense of the rule of law. In light of legislative and judicial usage, American case law, and established rules of constitutional and statutory construction, the term "other high Crimes and Misdemeanors" means great crimes against the state. Finally, a

review of American impeachment precedents shows that while judges may be impeached for something less than indictable offenses -- even here the standard is less than conclusive -- all the evidence points to the fact that a President may not. He may be impeached only for indictable crimes clearly set forth in the Constitution. This is the lesson of history, logic, and experience; this is the meaning of "Treason, Bribery, and other high Crimes and Misdemeanors."

Any analysis that broadly construes the power to impeach and convict can be reached only by reading Constitutional authorities selectively, by lifting specific historical precedents out of their precise historical context, by disregarding the plain meaning and accepted definition of technical, legal terms -- in short, by placing a subjective gloss on the history of impeachment that results in permitting the Congress to do whatever it deems most politic. The intent of the Framers, who witnessed episode after episode of outrageous abuse of the impeachment power by the self-righteous English Parliament, was to restrict the political reach of the impeachment power.

Those who seek to broaden the impeachment power invite the use of power "as a means of crushing political adversaries or ejecting them from office." 1 A. De Tocqueville, Democracy in America 114-115

(P. Bradley ed., 1945). The acceptance of such an invitation would be destructive to our system of government, and to the fundamental principle of separation of powers inherent in the very structure of the Constitution. If, as some have asserted, there is no appeal from the ultimate judgment of Congress, the moral responsibility of Congress is underscored in exercising its awesome power under the impeachment clause so as not to impair other provisions of the Constitution. The Framers never intended that the impeachment clause serve to dominate or destroy the executive branch of government. In their wisdom, they provided adequate and proper methods for change. The misuse of the impeachment clause was not one of them.

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