Presidential Impeachment: Must it Lie for a Crime?

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Introduction

Not since Andrew Johnson was impeached in 1868 has presidential impeachment been seriously considered. But in 1974, our country, for the second time in its history, faced the possibility that our President may, in the words of the Constitution, "be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."¹ It was this great, but unfortunate event in our history, that prompted me to write this thesis.

Impeachment, is potentially the most powerful weapon in the Congressional arsenal, and for this reason the least used. As strange as it may seem the exact meaning of this weapon was never clearly spelled out by the Framers of our Constitution and, in the intervening years between the Johnson impeachment and now, very little has been written on the subject of impeachable offenses relative to the President. I believe the Framers of our Constitution had a certain practice in mind when they adopted the impeachment clause, and by the time the reader is done with this paper he should be convinced that the conclusions I have drawn are reasonable and logical ones.

In this thesis I am going to deal only with impeachable offenses as they relate to the President. There are basically

two reasons for this. First of all, and most importantly, I have approached the problem of impeachable offenses in much the same way as they were in the Constitutional Convention, and that is, in direct relation to the President. Although the discussion of impeachment in the Constitutional Convention was rather short, it dealt almost exclusively with the President. And second, there is much debate on whether or not the "good behavior" clause of Article III, section 1, in the Constitution adds a new dimension to the impeachment clause as it concerns the removal of judges. It is for these reasons that I will limit my discussion of impeachable offenses to the President. What I shall endeavor to prove is that an impeachable offense for a President can be, but, does not have to be, criminal or indictable.

The subject of impeachment and conviction is dealt with by the Constitution in six places. Following are the six provisions in their chronological order:

Article I, Section 2 states:

The House of Representatives . . . shall have the sole power of impeachment.2

Article I, Section 3 states:

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

Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit

under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law. 3

Article II, Section 2 states:

The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment. 4

Article II, Section 4 states:

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. 5

Article III, Section 2 states:

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . 6

Most of what has been stated above is clear, except for the one key provision, that of Article II, Section 4, dealing with the grounds for impeachment, but I assert that it does have a semi-defined meaning and to find that meaning one must turn to history.

Impeachment is an English invention and therefore any discussion of it should begin there. In this thesis I begin by giving a brief history of impeachment in England. The brief historical analysis includes the origin of impeachment, its development, and a few cases in which it was used. By viewing impeachment historically it should become apparent to the reader that the phrase "high crimes and misdemeanors", as used in England, developed apart from

3 Ibid.
4 Ibid., p. 672.
5 Ibid., p. 673.
6 Ibid., p. 674.
the ordinary criminal law and included offenses, which in some cases, were not criminal.

The debates in the Constitutional Convention and other contemporary statements are then taken up and analyzed in the attempt to discover if impeachment must lie for a crime. The conclusion I draw is that impeachable offenses were not limited to crimes by the Framers of our Constitution.

After the above discussion I will take up the arguments most often advanced by the constitutional authorities who argue that impeachment can only lie for a crime. The first argument asserts that only those offenses which were indictable at the time our Constitution was adopted are impeachable. The second argument is a multifaceted one, but relies primarily on the language used by the Framers in speaking of impeachment during their debates in the Constitutional Convention and the language which appears in the Constitution which connotes criminality. My rebuttal follows each argument.

The impeachment of Andrew Johnson is then dealt with rather briefly and its validity as a proper precedent explored. This discussion is followed up by my conclusion.

It has been accepted by nearly everyone that has ever written on the subject of impeachment that our impeachment practice was modelled after that of England's, subject to the modifications applied to it by the Constitution. Thus in my attempt to prove that impeachment can lie for less than a crime I start with a discussion of impeachment as that process operated in England.

Before I take up the English practice it is necessary to define the term crime so the reader will know or understand what I
mean when I say that impeachment can lie for less than a crime.
The definition that appears here is taken almost word for word from
the fourth edition of Black's Law Dictionary. There crime is defined
as a positive or negative act in violation of penal law or statute,
and the dictionary goes on to state that "crime" and "misdemeanor"
are, properly speaking, synonymous terms; though in common usage
"crime" is made to denote an offense of a more serious nature. 7

II. Impeachment: In England

Impeachment began in the late fourteenth century when the
Commons took it upon themselves to prosecute before the Lords,
the Kings ministers and favorites. These were men, as the Parlia-
ment saw it, who were beyond reach of the ordinary sanctions applied
to the average wrongdoer. Thus impeachment became a tool by which
the Parliament made an effort to establish a more responsive and
responsible government and to correct imbalances when they occurred.

The term "high crimes and misdemeanors" was first met in
the proceedings against the Earl of Suffolk in 1386. 8 At that
time "there was in fact no such crime as a misdemeanor." 9 Ac-
cording to Raoul Berger "lesser crimes were prosecuted as tres-
passes well into the sixteenth century, and only then were tres-
passes supplanted by misdemeanors as a category of ordinary crimes." 10
Since there was a gap of around 150 years between the time "high

9 Ibid., p. 61.
10 Ibid.
crimes and misdemeanors" evolved relative to impeachment and misde-
meanor as a category of ordinary crimes a difference in the
meaning of the two is implicit. To argue otherwise places one in
the position of explaining away the 150 year gap before the term
misdemeanor was incorporated into the ordinary criminal law. It
will become apparent shortly that the gap of 150 years shows a
functional difference that separates misdemeanors from high misde-
meanors. "High crimes and misdemeanors were a category of polit-
ic crimes against the state, whereas misdemeanors described
criminal sanctions for private wrongs". Berger continues on in
his book to explain that "misdemeanors", although part of the ordinary
criminal law, did not become the criterion of "high misdemeanor" in
the parliamentary law of impeachment. Nor did the term "high misde-
meanor" find its way into the general criminal law of England. It
is because of this division that people have considered the phrase
"high crimes and misdemeanors" a "term of art" confined to impeach-
ment.

As used in England the term high modified both "crimes" and
"misdemeanors". Proof of this can be found by referring to the charges
against Chief Justice Scroggs mentioned in the list of English of-
ficials impeached in the following pages. The legal doctrine
eiusdem generis would also require that "high" modify misdemeanor.
That doctrine states that "the meaning of a general word ought to
be limited to the kind or class of things within which the specific
words fall." This doctrine applies more specifically in the case

11 Ibid.

12 Charles L. Black Jr., Impeachment (New Haven & London:
of our Constitution because there treason, bribery and high crimes are of a serious nature and if misdemeanor is contrasted with those terms it's meaning must also be of a serious nature following the above doctrine. According to Professor Black it would be a misapplication of the rule to limit misdemeanors to crimes. The class or kind of offenses refers not to crimes but to serious offenses.

In the following pages I will list a few of the officials who were impeached in England for "high crimes and misdemeanors" and, provide at the same time the list (in some cases a partial list) of charges against them. It is in this way that content can be given to the phrase "high crimes and misdemeanors".

Chancellor Michael de la Pole, Earl of Suffolk (1386), high crimes and misdemeanors: applied appropriated funds to purposes other than those specified.\(^13\)

Duke of Suffolk (1450), treason and high crimes and misdemeanors: Procured offices for persons who were unfit and unworthy of them; delayed justice by stopping writs of appeal (private criminal prosecutions) for the death of complainants' husbands.\(^14\)

Lord Treasurer Middlesex (1624), high crimes and misdemeanors: allowed the office of Ordinance to go unrepaired though money was appropriated for that purpose; allowed contracts for greatly needed powder to lapse for want of payment.\(^15\)

Duke of Buckingham (1626), misdemeanors, misprisions, offenses, and crimes: though young and inexperienced, procured offices for himself, thereby blocking the deserving; neglected as great admiral to safeguard the seas; procured titles of honor to his mother, brothers, kindred.\(^16\)

Sir Richard Gurney, Lord Mayor of London (1642), high

\(^{13}\)Berger, Impeachment, p. 67.

\(^{14}\)Ibid.

\(^{15}\)Ibid.

\(^{16}\)Ibid.
crimes and misdemeanors: thwarted Parliament’s order to store arms and ammunition in storehouses.\textsuperscript{17}

Viscount Mordaunt (1660), high crimes and misdemeanors: prevented Tayleur from standing for election as a burgess to serve in Parliament; caused his illegal arrest and detention.\textsuperscript{18}

Peter Pett, Commissioner of the Navy (1668), high crimes and misdemeanors: negligent preparation for the Dutch invasion; loss of ship through neglect to bring it to mooring.\textsuperscript{19}

Chief Justice North (1680), high crimes and misdemeanors: assisted the Attorney General in drawing a proclamation to suppress petitions to the king to call a Parliament.\textsuperscript{20}

Chief Justice Scroggs (1680), treason and high misdemeanors: discharged grand jury before they made their presentment, thereby obstructing the presentment of many Papists; arbitrarily granted general warrants in blank.\textsuperscript{21}

Sir Edward Seymour (1680), high crimes and misdemeanors: applied appropriated funds to public purposes other than those specified.\textsuperscript{22}

Duke of Leeds (1695), high crimes and misdemeanors: as president of Privy Council accepted 5,500 guineas from the East India Company to procure a charter of confirmation.\textsuperscript{23}

Edward, Earl of Oxford (1701), high crimes and misdemeanors: The Earl . . . in concert with other false and evil counsellors, advised our said sovereign lord the king . . . to enter into a one treaty for dividing the monarchy and dominions of Spain.\textsuperscript{24}

\textsuperscript{17} Ibid., p. 68.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid.
\textsuperscript{23} Ibid.
What this article amounted to was giving pernicious advice to the Crown. England was at this time engaged in several alliances, the intention of which was to prevent the growth of power of the French King. The treaty, advised by the Earl and others, gave large parts of the Spanish dominion to the French, thereby adding to the power of the French King.

Warren Hastings first Governor-General of India (1786), high crimes and misdemeanors: "Gross maladministration, corruption in office, and cruelty towards the people of India".25

It might be well to remember that it was the impeachment of Warren Hastings that was referred to by George Mason in the debates during the Constitutional Convention.

The charges listed in the impeachment cases above demonstrated that, in England, impeachable offenses need not be criminal or indictable. More precisely the term "high crimes and misdemeanors" incorporated those political sorts of offenses that were contrary to responsible government. Thus criminality was not controlling. Again, the cases listed above do not constitute a complete list of those officials impeached in England.

Generally then two points emerge from the English parliamentary experience with the phrase "high crimes and misdemeanors," and both are found or represented by the charges listed above. In a broad sense the allegations serve to delineate the outlines of "high crimes and misdemeanors".

First, the particular allegations of misconduct alleged damage to the state in such forms as misapplication

of funds, abuse of official power, neglect of duty, encroachment on Parliament's perogatives, corruption, and betrayal of trust. Second, the phrase "high crimes and misdemeanors" was confined to parliamentary impeachments; it had no roots in the ordinary criminal law, and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions or crimes.\(^26\)

Even though English officials were impeached for offenses that amounted to something short of a crime, impeachment proceedings were clearly criminal in nature. Not only were those officials that were impeached and convicted subject to fines and imprisonment, but also to execution. Undeniably then, impeachment in England was a criminal proceeding.

In summary it appears that impeachable offenses, in England, were not limited to the criminal law. The institution of impeachment evolved because the officials and in some instances the offenses they committed were beyond the ordinary means of criminal redress. The phraseology (i.e., high crimes and misdemeanors) in impeachment proceedings evolved independently of and different from that language used in the ordinary criminal law. "High crimes and misdemeanors" represented a category of what can be called political offenses, but misdemeanors as it evolved in the criminal law "described criminal sanctions for private wrongs".\(^27\) Again, "misdemeanors", as that term was used in the criminal law, never became the criterion of "high misdemeanor" in the parliamentary law of impeachment. Nor did "high misdemeanor", as used in impeachment, find its way into the general criminal law of England. Thus "high

\(^{26}\)Ibid.

\(^{27}\)Berger, Impeachment, p. 61.
crimes and misdemeanors" were words of art confined to impeachment. Richard Woodeson, Blackstone's successor as Vinerian lecturer, perhaps put it best when he labeled impeachable offenses as being of a "peculiar quality". The reason they were "peculiar" was because in many cases the offenses that fell under the phrase "high crimes and misdemeanors" were not encompassed by criminal statutes or by common law cases. This was the history of English impeachment when our founding fathers wrote our Constitution.

III. Grounds For Impeachment: The Indictability or Criminality Issue

Basically there are four primary sources for the contemporary interpretation of the provisions in the Constitution. The sources are the Constitutional Convention debates, the ratification conventions, the Federalist Papers, and the debates and the proceedings during the first session of Congress under the New Constitution. In the following pages I will use those sources and others to support my conclusion about the nature of impeachable offenses as it was intended by the Framers themselves.

A. Treason

For the definition of treason we are on fairly smooth ground. We are because the Constitution narrowly defined treason. The reason for this, to put it in the words of James Wilson, is that "numerous and dangerous excrescences" had disfigured the law of treason in England and so the Framers closely defined and limited treason so that as Wilson said before the ratification convention in Pennsylvania, Congress could not "extend the crime and punishment of treason." According to Article III, section 3 of the

28 Ibid., p. 63.
29 Ibid., pp. 54-55.
Constitution treason is defined as:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two witnesses to the same overt Act, or on Confession in open Court.30

No where in the Constitution is a crime so precisely defined as that of treason. The reason for this is because treason is without a doubt a crime of the most serious nature, and there is no reason to think that the word means anything other than this, as it is found in the impeachment provision. Also of importance here is that treason can be labeled a political crime, because it is an offense against the State.

B. Bribery

Unlike treason, bribery is not defined in the Constitution. And like the Framer’s, we to must look to the common law for a definition of bribery.

Basically, bribery means the giving or taking of something as an inducement. There is nothing inherently wrong with the giving or taking of something, but it is the connection between the two that is so important. For this reason the states of mind of both the giver and the recipient become crucially important. In other words, it is the improper motive or intent behind the giving or receiving of something that one must prove in a bribery case.

Like treason, I also believe bribery can be labeled a political offense. The reason for this is because the Framers talked of bribery, in the impeachment clause, in the context of the officers of the State. What one is doing when he bribes an officer of the

30 Mason & Beaney, American Constitutional Law, p. 674.
State is in effect corrupting the administration of the State. Therefore since bribery has an effect on politics it can be said to be of a political nature.

C. High Crimes and Misdemeanors

Never has a finite content been given to this phrase, and since its inception in the United States Constitution, battles have been waged as to what sort of misconduct it encompasses. Obviously then, one cannot simply say that the phrase means exactly that of what our modern notion of the words "crimes" and "misdemeanors" would indicate they do. If the meaning were so simple to deduce, the many arguments over its meaning would never have taken place.

Many arguments have been advanced as to what the phrase "high crimes and misdemeanors" means. I will first analyze the debates in the Constitutional Convention and then take up the other primary arguments contrary to my interpretation of the phrase "high crimes and misdemeanors".

The debates in the Constitutional Convention took place in a private atmosphere. Because of this we are not allowed the luxury of reviewing the full reproduction of those debates in order to discover what exactly the founding fathers had in mind when they pieced together our Constitution. Instead we must rely on the partial and sometimes incomplete notes of those men who attended the Constitutional Convention. Another factor that hinders one in his search for an understanding of impeachable offenses is that in the context of its monumental task, the Constitutional Convention devoted very little time to the question of impeachment. But, enough time was given to the question to show that the Founding Fathers deemed impeachment to be of the utmost importance, and more importantly for
my purposes, that an impeachable offense may lie for something less than a criminal or indictable offense.

In order to determine whether or not impeachment must lie for a crime constitutional authorities on both sides of the issue have turned to the Convention debates for support. The language used by the Framers is examined not only in the final debate on impeachment but also in prior debates.

The Constitutional Convention began in mid-May 1787, but it was not until the latter part of July that the Convention took up the impeachment of the President to any length. Finally on July 20, 1787, the Convention approved a provision that the President was "to be removable on impeachment and conviction of mal-practice or neglect of duty." The provision cited above was approved for a second time on July 26th. The above discussion in the Convention is not the most important one that took place on the subject of impeachment because it was directed toward the institution of impeachment itself, and not in direct relation to impeachable offenses. However, the discussion is interesting in several respects because it does lend an indirect insight to impeachable offenses.

This draft of the impeachment provision was changed on August 6 by the committee of detail to read "treason, bribery, or corruption". The new reading of the provision was the referred to the committee of eleven and on September 4 this committee recommended

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31 Simpson, Treatise on Federal Impeachment, p. 10.
32 See Appendix A for reproduction of full debate.
that the impeachment of the President be restricted to "treason and bribery". It was the debate on this proposal which took place on September 8 that is most important. This final discussion on the grounds for impeachment was brief, probably taking no more than five or ten minutes. The debate begins with Colonel Mason when he asks:

Why is the provision restrained to Treason and bribery only? Treason as defined by the Constitution will not reach many great and dangerous offenses. 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, 34

Mason then "moved to add after 'bribery' the words or maladministration". After Gerry seconded Mason, Madison demurred: "So vague a term will be equivalent to a tenure during the pleasure of the Senate." But Morris rejoined "it will not be put in force & can do no harm -- An election every four years will prevent maladministration". Still without further debate or explanation on this point, Mason "withdrew 'maladministration' & substitutes 'other high crimes & misdemeanors' (agst. the State). 35

By a vote of eight to three this amendment passed. The above debate was the final one on the grounds for impeachment, and that final addition accounts for the words that are in our Constitution today. And ever since its inception that final addition has never ceased to cause controversy. The language used, in the above debates, becomes especially important at this time.

Irving Brant is the constitutional authority I found cited most often as being in favor of impeaching for only criminal misconduct. Brant, like all other authorities, agrees that our impeachment mechanism was modelled after that of England's. However,

34 Black, C., Impeachment, p. 28.
Brant rejects the idea that in order to help find the meaning of this phrase one must look to English precedents. To find the meaning of the phrase "high crimes and misdemeanors" he is content to turn to the Constitution and from there concludes that criminality is required in order to impeach. In reaching this conclusion Brant relies on basically two propositions. His first is that within the Constitution there are numerous references which imply or connote that impeachable acts are criminal. His second proposition which is drawn from his first is that because the Constitution speaks of impeachable offenses in criminal terms or language, impeachment is a criminal process.

Before I begin to analyze either of Brant's propositions an important point must be made. Again, Brant's book is the one I found referred to most often in support of the strict interpretation of the impeachment clause and it is for this reason important to point out that his book was written in response to the impeachment attempt on Justice William Douglas. Since it was written to vindicate Justice Douglas it is, therefore, hardly what one could call objective.

Brant begins his attempt to show that impeachable offenses must be criminal by referring to the July 20, debate in the Constitutional Convention I mentioned earlier. Referring to this debate Brant says:

Putting together the various grounds of impeachment that were formally placed before the convention, either in individual motions or committee reports we find the following: maladministration (objected to and withdrawn) neglect of duty, malversation, corruption, treason, bribery, . . . incapacity, negligence, or perfidy of the Chief Magistrate, and treachery . . .

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In the very next paragraph he states that "perfidy and treachery of the sort Madison and Morrison had in mind would be a form of treason." He also states that "malversation is fraud in office and that corruption implies criminal acts." I think it is peculiar that he says this but does not cite an example or a footnote to help substantiate his position. I agree with him only to the extent that "perfidy and treachery" might or could amount to treason if it involved levying war against the United States or in giving aid or comfort to our enemies. However, treachery and perfidy cannot be limited to treason. According to Black's Law Dictionary treachery can be defined as betraying one's trust and perfidy is defined as betraying one's faith to do something. No where, could I find a definition of treachery and perfidy that was limited only to criminal offenses. And in the context in which those words were used there is no reason to limit the definition to criminal misconduct.

Brant also talks of malversation and takes this to mean the crime of fraud. And again I would agree with him that malversation includes fraud, but it is not limited to that. The American Heritage Dictionary of the English Language defines malversation as "misconduct in public office". There is no reason given to believe that misconduct in public office is necessarily limited to criminal conduct, nor does the context in which it was used necessitate looking at it in strictly criminal terms.

37 Ibid.
38 Ibid.
A little later in his book Brant goes on to say that "only incapacity and neglect of duty are nonindictable as felonies or high misdemeanors". He justifies both of these by saying that neither were formally put forward in the debate and that gross and willful neglect of duty would be a violation of the oath of office. This argument is not only weak but also somewhat inconsistent, and it is so because his initial stand was that only crimes are impeachable.

The problem of impeaching a president for incapacity has not been an issue since 1967 when the 25th amendment was passed which provides that the Vice-President shall assume the duties of President when the President is no longer able to discharge the powers or duties of that office. Therefore the issue that Brant raises is really not an issue at all anymore. Even in the latter 1700's I seriously doubt that lacking capacity was a crime and since it more than likely was not, one finds the Framers again speaking in less than criminal terms.

As for the neglect of duty issue I disagree with Mr. Brant that it was not formally put forward. To the contrary, it was part of the provision the Convention was debating on July 20. So, it was formally put forward! Thus what we have now is the fact that non-criminal misconduct was advanced at the beginning of this debate and not once was it objected to because it was not criminal misconduct, thereby exhibiting a belief that impeachable behavior need not necessarily be criminal.

Until this point in his book Brant was willing to hold to
the belief that all impeachable behavior must be criminal, but now he is willing to admit that a breach of the President's oath of office could be considered an impeachable offense. This seems rather inconsistent to me in view of his initial stand on the issue. The important point at this time is that, in the reading I have done, at no time has it been said or implied that a violation of the oath of office, by itself, constitutes a crime. Accordingly then a President might breach his oath of office (i.e., neglect of duty) which states that "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States", but, depending on the severity of that breach, he may or may not have broken the law. 42 Again we find the Framers speaking of noncriminal impeachable offenses. Thus what we are left with in this argument, is that a President may be impeached for a breach of his oath of office, that this breach of the oath does not in and of itself constitute a crime, therefore it is possible for a President to be impeached for something less than a crime.

What we have up to this point then is an argument by Brant that imputes criminality into the language used by the Framers, but not once was it indicated by the Framers that only criminal acts were what they had in mind in speaking of impeachable offenses. In fact the language they used could very easily be understood to mean noncriminal as well as criminal offenses.

From this argument Brant goes directly to the language used in the Constitution itself in his attempt to prove that

42 Mason & Beaney, American Constitutional Law, p. 672.
impeachment can only take place for a crime. In doing so I find it a bit peculiar that he never formally discussed the September 8 debate because it was during this debate that the Framers directly addressed the issue of impeachable offenses. And that debate was the most important one that took place on impeachable offenses. Mr. Brant felt no need to discuss this debate, which I think was an unwise decision on his part.

While Brant does not discuss the September 8 debate, I believe it is important because several inferences may be drawn from it. The first follows from the fact that Mason questioned the impeachment clause which was at that time limited to treason and bribery. He then mentioned that Hastings was not guilty of treason and that attempts to subvert the Constitution may not be treason. The above remarks are interesting for basically three reasons.

First of all it shows that the Framers were aware of the impeachment proceedings taking place against Hastings and they knew of the offenses charged against him. The statements made by Mason also show that the Framers were concerned that the behavior exhibited by Hastings was not impeachable under our Constitution, thereby implying that it should be. As mentioned earlier Hastings was impeached for high crimes and misdemeanors, and according to the House Judiciary Committee staff report, the articles of impeachment included "both criminal and non-criminal offenses". Since many of the Framers were seemingly knowledgeable of the Hastings impeachment it is fair to conclude that they were concerned that certain conduct, some of which was not criminal, was not impeachable according to the Framers. 

43 Staff of Impeachment Inquiry, Constitutional Grounds For Presidential Impeachment, p. 7.
to the Constitution as it was then worded. Mason, with that in mind, I assert, thus moved to add the word maladministration after the word bribery in order to include all the conduct that impeachment ought to remedy. Madison objected to the term saying that it would leave the President's tenure up to the pleasure of the Senate. Gouverneur Morris then remarked that impeachment would not be put into force and therefore it could do no harm. And with no other debate than this Mason withdrew maladministration and in it's place substituted "high crimes and misdemeanors" which was passed.

The second interesting thing about this debate, then, is the fact that Mason, the person who moved to add maladministration to the impeachment clause in order that it reach all those offenses worthy of impeachment, some of which might not be criminal, was the person who, in the end, added high crimes and misdemeanors. With hardly any debate on his original motion, it would not seem logical or reasonable that he would, a few minutes later, offer a phrase that was limited strictly to criminal offenses. I believe he accepted the remark made by Madison and substituted the technical phrase "high crimes and misdemeanors". And I believe he did so in the belief that it had a more serious and ascertainable meaning than did maladministration thus removing the fear voiced by Madison but at the same time reaching those offenses he was concerned with, some of which were not criminal.

As I discussed before "high crimes and misdemeanors" is a term of art that was confined to impeachment in England. I also discussed that the term included offenses that were less than criminal as was evidenced by the Hasting impeachment taking place at the time of the Convention. So the noncriminal use of "high crimes and misdemeanors",
by Parliament, was still occurring. The use of maladministration as a reason for impeaching, was, to vague a term, because it would have allowed the very thing Gerald Ford said in April of 1970 to happen. In speaking of the Douglas impeachment Ford was asked what an impeachable offense was. His answer was:

The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office.44

Statements like Gerald Ford's is why maladministration was objected to, I assert, and not because it included noncriminal misconduct, it was to vague and the Framers recognized this danger. A review of the phrase "high crimes and misdemeanors" does not leave the impeachment of a president up to the whim of Congress. As I said earlier while "high crimes and misdemeanors" was not limited to crimes, it's boundaries reached only serious misconduct.

Third and last I believe that since it appears Mason moved to add high crimes and misdemeanors in order that all the necessary misconduct be reached, again, some of which was not criminal, it implies that he was at least somewhat familiar with the Parliamentary use of that phrase. The Parliament did not limit that term to criminal acts and Mason, I believe, chose the term high crimes and misdemeanors for that reason. We know that Mason was at least partly familiar with impeachment in England and it is quite possible that most of the other convention members were to. It seems to me, from the reading I have done, that all of the Framers were intimately familiar with English history, and many of them were lawyers, of which "at least

44Brant, Impeachment Trial and Errors, pp. 5 & 6.
nine had studied law in England". When combined, these facts could reasonably lead one to believe that most of the Framers did have some knowledge of the English impeachment process. This is even further substantiated by the fact that our impeachment mechanism is very similar to England's in a number of ways and is in fact modelled after England's.

Ex-President Nixon's attorney also discusses the constitutional grounds for presidential impeachment in a brief. St. Clair begins his discussion of impeachment by saying that our impeachment mechanism was modelled after that of Great Britian's. He in fact agrees with me that "the language of the impeachment clause is derived directly from the English impeachments". But he then goes on to say that there is no evidence to attribute anything but a criminal meaning to the phrase high crimes and misdemeanors in light of the American and English history and usage from the time of Blackstone onward. There is no evidence to support this statement though. While it is true that most impeachments for "high crimes and misdemeanors" in England, during the eighteenth century (Blackstone era) did involve crimes, not all did and Hasting's impeachment is a good example. As it was pointed out earlier, some of the offenses for which Hasting's was impeached were criminal, and others clearly were not. And even if the impeachments tried then had been for crimes, there is absolutely no reason to believe, as St. Clair implies, that

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45 Staff of Impeachment Inquiry, Constitutional Grounds For Presidential Impeachment, p. 12.

the Framers adopted the phrase "high crimes and misdemeanors" only as it was used from around 1725 onward. I could not find one shred of evidence that indicated that the Framers adopted the impeachment language only from a certain time forward, thus there is no reason to suppose they did.

The September 8 debate in the Constitutional Convention was then taken up by St. Clair. According to him "the debates clearly indicate a purely criminal meaning for other high crimes and misdemeanors". He draws this inference from the fact that the vague standard of maladministration was objected to and withdrawn by Mason and in its place was substituted high crimes and misdemeanors. As I argued before, maladministration was not objected to because it was not criminal in nature but because it left the President's tenure strictly up to the Senate's pleasure. Maladministration had almost no boundaries at all but a review of "high crimes and misdemeanors" shows that it does. That phrase reached the types of misconduct of concern to the convention members but at the same time provided limits on the House and Senate that were not present with the use of maladministration. And again the offenses Mason mentioned were those committed by Hastings, some of which were not criminal, that fell short of Treason. Thus the only thing that is clear about the debates is the fact that impeachable offenses must be serious, but the implication is not that they must be criminal but that they may be either criminal or non-criminal.

The Ex-President's attorney then goes on to argue that the phrase "high crimes and misdemeanors" means exactly what the words

47 Ibid., p. 3.
connote, and that is, criminal offenses, and that this criminality is further reinforced by the language used in talking about impeachment. I do not believe the phrase clearly connotes criminality. If the meaning is so clear, then why did he find it necessary to write a brief arguing the meaning of the phrase? Obviously then, the meaning of the phrase is not very clear. And since as St. Clair says, the language of the impeachment clause was derived directly from the English impeachments, and since the Framers made no attempt to limit it's meaning and usage I assert that it (the phrase high crimes and misdemeanors) was adopted with it's history in tact thus not limiting impeachment to crimes indictable or otherwise.

Thus it seems to me that the phrase "high crimes and misdemeanors" was chosen by Mason, and approved by the convention, because it was a more limited term than maladministration but it still reached serious non-criminal offenses. They must be serious in nature because high modifies misdemeanors as well as crimes and if nothing else common sense would require them to be serious.

The Framers looked to the Constitution for the definition of treason. Bribery was not defined in that document and so the Framers were content to look to the common law to give it content. Neither is high crimes and misdemeanors defined in the Constitution. To put it in Justice Story's words then, since

High crimes and misdemeanors are not defined by any statute of the United States (nor, it may be added, by any English statute), resort, then, must be had either to the parliamentary practice and the common law, in order to ascertain what are high crimes and misdemeanors, or the whole subject must be left to the arbitrary discretion of the Senate. 

Resort must be had to the parliamentary law and the common law because Story pointed out earlier there is no federal common law of crimes and Congress never defined, by statute, "high crimes and misdemeanors." And since the Framers did not leave impeachment to the discretion of the Senate one must turn to English parliamentary law and common law for a meaning.

To put it a slightly different way, "high crimes and misdemeanors" has, according to the staff of the House Judiciary committee, traditionally been considered a term of art. And according to the staff report on impeachment "the Supreme Court has held that such phrases must be construed, not according to modern usage, but according to what the Framers meant when they adopted them." Chief Justice Marshall perhaps put it best when he wrote of another such phrase:

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 substratum 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.

Another difficult problem faced by those who would limit impeachable offenses to criminal conduct is posed by the doctrine announced in the Holmes v. Jennison decision that each word in the Constitution must be given meaning and none can be discarded as superfluous.

If one was to consider the phrase "high crimes and misdemeanors" by itself, dissociated from the Constitution and all historical background the word "misdemeanors cannot logically be limited

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49 Staff of Impeachment Inquiry, Constitutional Grounds For Presidential Impeachment, p. 12.
50 Ibid., p. 13.
to its meaning in the criminal law -- that is, all crimes which do not amount to felonies. The reason for this is that "misdemeanors" is encompassed within the term "crimes." This fact is beyond doubt or debate. Misdemeanor, basically is used to indicate lesser sorts of crimes, but it is a crime nevertheless. Therefore if the no superfluous words doctrine is to be followed "misdemeanors" must be interpreted to include non-criminal misconduct if it is to have an independent meaning. As Paul Fenton said in his article "the word crimes was used to negative the thought that the only criminal offenses for which an impeachment would lie were treason and bribery; and the word misdemeanors was used to negate the thought that only crimes were impeachable. The Holmes v. Jennison decision did not concern impeachment directly but it did announce a doctrine that can be applied to the language used in the impeachment clause of the Constitution. And if one accepts the validity of this doctrine and applies it to the phrase "high crimes and misdemeanors", by itself, dissociated from the Constitution and any historical background, it becomes necessary to read the term "misdemeanors" to include non-criminal offenses.

Thus, what we have up to this point is the fact that the Framers never limited themselves, in talking of impeachment, to offenses that were strictly criminal in nature. Instead, I found the Framers referring to impeachment, over and over again, in terms that imply less than criminality. Doctor Franklin used the term "misconduct" in relation to impeachment. James Madison in turn used the terms "negligence or perfidy" in speaking of impeachment.

51Committee on the Judiciary, Impeachment, p. 668.
52Ibid., p. 669.
Along the same line Edmund Randolph thought that impeachment should be provided for because the Executive has many opportunities to abuse his power. The final language in our Constitution was adopted after the term maladministration was objected to because of it's vagueness and not because it had non-criminal implications. The question must be asked, why didn't the Framers simply write "or other high crimes" as they did, for example, in the provision dealing with the extradition of criminal offenders from one state to another?\textsuperscript{53} If it was the seriousness of the offense they meant to emphasize, they could have done so more directly, but they did not. Instead, a unique phrase that had been used for centuries in the English Parliamentary impeachments was adopted. Impeachment in England was not limited to crimes and the Framers indicated they knew of the impeachment mechanism in that country.

There are several other arguments put forth by Brent, and other constitutional authorities, who argue that impeachment, and therefore "high crimes and misdemeanors" must be limited to crimes. The first argument is "that only those offences are impeachable which were indictable crimes at the time of the adoption of the Constitution, when there was no common law of the United States".\textsuperscript{54} This argument, it seems to me, is manifestly wrong. Anyone who has read the Constitution knows that it is an instrument that speaks in general terms. The document was written not for the past, but rather so that it could easily adapt to the present and future. It was perhaps best said by the great Justice Story in the case Martin v.

\textsuperscript{53}Mason & Beaney, American Constitutional Law, p. 674.

\textsuperscript{54}Simpson, Treatise on Federal Impeachment, p. 30.
Hunter's Lessons.

The Constitution unavoidably deals in general language. It did not suit the purpose of the people, in framing the great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was seen that this would be a perilous and difficult, if not impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the Legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interests shall require.\(^{55}\)

Thus I think the above mentioned argument is very weak, and wrong to boot.

Another argument put forth by Brant is that the language used in the Constitution itself proves that impeachment must lie for a crime. The Constitutional language relied on to show that impeachment deals only with crimes includes such terms as: "to try," "convicted," "pardons for offenses . . . except impeachment," "conviction of," and "trial of all crimes except . . . impeachment."\(^{56}\) I am somewhat awed by Brant's treatment of such terms, because absolutely no discussion about them takes place. Instead, he seems to take for granted that the terms are a self evident truth that impeachable offenses must be crimes.

First I will take up the so-called criminal terms of "to

\(^{55}\)Simpson, Treatise on Federal Impeachment, p. 31.

\(^{56}\)Brant, Impeachment Trial and Errors, p. 23.
try," "convicted," and "conviction of." I would be interested in
knowing what other terms might be used in their place, but again
no examples or references were given. The use of these terms in
the context of impeachment is of no special significance as far as
I could discover. According to Black's Law Dictionary to try means
"to examine judicially; to examine and investigate a controversy, by
the legal method called "trial," for the purpose of determining the
issues it involves."57 Again, according to the same dictionary men-
tioned above, neither is the term "convicted" limited to use in the
criminal law. The term "convicted" means "that a judgment of final
condemnation has been pronounced against the accused."58 Likewise,
neither is the term "conviction" limited only to use in the criminal
law. Black's Law Dictionary defines the term "conviction" as "in a
general sense the result of a criminal trial . . ." but the dictionary
goes on to state that "in legal parlance, it often denotes the final judgment of the court."59 And according to the Black's
dictionary the term "final judgment" means "one which puts an end to
a suit or action."60 Thus, at no time did I find the above mentioned
language limited only to use in the criminal law. There is nothing
magical about those words in the sense that they are limited to the
criminal law, and Black's Law Dictionary shows this to be true. So,
to take the strictly criminal approach to these terms, as has Brant,
is indefensible. Although the terms may be used more often in some

57 Black H., Black's Law Dictionary, p. 403.
58 Ibid.
59 Ibid.
60 Ibid., p. 979.
categories than in others, it is not strictly limited to the criminal law. What Mr. Brant seems to imply is that if the Framers intended impeachment to lie for offenses less than criminal then they should have formulated a new set of terms or language to say that. To require so much would have probably been a near impossible task given the circumstances.

Now to take up such phrases as: "pardons for offenses . . . except impeachment," and "trial of all crimes except . . . impeachment". These phrases do pose difficult and sometimes confusing issues, but they are by no means insuperable, I will address the phrase concerning pardons first.

There are basically two other ways to view the problem posed by the phrase concerning pardons, and both are reasonable ones. One way, is to view the term "offenses" as used in Article II, Section 2 as something that amounts to less than a crime. In other words the term "offenses" was used because it was recognized that there were some sorts of offenses "which were not crimes, and they included fines, penalties and forfeitures" and these offenses "could be pardoned by the President". But, there were offenses "resulting in a conviction upon impeachment" and those "the President was not permitted to pardon."

The second interpretation on this phrase is to treat the term "offenses" as synonymous with crimes. This seems to go against the grain of my thesis, but not necessarily so. It must be remembered that impeachment was an English invention and we modelled our

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61 Simpson, Treatise on Federal Impeachment, p. 34.
62 Ibid.
impeachment proceedings after that of England's. This fact is not in dispute. I think it is quite possible that the Framers thought it wise to bar a presidential pardon after impeachment and conviction thus profiting from the pardon of the Earl of Danby by Charles II. In doing so they overlooked some lack of harmony in detail because as, Berger states, the "separation of removal from subsequent indictment and conviction had rendered it unnecessary". Thus in the Framers' attempt to assure that our President could not do what Charles II had done they overlooked the fact that they created a discrepancy. This is not an unreasonable interpretation in light of the fact that the Framers were looking at the English model of impeachment and trying to adapt it to their own needs minus of course the faults they saw it as having. And one such fault was that a king could pardon someone who had been impeached in England and the Framers did not want that to happen in the United States.

Now comes the phrase "trial of all crimes except . . . impeachment". Like the last phrase that was discussed, this one also can be approached two different ways.

The first approach relies on the assumption taken in this thesis, and that is that an impeachment may or may not lie for a crime. The argument is basically that an impeachment proceeding is a trial, and that because the trial may or may lie for a crime it was necessary "therin to exclude impeachments in order to avoid the implication, which otherwise might arise, that criminal impeachments should be tried by a jury".

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63 Berger, Impeachment, p. 85.
64 Simpson, Treatise on Federal Impeachment, p. 34.
I assert that this is a logical and reasonable argument if one is willing to accept the assumption that an impeachment may or may not lie for a crime. If one is unwilling to accept this argument there is still another which might possibly be even more difficult to overcome. This argument initially accepts the assumption that an impeachment must proceed on a crime.

The reading of impeachment in criminal terms runs into problems when it is read in contrast to the Sixth Amendment which states in part that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." Accordingly then, if impeachment is to be deemed a criminal prosecution it is difficult to escape the requirement of the Sixth Amendment. As Berger says, the Framers had exempted impeachment from the jury trial of all crimes be Article III, Section 2, clause 3, "and with that exemption before them, the draftsmen of the Sixth Amendment extended trial by jury to all criminal prosecutions without exception thereby exhibiting an intention to withdraw the former exception." Thus it must be concluded that either the Framers did not exempt impeachment from the Sixth Amendment because they did not believe impeachment to be a criminal prosecution or that if in fact impeachment does amount to a criminal prosecution then it requires a jury trial. The latter statement poses even more problems when viewed according to the Supreme Court's well known rule that "the last expression of the will of the law maker prevails over the earlier one".

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65 Berger, Impeachment, p. 81.
66 Ibid., p. 82.
67 Ibid.
prosecution the accused must have a public trial by an impartial jury. And further yet, if an impeachment is seen as a criminal prosecution but is not included in the Sixth Amendment wording "all criminal prosecution" one has placed upon him the burden of proving that the normal meaning of the word "all" means less than all.

Thus in the above instances all the problems associated with impeachment are alleviated if one does not read criminality into the process. And so far, I believe I have provided reasonable reasons why one should not read impeachment in strictly criminal terms.

The last major argument Brant puts forth is that impeachment proceedings constitute a criminal process. This conclusion is drawn from the words used in the Convention and the Constitution discussed above. Since, in fact, it has not satisfactorily been shown, let alone proven, that the words; to try, conviction and so on necessitate looking at impeachment in a strictly criminal light this conclusion is very questionable to say the least. If one is still not satisfied with the above arguments there are at least two other things that must be considered.

The first is a statement by Justice Story and another by James Wilson who was in fact one of the Framers of our Constitution and was later a Supreme Court Justice. Justice Story said that impeachment is:

A proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity.68

And James Wilson said:

68Committee on the Judiciary, Impeachment, p. 682.
Impeachments . . . come not . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects; for this reason, the trial and punishment of an offense on impeachment, is no bar to a trial and punishment of the same offense at common law.69

If one was to contrast these statements with the fact that Article I, Section 3, clause 7 separates impeachment and removal from office, from subsequent indictment and punishment and at the same time keeping in mind that in England impeachment and punishment were wedded, then one is led to believe that impeachment in the United States is more of a political process than a criminal process. Thus impeachment seems to be a political process necessary for maintaining efficient government and thus leaving to a separate criminal proceeding the problem of punishment.

Suppose however that one is not satisfied with the above argument that removal is not, in the pure sense of the word, a punishment. I believe that Article I, Section 3, clause 7 clearly dispells the notion that removal is to be regarded as punishment, but, for the time being let us assume that impeachment is a criminal process and that removal is a punishment rather than a remedy for inefficient government.

If impeachment is a criminal process and removal is a punishment, how does one reconcile that with the double jeopardy provision in the Fifth Amendment? According to a Supreme Court ruling "life and limb" has been expanded to mean twice "placed in peril of legal penalties upon the same accusation."70 Clearly then, if removal is the criminal punishment resulting from the

69 Ibid., p. 635.
70 Ibid., p. 636.
criminal process of impeachment a constitutional doubt is raised as to whether the subsequent indictment and trial violates the double jeopardy provision of the Constitution. If, however, impeachment is a political process, as I believe it is, which is designed not as a punishment, but rather a remedy for the State, then the double jeopardy provision is not offended or violated.

The preceding arguments are those that are commonly relied on by the constitutional authorities who take the position that impeachment must lie for a criminal offense. The arguments presented do not constitute a conclusive list but rather are only those arguments I believe most challenging to my thesis and that is that an impeachable offense need not necessarily lie for a crime. So far I have relied mostly on comments that occurred in the Convention. I now turn my attention to other remarks, chiefly those made during the various ratification conventions and the First Congress. Other contemporary remarks will also be cited.

The ratification conventions indicated that a president could only be impeached for serious offenses. But again, at no time did I find the Framers limiting themselves strictly to criminal offenses. I believe the only reasonable conclusion one can draw from the various conventions is that an impeachable offense may, but does not have to be a crime.

In the Virginia ratification convention James Madison in talking about the Senate's power to ratify treaties was asked what would happen if the President summoned only a few Senators of a few states? His response was that "were the President to commit anything so atrocious . . . he would be impeached and convicted, as a majority
of the states would be affected by his misdemeanor." According to a Stanford Law Review dealing with impeachment this was not an act "that would have been criminal under existing statutes". In the South Carolina ratification convention Charles Cotesworth Pinckney stated that the power of impeachment reached those who would "betray their public trust". Edward Rutledge in the same convention said that an "abuse of trust by the President" would be impeachable. At no time was it said or even remotely implied that these betrayals or abuses must be criminal, and thus there is no reason to believe they must be so limited.

If the offenses subject to impeachment were to be limited strictly to crimes why didn't the Framers so confine themselves? These remarks may not be proof that impeachment can lie for less than a crime but I do believe it would be odd that not one, but several of the Framers had the same misconception.

The First Congress has also been an important source for the interpretation of the Constitution. It was during this Congress that Madison successfully argued the appropriateness of the removal power of the president. During this debate Madison said:

The danger, then, consists merely in this: The President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the president can feel for such abuse of his power and the restraints that operate to prevent it? In the first

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71 Staff of Impeachment Inquiry, Constitutional Grounds For Presidential Impeachment, p. 14.


73 Staff of Impeachment Inquiry, Constitutional Grounds For Presidential Impeachment, p. 13.

74 Committee on Federal Legislation, Law of Presidential Impeachment, p. 642.
place, he will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.  

Madison also said in connection with the removal power of the President:

I think it absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetuate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses.  

This is only one part of the many arguments that took place during the First Congress, but it was also the only argument I found dealing with impeachment. The important point to get out of this argument is that the language used does not limit itself to criminality. Neglecting to superintend the excesses of one's officers could easily fall outside the scope of criminal conduct.

During the convention and shortly after many enlightening statements were made that have a bearing on this thesis. James Wilson, who was later to become a Supreme Court Justice, equated malversation with "high misdemeanors." As I said earlier, malversation cannot be limited to criminal conduct. It may include criminal conduct but it is not possible to limit it to that.

Alexander Hamilton in Federalist number 65 indicated that "high crimes and misdemeanors" should not be limited to criminal offenses. During his discussion of the Senate's role in trying

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75 Broderick, American Bar Association Journal, April 1, 1974, p. 417.
impeachments, he said:

The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be dominated political as they relate chiefly to injuries done immediately to the society itself.\(^7\)

Again, this discussion is not limited to criminal offenses. I do not believe the misconduct of public men, or the abuse or violation of public trust talked about by Hamilton can, in good faith, be limited to criminal offenses. If he meant that only criminal conduct was impeachable why didn't he say so? I believe that here, as in all the other instances concerning impeachment, criminality was not specified as being the controlling factor in impeachment because it is not controlling.

Justice Story in his Commentaries on the Constitution talked of impeachment in much the same vein. In 1833 he wrote:

Not but that crimes of a strictly legal character fall within the scope of the power \ldots; but that it has a more enlarged operation, and reaches, what are aptly termed political offenses, 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. They must be judged of by the habits and rules and principles of diplomacy, or departmental operations and arrangements, of parliamentary practice, or executive customs and negotiations of foreign as well as domestic political movements; and in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence.\(^8\)

\(^7\)Ibid., p. 9.

\(^8\)Staff of Impeachment Inquiry, Constitutional Grounds For Presidential Impeachment, pp. 16 & 17.
Justice Story all but spells out the fact that impeachable offenses are not limited to crimes when he says that they (impeachable offenses) are not of a strictly legal character. In talking of impeachable offenses another court put it somewhat differently. The court said:

It may be safely asserted that where the act of official delinquency consists in the violation of some provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done, with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office. But where it consists of a mere error of judgment or omission of duty without the element of fraud, and where the negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the State.79

This interpretation also does not limit impeachable offenses to criminal conduct. Like most other interpretations I could find this court limited impeachable offenses to serious misconduct without regard to its criminality.

Thus one is faced with the numerous remarks in the Convention, during the Convention, in the ratification conventions, and other contemporary remarks which I believe show that impeachment may lie for less than a crime. There are, however, at least two other factors I wish to discuss before this thesis ends that will help to clarify and justify my position. They are the Andrew Johnson impeachment, and a few final considerations. I will begin with the Johnson impeachment.

1. The Impeachment of Andrew Johnson

Only once in our constitutional history has a president ever

79 Committee on the Judiciary, Impeachment, p. 682.
been impeached by the House of Representatives. The president was Andrew Johnson and the year was 1868.

The political, social, and economic conditions were much different than they are today and were in fact in a peculiar condition even then. The wounds of the Civil War were still raw, and the nation was still in the process of becoming whole again. It was into this period of reconstruction that Andrew Johnson was thrust as a result of the assassination of Abraham Lincoln.

More than anything else, the impeachment of Andrew Johnson has served a reminder to us that political passions should play no part in our impeachment process. Thus, while the Johnson impeachment must be discounted in many respects, it does serve as a warning against the lighthearted resort to such removal of the President.

Andrew Johnson was a Southerner, from North Carolina without a formal education. Johnson entered politics as a young man and his ascent of the political ladder was a rapid one. He was elected to the Tennessee state legislature in 1835, and later went on to become a member of the United States House of Representatives, Governor of his state, and by 1857 had become a member of the United States Senate. When the Civil War began he was the only Southern Democratic Senator to remain loyal to the Federal Government. Lincoln was so impressed with his loyalty and devotion to the Union that, in 1862, he appointed him the military Governor of Tennessee. And when the 1864 presidential campaign rolled around, Johnson was chosen to be Lincoln's running mate on the Union (Republican) party ticket.

While he was an admired politician, he had only a very small political following after the assassination of Lincoln. Initially, after becoming President the Radical wing of the Republican party
was overjoyed. The Radical Republicans favored harsh and rather vindictive measures in Reconstruction and they believed Johnson would support their policies. However, Radical enthusiasm for Johnson soon waned as it became obvious that he was a man of independent will and strong mind. The immediate problem was the treatment of the Confederate states. Were they to be regarded as still part of the Union, and treated as if they had never left, or were they to "be regarded as conquered provinces, to be readmitted as states under such conditions as Congress should prescribe and they should agree to?"\textsuperscript{80} The problems began when President Johnson adopted the former view and Congress the latter.

When the Radical Congress reconvened in December of 1865 they took immediate steps to assure a legislative influence in reconstruction. The representatives from the Southern states that had formed new states according to Johnson's guidelines were not permitted to take their seats in Congress, and a joint committee was assembled to prepare a Congressional plan for reconstruction. Early in 1866 Congress passed the Freedman's Bureau Act which was designed to protect the blacks from discrimination in the South. Johnson successfully vetoed this act and Congress countered with the Civil Rights Act of 1866. Johnson refused to sign this act into law but the veto was quickly overridden. Johnson would never again see a veto of his upheld. For the rest of the time he served as President, he and Congress remained at each other's throats. Instead of a co-operative effort between the two branches to determine a workable reconstruction program it turned into a bitter struggle.

\textsuperscript{80} Brant, \textit{Impeachment Trial and Errors}, p. 135.
The only question was: Who would win?

Johnson did little to improve his position in the eyes of Congress. He made many remarks and speeches so critical of Congress that one speech in particular became the basis for one of the eleven articles of impeachment against him.

Early in 1867 the Radical Congress took further steps to assure their control over the reconstruction process. To do this they moved against the presidency itself. In March, 1867 the Tenure of Office Act was passed over Johnson's veto. Under the provisions of the act the President could not remove from office any official that had been appointed with the approval of the Senate without their consent. Johnson believed the act to be unconstitutional. Although the Constitution speaks only of the presidential power of appointment and not of removal, it had been common practice since the Constitution's inception that cabinet officers served only at the pleasure of the President who had appointed them. As strange as it may seem, of all his cabinet members none seemed to be more opposed to the Tenure of Office Act than was Edwin M. Stanton.

In the months that followed the passing of the Tenure of Office Act Stanton became an active ally of the Radicals in Congress. For a while President Johnson put up with Stanton's disloyalty, probably because of his own unstable position. Finally, Stanton became too much of a problem and on August 5, 1867 Johnson asked for his resignation. Disregarding his earlier stand, Stanton refused and Johnson promptly suspended him from his post. In his place Johnson appointed General Ulysses S. Grant as Secretary of War.

At the time Stanton was removed Congress was not in session so the issue remained up in the air until they reconvened. In
January, Congress rejected Johnson's explanation for the removal of Stanton and demanded his reinstatement. It was Johnson's hope that Grant would refuse to give up his office and thus force Stanton to seek redress in the courts. However, Grant backed down and Stanton resumed his office.

Finally in February, Johnson formally dismissed the Secretary of War and replaced him with Major-General Lorenzo Thomas. Again Congress refused to accept or confirm the new appointment.

By this time the conflict between the two branches of government had finally come to a head. Two previous attempts had been made to impeach Johnson, but both had failed. This time Congress would succeed. Within a short time an impeachment resolution was introduced in the House of Representatives and was quickly reported out of committee. Finally on February 24, the House voted 126 - 47 to impeach President Johnson for high crimes and misdemeanors in office. Within a week the Radical Congress had drawn up eleven articles of impeachment and had appointed seven managers to act as prosecutors in the trial before the Senate.

Of the eleven articles presented ten related to the removal of Secretary of War Stanton.

Primarily, the House charged as a high crime and misdemeanor that on February 21 the President did unlawfully "issue an order in writing for the removal of Edwin M. Stanton from the office of Secretary for the Department of War . . . which order was unlawfully issued with intent then and there to violate the act entitled 'An act regulating the tenure of certain civil officers', passed March 2, 1867."\(^{81}\)

The only other article was article ten and in it the House charged primarily that the President:

\(^{81}\)Ibid., 138.
Unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the government of the United States ... did attempt to bring in to disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power ... did ... make and deliver with a loud voice certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duty enacted thereby ... 82

The approval of this article was rather ironic in sight of the fact, according to Raoul Berger, that the speeches delivered by Johnson were more injurious to himself than to Congress.

Suffice it to say that the trial of President Johnson made a mockery of justice. On many occasions Chief Justice Chase was overridden on questions of evidence. Most questions were resolved in favor of the Radicals, and logically enough, since the Radicals constituted a majority and a simple majority was all that was needed to override the Chief Justices' decision.

When the trial finally concluded some thirty-five days later a vote was taken on nine of the articles, and on each one the vote was the same: 35 for and 19 against, a single vote shy of the necessary two-thirds majority. The Congress then adjourned for a little over a week before taking a vote on the two remaining articles. More than likely the adjournment was made in an attempt to convert at least one member to an anti-Johnson stand. On May 26, the final vote was taken and again the vote was: 35 for and 19 against. No converts had been made.

One must be very careful in relying upon the Johnson

82 Committee on the Judiciary, *Impeachment*, pp. 157 & 158.
impeachment as a precedent. Never before and since have the passions of our leaders been as aroused. Because of this I believe it best that the impeachment attempt of President Johnson failed. Although he was impeached primarily for violations of the Tenure of Office Act those violations were not the real reasons he was impeached. Actually his impeachment was an attempt to make him subservient to Congress, and I would argue most authorities would accept that view.

Johnson was impeached mainly for a violation of the Tenure of Office Act. Johnson saw the Act as an intrusion into or usurpation of, that power traditionally belonging exclusively to the President. Thus he thought the act to be unconstitutional. It seems to me this decision fell under the ambiguous term executive privilege and therefore this act might have been rightfully disobeyed. However, I am not an authority on executive privilege and therefore must defer judgment to someone more knowledgeable on the subject than myself. It is interesting to note however, that the Supreme Court, did, some years later, declare the act to be unconstitutional.

Last, but definitely not least important, is the fact that the Johnson impeachment did establish a precedent, even though the properness of it is questionable. And for those people who believe that the law, and precedent in common law, must be strictly adhered to, must accept the fact that President Johnson was impeached on article ten for high misdemeanor, and article ten was clearly not criminal. Therefore according to the precedent set by the Congress of 1868 impeachable conduct need not necessarily be criminal. The fact that he was not convicted does not support my thesis nor does it support the opposite point of view. An acquittal does not mean that the Senate does not approve or accept the articles of impeachment
voted by the House, but only means, as in a regular jury trial, that the defendant has been found not guilty of the acts charged against him.

Ex-President Nixon's attorney, also spoke of the Johnson impeachment. As I did in this thesis, St. Clair says that one must be careful in relying on the Johnson impeachment because of the way in which it was carried out. But he did not stop there and instead went on to say that "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". Again, I must mention that an acquittal does not necessarily mean the articles of impeachment voted by the House were unacceptable, but could just as easily mean that the defendant was not proven guilty of those acts charged against him. And I would further argue that a failure to impeach by a single vote, as was the case with Johnson, is not a strong indication of anything, as St. Clair would have one believe. Thus the impeachment of Andrew Johnson does nothing to disprove my thesis.

There are a few final considerations that are important in a discussion of impeachable offenses, and those are taken up next.

3. Some Final Considerations

Charles Black, a professor from the Yale University Law School wrote a small handbook on impeachment, and in that book he made several interesting comments on impeachable offenses. I will mention only three of the examples he cites of presidential conduct that would not be impeachable if one were to adopt a strictly criminal interpretation of the phrase "high crimes and misdemeanors" but would at the

83 St. Clair, Summary An Analysis of, p. 5.
same time be hostile to the nature and purpose of our Constitution.

His first example begins by supposing that an American president has moved to Saudi Arabia. The reason for this move was so that he could have four wives, a practice prohibited in the United States. And since the President has decided to live there, with his four wives, he would have to conduct the office of presidency from there by way of the mail, telephone, and wire service. Black puts it "is it possible that such gross and wanton neglect of duty could not be grounds for impeachment?" 84

This is a rather extreme example and the chances of something like it happening are probably next to zero but it does however test the overall validity of the proposition that all impeachable offenses must be crimes. I cannot believe that the phrase "high crimes and misdemeanors", as used by the Framers, would not reach this sort of behavior on the part of a president.

The second example Black gives concerns the President's appointment power. He said suppose, for instance, that a president announced that he would not, under any circumstances, appoint a person to office if that person was of the Roman Catholic faith. That action, in and of itself, as far as Professor Black could discover, does not amount to a crime. But as he says, such a policy would be a gross abuse of power that could seriously affect our national unity.

This example, unlike the last one, is not so extreme that it's happening can be ruled out, and I think it is wrong to believe that a president could not be removed for such behavior. I do not

believe that this sort of bigotry practiced by a president is protected by our Constitution, nor do I believe it was the Framers intention to do so. It is important to remember that an overly strict interpretation of "high crimes and misdemeanors" can bring about as much harm as can a general term such as maladministration.

Professor Black's third example is not, as "clear cut" as his two previous ones, but he does nevertheless set forth a serious question. The question is asked, is it possible that military action that has not been authorized by Congress and that has been concealed from Congress might not "at some point constitute such a murderous and insensate abuse of the commander-in-chief power as to amount to a "high crime" or "misdemeanor" for impeachment purposes?" Black says that such an action, as far as he knows, is not criminal. Even if it is not criminal I think it should be impeachable because it is this sort of excrescence on the part of a president that could lead this country down the roads of absolutism.

The three previous examples are not the sort of things that will necessarily happen in the United States. But the fact that they are unlikely to happen does not mean they would not. The examples point out misconduct on the part of the president that is not necessarily criminal and thus I think they point out the invalidity of the proposition that an impeachable offenses must be a crime.

It might be more clarifying to turn the coin around and ask the question if a president should be impeached for reckless driving. That is a misdemeanor as far as I know, but is it a high misdemeanor, and should it be impeachable? No, I would think not.

\[85\text{Ibid.}, p. 35.\]
but this does show the problem involved in determining what is a high misdemeanor worthy of impeachment. Another question, again asked by professor Black, is, should a president be impeached if he transported a woman across state lines for immoral purposes?

This poses a very difficult problem because it does break the law, the Mann Act. If this actually did happen the president would be guilty of a crime, but is it a high crime and should he be impeached for it? Or better yet do you think this is the sort of thing the Framers had in mind when they formulated the impeachment clause?

Again, my answer to this question must also be no. Impeachment, it seems to me, is a constitutional remedy, and its' use was not limited to those offenses in the Constitution or statute books but rather was aimed at serious misconduct that is injurious and abusive to our constitutional institutions and our form of government regardless of what the law has to say.

IV. Conclusion

Impeachment is potentially the most powerful weapon in the Congressional arsenal and for that reason the least used. Only once has a president ever been impeached, and it is a shaky precedent at best. Never has a definite meaning been given to the impeachment language of high crimes and misdemeanors, and this accounts for the battles that have been fought and will continue to be fought over the meaning of that phrase. A finite list of the offenses included within the phrase "high crimes and misdemeanors" probably will never occur. And to make a finite list would not be in the best interest of our country. That phrase has never been strictly defined because of the nature of the phrase. The phrase includes not only statutory and constitutional offenses, but also all those ingenious sorts of
offenses that are abusive to our constitutional system or government, but are not defined as crimes. The reason they are not defined as crimes is because it was recognized that the ingenuity of an evil office holder, in this case the President, could perpetrate some harmful act that our legislature had not foreseen.

The phrase "high crimes and misdemeanors" may mean to some that an indictable offense is required. This, however, is a mistaken assumption, because to do so one would have to remove that phrase from the context in which it was adopted and apply to it a present day criminal meaning. This is a tempting and easy mistake to make. However, as I have shown impeachment was not an invention of the Framers of our Constitution. Instead our impeachment mechanism was adopted from that of England's.

Impeachment itself was conceived of in England because the objects of that process were, for one reason or another, beyond the reach or ordinary criminal redress. The phrase "high crimes and misdemeanors" was first met, not in the criminal law of England but in the impeachment of the Earl of Suffolk in 1386. In fact when that phrase was first met there was no such crime as a misdemeanor in England. Lesser crimes were, at that time, prosecuted as trespasses, and it was not until about one hundred and fifty years later that trespasses were supplanted by the term misdemeanor as a category of ordinary crimes. There was also a functional difference between "high misdemeanor" as used by the English Parliament and "misdemeanor" as it was used in the criminal law. High crimes and misdemeanors established a category of political offenses against the state whereas "misdemeanor" in the criminal law described a private wrong. Thus while "misdemeanor" did enter the ordinary criminal law
it was not the criterion of "high misdemeanor" in the Parliamentary law of impeachment and likewise neither did "high misdemeanors" find their way into the general criminal law of England. High crimes and misdemeanors, are then, words of art confined to impeachment with no relation to the ordinary criminal law. And one only has to look at the impeachments in England to see that they did not necessarily have to lie for a crime. The only requirement was that they must in some way subvert or undermine the fundamental principles of English government.

This, then, was the history of "high crimes and misdemeanors" when the Framers sat down in Philadelphia to carve out our Constitution. The Framers were intelligent men and in light of their task did a very good job. They provided us with a living constitution, not one that was meant to last for a few months or years but for many years.

More than half of the signers of our Constitution were lawyers and of them almost half received their legal educations in England. Then, as today, it was acknowledged that our model of impeachment was borrowed from England. In the Constitutional Convention George Mason referred to Hasting's impeachment voicing concern that his misconduct some of which was not criminal, was not impeachable as our Constitution was then worded. So in addition to Treason and Bribery Mason added "high crimes and misdemeanors" thus implying that it should reach the misconduct he was concerned about.

Nothing in the debates that took place then or prior to September 8 indicates that the Framers limited that phrase to include only crimes. In fact the language used in the debate concerning impeachment was not limited to criminality but instead implied that impeachment
could lie for less than a crime.

Other contemporary remarks also indicate that impeachment may lie for less than a crime, like the one made by James Iredell in the North Carolina ratification convention. There he said in talking of impeachment:

\[\ldots\text{, the person convicted is further liable to a trial at common law, and may receive such common law punishment as belongs to a description of such offences if it be punishable by that law.}\]^{86}

In that quote he almost spells out the fact that an impeachable offense may or may not lie for a crime when he said "if it be punishable by that law".^{87} James Madison, the person who objected to maladministration as being to vague in the September 8 debate in the Convention, said in the Virginia ratification convention that a president could be impeached if he summoned only a few states to sign a treaty because a majority of the states would be affected by his misdemeanor. That act which Madison called a misdemeanor was not a crime under statutes at that time.

Other, post convention remarks include one made by Alexander Hamilton. He wrote at that time that: "Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment."^{88}

Thus, over and over again one is faced with the number of examples in which the Framers, and others, speak of impeachment in

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86 Staff of the Impeachment Inquiry, Constitutional Grounds For Presidential Impeachment, p. 23.
87 Ibid.
88 Ibid.
less than criminal terms. I believe then that the Framers never intended to limit impeachment to indictable crimes, and they implied this many times.

It has also been shown that the language used in the Constitution does not limit impeachment to crimes. There is nothing magical about the terms used in connection with impeachment that limit impeachable offenses to crimes. Neither does the language used make impeachment a criminal process. If impeachment is a criminal process and removal a punishment, a number of constitutional problems are raised namely that a subsequent trial and punishment would violate the double jeopardy provision. If impeachment is seen as a political process and a political remedy, as I believe the Framers did, then no problems arise. The no superfluous language doctrine also requires that misdemeanors be given a less than criminal content. The fact there is no federal common law and that "high crimes and misdemeanors" is a term of art also requires that we turn to the English meaning of that term to give it content unless it is otherwise limited. The term is not limited and thus its meaning as understood in England was accepted. And the term "high crimes and misdemeanors" was not limited to crimes in that country.

Impeachment was not limited to the criminal law sorts of crimes because the two serve different purposes. The purpose of impeachment is not to punish but to remedy. The criminal law punishes, but, the primary function of impeachment is to maintain constitutional government. The Constitution exempts impeachment from a criminal law function by providing that a subsequent trial may take place.

The criminal law should not be a limit upon impeachment
because it sets general standards of conduct that everyone must follow, and does not address itself to abuses of presidential power. Again, impeachment was invented to reach those officials beyond the ordinary criminal redress. Thus a president, in an impeachment proceeding, is made to answer for abusing only those powers that he possesses.

As I said earlier, to limit impeachable offenses to only those that are indictable may set a standard so restrictive that many offenses that could adversely affect our government could not be reached. This does not mean that all presidential misconduct is impeachable. His misconduct must have a substantial affect upon our constitutional system or government. In determining the substantiality, the facts must NOT be considered in terms of isolated or separate events but must be considered as a whole in the context of the office of the President.

In exercising its authority I do not believe the House of Representatives needs to prove every article of impeachment beyond a reasonable doubt before requiring the President to stand trial in the Senate. If proof, beyond a reasonable doubt, was the constitutional standard, the Senate trial would be a redundant re-enactment of the proceedings in the House. The function of the two chambers are easily distinguishable. The House, analogous to a grand jury, decides whether there is enough evidence to justify holding a trial. If so, the House draws up articles of impeachment and then acts as prosecutor in presenting the evidence to the Senate which renders a judgment.

Any impeachment case will probably have its ambiguities and weaknesses, and they should be explored and tested in a full
adversary procedure of a trial before the Senate. It is not up to
the House to hold a trial, for the purposes of the House, I believe,
there need only be a showing of reasonable grounds to believe that
serious misconduct has occurred. It is for the Senate after a trial
to decide whether the evidence is sufficient to convict.

The phrase "high crimes and misdemeanors," as Berger states,
may not be as sharply defined as "treason" or "bribery" but it does
have an ascertainable content in English practice. Thus, even though
the phrase leaves more latitude for judgment to the Senate, which is
the nature of the phrase, this is not equivalent to unbridled discretion.
The Framers' last intention was to leave the Senate free to declare
any conduct whatsoever a "high crime and misdemeanor." Maladmini-
stration was objected to because of its vagueness, and "high crimes
and misdemeanors" was adopted in its place with knowledge that it was
a term of art with a technical meaning, a "meaning sought by recurrence
to English practice." The offenses included within the meaning of
"high crimes and misdemeanors," as mentioned before, includes such
acts as, abuse of official power, neglect of duty, corruption, betrayal of trust, and others. Congress has no more right to go beyond
these established boundaries than they do to extend the boundaries of
"treason" or "bribery." "It was never intended that Congress should
be the final judge of the boundaries of its own powers." "Limits
on Congress determined by Congress itself would be no limits at all." Berger reminds us that "impeachment was a carefully limited exception

—-89 Berger, Impeachment, p. 107.
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90 Ibid., p. 116.
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91 Ibid., p. 118.
to the separation of powers, tolerable only if exercised strictly within bounds."\textsuperscript{92}

To a degree the Senate must be trusted to exercise self-restraint in the exercise of its impeachment power. But when Congress goes beyond its Constitutional limits those limits "are subject to judicial enforcement" and as Berger states, "judicial review of impeachments is required to protect the other branches from Congress' arbitrary will."\textsuperscript{93} Our Constitution, said the Supreme Court condemns "all arbitrary exercise of power " and as Berger states "the sole power to try" affords no more exemption from that doctrine than does the sole power to legislate, which, it needs no citation, does not extend to arbitrary acts".\textsuperscript{94} Also it has been epitomized by the Court that the due process clause acts in "protection against the individual against arbitrary action."\textsuperscript{95} When one enters government service he "does not cease to be a "person" within the Fifth Amendment; and an impeachment for offenses outside constitutional authorization would deny him the protection afforded by due process."\textsuperscript{96} That the due process guarantee applies is proven by the statement made in the book Impeachment by the House Judiciary Committee. There it was said in the examination of witnesses and the presentation of testimony, the general rules of evidence obtainable in criminal courts apply, including the constitutional presumptions and guarantees applicable to criminal

\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid., p. 119.
\textsuperscript{94} Ibid., p. 120.
\textsuperscript{95} Ibid.
\textsuperscript{96} Ibid.
trials."97 Thus the foregoing points and guarantees will assure that Congress respect the Constitutional boundaries that limit them.

Impeachment is a grave step for our nation and should be resorted to only when the President exhibits conduct seriously incompatible with our Constitution or the principles behind our Constitution or government. In concluding this paper the author leaves the reader with this statement:

In sum, to limit impeachable conduct to criminal offenses would be incompatible with the evidence concerning the constitutional meaning of the phrase "high Crimes and Misdemeanors" and would frustrate the purpose that the framers intended for impeachment. State and federal criminal laws are not written in order to preserve the nation against serious abuse of the presidential office. But this is the purpose of the Constitutional provision for the impeachment of a President and that purpose gives meaning to "high Crimes and Misdemeanors."98

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APPENDIX A

The following discussion is that which occurred on July 20, 1787. The discussion centered around the provision which stated that the President was to be removable on impeachment and conviction of mal-practice or neglect of duty.

Mr. Pinckney and Mr. Gouveneur Morris moved to strike out this part of the resolution. Mr. P. observed (ought not to) be impeached whilst in office.

Mr. Davie. If he be not impeachable whilst in office he will spare no efforts or means whatever to get himself re-elected. He considered this as essential security for the good behavior of the Executive.

Mr. Wilson concurred in the necessity of making the Executive impeachable whilst in office.

Mr. Govr. Morris. He can do no criminal act without coadjutors who may be punished. In case he should be reelected, that will be sufficient proof of his innocence. Besides who is to impeach? Is the impeachment to suspend his functions? If it is not, the mischief will go on. If it is, the impeachment will be nearly equivalent to a displacement and will render the Executive dependent on those who are to impeach.

Colonel Mason. No point is of more importance than that the right of impeachment should be continued. Shall any man be above justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the coadjutors. There had been much debate and difficulty as to the mode of choosing the Executive. He approved of that which had been adopted at first,
namely that of referring the appointment to the National Legislature. One objection against electors was the danger of their being corrupted by the candidates: and this furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practiced corruption and by that means procured his appointment in the first instance, be suffered to escape punishment by repeating his guilt?

Dr. Franklin was for retaining the clause as favorable to the Executive. History furnishes one example only of a first Magistrate being formally brought to public justice. Everybody cried out against this as being unconstitutional. What was the practice before this in cases where the Chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in which he was not only deprived of his life but of the opportunity of vindicating his character. It would be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it and for his honorable acquittal when he should be unjustly accused.

Mr. Govr. Morris admits corruption and some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated and defined.

Mr. Madison thought it indispensable that some provision should be made for defending the community against the incapacity, negligence or perfidy of the Chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers. The case of Executive Magistracy was very distinguishable, from that of the legislative or of any other public body, holding offices of limited duration.
It could not be presumed that all or even a majority of the members of an assembly would either lose their capacity for discharging or be bribed to betray their trust. Besides the restraints of their personal integrity and honor, the difficulty in acting in concert for purposes of corruption was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.

Mr. Pinckney did not see the necessity of impeachments. He was sure they ought not to issue from the Legislature who would in that case hold them as a rod over the Executive and by that means effectually destroy his independence. His revisionary power in particular would be rendered altogether insignificant.

Mr. Gerry urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped the maxim would never be adopted here that the Chief Magistrate could do (no) wrong.

Mr. King expressed his apprehensions that an extreme caution in favor of Liberty might enervate the Government we were forming. He wished the House to recur to the primitive axiom that the three great departments should be separate and independent. That the Executive should be so equally with the Judiciary. Would this be the case if the Executive should be impeachable? It had been said that the Judiciary would be impeachable. But it should have been remembered at the same time that the Judiciary should hold
their places, not for a limited time but during good behavior. It is necessary, therefore, that a forum should be established for trying misbehavior. The Executive was to hold his place for a limited term like the members of the Legislature. Like them particularly the Senate whose members would continue in appointment the same term for six years. He would periodically be tried for his misbehavior by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it. Like them, therefore, he ought to be subject to no intermediate trial, by impeachment. He ought not to be impeachable unless he hold his office during good behavior, a tenure which would be most agreeable to him; provided an independent and effectual forum could be devised. But under no circumstances ought he to be impeachable by the Legislature. This would be destructive to his independence and the principles of the Constitution. He relied on the vigor of the Executive as a great security for the public liberties.

Mr. Randolph. The propriety of impeachments was a favorite principle with him. Guilt whenever found out to be punished. The executive will have great opportunities of abusing his power; particularly in time of war when the military force and in some respects the public money will be in his hands. Should no regular punishment be provided, it will be irregularly inflicted by tumults and insurrections. He is aware of the necessity of proceeding with a cautious hand, and of excluding as much as possible the influence of the Legislature from the business. He suggested for consideration an idea which had fallen (from Colonel Hamilton) of composing a forum out of the Judges belonging to the States: and even of requiring some preliminary inquest whether just grounds of impeachment existed.
Doctor Franklin mentioned the case of the Prince of Orange during the late war. An agreement was made between France and Holland; by which their two fleets were to unite at a certain time and place. The Dutch fleet did not appear. Everybody began to wonder at it. At length it was suspected that the statholder was at the bottom of the matter. The suspicion prevailed more and more. Yet as he could not be impeached and no regular examination took place, he remained in his office, and strengthening his own party, as the party opposed to him became formidable, he gave birth to the most violent animosities and contentions. Had he been impeachable, a regular and peaceful inquiry would have taken place and he would if guilty have been duly punished, if innocent restored to the confidence of the public.

Mr. King remarked that the case of the statholder was not applicable. He held his place for life, and was not periodically elected. In the former case impeachments are proper to secure good behavior. In the latter they are unnecessary; the periodical responsibility to the electors being an equivalent security . . .

Mr. Govr. Morris's opinion had now been changed by the arguments used in the discussion. He was now sensible of the necessity of impeachments, if the Executive was to continue for any time in office. Our Executive was not like a magistrate having a life interest, much less like one having an hereditary interest in his office? He may be bribed by a greater interest to betray his trust; and danger of seeing the first Magistrate in foreign pay without being able to guard against it by displacing him. One would think the King of England well secured against bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV. The
Executive ought therefore to be impeachable for treachery; corrupting his electors, and incapacity were other causes of impeachment. For the latter he should be punished not as a man, but as an officer, and punished only by degradation from his office. This Magistrate is not the King but the prime Minister. The people are the King. When we make him amenable to justice, however, we should take care to provide some mode that will not make him dependent on the Legislature. 99

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