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Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice

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Summary

The impeachment process provides a mechanism for removal of the President, Vice President, and other federal civil officers found to have engaged in "treason, bribery, or other high crimes and misdemeanors." The Constitution places the responsibility and authority to determine whether to impeach and to draft articles of impeachment in the hands of the House of Representatives. A number of means have been used to trigger the House's investigation, but the ultimate decision in all instances as to whether or not impeachment is appropriate rests with the House. Should the House vote to impeach and vote articles of impeachment specifying the grounds upon which impeachment is based, the matter is then presented to the Senate for trial.

Under the Constitution, the Senate has the unique power to try an impeachment. The decision as to whether to convict on each of the articles must be made separately. A conviction must be supported by a two-thirds majority of the Senators present. A conviction on any one of the articles of impeachment brought against an individual is sufficient to constitute conviction in the trial of the impeachment. Should a conviction occur, then the Senate must determine what the appropriate judgment is in the case. The Constitution limits the judgment to either removal from office or removal and prohibition against holding any future offices of "honor, Trust or Profit under the United States." The precedents in impeachment suggest that removal may flow automatically from conviction, but that the Senate must vote to prohibit the individual from holding future offices of public trust, if that judgment is also deemed appropriate. A simple majority vote is required on a judgment. Conviction on impeachment does not foreclose the possibility of criminal prosecution arising out of the same factual situation. The Constitution precludes the President from extending executive clemency to anyone to preclude their impeachment by the House or trial or conviction by the Senate.

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Introduction

Removal of the President, Vice President, and federal civil officers by impeachment has been placed, by constitutional mandate, in the hands of the Legislative Branch of the United States government. Although rooted in the soil of English impeachment experience, the American impeachment system differs from its English forebear in some significant respects. Recorded incidents of English impeachments may begin as early as 1376, and one source would place the first in 1283.[1] A more fixed procedure appears to have begun in 1399, with the passage of the statute of I Henry IV, c. 14.[2] Whichever date one chooses, it is clear that the English practice took root well before the colonial beginnings of our country. It ceased to be used in England at about the time that it became part of the American system of government. The last two impeachments in England appear to have been those of Warren Hastings in 1787 and of Lord Melville in 1805.[3] The English system permitted any person to be impeached by the House of Commons for any crime or misdemeanor, whether the alleged offender was a peer or a commoner.[4]

Unlike the British system which permitted penal sanctions to attach upon conviction of impeachment,[5] the American system is designed to be remedial in

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[1] *See* Simpson, Jr., A., "Federal Impeachments," 64 *U. Pa. L. Rev.* 651 (1916); Yankwich, L., "Impeachment of Civil Officers Under the Federal Constitution," 26 *Geo. L.J.* 849 (1938), *reproduced in Impeachment, Selected Materials, prepared by the Committee on the Judiciary of the House of Representatives*, 93rd Cong., 1st Sess. 689 (Comm. Print, October 1973). Simpson, in his 1916 article, discussed the British history in considerable depth before moving into a discussion of some of the aspects of Constitutional Convention's consideration of impeachment as envisioned in what would become the American system.

[2] Simpson, Jr., A., "Federal Impeachment," 64 *U. Pa. L. Rev.* 651 (1916).

[3] Brief of Anthony Higgins and John M. Thurston, counsel for the respondent, Judge Charles Swayne, offered in the latter's impeachment trial on February 22, 1905, *reprinted in* III *Hinds' Precedents of the House of Representatives* § 2009, at 322 (1907).

[4] Yankwich, *supra* n. 1, at 690.

[5] Conviction under the British impeachment system could result in punishment by imprisonment, fine or even death. Berger, R., "Impeachment for `High Crimes and Misdemeanors'", 44 *So. Cal. L. Rev.* 395 (1971), *reprinted in Impeachment, Selected Materials, prepared by the Committee on the Judiciary of the House of Representatives*, H.

(continued...)

function. Despite surface similarities to a criminal trial, the judgments which may be rendered upon conviction of an article of impeachment in the American system are limited to removal from office and disqualification from holding further offices of public trust. Thus, the American system seems more designed to protect the public interest than to punish the person impeached. Nevertheless, much of the procedure and practice involved in this country's application of its impeachment process draws guidance and support from British precedents.[6]

The Constitutional Framework

The somewhat skeletal constitutional framework for the impeachment process can be found in a number of provisions. These include the following:

Art. I, Sec. 2, Cl. 5:

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

Art. I, Sec. 3, Cl. 6 and 7:

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

Art. II, Sec. 2, Cl. 1:

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

Art. II, Sec. 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

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[5](...continued)
R. Doc. No. 7, 93rd Cong., 1st Sess. 617 (October 1973).

[6] *See, Jefferson's Manual*, published in *Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States, One Hundred Fifth Congress*, H. Doc. No. 104-272, 104th Cong., 2d Sess. 117-313, particularly 301-313 (1993).

Art. III, Sec. 2, Cl. 3:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . . .

A number of principles can be drawn from these provisions. Impeachment applies only to the President, the Vice President, and those other federal officials or employees who fall within the category of "civil Officers of the United States." Impeachment will only lie where articles of impeachment are brought alleging that the individual to be impeached has engaged in conduct amounting to treason, bribery, or other high crimes and misdemeanors. The power to determine whether impeachment is appropriate in a given instance rests solely with the House of Representatives. The process may be triggered in a number of ways, including: charges made on the floor by a Member or Delegate; charges preferred by a memorial, usually referred to a committee for examination; a resolution dropped in the hopper by a Member and referred to a committee;[7] a message from the President; charges transmitted from the

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[7]Such a resolution may take one of two general forms. It may be a resolution impeaching a specified person falling within the constitutionally prescribed category of "President, Vice President, and all civil Officers of the United States." Such a resolution would usually be referred directly to the House Committee on the Judiciary. *See, e.g.*, H. Res. 461 (impeaching Judge Harry Claiborne for high crimes and misdemeanors, first introduced June 3, 1986, and referred to the House Judiciary Committee; as later amended, this resolution was received in the House on August 6, 1986, from the Committee; it impeached Judge Claiborne for high crimes and misdemeanors and set forth articles of impeachment against him); H. Res. 625 (impeaching President Richard M. Nixon for high crimes and misdemeanors); H. Res. 638 (impeaching President Richard M. Nixon for high crimes and misdemeanors).

Alternatively, it may be a resolution requesting an inquiry into whether impeachment would be appropriate with regard to a particular individual falling within the constitutional category of officials who may be impeached. Such a resolution, sometimes called an inquiry of impeachment to distinguish it from an impeachment resolution of the type described above, would usually be referred to the House Committee on Rules, which would then generally refer it to the House Committee on the Judiciary. *See, e.g.*, H. Res. 304 (directing the House Committee on the Judiciary to undertake an inquiry into whether grounds exist to impeach President William Jefferson Clinton, to report its findings, and, if the Committee so determines, a resolution of impeachment; referred to House Committee on Rules November 5, 1997); H. Res. 627 (directing the Committee on the Judiciary to investigate whether there are grounds for impeachment of Richard M. Nixon, referred to the House Committee on Rules, and then to the House Judiciary Committee); H. Res. 627 (directing the Committee on the Judiciary to inquire into and investigate whether grounds exist for the impeachment of Richard M. Nixon); H. Res. 636 (seeking an inquiry into whether grounds exist for impeachment of President Richard M. Nixon). *See* the discussion in 3 *Deschler's Precedents of the House of Representatives*, H. Doc. 94-661, ch. 14 § 5.10-5.11, at 482-84 and § 15, at 621-26 (1974).

On February 6, 1974, the House passed H. Res. 803, "authoriz[ing] and direct[ing]" the Committee on the Judiciary "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard

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legislature of a state or territory or from a grand jury; facts explored and reported by a House investigating committee; or a suggestion from the Judicial Conference of the United States, under 28 U.S.C. § 372(c), that the House may wish to consider whether impeachment of a particular federal judge would be appropriate.[8] Similarly, an independent counsel, under 28 U.S.C. § 595(c), must "advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under [28 U.S.C. § 591 *et seq.*], that may constitute grounds for an impeachment." However, the ultimate decision as to whether an impeachment proceeding should go forward to be presented for trial in the Senate remains a decision to be made by the House of Representatives.

The Senate also has a unique role to play in the impeachment process. It alone has the authority and responsibility to try an impeachment brought by the House. The final decision as to whether to convict on any of the articles of impeachment is one that only the Senate can make. As to each article, a conviction must rest upon a two-thirds majority vote of the Senators present. In addition, should an individual be convicted on any of the articles, the Senate must determine the appropriate judgment: either removal from office alone, or, alternatively, removal and disqualification from holding further offices of "honor, Trust or Profit under the United States." The precedents in impeachment suggest that removal can flow automatically from conviction, but that the Senate must vote to prohibit the individual from holding future offices of public trust under the United States, if that judgment is also deemed appropriate. A simple majority vote is required on a judgment. The Constitution precludes the President from extending executive clemency to anyone to preclude their impeachment by the House of Representatives or trial by the Senate.

Conviction on impeachment does not foreclose the possibility of criminal prosecution arising out of the same factual situation. The three most recent impeachments of federal judges after the conclusion of criminal proceedings against them indicate that, at least as to federal judges, the impeachment need not precede criminal proceedings arising out of the same facts. Nor does an acquittal in the criminal proceedings preclude a subsequent impeachment.

Can a Sitting President Be Prosecuted in a Criminal Trial or Must Impeachment Proceedings Precede Any Criminal Proceedings with respect to a President? It is an unsettled question whether a sitting President may be the subject of a criminal trial or whether removal by impeachment must precede any criminal proceedings which might be brought against him.[9] While the courts have

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[7](...continued)
M. Nixon, President of the United States of America." The Committee submitted H.Rept. No. 93-1305 to the House of Representatives on August 20, 1974. It included text of a resolution impeaching President Nixon and setting forth articles of impeachment against him, which was printed at 120 *Cong. Rec.* 29219, 29220 (August 20, 1974). However, because of the resignation of President Nixon, the House never voted on the resolution.

[8]*See Jefferson's Manual, supra,* § 603 at 302.

[9]*See, The Constitution of the United States of America, Analysis and Interpretation,* (continued...)

addressed somewhat related questions such as whether the President may be subject to judicial subpoenas to provide evidence in criminal cases against others,[10] whether the President may be subject to judicial process in the context of civil litigation based on official acts[11] or based on unofficial conduct occurring before the President took office,[12] or whether the President is subject to the Administrative Procedure Act,[13] the courts have not ruled on the question of whether a sitting President may be prosecuted while in office.

There is an indication that at least some of the Framers regarded the unique nature of the presidency as requiring removal through impeachment before a President could be subjected to criminal trial. Senator William Maclay of Pennsylvania, in his diary of the First Congress, wrote of a conversation with Vice President John Adams

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[9](...continued)
S. Doc. 103-6, 103rd Cong., 1st Sess., 578-82, 590 (1996).

[10]*United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Burr*, 25 Fed. Cas. 187 (No. 14,694) (C.C.D. Va. 1807). *Cf. Mississippi v. Johnson*, 4 Wall. (71 U.S.) 475 (1867) (refusing to permit the filing of an application for an injunction to forbid President Andrew Johnson to enforce the Reconstruction Acts based on their alleged unconstitutionality using language that could be interpreted to mean that the President could not be reached by judicial process, but also focused upon dire consequences if the Court were to act). The Court placed the President "beyond the reach of judicial direction, either affirmative or restraining, in the exercise of his powers, whether constitutional or statutory, political or otherwise, save perhaps for what must be a small class of powers that are purely ministerial." *The Constitution of the United States, Analysis and Interpretation*, S. Doc. 103-6, 103rd Cong. 1st Sess. 578 (1996) (hereinafter *Constitution Annotated*). While the Court in *United States v. Nixon* had an opportunity to provide clarification with regard to *Mississippi v. Johnson*, it did not do so directly, holding that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *United States v. Nixon*, 418 U.S. at 706. The Court found that the "primary constitutional duty of the courts `to do justice in criminal prosecutions' was a critical counterbalance to the claim of presidential immunity and to accept the President's argument" that the independence of the Executive Branch within its own sphere insulated the President from judicial subpoenas in an ongoing criminal case and, in so doing, protected confidential Presidential communications would "disturb the separation-of-powers function of achieving `a workable government' as well as `gravely impair the role of the courts under Art. III.'" *Constitution Annotated*, at 580, *quoting United States v. Nixon, supra*, 418 U.S. at 706-07. *See also, In re Grand Jury Subpoena to Richard M. Nixon*, 360 F. Supp. 1, 6010 (D. D.C. 1973) (Judge Sirica) *aff'd sub nom., Nixon v. Sirica*, 487 F.2d 700, 708-12 (D.C. Cir. 1973) (*en banc*) (rejecting the argument that the President was immune from process).

[11]*Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (holding that the President is absolutely immune from civil damages suits for acts within the "outer perimeter" of his official duties, based on his "unique position in the constitutional scheme").

[12]Clinton v. Jones, __ U.S. __ , No. 95-1853 (U.S., May 27, 1997) (holding that it was not constitutionally required that a civil lawsuit for damages against a President for unofficial conduct which occurred prior to his presidency be deferred until the end of his presidency).

[13]*Dalton v. Specter*, 511 U.S. 462 (1994); *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (holding that the President is not subject to the APA and that his actions are not reviewable in suits brought under the APA).

and Senator Oliver Ellsworth on the subject on Saturday, September 26, 1789. Senator Maclay records the exchange in pertinent part as follows (phrasing, punctuation, capitalization and spelling as in the original):

> . . . When I first went into the Senate Chamber this Morning the Vice President <,> Elsworth and Ames Stood together . . . . Ames left them and they seemed rather to advance afterwards, said the President personally was not . . . subject to any process whatever, could have no action Whatever brought against him . . . . was above the power of all Judges Justices &ca. For What said they would You put it in the power of a common Justice to exercise any Authority over him and Stop the Whole Machine of Government. I said that altho, President he was not above the laws. both of them declared You could only impeach him. and no other process Whatever lay against him. I put the Case suppose the President commits Murder in the Streets. impeach him. But You can only remove him from Office on impeachment. Why When he is no longer President, You can indict him. . . .[14]

Similarly, Alexander Hamilton, in a speech at the Constitutional Convention on June 18, 1787, stated that the President

> may be impeached for any crime or misdemeanor by the two Houses of the Legislature, two thirds of each House concurring, and if convicted shall be removed from office. He may afterwards be tried & punished in the ordinary course of the law—His impeachment shall operate as a suspension from office until the determination thereof.[15]

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[14]IX *Documentary History of the First Federal Congress, 1789-1791, The Diary of William Maclay and Other Notes on Senate Debates*, 168 (Kenneth R. Bowling and Helen E. Veit, eds. 1988). Senator Maclay's record of the exchange and his thoughts thereon continued:

> . . . but in the Mean While he runs away. but I will put an other case suppose he continues his Murders daily, and neither houses are sitting to impeach him. Oh! the People would rise and restrain him. very well You will allow the Mob to do what the legal Justice must abstain from. Mr. Adams said I was arguing from Cases nearly impossible. there had been some hundreds of crowned heads, within these 2 Centuries in Europe. and there was no instance of any of them having committed Murder. very true in the retail way, {Charles the IX of France excepted,} they generally do these things on the great Scale. I am however certainly, within the bounds of possibility, tho' it may be very improbable. Genl. Schyler joined Us. What think You Genl. said I by way of giving the Matter a different turn. I am not a good Civilian but I think the President a kind of Sacred Person. Bravo, my Jure divino, Man. not a Word of the above is worth minuting, but it Shows clearly how amazingly fond of the old leven many People are I needed no index however of this kind with Respect to John Adams.

Id. (phrasing, spelling, punctuation, and capitalization as in the original).

[15]Alexander Hamilton, Speech at the Convention (June 18, 1787), reprinted in William

(continued...)

In *The Federalist Papers*, No. 69, Hamilton echoed this conclusion:

> The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law.[16]

Thomas Jefferson appears to have expressed concern over the impact upon a President that could result from subjecting him to judicial process, as reflected in a letter from Thomas Jefferson to United States Attorney George Hay in connection with the trial of Aaron Burr, from June 20, 1807:

> The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive.[17]

This letter reflects concerns raised by Chief Justice Marshall's holding in *United States v. Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807), that a *subpoena duces tecum* could be issued to the President. Jefferson raised similar concerns in a letter to George Hay dated June 17, 1807, regarding dicta in *Burr* on the issue of whether a court might compel personal attendance of the President at a trial: "To comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function."[18]

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[15](...continued)
M. Goldsmith, *The Growth of Presidential Power: A Documented History* 99 (1974), *quoted in* "Note: Temporary Presidential Immunity: Adhering to the Separation of Powers Doctrine and the Will of the Framers for Civil Damages Litigation Involving the President—The Jones v. Clinton Case," 40 *St. Louis L.J.* 833, 841 n. 71 and accompanying text, 842 (1996).

[16]*The Federalist Papers*, No. 69, 416 (Penguin Books USA Inc., C. Rossiter, ed., 1961).

[17]10 *The Works of Thomas Jefferson* 404 n. (P. Ford ed. 1905) (emphasis in original), *quoted in Nixon v. Fitzgerald*, 457 U.S. 750 n. 31 (1982).

[18]Letter from Thomas Jefferson to George Hay (June 17, 1807), in 11 *The Writings of Thomas Jefferson* 232 (Andrew A. Lipscomb ed., 1905), *quoted in* A. Amar and N. Katyal, "Commentary: Executive Privileges and Immunities: The Nixon and Clinton Cases," 108 *Harv. L. Rev.* 701, 718 n. 67 and accompanying text (1995). It may also be worthy of note here that Jefferson also stated that if Burr should "suppose there are any facts within the (continued...)

In 1833, Justice Joseph Story stated in § 1563 of his *Commentaries on the Constitution of the United States,* Vol. III, at 418-419:

> There are other incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; . . . .[19]

More recently, in "The Constitutional Tangle," *New Republic*, October 6, 1973, 14, 15, Alexander M. Bickel addressed the issue of whether a sitting President may be indicted:

> The case of the President, however, is unique . . . . In the presidency is embodied the continuity and indestructibility of the state. It is not possible for the government to function without a President, and the Constitution contemplates and provides for uninterrupted continuity in that office. Obviously the presidency cannot be conducted from jail, nor can it be effectively carried on while an incumbent is defending himself in a criminal trial. And the incumbent cannot be replaced or suspended or deprived of his function as President while he is alive and not declared physically disabled, as he now may be under the 25th Amendment. (That the 25th Amendment applies only to physical disability is clear from its legislative history; the amendment would be a dangerous instrument indeed if it were otherwise.) Hence a sitting President must be impeached before he can be indicted.

However, some commentators have argued that a sitting President could be tried in criminal proceedings before a court of law. *See, e.g.*, E. Freedman, "The Law and King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?" 20 *Hastings L.Q.* 7 (1992); R. Berger, "The President, Congress, and

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[18](...continued)
knowledge of the Heads of departments or of myself . . . we shall be ready to give him the benefit of it, by way of deposition . . . ." 9 *Jefferson Writings* 57 (P. Ford ed. 1898), *quoted in* R. Berger, "The President, Congress, and the Courts," 83 *Yale L.J.* 1111, 1113 n. 12 and accompanying text (1974).

[19] The remainder of this sentence following the semi-colon reads, "and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." The first clause of the sentence seems unequivocal, discrete and complete in itself, and directly on point; however, it would seem possible that this second clause, if read *in pari materia* with the first, might be viewed as narrowing the scope of the first to those circumstances where a President might be subject to arrest, imprisonment, or detention in connection with a civil matter, perhaps in the context of contempt of court. Alternatively, it might be argued that this "inviolability" in civil matters simply reflects the holding in the *Burr* case in which President Jefferson was subject to a *subpoena duces tecum* to produce evidence sought by the defense in a criminal trial.

the Courts," 83 *Yale L.J.* 1111, 1123-1136 (1974). *But see*, R. Berger, *Impeachment: The Constitutional Problems* 79 (1973) (where, in an earlier writing, Berger speaks in terms of impeachment preceding any related criminal prosecution).

Professor Eric Freedman opines that the President can be subject to criminal trial while in office. He suggests that the disruption to presidential duties from a criminal trial would be no greater than those for an impeachment proceeding, and that Presidents have carried out the duties of their offices during the disruptions occasioned by the issuance of a subpoena to President Jefferson during the Burr trial and by the Watergate investigations. He also suggests that the courts, in deference to the demands of the presidency, could tailor the criminal proceedings to accommodate both the demands of the criminal process and those of the President's official duties.

Further, among his arguments in support of the position that a sitting President can be subjected to criminal proceedings, Freedman contends that the 25th Amendment can be used as a mechanism for having the President leave office temporarily if a criminal trial or resulting sentence precludes the President from performing his constitutional duties. Freedman suggests that the President could voluntarily step aside for the duration of the criminal proceedings by invoking Section 3 of the 25th Amendment, which reads:

> Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Alternatively, Freedman suggests that a President facing criminal proceedings could be suspended from office by operation of Section 4 of the 25th Amendment. This section reads:

> Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to [Congress] their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.
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> Thereafter, when the President transmits to the [Congress] his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days . . . their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue . . . . If the Congress . . . determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Freedman clearly disagrees with Bickel's view that the 25th Amendment was not intended to reach circumstances outside those involving physical disability, although he finds Bickel's position more persuasive in a Section 4 context than in one in which Section 3 of the 25th Amendment was called into play.

Raoul Berger, in his article "The President, Congress, and the Courts," supports his conclusion that the impeachment of a President need not precede indictment by negative implication from the absence of any indication of presidential immunity from criminal prosecution in the constitutional language, from the *Burr* trial, and from historical concerns over abuses of executive power with which the Framers were familiar, coupled with statements by Charles Pinckney and James Wilson. Berger's argument rests, in part, upon the explicit inclusion in the Constitution of Article 1, Section 6, which states in pertinent part:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No similar express treatment exists in the Constitution of a privilege from arrest or prosecution for the President. Berger appears to believe that such an omission was made advisedly, and that, by implication, the President must therefore be amenable to criminal prosecution while in office.

Berger further bases his position upon a statement made by Senator Charles Pinckney, who was one of the Framers, speaking in the Senate in 1800, that, "it never was intended to give Congress . . . any but specified [privileges], and those very limited privilege indeed."[20] Further, Berger noted that Pinckney stated during the

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[20] 10 *Annals of Cong.* 72 (1800). Charles Pinckney's remarks were part of his response to a motion made by Senator Tracy of Connecticut on Wednesday, February 26, 1800, as a newly appointed member of the Committee of Privileges which would have directed that committee to investigate and report to the Senate regarding certain assertions made in a Philadelphia newspaper called the "General Advertiser" or "Aurora" about the Senate and its members in their official capacities. Under the resolution, the committee was directed to inquire who the editor of the newspaper was, by what authority he had published specified information regarding a copy of a particular bill and a statement that Senator Pinckney had never been consulted on the bill, and who or what the origin was of assertions made in the article about the Senate and its members. Senator Tracy believed some of the information in the article to be false. To carry out this inquiry, the resolution would have empowered the committee to "send for persons, papers, and records, relating to the subject committed to them." 10 *Annals of Cong.* 53, 62-63 (1800). The suggestion by Senator Tracy on March 5, 1800, that the House decide on the propriety of referring the motion to the Committee of Privileges occasioned several Senators to raise objections to the substance of the resolution itself as seeking to exercise powers beyond those constitutionally granted to Senate, as intruding upon the power of the people to examine public measures, and as jeopardizing the freedom of the press. Pinckney, in his discourse on the floor of the Senate, raised all of these concerns. Having listed the privileges of the Legislative Branch included in Article I,

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course of this discourse that,"No privilege of this kind was intended for your Executive, nor any except which I have mentioned for your Legislature. The Convention . . . well knew that . . . no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more."[21] Similarly, Berger quotes James Wilson, also a

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[20](...continued)
Sections 5 and 6 of the Constitution, and having underscored the specificity of these privileges, Senator Pinckney then emphasized that:

> The powers they are to exercise, and the persons and cases they are to operate upon, are all distinctly marked and named; nor is there a word or a sentence in the whole that can by any possible construction be made to mean that for any libels or printed attack on the public conduct or opinions of either House of Congress, or of any of its members, that their privilege shall extend to ordering the persons charged with the offence before them, and imprisoning them at their will.

10 *Annals of Cong.* 71 (1800). Pinckney sought further support for his position by noting that if such a privilege existed, the Congress would have the obligation to legislate with respect to it, laying out the manner in which it would be executed, yet no such legislation existed. He then stated:

> I assert, that it was the design of the Constitution, and that not only its spirit, but letter, warrant me in the assertion, that it never was intended to give Congress, or either branch, any but specified, and those very limited, privileges indeed. They well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here. They knew that in free countries very few privileges were necessary to the undisturbed exercise of legislative duties, and those few only they determined that Congress should possess; they never meant that body who ought to be purest, and the least in want of shelter from the operation of laws, equally affecting all their fellow citizens, should be able to avoid them; they therefore not only intended, but did confine their privileges within the narrow limits mentioned in the Constitution. And here, sir, let me ask, are not these privileges all that are necessary? They have complete authority to keep order and decorum within their own chamber, to clear the galleries if an audience are unruly, and to punish their own members, to take care that no arrests, except for treason, felony, or breach of the peace, shall keep their members from their duty, and for all libellous attacks or misrepresentations the laws are open to them; and if unjustly attacked, no doubt the juries of their countrymen, who are interested to preserve the dignity and independence of their Legislature, will give them the most ample satisfaction. . . . .

Id. at 71-72 (spelling as in the original). This is the context from which the first of the Pinckney quotes raised by Raoul Berger is drawn.

[21]10 *Annals of Cong*. 74 (1800). This quote is also drawn from Pinckney's remarks in response to the substance of the motion by Senator Tracy of Connecticut. As he continued his remarks, Senator Pinckney articulated his understanding of the gist of the reasoning in support of the Tracy resolution to be that

> "each branch must possess this power to punish for breach of privileges, which they must judge as circumstances arise and require; that every legislative body, or

(continued...)

[21](...continued)

> branch of one, possesses an inherent right to protect itself, which must be exercised as their discretion directs, because it may frequently be necessary to exercise it immediately, when the public safety would make it impossible to wait for reference to other bodies, or tribunals," and "that if a man was approaching to knock you down, it would be absurd instead of defending yourself, to deliberate whether you were authorized to do so; that you must act instantly, as the occasion demands; and that as each individual in society possesses this inherent right to protect himself, so does each branch of the Legislature."

Id. at 72-73. He states further that this reasoning

> is said to be strengthened by the practice and precedent of the British Parliament, and the Colonial Legislatures, before the Revolution, and most of the State Legislatures since, and is now universally received as the true doctrine on this subject.
>
> That it is the doctrine and practice of the British Parliament, I will allow; but it was because the doctrines there held are utterly inadmissible in a free Government; and to prevent any influence from them, and their precedents, and the improper practice of the Colonial and State Legislatures, that this limitation of the privileges of Congress was here purposely introduced. Will any man undertake to say, that the privilege of the Parliament of Great Brritain [sic] ought to be that of the Congress of this country? Do you suppose that all their members, and their property, and even their servants, should be protected from arrests during the whole time they are elected for, many of them for twenty years together, or during their lives? Would it be thought safe in this country that a small majority of a small body, or single branch of a Legislature, should claim and exercise the authority, whenever they please, to send and seize any man in your community, however important, and confine him in a loathsome dungeon, for six months together, merely because he has differed with them in politics, and criticized, as he had a right to do, on their legislative acts? . . . .

Id. at 73.

Pinckney felt that such a result was clearly not intended by the Constitution. He found further support in the enactment of legislation creating a federal crime for "writing, uttering, publishing, or printing any libel against the President, or either branch of Congress." He contended that if either branch already possessed the power to punish such acts themselves, such a law would not have been enacted. He argued further:

> . . . but to prove this still more clearly, let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. Why should the individual members of either branch, or either branch itself, have more privileges than him? He is himself, as far as his qualified negative goes, a branch of the Legislature; he is, besides, your Executive, he is the sword of the law, and does he possess any privileges like these? If a man meets him walking alone in the streets and insults him; or if one of ruffian manners should enter his house, and even abuse him there, has your President any privileges like these? Can he commit and imprison without a trial? No sir, he must resort to the laws for satisfaction, where the person charged with the outrage will be heard, and where each party will

(continued...)

Framer, speaking to the Pennsylvania Ratification Convention, stating that "not a single privilege is annexed to [the president's] character."[22] In addition, Berger argues that if an impeachment must precede a related criminal trial of a president, then if the House did not vote to impeach or if the president was not convicted and removed from office in a Senate impeachment trial, the president might be immune from prosecution, and, if the statute of limitations were to be allowed to run during that time, that immunity could conceivably be permanent.[23]

As is apparent from the discussion above, arguments can be marshaled on both sides of the issue regarding whether a sitting President can be subjected to criminal prosecution, or whether a President must be removed from office through impeachment before a criminal prosecution may proceed. As yet, the ultimate resolution of this issue remains unknown.

While the constitutional provisions establish the basic framework for American impeachments, they do not begin to address all of the issues which may arise during the course of a given impeachment proceeding or to answer all of the procedural

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[21](...continued)

> have justice done them, by men who ought to be so impartially summoned as that no undue bias will be found, when they come to decide. No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more. . . .

Id. at 74. This, then, was the context from which the second Pinckney quotation by Berger was taken.

[22]2 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (1836), *quoted in* R. Berger, "The President, Congress, and the Courts," 83 *Yale L.J.* 1111, 1126-27 (1974). This quote is drawn from a discussion by Wilson of the executive authority under the Constitution. He stated:

> . . . The next good quality that I remark is, that the *executive authority is one.* By this means we obtain very important advantages. We may discover from history, from reason, and from experience, the security which this furnishes. The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes. We secure *vigor*. We well know what numerous executives are. We know there is neither vigor, decision, nor responsibility, in them. Add to all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment.*

[23]R. Berger, "The President, Congress, and the Courts," 83 *Yale L.J.* 1111, 1133-34 (1974).

questions which might become pertinent to an inquiry of this sort. To fill this void, a number of resources are available.

Recent Judicial Decisions Related to Impeachment

While no court has challenged the authority of the Senate to try impeachments, there are decisions regarding questions raised by the impeachment trials and convictions of Judges Walter L. Nixon, Jr., and Judge Alcee Hastings. *Compare Nixon v. United States*, 506 U.S. 224 (1993), *affirming*, 938 F.2d 239 (D.C. Cir. 1991), *affirming* 744 F. Supp. 9 (D.D.C. 1990), with *Hastings v. United States*, 802 F. Supp. 490 (D.D.C. 1992), *vacated and remanded on court's own motion*, 988 F.2d 1280 (Table Case), 1993 U.S. App. LEXIS 11592 (unpublished per curiam vacating and remanding for reconsideration in light of *Nixon v. United States, supra*) (1993), *dismissed*, 837 F. Supp. 3 (1993). In both cases, the Plaintiffs challenged the Senate's procedure under Rule XI of the "Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials," which provides:

> XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.
>
> Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before the committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

Former Judge Nixon, "arguing that the Senate's failure to give him a full evidentiary hearing before the entire Senate violated its constitutional duty to "try" all impeachments[,] . . . sought a declaratory judgment that his conviction by the Senate was void and that his judicial salary and privileges should be reinstated from the date of his conviction. The district court held that his claim was nonjusticiable . . . ." 938 F.2d at 241. The U.S. Court of Appeals for the District of Columbia Circuit agreed. *Id.* Judge Williams, writing for the court, determined that the constitutional language granting the Senate the "sole Power to try all impeachments" also "gives it sole discretion to choose its procedures." *Id*. at 245. This "textual commitment of impeachment trials to the Senate," coupled with the need for finality, led the court to

apply the political question doctrine in determining that the issue presented by former Judge Nixon was nonjusticiable. *Id.*

Judge Randolph, in his concurrence, framed the question before the court as "whether the judiciary can pass upon the validity of the Senate's procedural decisions. My conclusion that the courts have no such role to play in the impeachment process rests on my interpretation of the Constitution." *Id.* at 248. His analysis seems to focus specifically upon the text of the constitutional grant to the Senate of the sole power to try impeachments and upon the Framers' intentional exclusion of the Judiciary from a role in the impeachment process, rather than upon the political question doctrine. Judge Edwards concurred in the judgment but dissented in part. He would have found former Judge Nixon's constitutional challenge justiciable, but would find "that the Senate's use of a special committee to hear witnesses and gather evidence did not deprive Nixon of any constitutionally protected right." *Id*.

The *Nixon* case was decided by the Supreme Court on January 13, 1993. *Nixon v. United States*, 506 U.S. 224 (1993). Chief Justice Rehnquist delivered the opinion of the Court for himself and Justices Stevens, O'Connor, Scalia, Kennedy and Thomas. The Court held the issue before them to be nonjusticiable. The Chief Justice based this conclusion upon the fact that the impeachment proceedings were textually committed in the Constitution to the Legislative Branch. In addition, the Court found the "lack of finality and the difficulty in fashioning relief counsel[led] against justiciability." *Id*. at 236. To open "the door of judicial review to the procedures used by the Senate in trying impeachments would `expose the political life of the country to months, or perhaps years, of chaos.'" *Id., quoting the court below,* 938 F.2d, at 246. The Court found that the word "try" in the Impeachment Clause did not "provide an identifiable textual limit on the authority which is committed to the Senate." *Id*. at 238.

Justice Stevens, in his concurring opinion, emphasized the significance of the Framers decision to assign the impeachment power to the Legislative Branch. *Id*. Justice White, joined by Justice Blackmun, concurred in the judgment, but found nothing in the Constitution to foreclose the Court's consideration of the constitutional sufficiency of the Senate's Rule XI procedure. Justices White and Blackmun, addressing the merits of the claim before the Court, were of the opinion that the Senate had fulfilled its constitutional obligation to "try" Judge Nixon. *Id*. at 239.

Justice Souter agreed with the majority that the case presented a nonjusticiable political question, although his reasoning was somewhat different.

> . . . The Impeachment Trial Clause commits to the Senate "the sole Power to try all Impeachments," subject to three procedural requirements: the Senate shall be on oath or affirmation; the Chief Justice shall preside when the President is tried; and conviction shall be upon the concurrence of two-thirds of the Members present. U.S. Const., Art. I, §3, cl. 6. It seems fair to conclude that the Clause contemplates that the Senate may determine, within broad boundaries, such subsidiary issues as the procedures for receipt and consideration of evidence necessary to satisfy its duty to "try" impeachments.

Id. at 253. Justice Souter found the conclusion that the case presented a non-justiciable political question supported by the "`the unusual need for unquestioning adherence to a political decision already made,' [and] `the potentiality of embarrassment from multifarious pronouncements from various departments on one question.'" *Id., quoting Baker v. Carr*, 369 U.S. 186, 217 (1962). He noted, however, that

> . . . [i]f the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply a "bad guy" . . ., judicial interference might well be appropriated. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. . . .

Id. at 253-54.

In contrast to the decisions in *Nixon*, Judge Sporkin of the United States District Court for the District of Columbia initially ruled for the plaintiff in *Hastings v. United States*, 802 F. Supp. 490, 492 (D.D.C. 1992). The court there framed the question before it as follows:

> The key issue in this case is whether a life-tenured Article III judge who has been acquitted of felony charges by a petit jury can thereafter be impeached and tried for essentially the same alleged indiscretion by a committee of the United States Senate consisting of less than the full Senate. This court determines that the answer is no.

Judge Sporkin determined that his court was not foreclosed from reaching a decision in the *Hastings* case by what might have been viewed as a controlling court of appeals decision in *Nixon*, because the Supreme Court had agreed to take *certiorari* in *Nixon* on issues identical to those before him. Judge Sporkin concluded that the issue before him was justiciable and, further, that the Rule XI procedure did not provide an adequate "trial" before the full Senate. *Id.* at 501. In particular, the court considered the taking of evidence a process which required the presence of all the Senators, so that each could judge credibility with his or her own eyes and ears.[24] Judge Sporkin's decision seems to turn upon his reading of the implications of the constitutional phrase giving the Senate the sole power to "try all Impeachments." In light of his analysis, Judge Sporkin granted former Judge Hastings' motion for summary judgment,

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[24] In so doing, while Judge Sporkin appended a copy of Rule XI to his decision, he did not discuss the Rule XI requirement that all rulings as to competency, materiality or relevancy must be made by the full Senate, nor did he address the fact that the Rule XI procedure permits the full Senate to take further testimony or to take all evidence in open Senate. Judge Sporkin described the Rule XI committee as a deliberative body, 802 F. Supp. at 494, but seems not to have focused upon the fact that a committee formed to take evidence pursuant to Rule XI reports to the Senate a certified copy of the transcript of proceedings and testimony given before the committee. These committees do not appear to have made any recommendations as to the merits of the impeachment cases before them.

ordering that the Senate impeachment conviction and judgment be vacated and that a new trial by the full Senate be afforded the plaintiff. Judge Sporkin stayed his judgment pending appeal.

After the Supreme Court's decision in *Nixon v. United States, supra*, the United States Court of Appeals for the District of Columbia Circuit, on its own motion, vacated and remanded the *Hastings* decision for reconsideration in light of *Nixon*. *Hastings v. United States*, 988 F.2d 1280 (Table Case), 1993 U.S. App. LEXIS 11592 (unpublished per curiam) (D.C. Cir. 1993). On remand, Judge Sporkin dismissed the case. *Hastings v. United States*, 837 F. Supp. 3 (D.D.C. 1993). In doing so reluctantly, Judge Sporkin emphasized the factual differences between the two cases, but concluded that the *Nixon* decision compelled dismissal of the case before him.

Some Basic Research Tools to Assist in Impeachment Proceedings

The basic procedures to be followed by the House of Representatives are included in *Jefferson's Manual*, published in *Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States, One Hundred Third Congress*, H.R. Doc. No. 102-405, 102nd Cong., 2d Sess., particularly §§ 31, 38, 41, 162, 173-176, 180, 592, and Sec. LIII, §§ 601-620. The *Manual* states general procedural principles to be applied in the House of Representatives, accompanied by references to particular precedents included in *Hinds' Precedents of the House Representatives* (1907) (hereinafter *Hinds'*) and *Cannon's Precedents of the House of Representatives* (1941) (hereinafter *Cannon's*),[25] and a discussion of relevant English parliamentary procedure and practice. Also of great assistance in exploring precedents in this area is *Deschler's Precedents of the United States House of Representatives*, ch. 14, H.R. Doc. No. 661, 94th Cong., 2d Sess. 389-729 (1977) (hereinafter *Deschler's*).[26]

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[25] *Hinds', Cannon's,* and *Deschler's* include references to provisions of the Constitution, the laws, and decisions of the United States Senate, as well as precedents pertaining to the House of Representatives.

[26] The *Report of the National Commission on Judicial Discipline and Removal* (August 1993), published by the Commission, and the accompanying *Executive Summary of the Report of the National Commission on Judicial Discipline and Removal, Research Papers of the National Commission on Judicial Discipline and Removal, Volumes I and II*, and *Hearings of the National Commission on Judicial Discipline and Removal* may also provide useful information on impeachment and judicial discipline. For other recent congressional materials relating to impeachment and judicial discipline, *see, e.g.*, Byrd, R., "Impeachment," 2 *The Senate, 1789-1989: Addresses on the History of the United States Senate* 59, S. Doc. No. 100-20 (1991) (Bicentennial ed., Wolff, W., ed.); *Impeachment of Article III Judges: Hearing before the Committee on the Judiciary of the United States Senate, Subcomm. on the Constitution*, S. Hrg. 101-1275, 101st Cong., 2d Sess. (1990); *Judicial Independence: Discipline and Conduct: Hearing on H.R. 1620, H.R. 1930, and H.R. 2181 before the Comm. on the Judiciary of the House of Representatives, Subcomm. on Courts, Intellectual Property, and Administration of Justice*, 101st Cong., 1st Sess. (1990).

Senate conduct of impeachment trials is governed by the "Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials." The current form of these rules dates from the 1986 impeachment proceedings against Judge Harry E. Claiborne, although many of the rules predate the Claiborne impeachment.[27] *Procedure and Guidelines for Impeachment Trials in the Senate (Revised Edition)*, S. Doc. No. 33, 99th Cong., 2d Sess. (August 15, 1986), was prepared at the time of the Claiborne proceeding pursuant to S. Res. 439, 99th Cong., 2d Sess., to assist the Senators in understanding and utilizing the Senate impeachment trial procedure, using examples from past impeachment proceedings to follow the process from its inception, upon receipt of a message from the House of Representatives informing the Senate that the House has voted impeachment, adopted articles, and appointed managers, to its conclusion with the adjournment *sine die* of the Senate sitting as a Court of Impeachment. As these are Senate rules, that body can, where it deems such action appropriate, revise or amend the rules. Consideration of the appropriateness of such revisions is not unusual when a Senate impeachment trial is anticipated or is at a very early stage of the Senate proceedings.

A Brief History and Some Preliminary Issues Relating to Impeachment

In any impeachment inquiry, the Members of the Legislative Branch must confront some preliminary questions to determine whether an impeachment is appropriate in a given situation. The first of these questions is whether the individual whose conduct is under scrutiny falls within the category of "civil Officers of the United States" such that he is vulnerable to impeachment. One facet of this question in some cases is whether the resignation of the individual under scrutiny forecloses further impeachment proceedings against him. A second preliminary question is whether the conduct involved constitutes "treason, bribery, or other high crimes or misdemeanors." After a brief look at American impeachments and preliminary inquiries in historical context, we will turn to an examination of these issues.

In the history of the United States, only fourteen impeachment trials have taken place.[28] The fourteen who have thus far gone to trial include: William Blount, United

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[27] The "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials" were published for use in the impeachment proceedings regarding Alcee L. Hastings in *Impeachment of Judge Alcee L. Hastings Constitutional and Statutory Provisions; Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, Articles of Impeachment Against Judge Alcee L. Hastings, Judge Hastings' Answer, and Replication of the House of Representatives*, S. Doc. 101-3, 101st Cong., 1st Sess. 11 (Feb. 2, 1989). For those proceedings regarding Walter L. Nixon, Jr., these rules were published in *Impeachment of Judge Walter L. Nixon, Jr., Constitutional Provisions; Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials; Articles of Impeachment Against Judge Walter L. Nixon, Jr., Judge Nixon's Answer; and Replication of the House of Representatives*, S. Doc. 101-8, 101st Cong., 1st Sess. 7 (May 11, 1989).

[28] The House also impeached and voted articles of impeachment against George W. (continued...)

States Senator from Tennessee (impeachment proceedings from 1797-1799); John Pickering, District Judge for the United States District Court for the District of New Hampshire (1803-1804); Samuel Chase, Associate Justice of the United States Supreme Court (1804-1805); James H. Peck, District Judge for the United States District Court for the District of Missouri (1826-1831); West H. Humphreys, District Judge for the United States District Court for the District of Tennessee (1862); Andrew Johnson, President of the United States (1867-1868); William W. Belknap, Secretary of War (1876); Charles Swayne, District Judge for the United States District Court for the Northern District of Florida (1903-1905); Robert W. Archbald, Circuit Judge, United States Court of Appeals for the Third Circuit, serving as Associate Judge for the United States Commerce Court (1912-1913); Harold Louderback, District Judge, United States District Court for the Northern District of California (1932-1933); Halsted Ritter, District Judge of the United States District Court for the Southern District of Florida (1936); Harry E. Claiborne, United States District Judge for the District of Nevada (1986); Alcee Hastings, United States District Judge for the Southern District of Florida (1988-1989); and Walter L. Nixon, Jr., United States District Judge for the Southern District of Mississippi (1988-1989). Of these fourteen, seven were convicted in their impeachment trials: Judge Pickering,

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[28](...continued)
English, District Judge for the United States District Court for the Eastern District of Illinois (impeachment proceedings from 1925-1926), and the House Managers appeared before the Senate to advise the Senate of the House action and to begin the process which would lead to a Senate trial. However, Judge English resigned six days before the scheduled start of the Senate trial on his impeachment. The House Managers recommended to the House that the impeachment proceedings be discontinued, while stating that the resignation did not affect the Senate's authority to try the matter. The House voted to accept the Managers' recommendation. 68 *Cong. Rec.* 297 (1926), discussed in a Committee Print entitled *Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, Committee on the Judiciary, House of Representatives*, 93rd Congress, 2d Sess. 52-54 (February 1974). The Senate, having been advised by the House Managers that the House wished to discontinue the proceedings in light of Judge English's resignation, passed a resolution dismissing the impeachment proceedings. 68 *Cong. Rec.* 344, 348 (1926). This matter is sometimes counted as a fifteenth impeachment proceeding as the preliminary matters in the Senate had begun in preparation for trial, and the Senate terminated the impeachment proceedings by formal vote.

In addition, in 1974, the House Committee on the Judiciary filed its report on the impeachment inquiry with regard to President Richard M. Nixon with the full House. It included a resolution impeaching President Nixon and setting forth articles of impeachment against him. However, because President Nixon resigned from office, the House did not vote on the resolution and took no further action with respect to impeachment of the former President. *See, H. Res.* 803; *H. R. Rept. No. 1305, Report of the Committee on the Judiciary of the House of Representatives*, 93rd Cong., 2d Sess. (1974) (the report submitted by the Committee recommending President Nixon's impeachment). There is an interesting discussion of the proceedings in the House regarding the impeachment inquiry with respect to President Nixon in 3 *Deschler's Precedents of the House of Representatives*, ch. 14, 15, H.R. Doc. No. 661, 94th Cong. 2d Sess. (1977).

Judge Humphreys, Judge Archbald, Judge Ritter, Judge Claiborne, Judge Hastings,[29] and Judge Nixon.[30]

In addition to those impeachment investigations which have resulted in Senate trials, there have been a number of instances in which the impeachment process has been initiated in the House of Representatives which have not resulted in articles of impeachment being voted against the subjects of those inquiries. For example, in 1872, the House of Representatives adopted a resolution authorizing the House Committee on the Judiciary to investigate the conduct of District Judge Mark H. Delahay.[31] The following year, the committee proposed an impeachment resolution for "high crimes and misdemeanors in office." The resolution was adopted by the House.[32] However, Judge Delahay resigned from office before articles of impeachment were prepared against him, and the House took no further action. Other impeachment resolutions, inquiries, or investigations which, for various reasons, did not result in articles of impeachment being voted by the House included those related to the conduct of the following judges: Lebbeus R. Wilfley, Judge of United States Court for China (1908); Cornelius H. Hanford, United States Circuit Judge for the Western District of Washington (1912); Emory Speer, United States District Judge for the Southern District of Georgia (1913); Daniel Thew Wright, Associate Justice of the Supreme Court of the District of Columbia (1914); Alston G. Dayton, United States District Judge for the Northern District of West Virginia (1915); Kenesaw Mountain Landis, United States District Judge for the Northern District of Illinois (1921); William E. Baker, United States District Judge for the Northern District of West Virginia (1925); Frank Cooper, United States District Judge for the Northern District of New York (1927); Francis A. Winslow, United States District Judge for the Southern District of New York (1929); Harry B. Anderson, United States District Judge for the Western District of Tennessee (1930); Grover M. Moscowitz, United States District Judge for the Eastern District of New York (1930); Harry B.

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[29] Both former Judges Nixon and Hastings challenged the constitutionality of the Senate procedure used in their impeachment trials. *Nixon v. United States*, 506 U.S. 224 (1993), *affirming*, 938 F.2d 239 (D.C. Cir. 1991), *affirming*, 744 F. Supp. 9 (D.D.C. 1990); *Hastings v. United States*, 802 F. Supp. 490 (D.D.C. 1992), *vacated and remanded*, 988 F.2d 1280 (Table Case), 1993 U.S. App. 11592 (unpublished per curiam) (D.C. Cir. 1993), *dismissed*, 837 F. Supp. 3 (D.D.C. 1993). In *Nixon*, the plaintiff's claim was found nonjusticiable by the Supreme Court and the courts below. In *Hastings*, the United States District Court for the District of Columbia determined that the Senate's Rule XI procedure was constitutionally flawed, vacated Judge Hastings' impeachment conviction and judgment, ordered the Senate to try Judge Hastings before the full Senate, and stayed the effect of this decision pending appeal. After the Supreme Court's *Nixon* decision, the *Hastings* appeal was vacated and remanded on the court's own motion for reconsideration in light of *Nixon*. The case was dismissed on remand.

[30] For a crisp summary of the first twelve of these impeachments, see the Appendix to Fenton, P., "The Scope of the Impeachment Power," 65 *NW. U. L. Rev.* 719 (1970), *reprinted at Impeachment, Selected Materials*, H.R. Doc. No. 7, 93rd. Cong., 1st Sess. 663, 682 (October 1973).

[31] *Cong. Globe*, 42nd Cong., 2d Sess. 1808 (1872).

[32] *Cong. Globe*, 42nd Cong., 3d Sess. 1900 (1873).

Anderson, United States District Judge for the Western District of Tennessee (1931); James Lowell, United States District Judge for the District of Massachusetts (1933-1934); Joseph Molyneaux, United States District Judge for the District of Minnesota (1934); Samuel Alschuler, United States Circuit Judge for the Seventh Circuit (1935); Albert Johnson, United States District Judge for the Middle District of Pennsylvania and Albert Watson, United States District Judge for the Middle District of Pennsylvania (1944); Alfred Murrah, Chief Judge of the Court of Appeals for the Tenth Circuit, Stephen Chandler, United States District Judge for the Western District of Oklahoma, and Luther Bohanon, United States District Judge for the Eastern, Northern and Western Districts of Oklahoma (1966) (resolution referred to the Committee on Rules, but not acted upon); and William O. Douglas, Associate Justice of the United States Supreme Court (1970). Among the inquiries into conduct of Executive Branch officers which did not result in Senate trials were those regarding: H. Snowden Marshall, United States District Attorney for the Southern District of New York (1916-1917); Attorney General Harry M. Daugherty (1922-1924); Clarence C. Chase, Collector of Customs at the Port of El Paso, Texas (1924); Andrew W. Mellon, as Secretary of the Treasury (1932) (discontinued before completion of the investigation because of Mellon's resignation from the position of Secretary of the Treasury upon his nomination and confirmation as Ambassador to the Court of St. James); and President Herbert Hoover (1933) (motion to impeach laid on the table); Frances Perkins, Secretary of Labor, James L. Houghteling, Commissioner of the Immigration and Naturalization Service of the Department of Labor, and Gerard K. Reilly, Solicitor of the Department of Labor (1939); President Harry Truman (1952); President Richard M. Nixon (1973-1974) (President's resignation occurred before the Articles of Impeachment were voted upon by the House; report of the Judiciary Committee recommending impeachment and including articles of impeachment submitted to the House; House adopted a resolution accepting the report, noting the action of the committee and commending its chairman and members for their efforts, but no further action was taken upon the impeachment); and Andrew Young, United States Ambassador to the United Nations (1978) (measure considered in House; motion to table passed by House).

In some instances, impeachment resolutions may be introduced but no action taken on them beyond committee referral. For example, in recent Congresses, impeachment resolutions have been introduced with respect to a number of Executive Branch officers. Among these are: resolution to impeach the Ambassador to Iran (1976) (referred to House Judiciary Committee); resolution to impeach United States Ambassador to the United Nations (1977) (referred to House Judiciary Committee); resolution directing House Judiciary Committee to investigate whether to impeach Attorney General of United States (1978) (referred to House Rules and Administration); resolutions to impeach the Chairman of the Board of Governors of the Federal Reserve System (1983 and 1985) (referred to Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary); resolutions to impeach members of the Federal Open Market Committee (1983 and 1985) (referred to Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee); resolutions to impeach President Ronald Reagan (1983 and 1987) (referred to House Judiciary Committee); and resolutions to impeach President George W. Bush (two in 1991) (referred to the House Committee on the Judiciary). H. Res. 304, directing the House Committee on the Judiciary to undertake an inquiry into whether grounds exist to impeach President William Jefferson Clinton, to report

its findings, and, if the Committee so determines, a resolution of impeachment, was referred to the House Committee on Rules on November 5, 1997, but, as of the date of this report, no further action has been taken on the resolution. In 1978, a resolution was introduced to impeach United States District Judge Frank J. Battisti from Ohio. The resolution was referred to House Judiciary Committee. In addition, in the wake of the filing of the lawsuit in *Atkins v. United States*, 214 Ct. Cl. 186, 556 F.2d 1028 (1977), *cert. denied*, 434 U.S. 1009 (1978)[33] (a case filed by 140 federal judges (1) seeking to recover additional compensation under the theory that failure to increase the nominal salaries of federal judges during an inflationary period amounted to a diminution of compensation in violation of Article III, Sec. 1 of the Constitution and (2) challenging the constitutional validity of a one-House veto provision in the Federal Salary Act of 1967, 2 U.S.C. §§ 351 *et seq.*), two resolutions were introduced to impeach judges involved in the case. These resolutions were also referred to the House Judiciary Committee.

As is apparent from the instances noted above, the impeachment mechanism, while not used frequently, has provided a means of exploring allegations of misconduct involving, with the one notable exception of Senator Blount, civil officers from both the Judicial and Executive Branches. The bulk of the inquiries begun have not resulted in impeachment trials; of those which have gone to trial, half of them have led to convictions, all involving federal judges. The impeachment process provides a means of monitoring and checking misconduct by such officials through the use of a legislative forum. The mechanism is a cumbersome one which takes time away from other legislative business. Yet its very cumbersomeness might be viewed as necessary to minimize the chance that so serious a course would be engaged in lightly; in this light, its complex and somewhat unwieldy nature could be considered an attempt to deter unwarranted legislative intrusions into the business and personnel of the other two branches. The impeachment process might be seen as a constitutional effort to balance these two countervailing forces.

Who Are "civil Officers of the United States" under Article II, Sec. 4 of the Constitution? A perusal of the examples included in the list of impeachment trials and of inquiries with an eye towards possible impeachment may provide some indication as to what sort of officials have been considered "civil Officers of the United States" within the scope of the impeachment powers. The term is not defined in the Constitution. With the exception of the trial of Senator Blount, all of those listed above were from either the Executive or the Judicial Branch. Senator Blount was not convicted in his impeachment trial. During that trial the Congress wrestled with the question of whether a Senator was a civil officer subject to impeachment. The Senate concluded that he was not and that it lacked jurisdiction over him for impeachment purposes. He was acquitted on that basis.[34]

Clearly the precedents show that federal judges have been considered to fall within the sweep of the "Civil Officer" language. There have been instances where

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[33] *Cf. United States v. Will*, 449 U.S. 200 (1980).

[34] III *Hinds'* § 2318, at 678-80.

questions have been raised as to whether the Congressional Printer,[35] a vice-consul-general,[36] or a territorial judge[37] could be impeached. In addition, a House committee concluded that a Commissioner of the District of Columbia was not a civil officer for impeachment purposes.[38] It has been argued that the term "civil officer" for impeachment purposes should at least be deemed to include officers appointed in accordance with the Appointments Clause of the Constitution, Art. II, Sec. 2, Cl. 2, which provides in pertinent part:

> He shall . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Reliance in this argument is placed upon a statement of the Supreme Court in *United States v. Mouat*, 124 U.S. 303 (1888), in discussing this provision, that:

> Unless a person in the service of the government hold his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

Id. at 307.[39]

It is clear that a private citizen is not subject to impeachment, except as to those offenses committed while holding federal public office.[40] This question was explored during the Belknap impeachment trial. Belknap resigned just prior to the adoption of impeachment articles by the House. The Senate, after having given exhaustive consideration to the arguments of the House managers and counsel for the respondent, concluded that the former Secretary of War was amenable to trial by impeachment for acts done in that office, despite his resignation from office before he was impeached. Belknap's demurrer to the replication of the House on the ground

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[35] *See* III *Hinds'* § 1785.

[36] *See* III *Hinds'* § 2515.

[37] *See III Hinds'* §§ 2022, 2486, 2493.

[38] *See* VI *Cannon's* § 548. *Jefferson's Manual* § 174 briefly discusses this question in light of the precedents.

[39] *See* Library of Congress, Legislative Reference Service. "Impeachment," *reprinted in Legal Materials on Impeachment, prepared by the Special Subcommittee on H. Res. 920 of the Committee on the Judiciary of the House of Representatives, 91st Cong., 2d Sess., pursuant to H. Res. 93,* at 4 (Comm. Print, August 11, 1970).

[40] III *Hinds'* § 2007, at 310-28.

that the Senate lacked jurisdiction to go forward with the impeachment was therefore overruled.[41]

What Kinds of Conduct May Give Rise to an Impeachment? The second fundamental issue which each Congress contemplating impeachment of a federal official must confront is whether the conduct in question falls within the constitutional parameters of "treason, bribery, or other high crimes and misdemeanors." Treason is defined in the Constitution, Art. III, Sec. 3, cl. 1, and in statute, 18 U.S.C. § 2381, to mean levying war against the United States or adhering to their enemies, giving them aid and comfort. The Constitution requires that a conviction on a charge of treason be supported by the testimony of two witnesses to the same overt act or a confession in open court. The statutory language expressly applies only to those owing allegiance to the United States. Bribery is not defined in the Constitution, although it was an offense at common law, and the First Congress enacted a bribery statute, the Act of April 30, 1790, 1 Stat. 112, 117, which, with some amendment, is now codified at 18 U.S.C. § 201.[42] Thus treason and bribery may be fairly clear as to their meanings, but the remainder of the language has been the subject of considerable debate. The phrase "high crimes and misdemeanors" is not defined in the Constitution or in statute. It was used in many of the English impeachments, which were proceedings in which criminal sanctions could be imposed upon conviction. As Alex Simpson, Jr., amply demonstrated in his discussion of the Constitutional Convention's debate on this language and the discussion of it in the state conventions considering ratification of the Constitution, in "Federal Impeachments," 64 *U. Pa. L. Rev.* 651, 676-695 (1916), confusion as to its meaning appears to have existed even at the time of its drafting and ratification. No definitive list of types of conduct falling within the "high crimes and misdemeanors" language has been forthcoming as a result of this debate, but some measure of clarification has emerged.

Article 1, Section 3, Clause 7 appears to anticipate that some of the conduct within this ambit may also provide grounds for criminal prosecution. It indicates that

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[41] III *Hinds'* § 2007, at 321. While this precedent clearly exists, it may be noted that Belknap was acquitted of the charges against him in the articles of impeachment. This acquittal seems to have reflected, in part, a residual level of concern on the part of some of the Senators as to the wisdom of trying an impeachment of a person no longer in office. Two of the 37 voting "guilty" and 22 of the 25 voting "not guilty" stated that they believed the Senate lacked jurisdiction in the case. III *Hinds'* § 2467, at 945-46.

[42] This measure, as amended, was included in the 1878 codification and revision of the United States Statutes, Rev. Stat. § 5501 (2d ed. 1878). It was again amended (and seemingly also repealed, *see* Act of March 4, 1909, ch. 321, § 341, 35 Stat. 1153) in 1909, Act of March 4, 1909, ch. 321, § 117, 35 Stat. 1109-10 (1909); and in 1948, Act of June 25, 1948, ch. 645, § 207, 62 Stat 692-93 (1948), 18 U.S.C. §207 (1952 ed.) (The 1940-46 editions of the United States Code show then current versions of this measure at 18 U.S.C. § 238.). It was re-enacted as amended in 1962, Act of Oct. 23, 1962, P.L. 87-849, § 201(e), 76 Stat. 1119 (1962), as part of a rewriting and consolidation of the bribery provisions previously codified at 18 U.S.C. §§ 201-213. The current language is included in 18 U.S.C. § 201, as amended by P.L. 91-405, Title II, § 204(d)(1), Act of Sept. 22, 1970, 84 Stat. 853; P.L. 99-646, § 46(a)-(l), Act of Nov. 10, 1986, 100 Stat. 3601-3604; and P.L. 103-322, Title XXXIII, §§ 330011(b), 330016(2)(D), Sept. 13, 1994, 108 Stat. 2144, 2148.

the impeachment process does not foreclose judicial action. Its phrasing might be regarded as implying that the impeachment proceedings would precede the judicial process, but, as is evident from the impeachments of Judge Claiborne in 1986, and of Judges Hastings and Nixon in 1988 and 1989, at least as to federal judges and probably as to most civil officers subject to impeachment under the Constitution, the impeachment process may also follow the conclusion of the criminal proceedings. Whether impeachment and removal of a President must precede any criminal prosecution is as yet an unanswered question.

The debate on the impeachable offenses during the Constitutional Convention in 1787 indicates that criminal conduct was at least part of what was included in the "treason, bribery, or other high crimes and misdemeanors" language.[43] However, the precedents in this country, as they have developed, reflect the fact that conduct which may not constitute a crime, but which may still be serious misbehavior bringing disrepute upon the public office involved, may provide a sufficient ground for impeachment. For example, Judge John Pickering was convicted on all four of the articles of impeachment brought against him. Among those charges were allegations of mishandling a case before him in contravention of federal laws and procedures: (1) by delivering a ship which was the subject of a condemnation proceeding for violation of customs laws to the claimant without requiring bond to be posted after the ship had been attached by the marshal; (2) by refusing to hear some of the testimony offered by the United States in that case; and (3) by refusing to grant the United States an appeal despite the fact that the United States was entitled to an appeal as a matter of right under federal law. However, the fourth article against him alleged that he appeared on the bench in an intemperate and intoxicated state.

Judge Halsted Ritter was acquitted of six of the seven articles brought against him. He was convicted on the seventh which summarized or listed the first six articles and charged that the "reasonable and probable consequences of the actions or conduct" involved therein were "to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge." The factual allegations upon which this statement was based included assertions that Ritter, while a federal judge, accepted large fees and gratuities and engaged in income tax evasion. This article was challenged unsuccessfully on a point of order based upon the contention that article VII repeated and combined facts, circumstances and charges from the preceding six articles. The President Pro Tempore ruled that article VII involved a separate charge of "general misbehavior."[44]

It has been suggested that the impeachment provisions and the "good behaviour" language of the judicial tenure provision in Article III, Sec. 1, of the Constitution

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[43] *See* the discussion of the debates on this subject in the minority views in connection with the report submitted by the House Judiciary Committee recommending President Nixon's impeachment, H.R. Rept. No. 1305, 93rd Cong., 2d Sess. 362-72 (1974), *printed in* 120 *Cong. Rec.* 29312-15 (1974). For a discussion of presidential impeachment grounds, see 3 *Deschler's* § 3.8, at 434-45.

[44] 3 *Deschler's* ch. 14, § 13.6, at 581-82.

should be read in conjunction with one another.[45] Whether this would serve to differentiate impeachable offenses for judicial officers from those which would apply to civil officers in the Executive Branch is not altogether clear. During the impeachment investigation of Justice Douglas in the 91st Congress, Representative Paul McCloskey, Jr., reading the impeachment and good behavior provisions in tandem, contended that a federal judge could be impeached for either improper judicial conduct or non-judicial conduct amounting to a criminal offense.[46] Then Minority Leader Gerald Ford inserted in the *Congressional Record* a memorandum taking the position that impeachable misbehavior by a judge involved proven conduct, "either in the administration of justice or in his personal behavior," which casts doubt on his personal integrity and thereby on the integrity of the entire judiciary."[47] During the Douglas impeachment debate, Representative Frank Thompson, Jr., argued that historically federal judges had only been impeached for misconduct that was both criminal in nature and related to their judicial functions, and that such a construction of the constitutional authority was necessary to maintaining an independent judiciary.[48] In the *Final Report by the Special Subcommittee on H.Res. 920 of the Committee on the Judiciary of the House of Representatives*, 91st Cong., 2d Sess. (Comm. Print, Sept. 17, 1970), as cited in 3 *Deschler's* ch. 14, § 3.13, the Subcommittee suggested two "concepts" related to this question for the Committee to consider. These concepts shared some common ground. As the Subcommittee observed:

> Both concepts would allow a judge to be impeached for acts which occur in the exercise of judicial office that (1) involved criminal conduct in violation of law, or (2) that involved serious dereliction from public duty, but not necessarily in violation of positive statutory law or forbidden by the common law. Sloth, drunkenness on the bench, or unwarranted and unreasonable impartiality [sic?] manifest for a prolonged period are examples of misconduct, not necessarily criminal in nature, that would support impeachment. When such misbehavior occurs in connection with the federal office, actual criminal conduct should not be a requisite to impeachment of a judge or any other federal official. While such conduct need not be criminal, it nonetheless must be sufficiently serious to be offenses against good morals and injurious to the social body.
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> Both concepts would allow a judge to be impeached for conduct not connected with the duties and responsibilities of the judicial office which involve [sic] criminal acts in violation of law.[49]

Thus it would appear that this common ground represented those general principles which the Subcommittee deemed fundamental to conduct upon which impeachment of a federal judge could be based.

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[45] *See* 3 *Deschler's* ch. 14, § 3.10, at 449-52.

[46] *Id.*

[47] 3 *Deschler's* ch. 14, § 3.11, at 452-55.

[48] *See* 3 *Deschler's* ch. 14, § 3.12, at 455-57.

[49] 3 *Deschler's* ch. 14 § 3.13, at 463-64.

There is no constitutional parallel to the judicial "good behaviour" language applicable to executive officials. The House Judiciary Committee, in recommending articles of impeachment against President Richard Nixon in 1974, appears to have premised those articles on the theory that President Nixon abused the powers of his office, causing "injury to the confidence of the nation and great prejudice to the cause of law and justice," and resulting in subversion of constitutional government; that he failed to carry out his constitutional obligation to faithfully execute the laws; and that he failed to comply with congressional subpoenas needed to provide relevant evidence for the impeachment investigation.[50] The minority of the House Committee on the Judiciary in the report recommending that President Nixon be impeached took the view that errors in the administration of his office were not sufficient grounds for impeachment of the President or any other civil officer of the United States.[51] The minority views seem to suggest that, under their interpretation of "high crimes and misdemeanors," crimes or actions with criminal intent must be the basis of an impeachment.[52]

The charges against President Andrew Johnson involved allegations of actions in violation of the Tenure of Office Act, Act of March 2, 1867, ch. 154, § 6, 14 Stat. 430, including removing Secretary of War Stanton and replacing him with Secretary of War Thomas and other related actions. Two of the articles brought against the President asserted that he sought to set aside the rightful authority of Congress and to bring it into reproach, disrepute and contempt by "harangues" criticizing the Congress and questioning its legislative authority.[53] He was acquitted on those articles upon which votes were taken. The only other Executive Branch officer to go to trial on articles of impeachment was Secretary of War Belknap. The articles alleged that he, in an exercise of his authority as Secretary of War, appointed John Evans to maintain a trading post at Fort Sill, and allowed Evans to continue in that position, as part of an arrangement which provided Belknap personal gain. The arrangement allegedly provided that Evans would pay $12,000 annually from the profits of the trading post to a third party who would, in turn, pay Belknap $6,000 annually. Belknap resigned before the Senate trial on his impeachment and was not convicted on any of these articles.

This review of some of the precedents on the question of what constitutes an impeachable offense suggests that the answer to this question is less than clear. Criminal conduct appears to be a sufficient ground, whether the person involved is a judge or a member of the Executive Branch. Where the person to be impeached is the President or an executive officer, conduct having criminal intent, serious abuses of the power of the office involved, failure to carry out the duties of that office, and, possibly, interference with the Congress in an impeachment investigation of the

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[50] *See* 3 *Deschler's* ch. 14, § 3.7, at 429-34.

[51] H.R. Rept. No. 1305, 93rd Cong., 2d Sess. 362-72, *printed at* 120 *Cong. Rec.* 29312-15 (1974), *as reprinted in part in* 3 *Deschler's* ch. 14, § 3.8, at 434, 435.

[52] 3 *Deschler's* ch. 14, § 3.8 at 438-45.

[53] See "Impeachment of President Andrew Johnson," in *Impeachment, Selected Materials, prepared by the Committee on the Judiciary of the House of Representatives*, H.R. Doc. No. 7, 93rd Cong., 1st Sess. 154-61 (October 1973).

President or other executive official may be enough to support an article of impeachment. As to federal judges, the impeachment language might be read in light of the constitutional language providing that they serve during good behavior. With this in mind, a judge might be vulnerable to impeachment, not only for criminal conduct, but also for improper judicial conduct involving a serious dereliction of duty; placing the judge, the court or the judiciary in disrepute; or casting doubt upon his integrity and the integrity of the judiciary.

Conclusions and Other Observations

The American impeachment process, a constitutionally based remedy, provides a legislative mechanism for investigating and trying allegations of some forms of serious misconduct on the part of the President, Vice President, and "civil Officers of the United States." This mechanism has been used in cases involving judges, Presidents, and certain senior members of the Executive Branch. It has been found not to apply to Senators, and, although a parallel case does not exist as to Members of the House of Representatives, it seems likely that, on similar lines of reasoning, it would also be found inapplicable to them. The "civil Officer" language is not defined in the Constitution, and its outer limits are still somewhat unclear. It has been used to reach Cabinet level officials. It may be argued that it should be regarded as reaching anyone whose appointment to an office of public trust must be in compliance with the Appointments Clause of the Constitution. Private citizens are not vulnerable to impeachment.

The constitutional language which states that impeachment may lie for "treason, bribery, or other high crimes or misdemeanors" also lacks definition in the document itself, although treason is defined elsewhere in the Constitution. Here, too, the precedents provide some guidance as to what has been viewed as an impeachable offense, as do the debates at the Constitutional Convention of 1787, but the outside boundaries of the language have not been fully explored. It seems clear that a criminal offense may give rise to an impeachment. Yet in some of the impeachments which have gone to trial and conviction, some of the articles have involved conduct which did not constitute a crime, but which did involve serious misconduct or gross improprieties while in office or abuse of the powers of the office. Some of the literature seems to suggest that the standard for impeachable offenses may be somewhat different for Presidents and members of the Executive Branch than for judges.

The impeachment process itself appears to be placed completely in the hands of the Legislative Branch,[54] although the subject of an inquiry may occasionally be

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[54]*See Nixon v. United States*, 506 U.S. 224 (1993), *affirming*, 938 F.2d 239 (D.C. Cir. 1991), *affirming* 744 F. Supp. 9 (D.D.C. 1990) (finding that the issue of the constitutional sufficiency of the Senate's Rule XI procedure was nonjusticiable by application of the political question doctrine). *But see Hastings v. United States*, 802 F. Supp. 490 (D.D.C. 1992) (finding that the court had jurisdiction to evaluate the constitutional sufficiency of the

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brought to the attention of the House through communications from one of the other two branches or from one of the state legislatures. The House has the responsibility to make the initial investigation and to determine whether or not to impeach. If the Members of the House decide that impeachment is appropriate, they vote to impeach and vote articles of impeachment specifying the particular grounds upon which the impeachment is based. These are then presented to the Senate for trial.

In the Senate trial, the House of Representatives is represented by Managers, who may be assisted by counsel. The individual impeached also is entitled to assistance of counsel. After the Senate has considered the evidence presented, it then must determine whether or not to convict upon each of the articles separately. A conviction on any article must be supported by a vote of two-thirds of the Senators present. A conviction on any one of the articles constitutes a conviction in the impeachment trial; the individual need not be convicted on all of the articles brought against him. If the Senate does vote to convict on an article, then it must determine what judgment is to flow from that decision. The Senate has two options: either to remove from office alone, or to remove from office and to prohibit the individual from holding other offices of public trust under the United States in the future. Recent precedents suggest that removal may flow automatically from conviction, but, if prohibition from holding further offices of public trust is to be applied, it must be voted upon specifically. The two issues are divisible. With regard to the determination as to the appropriate judgment, a simple majority vote is sufficient to sustain it. A two-thirds majority is not required.

The impeachment process is a complex and cumbersome mechanism. It places in the hands of the two legislative bodies the determination as to the fitness to continue in office of some of the officers of the Judicial and Executive Branches. As such it can act as a check upon abuses of power or instances of serious misconduct by those judicial and executive officers vulnerable to impeachment. It also places significant demands upon legislative time and resources. It is possible that this represents an effort by the constitutional Framers to balance the need to provide a means of remedying such misconduct against the need to minimize the chance that this legislative power to intrude into the business or personnel of the other co-equal branches could itself be over-used or abused. Its constitutional framework is skeletal, providing minimal guidance as to the nature of the proceedings. This void is filled to a great extent by House and Senate rules, procedures, and precedents. Yet, some questions remain, a few of which have been addressed in this report

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[54](...continued)
Senate impeachment trial procedures and concluding that the Rule XI committee procedure suffered from constitutional frailties), *vacated and remanded*, 988 F.2d 1280 (Table Case), 1993 U.S. App. 11592 (unpublished per curiam) (D.C. Cir. 1993), *dismissed*, 837 F. Supp. 3 (D.D.C. 1993). See discussion at pp. 14-17 and in fn. 24, *supra*, for further information regarding Rule XI and these court decisions.