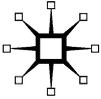


High Crimes and Misdemeanors in Presidential Impeachment

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H. Lowell Brown

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Preface

The U.S. Constitution provides that the president and other civil officers of the federal government may be removed from office upon impeachment by the House of Representatives and conviction by the Senate of treason, bribery, and “other high Crimes and Misdemeanors” (Article II, Section 4). The offense of treason was defined in the Constitution (Article III, Section 3) and bribery was an offense well established in common law. In contrast, however, no authoritative definition of “high crimes and misdemeanors” was provided either in the Constitution itself or in the debates of the Framers at the constitutional convention. As a consequence, the meaning of high crimes and misdemeanors—and in particular whether evidence of criminal conduct is required—has been a matter of controversy since the first impeachment and trial of Judge John Pickering in 1804 (chapter 2) and continuing through the impeachment and trial of President William Jefferson Clinton (chapter 4).

In order to discern what the Framers intended when they adopted high crimes and misdemeanors as grounds for the removal of the president from office, it is necessary not only to look at the debates at the convention and in the state ratification proceedings but to consider as well the usage of high crimes and misdemeanors in British parliamentary impeachments (including the impeachment of Warren Hastings, Governor General of India, which was occurring at the time of the federal constitutional convention) and by the legislatures of the colonies and states preceding the convention, all of which informed the conceptual thinking of the Framers concerning presidential impeachment. It is likewise necessary to view the impeachment debates in the larger context of the Framers’ aspirations and anxieties regarding the office of president that they were creating. This is the focus of chapter 1 and it is from these various sources that emerge the understanding of high crimes and misdemeanors as conduct in the discharge of the office of the presidency amounting to an abuse or overreaching of the powers of that office and an understanding that high crimes and misdemeanors were to be reserved for only the most grievous official conduct that poses a direct threat to the constitutional order of government.

Official misconduct described by Alexander Hamilton as being “injuries done to society itself.”

The Framers left to the Congresses the task of giving concrete substance to high crimes and misdemeanors. Thus, the impeachment proceedings that have been instituted beginning with the “State Trials” of Senator William Blount, Judge Pickering, and Justice Samuel Chase, in which a number of the Framers themselves participated, are instructive. This is the focus of chapters 2 through 4.

The impeachments and trials of President Andrew Johnson (chapter 2) and President Clinton (chapter 4) and the proceedings of the House Judiciary Committee concerning the presidency of Richard M. Nixon (chapter 3) each reveal the struggle of the legislators to marry the implications of high crimes and misdemeanors with their critiques of presidential misconduct. Regrettably, this struggle has often been obscured by partisan ardor.

However, having conceived of impeachment as a remedial, political process rather than a punitive, judicial proceeding, it is doubtless that the Framers anticipated controversy whether recourse to such an extreme measure was warranted. Nevertheless, although there has not been unanimity, when viewed in the context of the circumstances that have led to the three presidential impeachments, there is consensus that high crimes and misdemeanors must arise from the official acts of the president (in contrast to misconduct in the president’s private affairs) and must amount to a breach of faith with the Constitution that is so grave (whether or not the conduct is also criminal) that there is no alternative to removal by the Congress of the elected head of state.

Author's Note

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The author also wishes to express his thanks to Nancy Giachinta, of Raymond, Maine, who typed draft upon draft of the manuscript with good humor and without complaint.

But it is to my wife, Ella, that I owe my greatest debt of gratitude and thanks for her unfailing support, and for her belief and confidence. It is to her that this book is dedicated.

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