

Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

Constitutional Grounds for Presidential Impeachment (1974)¹

Richard Nixon was immediately mired in controversy after his reelection to a second term of office in 1972. Nixon handed Democrat nominee Senator George McGovern a crushing defeat, but Republicans lost two seats in the Senate and gained only twelve seats in the House of Representatives, leaving Democrats with solid majorities in both chambers of Congress. In June 1972, five men had been caught breaking into the headquarters of the Democratic National Committee in the Watergate hotel complex in Washington, D.C. Links between those individuals and the Republican presidential campaign were soon revealed, and senior presidential aides faced prosecution for obstructing the criminal investigation into the burglaries by a special prosecutor. Suspicions that the president also knew about and participated in the cover-up of the burglaries were widespread.

Within a year of Nixon's reelection, resolutions calling for his impeachment were introduced in the U.S. House of Representatives. In February 1974, the House overwhelmingly voted to direct the Judiciary Committee to launch an impeachment investigation. In the late spring, the House held televised impeachment hearings and voted in favor of impeaching the president for obstruction of justice. A month later, the U.S. Supreme Court in *Nixon v. United States* (1974) ruled that White House audiotapes of presidential conversations were not protected by executive privilege. On August 9, shortly after the public release of the tapes, Nixon resigned the presidency, ending the threat of an impeachment vote in the full House and a possible trial in the Senate.

The 1974 hearings marked the first time in a century that a presidential impeachment was seriously contemplated. The House of Representatives and its legal advisors scrambled to identify the proper grounds for a presidential impeachment and the procedures to be used in such an event, even as they built the factual case to support an impeachment vote. The widely circulated staff report of the Judiciary Committee laid out the legal foundations for an impeachment inquiry, elaborating on the meaning of the constitutional provision that the president "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Did this House Report limit impeachable offenses to violations of the criminal law? Why might the House have adopted this reading of its constitutional impeachment power? Were the standards for impeachment offered here expansive enough to cover other actions of President Nixon, such as his impoundment (refusal to spend) appropriated funds or his expansion of the American offensive beyond the borders of Vietnam against congressional preferences? What type of actions would not be impeachable according to this standard? Could the president expect to be able to mount the same defense against an impeachment for obstruction of justice that he would mount in a criminal trial for a charge of obstruction of justice? Should historical understandings of the impeachment power be decisive in setting the limits on how that power could be used today?

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This memorandum offers no fixed standards for determining whether grounds for impeachment exist. The framers did not write a fixed standard. Instead they adopted from English history a standard

¹ Excerpt taken from House Committee on the Judiciary, *Constitutional Grounds for Presidential Impeachment*, 93rd Cong., 2nd sess. (1974).

sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee.

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Parliament developed the impeachment process as a means to exercise some measure of control over the power of the King. An impeachment proceeding in England as a direct method of bringing to account the King's ministers and favorites – men who might otherwise have been beyond reach. Impeachment, at least in its early history, has been called “the most powerful weapon in the political armory, short of civil war.” . . . In this respect impeachment was one of the tools used by the English Parliament to create more responsive and responsible government and to redress imbalances when they occurred.

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Characteristically, impeachment was used in individual cases to reach offenses, as perceived by Parliament, against the system of government. The charges, variously denominated “treason,” “high treason,” “misdemeanors,” “malversations,” and “high Crimes and Misdemeanors,” thus included allegations of misconduct as various as the kings (or their ministers) were ingenious in devising means of expanding royal power.

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Two points emerge from the 400 years of English parliamentary experience with the phrase “high Crimes and Misdemeanors.” First, the particular allegations of misconduct alleged damage to the state in such forms as the misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament's prerogatives, corruption, and betrayal of trust. Second, the phrase “high Crimes and Misdemeanors” was confined to parliamentary impeachments; it had no roots in the ordinary criminal law, and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions or crimes.

The debates on impeachment at the Constitutional Convention in Philadelphia focus principally on its applicability to the President. The framers sought to create a responsible though strong executive . . . Impeachment was to be one of the central elements of executive responsibility in the framework of the new government as they conceived it.

The constitutional grounds for impeachment of the President received little direct attention in the Convention. . . .

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James Iredell, who played a leading role in the North Carolina ratifying convention and later became a justice of the Supreme Court, said that under the proposed Constitution the President “is of a very different nature from a monarch. He is to be . . . personally responsible for any abuse of the great trust reposed in him.” In the same convention, William R. Davie, who had been a delegate in Philadelphia, explained that the “predominant principle” on which the Convention had provided for a single executive was “the more obvious responsibility of one person.” When there was but one man, said Davie, “the public were never at a loss” to fix the blame.

. . . . [T]he impeachability of the President was considered to be an important element of his responsibility. . . .

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. . . . Throughout its deliberations on ways to avoid executive subservience to the legislature . . . the convention never reconsidered its early decision to make the executive removable through the process of impeachment.

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Contemporaneous comments on the scope of impeachment are persuasive as to the intentions of the framers. In *Federalist* No. 65, Alexander Hamilton described the subject of impeachment as

those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.

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In short, the framers who discussed impeachment in the state ratifying conventions, as well as other delegates who favored the Constitution, implied that it reached offenses against the government, and especially abuses of constitutional duties. The opponents did not argue that the grounds for impeachment had been limited to criminal offenses.

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Each of the thirteen American impeachments involved charges of misconduct incompatible with the official position of the officeholder. This conduct falls into three broad categories: (1) exceeding the constitutional bounds of the powers of the office in derogation of the powers of another branch of government; (2) behaving in a manner grossly incompatible with the proper function and purpose of the office; and (3) employing the power of the office for an improper purpose or for personal gain.

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... The issue between the President and Congress [in 1868] was which of them should have the constitutional – and ultimately even the military – power to make and enforce Reconstruction policy in the South. The [President Andrew] Johnson impeachment, like the British impeachments of great ministers, involved issues of state going to the heart of the constitutional division of executive and legislative power.

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The formal language of an article of impeachment ... is less significant than the nature of the allegations that it contains. All have involved charges of conduct incompatible with continued performance of the office ... Some of the individual articles seem to have alleged conduct that, taken alone, would not have been considered serious ... Unlike the Senate, which votes separately on each article after trial, and where conviction on but one article is required for removal from office, the House appears to have considered the individual offenses less significant than what they said together about the conduct of the official in the performance of his duties.

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Impeachments and the criminal law serve fundamentally different purposes. Impeachment is the first step in a remedial process – removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment; its function is primarily to maintain constitutional government. Furthermore, the Constitution itself provides that impeachment is no substitute for the ordinary process of criminal law since it specifies that impeachment does not immunize from criminal liability for his wrongdoing.

... The criminal law sets a general standard of conduct that all must follow. It does not address itself to the abuses of presidential power. In an impeachment proceeding a President is called to account for abusing powers that only a President possesses.

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To confine impeachable offenses to indictable offenses may well be to set a standard so restrictive as not to reach conduct that might adversely affect the system of government. Some of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law.

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Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement – substantiality. In decided whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principle of our government or the proper performance of constitutional duties of the presidential office.