

The Origins and Scope of Presidential Impeachment

By Matthew R. Romney

This essay discusses the historical background leading to the inclusion of the impeachment clause in Section 4 of Article II of the U.S. Constitution. In English parliamentary history, American colonial history, and American state constitutions under the Articles of Confederation, considerably varied answers were given to relevant questions. These included: What is impeachment, who is subject to it, what offenses can it reach, who can exercise the power of impeachment and trial, and what penalties can be imposed? The author concludes that the history of impeachment provided quite unclear guides to the Constitution's framers, and the evidence from the Constitutional Convention likewise leaves the framers' intent as to scope (what is impeachable) quite unclear.

INTRODUCTION

During the impeachment inquiry into the conduct of President William Jefferson Clinton, White House Press Secretary, Mike McCurry, asserted that it "should now be clear to everyone" that "the President's conduct does not rise to the level of an impeachable offense" (1998). Certainly the Press Secretary intended to make a rhetorical argument more than to present a historical fact. Nevertheless, this statement is at the root of a fascinating constitutional conundrum. At first glance, such a statement seems simple and commonplace in our system of codified laws. But making such an unqualified statement about any constitutional issue is extremely problematic and more so in the case of impeachment. The framers wrote presidential impeachment into the Constitution of the United States with very little recorded discussion. And the pragmatic opportunism of the British political system, followed by more than a century of colonial application, make the precedents from which the framers were working not only unclear, but divergent as well. The historical evidence available regarding the origins of executive impeachment seems to defy any definitive statement about the scope of the impeachment power as it existed in the minds of the framers.

IMPEACHMENT IN ENGLAND

Alexander Hamilton wrote in *Federalist Paper #65* that the Parliamentary practice of impeachment served as "the model

from which [impeachment] has been borrowed" (Cooke 1961, 439), and considering the respect for law and government that the American colonists had inherited from their mother country, it seems to be the obvious beginning. But the precise origins in British history are nebulous. Historians have found antecedents for the practice of impeachment in the early Norman period, and even as far back as the city states of ancient Greece. In England, during the thirteenth and fourteenth centuries, several incidents occurred which involved the removal of royal officials by the King with the consent of Parliament. Such events served as precedents which Parliament, especially the House of Commons, used to justify later impeachments. Still, some consensus exists that these were not impeachments in a modern context (Melton 1998, 24-25).

Historians have, instead, identified the 1376 impeachments of Richard Lyons, a London merchant, and Lord William Latimer, a peer of the realm, as the first modern impeachments (Melton 1998, 25). Their justification for this relates to specific structural relationships between branches of government and within the legislative branch, which originate in these impeachments and which become the foundation of the modern institution. Defining these relationships is an ideal beginning point for defining the nature of impeachment.

At its most basic level, impeachment is the assertion of power by a legislative body over an individual who cannot be removed any other way. There had been prior instances of punishment at the behest of parliament. In 1283 the last Cymric Prince of Wales was put to death by King Edward I at the request of Parliament (Melton 1998, 23). In 1330, Roger Mortimer, the Baron of Wigmore and first Earl of March was dragged before Parliament by Edward III who ordered the

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Peers to do justice. The Lords consented to the fourteen charges against Mortimer and ordered his execution for treason (Melton 1998, 1). But the 1376 impeachments were different. For the first time, although great pains were taken at various points along the way to get at least the tacit consent of the King, the proceedings were *initiated* by the Parliament. Speaker Peter de la Mare of the Commons accused Latimer and Lyons of fraudulent transactions with royal monies for the furthering of their own interests, and asked that two ex-treasurers be allowed to give sworn statements against them before the Commons. There is some speculation that the Commons resorted to initiating these proceedings, because Edward III was unwilling to act against the corrupt Latimer and Lyons, but, growing old and occupied with foreign affairs, he was also either unable or unwilling to impede Parliament from doing so. Indeed, modern impeachment is defined by an arrogation of power by the legislative branch.

The conclusion of the proceedings in the Commons was a call for punishment and judgement:

“Wherefore we pray and require you on behalf of the king and the council of parliament that the said lord Latimer be arrested and kept safely for all the said trespasses and forfeits, until he has made satisfaction to the king for his misdeeds; and that the said Richard Lyons be judged as he deserves upon the points and articles put against him, which he cannot reasonably deny” (quoted in Plucknett 1983, 158).

But unwilling to accept this summary judgement of the Commons, Lord Latimer asked that written charges be submitted and that he be granted counsel and time to prepare a defense. As a member of the House of Lords, Latimer was asking for a trial before the Lords to determine his guilt or innocence, just as would be required for a common-law offense. Though he was not ultimately granted the first request for written charges, he was granted his second and third requests and was allowed to defend himself before the Lords, thus introducing the element of intra-parliamentary rivalry into the impeachment process. More importantly, however, the Lords’ concern for the legitimacy of charges, procedures and evidence, as well as other legal processes would become a check on the highly politicized environment of the Commons. In fact, of the fifty-seven men impeached by the Commons between 1626 and 1715, only five were prosecuted to judgement by the Lords (Hoffer and Hull 1984, 6). By adding a trial in a separate body to impeachment by the Commons, a first in English history, the Parliament of 1376 gave the impeachment process a legal framework which would become one of the roots of its legitimacy for centuries to come.

Historians demarcate the 1376 impeachments as the first modern impeachments for these political, and quasi-legal elements. Still, many details were yet to be delineated. For example, a clear definition of roles had not yet been settled. The Lords proved to be protective of their role in impeachment, especially against the crown. In 1388, Richard II chal-

lenged the right of Parliament to bring an impeachment without the consent of the King. The challenge resulted in a decision from several judges of the realm declaring impeachment without royal consent to be illegal. As a result, all of the judges who subscribed to the opinion were brought before Parliament, impeached and removed by the lords (Hoffer and Hull 1984, 5).

The Commons likewise resented any interference from the Lords. In the 1700’s, pushing for the trial on impeachment of Edward Fitzharris, the Commons argued:

“[I]t is the undoubted right of the Commons, in Parliament assembled, to impeach before the Lords in Parliament, any peer or commoner for treason or any other crime or misdemeanor; and...the refusal of the Lords to proceed in Parliament upon such impeachment is a denial of justice, and a violation of the constitution of Parliaments” (Hoffer and Hull 1984, 5).

In addition, there was as yet no clear consensus on the scope of the impeachment power. As mentioned, the Commons believed it their right to impeach any peer or commoner for any crime or misdemeanor. And indeed, the charges leading to impeachment were diverse. Most impeachments (and all impeachments in the eighteenth century) were brought for alleged “high crimes and misdemeanors,” a phrase which originated in the impeachment of the King’s Chancellor, Michael de le Pole, Earl of Suffolk in 1386. It is clear however that, although various legal definitions existed in English common law for the various terms in the phrase, its application was not nearly so precise in impeachment proceedings. For de le Pole, “high crimes and misdemeanors” consisted of “advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of the laws,” “procuring offices for persons who were unfit, and unworthy of them,” and “squandering away the public treasure.” For Chief Justice Scroggs in 1680, it consisted of “browbeating witnesses and commenting on their credibility,” and of “cursing and drinking to excess,” thereby bringing “the highest scandal on the publick justice of the kingdom.” And one of Warren Hastings’s “high crimes and misdemeanors” was his failure to conduct himself “on the most distinguished principles of good faith, equity, moderation, and mildness” (Staff of the Impeachment Inquiry 1974). While in many cases, “high crimes and misdemeanors” consisted of common-law offenses, it was clearly not exclusively so.

Since Parliament arrogated to itself the right to impeach, it needed no systematic justification for its exercise. There was some effort in impeachment trials to research precedents in prior impeachments, but precedents consisted of no more than the sum total of Parliamentary impeachment proceedings. In the end, “every ruling on impeachment was legal because the root of public law was the pronouncement of Parliament” (Hoffer and Hull 1984, 9).

Because of these debates which continued in England for centuries, it is difficult to determine with certainty any exact

definition for British impeachment. One British scholar has summed up the convoluted nature of English impeachment in this way:

[L]inked up with the age-old criminal procedure of the common law, the parliamentary impeachment could cast a decent veil of legality over the political realities...and could pose before the world in the reassuring robes of justice (Plucknett 1983, 153).

Still, some consensus does exist on the characteristics of modern impeachment, which stem from their political and quasi-legal characteristics. One scholar describes the characteristics upon which historians can agree this way:

Practically all who have written on the subject agree that impeachment involves a protection of a public interest, incorporating a public law element, much like a criminal proceeding....[I]mpeachment is a process instigated by the government, or some branch thereof, against a person who has somehow harmed the government or the community. The process, moreover, is adversarial in nature and resembles, to that extent, a judicial trial (Melton 1998, 25).

Thus, Hamilton, to a certain extent was correct. The foundations of modern impeachment did have their beginnings in England. It is also probable that the many lawyers attending the Federal Convention of 1787 had some knowledge of the British impeachment history. The impeachment of Warren Hastings, the Governor of India, which was contemporaneous to the convention, is even mentioned in the convention debates. Thus it is easy to reach the conclusion that British impeachment history was the dominant influence on the establishment of the impeachment clause. In 1984 however, as part of a ground breaking book called *Impeachment in America, 1635-1805*, Peter C. Hoffer and N.E.H. Hull examined a part of the impeachment history which had previously been neglected. Their research into the history of colonial America demonstrates important transformations in the practice of impeachment which are fundamental to understanding the intent of the framers.

IMPEACHMENT IN THE AMERICAN COLONIES

Impeachment arrived in America soon after the first colonists with the driving of John Harvey, Royal Governor of Virginia, from power in 1635. Because impeachment was reaching the height of its influence in the British experience during the 1600's, its migration to America at this time guaranteed that it would eventually have a greater influence in American political culture than it ultimately had in England. The impeachment of Harvey was a pragmatic assumption of power by the General Assembly of Virginia, much like the first impeachments in the Commons, and the development of impeachment in America until the end of the seventeenth century in many ways mimicked the British experience. Colonial assemblies adopted the use of impeachment to try to remove royal officials, but they were unable to remove the offenders from office by themselves, because such officials

always had recourse to higher powers. The assemblies were therefore, forced to turn to higher powers such as provincial councils or executive appointees, thereby creating a form of trial (as well as dooming any hopes of removal).

Impeachment only became more difficult as the King and the royal legal advisors grew in opposition to the adoption of impeachment by the colonial assemblies. From 1700 to 1750, only four offenders were impeached by colonial assemblies and none of them were removed (Hoffer and Hull 1984, 27). Political tracts of Britain's "Glorious Revolution" of 1688 were reaching the colonies, decrying the corruption in British government. Colonists recognized the same corruption in their own government and attributed it to royal patronage. But the colonies had not yet reached the point where they were ready to challenge the royal authority which protected the King's appointees.

As frustration in the colonies grew over what they viewed to be tyrannical acts of Parliament, that began to change. Assemblies began to realize that impeachment could have a detrimental effect on an official's ability to govern, even if it could not remove him, so the process became a tool of colonial protest. This mode of protest, like so many others in the revolutionary period, came to a head in Massachusetts. Lord North's ministry had ordered that all justices be paid from customs receipts. The General Court of Massachusetts (its colonial legislature) was concerned that such a scheme would remove the ultimate responsibility of the justices to the General Court which had previously paid their salary. As a result, the General Court's members passed a mandate requiring that justices receive their salary only from them. When Thomas Hutchinson was elevated to the governorship in 1770, he immediately looked for someone who would be loyal to him to occupy the position of Chief Justice. His first choice, Benjamin Lynde, Jr., soon resigned, sensing the growing agitation over royal salaries. Hutchinson then turned to Peter Oliver who was related to him by marriage. Oliver accepted the nomination and, along with other justices, refused to accept the General Court salary in lieu of that from the crown. For that offense, he was impeached by the General Court on February 14, 1774 as "an enemy" to the "constitution" (Hoffer and Hull 1984, 54). With such action, the colonial assemblies asserted the ultimate superiority of the legislative branch, which brought them one step closer to revolution. Significantly, this step was just one more creative application of precedent to justify pragmatic actions.

Impeachment until the American Revolution had been an instrument used against the royal officials who were protected by the Crown and who could not be removed in any other fashion. With the opening of the republican period in the new Confederation, there was no crown and all offices were held, ostensibly, by common people. Under a republican system, what purpose would impeachment serve? But impeachment was by now ingrained in the American experience, and so it began a process of republicanization (Hoffer and Hull 1984, 57-96).

IMPEACHMENT IN THE STATE CONSTITUTIONS

Soon it became apparent that impeachment could be applied effectively in the new and relatively weak state governments to prevent the corrupt or incompetent application of power. It also became apparent, however, that the American legislatures were willing to use impeachment to punish loyalists and seize their property. Impeachment was even used against Governor Thomas Jefferson for alleged incompetence in his role during the British invasion of Virginia. Though he was subsequently cleared, and though it was not formally called impeachment, it was identified as such by at least one observer, Edmund Randolph (Hoffer and Hull 1984, 85). The British Parliament had possessed the authority to impeach anyone in the realm for any reason, and assuming it could get by the Lords, it could ask for any punishment. Abuses by the American assemblies made it clear, however, that the enormous power which impeachment had encompassed in the British experience would have to be curtailed.

Other prominent revolutionaries had direct experience with impeachment, and the topic was discussed among the elites which would form the state constitutions. John Adams played an important role in the impeachment of Peter Oliver, and subsequently included the following passage in his *Thoughts on Government*, which was circulated widely during April 1776 and clearly influenced the thinking of other American leaders:

“For misbehaviour the grand inquest of the Colony, the House of Representatives, should impeach [officials] before the Governor and Council, where they should have time and opportunity to make their defence, but if convicted should be removed from their offices, and subjected to such other punishments as shall be thought proper” (Hoffer and Hull 1984, 65).

The importance Americans ascribed to impeachment is evidenced by the fact that it was written into the first constitutional drafts of eight states: Massachusetts, Pennsylvania, North Carolina, Virginia, New York, Vermont, New Jersey and Delaware. Those drafting the state constitutions, then, were facing some important questions: Who can be impeached, and for what offenses?

It turns out that answers took on different appearances in different states. Generally, states limited impeachment to state officials, though some limitations were more rigid than others. By the end of the Virginia debate for example, George Mason’s draft restricting impeachment to office holders had been changed to the governor and others “offending against the state” (Hoffer and Hull 1984, 70), leaving the definition of “others” open to debate. On the question of scope of offenses reachable, there was far less agreement. In Pennsylvania, impeachment was limited to “mal-administration,” thus relegating common and statutory crimes to the courts. New York and North Carolina added corruption as an impeachable offense. New Jersey was the most liberal with the impeachment power, allowing impeachment for “misbe-

havior.” And Delaware tacked on the phrase, “or other means, by which the safety of the commonwealth may be endangered.” This disparity among different states becomes one of the key obstacles to defining the intention of the U.S. Constitution’s framers. Nevertheless, there was a republican consensus, with only small exceptions, that impeachment should be limited to office holders, for acts while in office, and that the punishment would be limited to removal and disqualification (Hoffer and Hull 1984, 68-69).

There was also disagreement among the drafters of the state constitutions about where the impeachment trial should be held. Many accepted the framework of trial in the upper houses, but Thomas Jefferson, having had a poor experience with legislative trial, supported trial in the Virginia Supreme Court by a conglomerate of officials from different branches of government. James Madison agreed and the methods they proposed for selecting the impeachment court grew fairly complex. At issue was the republican idea of separation of powers. What incentive did legislatures have to remove officials they had appointed? In the end, the states made varying attempts to balance trial in the upper house with the presence of judicial officials, all except Virginia, where impeachments were tried by the Supreme Court (Hoffer and Hull 1984, 70-75).

IMPEACHMENT IN THE U.S. CONSTITUTIONAL CONVENTION

By the time the Constitutional Convention convened in Philadelphia in the summer of 1787, republican impeachment had begun to take on a distinct republican shape—it was limited to office holders, for offenses outside the jurisdiction of the common law, with a punishment limited to removal and disqualification. Significantly, while these were the general trends, each state applied them slightly differently. On the issues of the impeachment trial and the scope of impeachment there were subtle but significant differences. It was not surprising therefore, that when delegates met in Philadelphia, impeachment of the executive was quickly agreed upon, but also that these differences were the objects of debate. It is important to note however, that neither the issue of trial, nor the issue of scope of offenses covered were motivated by fears of factionalism. It was not feared, for example, that it would be too difficult to get impeachment through the judiciary, nor that it would be too easy to get it through the Senate. It was not a concern that defining the scope of impeachment too broadly would allow factions to exploit the process. What little concern there was about factionalism was abated by the application of the two-thirds standard to the impeachment trial, another American innovation born during the drafting of state constitutions and also stemming from the requirement of nine states to ratify treaties in the Articles of Confederation.

On May 29, as part of the “Virginia Plan,” Randolph included the impeachment of any national officer, assigning

the trial to the national judiciary (Farrand 1911, 22). On June 18, Hamilton proposed trial by the “Chief or Judge of the Superior Court of Law of each State” (Farrand 1911, 292-93). This was a modification of the New York Court of Impeachments and Errors. Late in July, the Committee of Detail proposed a compromise of state precedents, where the trial would be by both the Senate and the judges of the federal judiciary (Farrand 1911, 136, 139). The sticking point lay in the early process for electing the Executive, providing for the election by Congress in joint session. Virginians held fast to trial in the judiciary, arguing that there would be a conflict of interest if impeachments of executive officials were tried by the same body that appointed them, and that it would violate separation of powers by creating a dependent Executive. There was also a fear that centralized election would allow foreign powers to use bribery to influence the election. Finally, in early September, these obstacles were overcome with the suggested alternative of the electoral college (McDonald 1998). Gouverneur Morris, explaining the committee’s reasoning, said that such a scheme allowed trial in the Senate while preserving separation of powers and averting conflicts of interest (Hoffer and Hull 1984, 99).

Interestingly, on the other point of difference, the scope of offenses reachable by the impeachment power, there is little record of any debate, but there surely must have been some sort of discussion. On June 2, Hugh Williamson, borrowing the words from his native North Carolina, suggested the Executive “be removable on impeachment and conviction of malpractice and neglect of duty,” a standard that persisted until August (Farrand 1911, 88). Suddenly on August 6, with no record of debate, the phrase was changed in Madison’s notes to “treason, bribery, or corruption” (Farrand 1911, 186). This change is interesting because treason is a criminal act for which trial had traditionally been held in the judiciary. Nevertheless, the new phrase was consistent with state impeachment precedent. By September 4, in Madison’s notes, the phrase had been reduced to “treason and bribery” again without record of debate (Farrand 1911, 499). On September 8, Madison documents this objection of George Mason:

“Why is the provision restrained to Treason and bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences....[I]t is more necessary to extend the power of impeachments.”

He proposed the addition of “maladministration” after bribery, but Madison objected that this was too vague and would make the Executive dependent upon the pleasure of the Senate. Colonel Mason withdrew “maladministration” and substituted “other high crimes and misdemeanors,” which was adopted, again without any record of discussion of any kind (Farrand 1911, 550). The words “against the state” and then “against the United States” are added and removed again between September 8 and September 12 (Farrand 1911, 550, 575, 600).

The phrase “high crimes and misdemeanors” appears nowhere in the state constitutions. It is one of the only exclusively English parts of the impeachment clause. But what does it mean? We have already observed that, although the words of the phrase may once have had precise legal definitions, the application of the phrase in the British impeachment process proved it to be very vague indeed. Most likely, delegates had little precise knowledge of English precedent, certainly not enough to form a definition of the phrase, so some have argued that since Mason substituted it after Madison’s objection to maladministration, it must be smaller in scope than that.

Others assert that it depends on whether high refers to both crimes and misdemeanors or just to crimes. Based on later statements by framers, Forrest McDonald offers his opinion that such an argument is meaningless because they clearly meant “high crimes or misdemeanors” (McDonald 1998). Hoffer and Hull see the change not as a bow to Madison’s objection, but a compromise. They conclude:

Misdemeanor, meaning lesser offenses, was by this time a catchall phrase in American criminal law. The addition of misdemeanors to the list of offenses meant that the House of Representatives was permitted to charge officials with minor breaches of ethical conduct, misuse of power, and neglect of duty, as well as more prolonged, egregious or financially rapacious misconduct (Hoffer and Hull 1984, 102).

It is very possible, however, that the addition of this archaic terminology allowed each delegate to envision “high crimes and misdemeanors” as consistent with his own views on the scope of the impeachment power. If that is the case, then historians and politicians will look in vain for the original intent of the framers, because, considering the differences that existed in the several states, it is not likely that a single intent existed.

Nevertheless, all of these arguments originate after the fact. Without any record of discussion regarding the phrase in the Convention, “high crimes and misdemeanors” on September 12 is the last word. There, the debate over the scope of the impeachment power ends. It plays no role in the ratification process. Impeachment in the ratification debate is only mentioned by Anti-Federalists in conjunction with their opposition to what they perceived as the excessive power of the Senate. Scope of offenses is mentioned only in passing by Alexander Hamilton in *Federalist Paper* # 65, stating his opinion that impeachable offenses are “political,” that they are “injuries done immediately to the society itself,” or actions that are “violations of the public trust” (Cooke 1961, 439). But these statements are consistent with the impeachment experience of New York, from which Hamilton was a delegate. And any statement made by delegates to the Convention in the ratification debate may have been motivated by political expediency, and thus may not truly reflect the intent of the Convention. The issue would reemerge with the very first federal impeachment, and surviving framers would make statements, but due to the new elements of party

politics, it is equally difficult to judge the accuracy of those statements, especially as they regard original intent.

The drafting of the Constitution is certainly not the end of the impeachment story. The debate will continue as long as the impeachment power is wielded by the Congress, and each time it is, just as in Parliament, that precedent becomes a part of impeachment. Thus, it is clear that the inherent pragmatism of the historical development of impeachment means that neither English parliamentary precedent, nor colonial application, nor the Convention record can answer for us the question of what is "impeachable." But perhaps turning to the framers to define what is impeachable only obfuscates the issue. Perhaps they would not want us to. Perhaps they would expect each generation of Americans to decide for themselves the impeachment question. In that case, the most appropriate question to ask is not what is impeachable, but instead, what *should be*.

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