

Constitution Society

Meaning of "High Crimes and Misdemeanors"

by Jon Roland, Constitution Society

The question of impeachment turns on the meaning of the phrase in the Constitution at Art. II Sec. 4, "Treason, Bribery, or other high Crimes and Misdemeanors". I have carefully researched the origin of the phrase "high crimes and misdemeanors" and its meaning to the Framers, and found that the key to understanding it is the word "high". It does not mean "more serious". It refers to those punishable offenses that only apply to high persons, that is, to public officials, those who, because of their official status, are under special obligations that ordinary persons are not under, and which could not be meaningfully applied or justly punished if committed by ordinary persons.

Under the English common law tradition, crimes were defined through a legacy of court proceedings and decisions that punished offenses not because they were prohibited by statutes, but because they offended the sense of justice of the people and the court. Whether an offense could qualify as punishable depended largely on the obligations of the offender, and the obligations of a person holding a high position meant that some actions, or inactions, could be punishable if he did them, even though they would not be if done by an ordinary person.

Offenses of this kind survive today in the Uniform Code of Military Justice. It recognizes as punishable offenses such things as perjury of oath, refusal to obey orders, abuse of authority, dereliction of duty, failure to supervise, moral turpitude, and conduct unbecoming. These would not be offenses if committed by a civilian with no official position, but they are offenses which bear on the subject's fitness for the duties he holds, which he is bound by oath or affirmation to perform.

Perjury is usually defined as "lying under oath". That is not quite right. The original meaning was "violation of one's oath (or affirmation)".

The word "perjury" is usually defined today as "lying under oath about a material matter", but that is not its original or complete meaning, which is "violation of an oath". We can see this by consulting the original Latin from which the term comes. From *An Elementary Latin Dictionary*, by Charlton T. Lewis (1895), Note that the letter "j" is the letter "i" in Latin.

periurium, i, n., a false oath, perjury.

periurus, adj., oath-breaking, false to vows, perjured. iuro, avi, atus, are, to swear, take an oath.

iurator, oris, m., a swearer.

iuratus, adj., sworn under oath, bound by an oath.

ius, iuris, that which is binding, right, justice, duty.

per, ... IV. Of means or manner, through, by, by means of, ... under pretense of, by the pretext of,

By Art. II Sec. 1 Cl. 8, the president must swear: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." He is bound by this oath in all matters until he leaves office. No additional oath is needed to bind him to tell the truth in anything he says, as telling the truth is pursuant to all matters except perhaps those relating to national security. Any public statement is perjury if it is a lie, and not necessary to deceive an enemy.

When a person takes an oath (or affirmation) before giving testimony, he is assuming the role of an official, that of "witness under oath", for the duration of his testimony. That official position entails a special obligation to tell the truth, the whole truth, and nothing but the truth, and in that capacity, one is punishable in a way he would not be as an ordinary person not under oath. Therefore, perjury is a high crime.

An official such as the president does not need to take a special oath to become subject to the penalties of perjury. He took an oath, by Art. II Sec. 1 Cl. 8, to "faithfully execute the Office of President of the United States" and to "preserve, protect and defend the Constitution of the United States" to the best of his ability. While he holds that office, he is always under oath, and lying at any time constitutes perjury if it is not justified for national security.

Independent Counsel Kenneth Starr erred in presenting in his referral only those offenses which could be "laid at the feet" of the president. He functioned like a prosecutor of an offense against criminal statutes that apply to ordinary persons and are provable by the standards of "proof beyond a reasonable doubt". That is not to say that such offenses are not also high crimes or misdemeanors when committed by an official bound by oath. Most such offenses are. But "high crimes and misdemeanors" also includes other offenses, applicable only to a public official, for which the standard is "preponderance of evidence". Holding a particular office of trust is not a right, but a privilege, and removal from such office is not a punishment. Disablement of the right to hold any office in the future would be a punishment, and therefore the standards of "proof beyond a reasonable doubt" would apply before that ruling could be imposed by the Senate.

It should be noted, however, that when an offense against a statute is also a "high crime or misdemeanor", it may be, and usually is, referred to by a different name, when considered as such. Thus, an offense like "obstruction of justice" or "subornation of perjury" may become "abuse of authority" when done by an official bound by oath. As such it would be grounds for impeachment and removal from office, but would be punishable by its statutory name once the official is out of office.

An executive official is ultimately responsible for any failures of his subordinates and for their violations of the oath he and they took, which means violations of the Constitution and the rights of persons. It is not necessary to be able to prove that such failures or violations occurred at his instigation or with his knowledge, to be able, in Starr's words, to "lay them at the feet" of the president. It is sufficient to show, on the preponderance of evidence, that the president was aware of misconduct on the part of his subordinates, or should have been, and failed to do all he could to remedy the misconduct, including termination and prosecution of the subordinates and compensation for the victims or their heirs. The president's subordinates include everyone in the

executive branch, and their agents and contractors. It is not limited to those over whom he has direct supervision. He is not protected by "plausible deniability". He is legally responsible for everything that everyone in the executive branch is doing.

Therefore, the appropriate subject matter for an impeachment and removal proceeding is the full range of offenses against the Constitution and against the rights of persons committed by subordinate officials and their agents which have not been adequately investigated or remedied. The massacre at Waco, the assault at Ruby Ridge, and many, many other illegal or excessive assaults by federal agents, and the failure of the president to take action against the offenders, is more than enough to justify impeachment and removal from office on grounds of dereliction of duty. To these we could add the many suspicious incidents that indicate covered up crimes by federal agents, including the suspicious deaths of persons suspected of being knowledgeable of wrongdoing by the president or others in the executive branch, or its contractors.

The impeachment and removal process should be a debate on the entire field of proven and suspected misconduct by federal officials and agents under this president, and if judged to have been excessive by reasonable standards, to be grounds for removal, even if direct complicity cannot be shown.

See also:

- [A defect in the Constitution](#) — There is no authority to criminally prosecute in federal court such offenses committed outside exclusively federal territory.

http://www.constitution.org/cmt/high_crimes.htm