Standards for Impeachment

"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."

--- *Article II, Section 4*

Teacher's Companion Lesson (PDF)

Impeachment is the constitutionally specified means by which an official of the executive or judicial branch may be removed from office for misconduct. There has been considerable controversy about what constitutes an impeachable offense. At the Constitutional Convention, the delegates early on voted for "mal-practice and neglect of duty" as grounds for impeachment, but the Committee of Detail narrowed the basis to treason, bribery, and corruption, then deleting the last point. George Mason, who wanted the grounds much broader and similar to the earlier formulation, suggested "maladministration," but James Madison pointed out that this would destroy the President's independence and make him dependent on the Senate. Mason then suggested "high Crimes and Misdemeanors," which the Convention accepted.

Because "high Crimes and Misdemeanors" was a term of art used in English impeachments, a plausible reading supported by many scholars is that the grounds for impeachment can be not only the defined crimes of treason and bribery, but also other criminal or even noncriminal behavior amounting to a serious dereliction of duty. That interpretation is disputed, but it is agreed by virtually all that the impeachment remedy was to be used in only the most extreme situations, a position confirmed by the relatively few instances in which Congress has used the device.

The word "impeachment" is popularly used to indicate both the bringing of charges in the House and the Senate vote on removal from office. In the Constitution, however, the term refers only to the former. At the Convention, the delegates experimented with differing impeachment proceedings. As finally agreed, a majority vote of the House of Representatives is required to bring impeachment charges (Article I, Section 2, Clause 5), which are then tried before the Senate (Article I, Section 3, Clause 6). Two-thirds of the Senate must vote to convict before an official can be removed. The President may not pardon a person who has been impeached (Article II, Section 2, Clause 1). If an official is impeached by the House and convicted by the requisite vote in the Senate, then Article I, Section 3, Clause 7, provides that the person convicted is further barred from any "Office of honor, Trust or Profit under the United States." The convicted official also loses any possible federal pensions. With a few exceptions, those impeached and removed have generally faded into obscurity.

In *The Federalist* No. 64, John Jay argued that the threat of impeachment would encourage executive officers to perform their duties with honor, and, used as a last resort, impeachment

itself would be effective to remove those who betray the interests of their country. Like the limitations on the offense of treason, the Framers placed particular grounds of impeachment in the Constitution because they wished to prevent impeachment from becoming a politicized offense, as it had been in England. Nonetheless, Alexander Hamilton, in *The Federalist* No. 65, also warned that during impeachment proceedings, it would be difficult for Congress to act solely in the interests of the nation and resist political pressure to remove a popular official. The Framers believed that the Senate, elected by the state legislatures, would have the requisite independence needed to try impeachments. The Framers also mandated a supermajority requirement to militate against impeachments brought by the House for purely political reasons.

There have been several impeachment proceedings initiated since the adoption of the Constitution, principally against judges in the lower federal courts. The most important impeachments were those brought against United States Associate Justice Samuel Chase in 1805, against President Andrew Johnson in 1867, and against President William Jefferson Clinton in 1999. None of these three resulted in removal from office, and all three stand for the principle that impeachment should not be perceived as a device simply to remove a political opponent. In that regard, the caution of the Framers has been fulfilled.

President George Washington appointed Samuel Chase to the Supreme Court in 1796. Washington had been warned of Chase's mercurial behavior, but Chase had written the President that, if he were appointed, he would do nothing to embarrass the administration. In his early years on the Court, Chase kept his pledge and did render some fine decisions clarifying the powers of the federal government. In the election of 1800, however, when Thomas Jefferson ran against Washington's Vice President and successor John Adams, Chase earned the ire of Jefferson's emerging Republican party. For one thing, Chase actively took to the hustings to campaign for Adams (a move rare for sitting judges even then). What finally brought President Jefferson to approve of efforts by his party's representatives in Congress to remove the judge was a grand-jury charge Chase made in Baltimore in 1803. There Chase lamented the Jeffersonian restructuring of the federal judiciary in order to abolish the Circuit Court judgeships that the Adams administration had created, and the Maryland Jeffersonians' abolishing a state court and establishing universal male suffrage in Maryland. Chase argued that all of this was plunging the country into "mobocracy." Chase voiced sentiments common to a wing of the party of Washington and Adams, but Jefferson and his men believed that to have a federal judge publicly articulating such views was harmful to the government, and they moved against Chase. In addition to citing his behavior in Baltimore, the impeachment charges included several counts based on Chase's conduct during controversial trials in 1800 against Jeffersonian writers who had been prosecuted under the Alien and Sedition Act of 1798 (a temporary measure that punished libels against the government).

The proceeding against Chase was part of a broader Jeffersonian assault on the judiciary, and it was widely believed, at least among Federalists, that if it were successful, Chief Justice John Marshall might be the next target. None of the specifications brought against Chase charged him with any criminal conduct, and their thrust seemed to be that his legal rulings were simply not in accordance with Jeffersonian theory on how trials ought to be conducted or how juries should function. There was substantial legal precedent behind each of Chase's rulings, however, and although he may have been guilty of having a hair-trigger temper, it was also clear that to permit

his removal would seriously, perhaps permanently, compromise the independence of the judiciary. The requisite two-thirds majority of Senators could not be cobbled together to remove Chase, and, in fact, members of Jefferson's own party even voted for acquittal. From that time to this, the Chase acquittal has been understood to bar the removal of a Supreme Court Justice on the ground of his political preferences. Subsequently, there have been several attempts to begin impeachment proceedings against particular Justices, but none has ever prevailed in the House.

Andrew Johnson, who succeeded to the presidency following Abraham Lincoln's assassination in 1865, was impeached because of his failure to follow procedures specified in federal legislation (passed over his veto) that prohibited the firing of Cabinet officials without the permission of Congress. The legislation, known as the Tenure of Office Act, was arguably unconstitutional because it compromised the independence of the executive. Nevertheless, the radical Republicans, who then controlled Congress and who recoiled at President Johnson's active hostility to their plans to protect the newly freed slaves, sought to keep the sympathetic members of Abraham Lincoln's Cabinet in office. When Johnson fired Secretary of War Edwin Stanton, the gauntlet was thrown down, and impeachment was voted by the House. Though just as political as the Chase impeachment proceedings, there was some support for the Tenure of Office Act (Alexander Hamilton, writing in the *The Federalist* No. 77, had suggested that the consent of the Senate would be necessary "to displace as well as to appoint" officials). As it turned out, the conviction of Johnson failed in the Senate by only one vote.

The administration of President William Jefferson Clinton was beset by assorted scandals, many of which resulted in the appointment of special federal prosecutors, and several of which resulted in the convictions of lesser officials. One of the special prosecutors, Kenneth Starr, recommended to the Congress in 1998 that it consider evidence that the President had obstructed justice, tampered with witnesses, lied to a grand jury, and sought to conceal evidence in connection with a civil proceeding brought against him involving claims of sexual harassment. President Clinton denied the charges, but the Arkansas federal judge who presided in that civil proceeding eventually cited and fined Clinton for contempt based on his untruthful testimony.

A majority of the Republican-controlled House of Representatives voted in early 1999 to impeach the President based upon Judge Starr's referral. The House managers argued that what the President had done was inconsistent with his sworn duty to take care that the laws of the nation be faithfully executed. When the matter was tried in the Senate, in February 1999, however, the President's defenders prevailed, and no more than fifty Senators (all Republicans) could be found to vote for conviction on any of the charges.

The only other time a President came close to being impeached was the case of Richard M. Nixon. He resigned from office in 1974, after a House Committee had voted to put before the full House a number of impeachment charges, the most serious of which was that he had wrongly used the FBI and the CIA in order to conceal evidence that persons connected to the White House had participated in a burglary at the Democratic Party's offices at the Watergate apartment complex. Nixon avoided impeachment, though not disgrace.

There is no authoritative pronouncement, other than the text of the Constitution itself, regarding what constitutes an impeachable offense, and what meaning to accord to the phrase "other high

Crimes and Misdemeanors." When he was a Congressman, Gerald R. Ford advocated the ultimately unsuccessful impeachment of a Supreme Court Justice by defining an impeachable offense as anything on which a majority of the House of Representatives can agree. As impeachment is understood to be a political question, Ford's statement correctly centers responsibility for the definition of "high Crimes and Misdemeanors" in the House. The federal courts have thus far treated appeals from impeachment convictions to be nonjusticiable. *Nixon v. United States* (1993). Even if the issue of impeachment is nonjusticiable, it does not mean that there are no appropriate standards that the House should observe.

Some scholarly commentary at the time of the Nixon impeachment proceedings argued that the actual commission of a crime was necessary to serve as a basis for an impeachment proceeding. However, the historical record of impeachments in England, which furnished the Constitution's Framers with the term "high Crimes and Misdemeanors," does not support such a limitation; at that time, the word "Misdemeanors" meant simply "misdeeds," rather than "petty crimes," as it now does. The issue was revisited at the time of the Clinton impeachment, when those who sought to remove the President from office, basing their arguments principally on the English experience and *The Federalist* No. 64, claimed that a President could be removed for any misconduct that indicated that he did not possess the requisite honor, integrity, and character to be trusted to carry out his functions in a manner free from corruption. As James Iredell (later Associate Justice of the Supreme Court) opined in the North Carolina ratifying convention, impeachment should be used to remedy harm "arising from acts of great injury to the community."

On the other hand, some have argued that a President should not be impeached unless he has actually engaged in a major abuse of power flowing from his office as President (although judges, who serve during "good behavior," have been impeached for conduct occurring outside of their official duties). In the end, because it is unlikely that a Court would ever exercise judicial review over impeachment and removal proceedings, the definitional responsibility to carry them out with fidelity to the Constitution's text remains that of the House of Representatives and the Senate.

Stephen B. Presser
Sullivan & Cromwell Professor of Law
Northwestern University School of Law

Further Reading

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- Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 Geo. Wash. L. Rev. 666 (1999)
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- Richard Posner, An Affair of State: The Investigation, Impeachment and Trial of President Clinton (1999)
- William H. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson (1992)
- Peter Charles Hoffer and N.E.H. Hull, Impeachment in America, 1635–1805 (1984)
- Stanley I. Kutler, The Wars of Watergate: The Last Crisis of Richard Nixon (1990)
- Cass R. Sunstein, *Impeachment and Stability*, 67 Geo. Wash. L. Rev. 699 (1999)
- Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (1999)

Case Law

- Nixon v. United States, 506 U.S. 224 (1993)
- United States v. Nixon, 418 U.S. 683 (1974)
- Clinton v. Jones, 520 U.S. 681 (1997)

http://www.heritage.org/constitution/#!/articles/2/essays/100/standards-for-impeachment