

NYTimes Excerpts From Impeachment Study by House Aides

WASHINGTON, Feb. 21—
The following are excerpts of a memorandum prepared for the House Judiciary Committee by the impeachment inquiry staff lawyers on conduct for which a president might be impeached:

Introduction

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

The Historical Origins of the Impeachment Process.

The Constitution provides that the President "shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." The framers could have written simply "or other crimes" . . . as indeed they did in the provision for extradition of criminal offenders from one state to another.

They did not do that. If they had meant simply to denote seriousness, they could have done so directly. They did not do that either. They adopted instead a unique phrase used for centuries in English parliamentary impeachments, for the meaning of which one must look to history.

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 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 Intention of the Framers

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; they hoped, in the words of Elbridge Gerry of Massachusetts, that "the maxim would never be adopted here that the chief magistrate could do no wrong."

Impeachment was to be one of the central elements of executive responsibility in the framework of the new government as they conceived it.



The New York Times/George Tames

Members of the House Judiciary Committee at a hearing defining impeachable conduct. From left are John M. Doar, special counsel; Peter W. Rodino Jr., chairman; Edward Hutchinson, ranking Republican, and Albert E. Jenner Jr., minority counsel.

The constitutional grounds for impeachment of the President received little direct attention in the convention, the phrase "other high crimes and misdemeanors" was ultimately added to "treason" and "bribery" with virtually no debate. There is evidence, however, that the framers were aware of the technical meaning the phrase had acquired in English impeachments.

The convention had earlier demonstrated its familiarity with the term "high misdemeanor." A draft constitution had used "high misdemeanor" in its provision for the extradition of offenders from one state to another. The convention, apparently unanimously, struck "high misdemeanor" and inserted "other crime" . . . "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited."

The "technical meaning" referred to is the parliamentary use of the term high misdemeanor. Blackstone's "Commentaries on the Laws of England"—a work cited by delegates in other portions of

the convention's deliberations and which Madison later described (in the Virginia ratifying convention) as "a book which is in every man's hand"—included "high misdemeanors" as one term for positive offenses "against the king and government."

The "first and principal" high misdemeanor, according to Blackstone, was "maladministration of such high officers, as are in public trust and employment," . . . "usually punished by the method of parliamentary impeachment."

Ground for Impeachment

An extensive discussion of the scope of the impeachment power occurred in the House of Representatives in the first session of the First Congress.

The House was debating the power of the President to remove the head of an executive department appointed by him with the advice and consent of the Senate, an issue on which it ultimately adopted the position, urged primarily by James Madison, that the Constitution vested the power exclusively in the President.

The discussion in the House lends support to the view that the framers intended the im-

peachment power to reach failure of the President to discharge the responsibilities of his office.

From the comments of the framers and their contemporaries, the remarks of the delegates to the state ratifying conventions, and the removal power debate in the First Congress, it is apparent that the scope of impeachment was not viewed narrowly. It was intended to provide a check on the President through impeachment, but not to make him dependent on the unbridled will of the Congress.

The American Impeachment Cases

Thirteen officers have been impeached by the House since 1787: one President, one Cabinet officer, one United States Senator, and 10 Federal Judges.

Each of the 13 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.

Past impeachments are not precedents to be read with an eye for an article of impeachment identical to allegations that may be currently under consideration. The American impeachment cases demonstrate a common theme useful in determining whether grounds for impeachment exist—that the grounds are derived from understanding the nature, functions and duties of the office.

The Criminality Issue

The phrase "high crimes and misdemeanors" may connote "criminality" to some. This likely is the predicate for some of the contentions that only an indictable crime can constitute impeachable conduct. Other advocates of an indictable-offense requirement would establish a criminal standard of impeachable conduct because that standard is definite, can be known in advance and reflects a contemporary legal view of what conduct should be punished.

A requirement of criminality would require resort to familiar criminal laws and concepts to serve as standards in the impeachment process. Furthermore, this would pose problems concerning the applicability of standards of proof and the like pertaining to the trial of crimes.

The American experience with impeachment reflects the principle that impeachable conduct need not be criminal. Of the 13 impeachments voted by the House since 1789, at least 10 involved one or more allegations that did not charge a violation of criminal law.

Impeachment 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 the officer from criminal liability for his wrongdoing.

To confine impeachable conduct 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.

Conclusion

Impeachment is a constitutional remedy addressed to serious offenses against the system of government. The purpose of impeachment under the Constitution is indicated by the limited scope of the remedy (removal from office and possible disqualification from future office) and by the stated grounds for impeachment (treason, bribery and other high crimes and misdemeanors).

It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are "high offenses in the sense that word was used in English impeachments.

The content of the phrase "high crimes and misdemeanors" for the framers is to be related to what the framers knew, on the whole, about the English practice—the broad sweep of English constitutional history and the vital role impeachment had played in the limitation of royal prerogative and the control of abuses of ministerial and judicial power.

The framers understood quite clearly that the constitutional system they were creating must include some ultimate check on the conduct of the executive, particularly as they came to reject the suggested plural executive. While insistent that balance between the executive and legislative branches be maintained so that the executive would not become the creature of the legislature, dismissible at its will, the framers also recognized that some means would be needed to deal with excesses by the executive.

While it may be argued that some articles of impeachment have charged conduct that constituted crime and thus that criminality is an essential ingredient, or that some have charged conduct that was not criminal and thus that criminality is not essential, the fact remains that in the English practice and in several of the American impeachments the criminality issue was not raised at all.

The emphasis has been on the significant effects of the conduct—undermining the integrity of office, disregard of constitutional duties and oath of office, abrogation of

power, abuse of the governmental process, adverse impact on the system of government. Clearly, these effects can be brought about in ways not anticipated by the criminal law.

Criminal standards and criminal courts were established to control individual conduct. Impeachment was evolved by Parliament to cope with both the inadequacy of criminal standards and the impotence of courts to deal with the conduct of great public figures.

It is useful to note three major Presidential duties of broad scope that are explicitly recited in the Constitution: "to take care that the laws be faithfully executed," 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.

The first is directly imposed by the Constitution; the second and third are included in the constitutionally prescribed oath that the President is required to take before he enters upon the execution of his office and are, therefore, also expressly imposed by the Constitution.

The duty to take care is affirmative. So is the duty faithfully to execute the office. A President must carry out the obligations of his office diligently and in good faith. The elective character and political role of a President make it difficult to define faithful exercise of his powers in the abstract.

A President must make policy and exercise discretion. This discretion necessarily is broad, especially in emergency situations, but the constitutional duties of a President impose limitations on its exercise.

The "take care" duty emphasizes the responsibility of a President for the over-all conduct of the executive branch, which the Constitution vests in him alone. He must take care that the executive is so organized and operated that this duty is performed.

The duty of a President to "preserve, protect, and defend the Constitution" to the best of his ability includes the duty not to abuse his powers or transgress their limits—not to violate the rights of citizens, such as those guaranteed by the Bill of Rights, and not to act in derogation of powers vested elsewhere by the Constitution.

Not all Presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding 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 principles of our government or the proper performance of constitutional duties of the Presidential office.