IMPEACHMENT: ITS HISTORY

Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?

Under our Constitution, and in the British system from which it is derived, impeachment was conceived as most important for control of the excesses of the Executive. In England it was the primary tool in the democratic struggle, Parliament's struggle, for supremacy over the King. In our Constitution, impeachment was the primary means provided the people, through their Congress, for protection from the Presidency, an office which the Founders, who had experienced dictatorship by the King, distrusted even as they were creating it.

Beginning in the late 14th century during the reign of Edward III, the House of Commons and House of Lords, newly separated from each other, flexed their political muscle by removing several corrupt and oppressive ministers despite their rank and favor with the King. Following the pattern which was to be incorporated into the Constitution of the United States 400 years later, the Commons proposed and the Lords disposed, i.e. the Commons impeached and the Lords tried and sentenced.

In England

More than 50 impeachments were brought to trial in England between 1621 and 1787, when the framers of the American Constitution began their work.[1] History told them that impeachment was not the "last resort" of desperate men[2] but was, instead, a powerful, regular, and important tool for the control of executive power.

Edmund Burke, opening the trial of Hastings before the House of Lords, described impeachment as a vital check on the heedlessness of power:

> It is by this tribunal, that statesmen, who abuse their power, are accused by statesmen, and tried by statesmen, not upon the niceties of a narrow jurisprudence, but upon the enlarged and solid principles of state morality.[3]

In the words of the House of Commons in 1679, impeachment was "the chief institution for the preservation of the government."[4]

As early as 1388, convicting six judges on impeachment charges brought by the House of Commons, the Lords declared themselves bound not by the common law of the inferior courts but only by the precedents of Parliament.[5] And in 1642, with the impeachment of the Earl of Strafford for treason, Parliament laid the foundations for a representative government in which the highest officials would be accountable to the people and subject to the rule of law.

The Commons charged Strafford with subverting the fundamental law and introducing an arbitrary and tyrannical government.[6] Treason, declared John Pym, a leader of the Commons, embraced acts which altered "the settled frame and constitution of government" as well as acts against the king himself.[7] "If it be treason to kill the governor," said another member of Commons, "then sure 'tis treason to kill the government."[8]

Over the years, the House of Commons impeached for a wide variety of misconduct, including violations of the criminal law and conduct which violated no law. Impeachment lay for subversion of the constitution, betrayal of trust, neglect of duty, corruption, and encroachment on the prerogatives of Parliament.[9]

In America

Impeachment in America was a reflection of the 17th century struggle by Parliament to curb ministers who were tools of royal oppression.[10] Nearly all early state constitutions followed English tradition and provided for impeachment on grounds which included endangering the safety of the state through "maladministration, corruption or other means,"[11] misconduct and maladministration in office,[12] or "misdemeanor or default."[13] On July 20, 1787, the delegates to the Constitutional Convention, drawing on English and colonial experience, debated the question, "Shall the Executive Be Removable on Impeachments?" The answer was a resounding yes.[14]

The Founders were preoccupied by control of the Executive. George Mason of Virginia, later author of much of the Bill of Rights, declared that "when great crimes were committed he was for punishing the principal as well as the Coadjutors." Mason asked:

> Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?[15]

William R. Davie of North Carolina considered impeachment "an essential security for the good behavior of the Executive," for if not impeachable while in office, "he will spare no efforts or means whatever to get himself re-elected."[16]

11/74

"Guilt wherever found ought to be punished," said Virginia Governor Edmund Randolph. He thought impeachment necessary because the executive would have great opportunities for abuse of power, especially the power to wage war.[17]

Historically, impeachable offenses in the United States have been defined as public wrongs by public men. In the discussion which determined the wording of Article II, § 4, George Mason objected to limiting the grounds for impeachment to treason and bribery. In response to English excesses, the American Constitution had closely defined and limited treason charges to certain conduct.[18] Mason warned that treason as so defined would not reach many "great and dangerous offenses" which ought to be impeachable, such as "[a]ttempts to subvert the Constitution."[19] After Madison rejected addition of "mal-administration," Mason proposed and the Convention adopted the term "high crimes and misdemeanors."[20] This was a technical term in English law, used primarily in connection with impeachment proceedings to reach abuses of the public trust.[21] English precedents make it clear that "high" crimes and misdemeanors were not ordinary crimes.[22] A "high" crime signified an act against the state as opposed to an act against a private person.[23] Injury to the nation was the gravamen of the offense.

James Wilson, later a Supreme Court Justice and second only to Madison as a constitutional architect, declared that "impeachments are confined . . . to political crimes and misdemeanors, and to political punishments."[24] James Iredell, another future Supreme Court Justice and chief advocate of ratification in North Carolina, said that impeachment was designed "to bring great offenders to punishment" for "high crime and misdemeanor against the government . . . [T]he occasion for its exercise will arise from acts of great injury to the community."[25] Alexander Hamilton described impeachment as intended to reach "the misconduct of public men" and "*abuse or violation of some public trust*." Impeachable offenses are political, said Hamilton, "as they relate chiefly to injuries done immediately to the society itself."[26]

One such political and impeachable offense encompasses the failure of the President to control his appointees and agents. Debating the power of the President to remove his appointees from office without Senate consent, James Madison eloquently explained:

> . . . it may, perhaps, on some occasion, be found necessary to impeach the President himself; surely, therefore, it may happen to a subordinate officer, whose bad actions may be connived at or overlooked by the President. . . . I think it absolutely necessary that the President should have the power of removing from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses. On the Constitutionality of the declaration I have no manner of doubt.[27]

Even those who disagreed with Madison's expansive view of Presidential power agreed with his view of Presidential responsibility. The President should be "as responsible as possible," said Elbridge Gerry of Massachusetts.[28] The First Congress, by a wide majority, declared that the power to remove presidential appointees resided in the President alone.[29] The President, after all, was responsible for their acts.

Despite such overwhelming evidence, some have concluded either that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history," as Congressman Gerald R. Ford asserted in proposing impeachment of Justice William O. Douglas in 1970[30] or that impeachment offenses are limited to indictable crimes, as Douglas' attorney maintained.[31]

But the clear lesson of history is otherwise. In the 12 impeachments, 11 of which were brought to trial before the Senate, and in some 50 other instances where impeachment of federal officials has been seriously considered, Congress has refused to ignore the limiting principles set by the Constitutional framers or to cramp the impeachment power within the strict confines of criminal law.

Of the cases brought to trial before the Senate, only four have resulted in conviction and removal. All four were federal judges—John Pickering in 1804, West H. Humphreys in 1862, Robert W. Archbald in 1912, and Halsted L. Ritter in 1936.

Pickering was drunken, senile, and insane, clearly unable to perform his duties as a federal judge.[32]

Humphreys of Tennessee was impeached and convicted for conduct described as "high crimes and misdemeanors," after he commenced acting as a judge for the Confederacy.[33]

Archbald used his position and influence to obtain favors from litigants who appeared before him.[34]

Ritter was charged with practicing law while in office and evading income taxes—charges which he admitted while denying wrongful intent.[35]

The most famous acquittals involved Supreme Court Justice Samuel Chase in 1805 and President Andrew Johnson in 1868—the latter trial failing by just one vote of the two-thirds majority for conviction.

Chase, a "terror on the bench," bullied counsel, witnesses, and juries.[36] Even his friend, Chief Justice John Marshall, described his judicial conduct as "tyrannical, oppressive, and overbearing."[37] Chase vigorously enforced the Alien and Sedition Laws, going so far as to announce his decision on one case in advance of the trial.[38] Nonetheless, after an impeachment trial marked by political extremism on both sides, Chase was acquitted.[39]

Johnson, protagonist in a bitter struggle between Congress and the executive branch over Reconstruction, was impeached for refusing to implement the Tenure of Office Act, which curtailed Presidential power to remove his appointed officials without Senate consent. Johnson claimed the law was unconstitutional—a position the Supreme Court eventually adopted.[40] *Presidential accountability for the acts of his subordinates was the very basis of President Johnson's defense. He had to be able to remove his appointees for he was responsible for their acts; and indeed he could be impeached for their acts.* There are no indications that, had the issues been presented to the courts, the President would have failed to bow to the judicial branch's interpretation of the Constitution.[41]

Of the other cases where impeachment charges were considered but not brought, a substantial majority involved federal judges accused of financial corruption. Other judges have been accused of but not impeached for incompetence, drunkenness, and prejudice.

Conclusion

The history of impeachment "shows that it works. It is not a rusty unused power."[42] It has been successfully used to curb breaches and abuses of public trust. Although "the lion's share of the debate about impeachment in the last 40 years"[43] has focused on removal of judges, restraint on the Executive was the Founders' primary target. Impeachment was conceived chiefly as a "bridle" upon the President and his associates.[44]

Impeachment is one of the ultimate sanctions of the American constitutional system, a part of the arrangement of checks and balances. It is a means to determine the guilt or innocence of the government official accused. It is the means to remove from office those found guilty of treason, bribery, and other high crimes and misdemeanors. But, most importantly, it is the means to declare that certain acts subvert the political principles on which our system of government itself is based.

The Procedures

"[A] method of national inquest into the conduct of public men." Alexander Hamilton in *The Federalist*, No. 65.

Impeachment proceedings are not criminal; consequently, the procedures are more relaxed than criminal procedures. Under the Constitution, the House of Representatives serves not as judges or jurors but as the prosecutor. The Senate chamber is the courtroom, and the Senate is the jury. The sole penalty is removal from office and disqualification from further office. The only non-judicial trial process authorized by the Founders, impeachment provides a political remedy for political offenses.

The terminology of impeachment is sometimes confusing because the word "impeach" is often used to describe three distinct steps in the process. Any member of the House may rise to "impeach," in the form of floor speech or introduction of a resolution or a memorial. The House votes to "impeach" when it adopts articles of impeachment, roughly analogous to an indictment. At the conclusion of the subsequent Senate trial, the Senators vote to acquit or convict. A Senate conviction is often inaccurately referred to as "impeachment." In fact, *it is only the House which impeaches;* the Senate convicts.

The procedures which the House and Senate follow during the impeachment process are governed by three sources: the Constitution itself, Jefferson's *Manual* (a document written by Thomas Jefferson which is still one of the sources of the parliamentary practice of the House of Representatives), and *Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.*

The Constitution's procedural commands are quite simple: The House of Representatives has the sole power to impeach; the Senate has the sole power to try those impeached by the House and can convict only on a two-thirds vote; the penalties are limited to removal and disqualification from office; the Chief Justice presides over the Senate when the President is to be tried.

The teachings of Jefferson's *Manual*, along with the accumulated precedents from past impeachments which are collected therein, supply the framework within which the House acts.

The process of impeachment in the House may begin in a variety of ways: by charges made on the floor by a member;

by resolution or memorial; by charges transmitted from the President, a state legislature, a grand jury; or in response to facts derived and reported by an investigating committee of the House. Indeed, "common fame," such as facts contained in newspaper reports, has at times led the House to order an investigation with a view toward impeachment. As Thomas Jefferson, drawing on a 1625 Resolution of Parliament, said: "Common fame is a good ground for the House to proceed by inquiry, and even to accusation."

The House has always had one of its existing committees or a specially-created Select Committee examine the charges before it has voted to impeach. In some instances committees initiated inquiries *ex parte* (without providing the accused notice and an opportunity to testify). However, later practice favors permitting the official to testify, present witnesses, cross-examine, and be represented by counsel.

If the investigating committee recommends impeachment, it sends to the House a resolution and articles of impeachment which specify the grounds of accusation. These are then debated and voted upon, a majority vote of those present being required to bring the President to trial. The House then selects "managers" to prosecute the impeachment in the Senate trial. In the past, House managers have been chosen by the Speaker or by majority vote of House members. The House managers then transmit the articles of impeachment to the Senate. The Senate, in turn, informs the House when it is ready to proceed with the trial.

The Senate trial is governed by the Senate Rules of Procedure mentioned above. When the President is on trial, the Chief Justice presides. The trial begins with the Chief Justice administering an oath to the Senate members. Each must swear or affirm that he or she will "do impartial justice according to the Constitution and laws." The accused is then summoned to appear and answer the charges. The accused may appear personally or by counsel. A failure to appear personally or by counsel is treated as the equivalent of a plea of "not guilty."

The proceedings are somewhat similar to, but far more flexible than, those applicable in either a civil or criminal trial. Both sides may present witnesses and evidence and the accused has the right to cross-examine witnesses. Procedural questions which arise during the trial, such as questions of evidence, are ruled upon by the Chief Justice. However, at the request of a single member, he may be overruled by a majority vote of the Senators present.

The Constitution specifically provides that conviction requires a two-thirds vote of the Senators present. The Senate rules require a separate vote on each article (charge). A two-thirds vote on a single article is sufficient for conviction.

The Constitution limits the penalties to removal from office and disqualification from future office.

Footnotes

1. Most of these were brought before 1725. 1 Sir William S. Holdsworth, *A History of English Law* 382 (3d ed. 1922). But the controversial impeachment of Warren Hastings, led by Edmund Burke, was under way in England while the Federal Conventions sat in Philadelphia, as the framers of the Constitution well knew. R. Berger, *Impeachment: The Constitutional Problems (1973)* at 3, 86.
2. See Berger, *supra*, at 299.
3. *7 Works of Edmund Burke* 13-14 (Boston, 1839).
4. Holdsworth, *supra*, at 383; Berger at 1.
5. 4 Hatsell, *Precedents of Proceedings in the House of Commons* 64 (1796).
6. 8 John Rushworth, *Historical Collections* 8 (1721); Berger, *supra*, at 32.
7. Rushworth, *supra*, at 669; Berger, *supra*, at 33.
8. C. Russell, *The Theory of Treason in the Trial of Strafford*, 80 Eng. Hist. Rev. 30, 38 (1965); Berger, *supra*, at 34.
9. The charges are summarized and characterized in Berger, *supra*, at 67-71.
10. Berger, *supra*, at 4.
11. Delaware Constitution of 1776, 1.B. Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, 276-277 (2d ed. 1868); Virginia Constitution of 1776, 2 Poore 1912.
12. Massachusetts Constitution of 1780, 1 Poore 963; New Hampshire Constitution of 1784, 2 Poore 1286.
13. Connecticut Charter of 1662, 1 Poore 254.
14. 2 M. Farrand, *The Records of the Federal Convention of 1787*, 61, 69 (1937 ed.).
15. *Id.* at 65.
16. *Id.* at 64.
17. *Id.* at 67.
18. Article III, Section 3, clause 1 provides: "Treason shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."
19. 2 Farrand 550.
20. *Id.*
21. 4 Blackstone, *Commentaries* 121; Berger, *supra*, at 74-75. The Framers understood this term had such a technical meaning. During the Constitutional Convention, it was proposed that extradition would be for treason, felony or "high misdemeanor." Recognizing that "high misdemeanor" had a technical meaning, limited to impeachable offenses against a state, the words "other crimes" were substituted to convey more clearly the notion of *serious* but not political misdemeanors. Farrand, *The Records of the Federal Convention of 1787*, 443 (New Haven 1911-37); discussed in Berger at pp. 74, 86.
22. Berger at 62.
23 *Id.* at 61.
24. 1 *Works of James Wilson* 426 (McCloskey ed. 1967).
25. 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 113 (2d ed. 1836).
26. *The Federalist*, No. 65, at 17 (Tudor Pub. Co. ed. 1937).
27. House Comm. on the Judiciary, 93rd Cong., 1st Sess. *Impeachment: Selected Materials* 10-11 (Comm. Print 1973).
28. *Id.* at 18.
29. *Id.* at 20.
30. 116 *Cong. Record H.* 3113-14 (April 15, 1970); Berger at 53.
31. S.H. Rifkind, *Memorandum on Impeachment of Federal Judges*, reprinted in Special Subcomm. on H. Res. 920 of the House Judiciary Comm., 91st Cong., 2d Sess., *Legal Materials on Impeachment* 24 (1970). The same arguments were made by those who sought to impeach, and those who sought to defend, President Andrew Johnson. 3 *Hinds' Precedents of the House of Representatives*, Sec. 2008 (1907).
32. F. Thompson & O.H. Pollitt, *Impeachment of Federal Judges: An Historical Overview* 49 N. Car. L. Rev. 87 (1970).
33. *3 Hinds' Precedents of the House of Representatives of the United States* § 2384, at 805 and § 2390, at 810 (1907).
34. J.D. Ferrick, *Impeaching Federal Judges: A Study of the Constitutional Provisions* 39 Fordham L. Rev. 1 (1970).
35. 80 *Congressional Record* 4899-4906 (1936).
36. Thompson & Pollitt, *supra* note 1; 3 A. Beveridge, *Life of John Marshall* 46-47 (1919).
37. A. Beveridge, *Life of John Marshall* 195 (1919).
38. *Id.* at 37-39.
39. *Id.* at 219-220.
40. *Myers* v. *United States*, 272 U.S. 52 (1926).
41. Berger, 292-294.
42. Thompson and Pollitt, *supra*, note 1.
43. Berger at 297.
44. *Id.* at 122.