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Impeachment Standards

Following are excerpts from an analysis of the constitutional standards for impeachment prepared by attorneys for President Nixon and submitted to members of the House Judiciary Committee's impeachment inquiry staff:

The English impeachment precedents represent the context in which the framers drafted the constitutional impeachment provision. In understanding this context and what it implies two things should be remembered.

First, the framers rejected the English system of government that existed in 1776: namely, absolute parliamentary supremacy. Instead, they opted for limited government with a finely devised system of separated powers in different branches.

Second, throughout the history of English impeachment practice, (beginning in 1376 and ending in 1805) there were two distinct types of impeachment in England. One type represented a well-established criminal process for reaching great offenses committed against the government by men of high station—who today would occupy a high government office. The other type of impeachments used this well-established criminal process in the 17th and early 18th century for the political purpose of achieving the absolute political supremacy of Parliament over the executive.

". . . a President may only be impeached for indictable crimes."

It is clear from the context of the constitutional commitment to due process that the framers rejected the political impeachments. They included in the impeachment provisions the very safeguards that had not been present in the English practice . . .

The language of the impeachment clause is derived directly from the English impeachments. "High crimes and misdemeanors" was the standard phrase used by those impeachments from 1376 onwards . . .

In light of English and American history and usage from the time of Blackstone onwards, there is no evidence to attribute anything but a criminal meaning to the unitary phrase "other high crimes and misdemeanors."

The only debate at the Constitutional Convention that is relevant to the impeachment clause is that which occurred subsequent to agreement by the framers on a concept of the presidency. Before Sept. 8, 1787, the debates were general and did not focus on a conclusive plan for the Chief Executive . . .

The Sept. 8 impeachment debate, the only one based on a clear concept of the actual presidency, emphatically rejected "maladministration" as a standard for impeachment. Madison and Morris vigorously noted the defects of "maladministration" as an impeachment standard. Maladministration would set a vague standard and would put the President's tenure at the pleasure of the Senate. Moreover, it could be limited by the daily check of Congress, and the adoption of a four-year term.

Colonel Mason then withdrew the term "maladministration" and substituted the current phrase in response to the criticisms of Madison and Morris. The debates clearly indicate a purely criminal meaning for "other high crimes and misdemeanors."

The words "treason, bribery, or other high crimes and misdemeanors," construed either in light of present usage or as understood by the framers in the late 18th century, mean what they clearly connote—criminal offenses. Not only do the words inherently require a criminal offense, but one of a very serious nature committed in one's governmental capacity.

This criminality requirement is reinforced by judicial construction and statutory penalty provisions. It is further evidenced by the criminal context of the language used in the other constitutional provisions concerning impeachment, such as Art. III, Sec. 2, Cl. 3, which provides in part, "the trial of all crimes, except in cases of impeachment, shall be by jury."

A careful examination of the American impeachment precedents reveals that the United States House of Representatives has supported different standards for the impeachment of judges and a President since 1804. This is consistent with judicial construction of the Constitution as defined by the United States Supreme Court, and the clear language of the Constitution which recognizes a distinction between a President who may be removed from office by various methods and a judge who may be removed only by impeachment.

In the case of a judge, the "good behavior" clause (Article III, Section 1) and the removal provision (Article III, Section 4) must be construed together, otherwise the "good behavior" clause is a nullity. Thus, consistent with House precedent, a judge who holds office for a life tenure may be impeached for less than an indictable offense. Even here, however, senatorial precedents have demonstrated a reluctance to convict a judge in the absence of criminal conduct, thus leaving the standard for judicial impeachment less than conclusive.

The use of a predetermined criminal standard for the impeachment of a President is also supported by history, logic, legal precedent and a sound and sensible public policy which demands stability in our form of government. Moreover, the constitutional proscription against ex post facto laws, the requirement of due process, and the separation of powers inherent in the very structure of our Constitution preclude the use of any standard other than "criminal" for the removal of a President by impeachment.

In the 197-year history of our nation, only one House of Representatives has ever impeached a President. A review of the impeachment trial of President Andrew Johnson, in 1868, indicates that the predicate for such action was a bitter political struggle between the executive and legislative branches of government.

The first attempt to impeach President Johnson failed because "no specific crime was alleged to have been committed." The Senate's refusal to convict Johnson after his impeachment by the House, has, of course, become legendary . . .

The most salient lesson to be learned from the widely criticized Johnson trial is that impeachment of a President should be resorted to only for cases of the gravest kind—the commission of a crime named in the Constitution or a criminal offense against the laws of the United States.

"Not only . . . a criminal offense but one of a very serious nature committed in one's governmental capacity."

The English precedents clearly demonstrate the criminal nature and origin of the impeachment process. The framers adopted the general criminal meaning and language of those impeachments, while rejecting the 17th century aberration where impeachment was used as a weapon by Parliament to gain absolute political supremacy at the expense of the rule of law.

In light of legislative and judicial usage, American case law, and established rules of constitutional and statutory construction, the term "other high crimes and misdemeanors" can only have a purely "criminal" meaning. Finally, in our review of the American impeachment precedents, we have shown that while judges may be impeached for something less then indictable offenses—even here the standard is less than conclusive—all evidence points to the fact that a President may not.

Thus the evidence is conclusive on all points; a President may only be impeached for indictable crimes. That is the lesson of history, logic, and experience on the phrase "treason, bribery and other high crimes and misdemeanors."