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IMPEACHMENT CAN BE BASED ON NON-CRIMINAL MISCONDUCT: CORPUS-LINGUISTIC AND HISTORICAL EVIDENCE

Clark D. Cunningham & Ute Römer-Barron[*]

> 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.
>
> —U.S. CONST. art. II, § 4

Whether the power of impeachment extends to non-criminal misconduct has been a perennial question in American constitutional history. As Laurence Tribe observed in a recent co-authored book on presidential impeachment: "Few terms in constitutional law have been so fiercely contested as 'high crimes and misdemeanors.'"[2] *Although most legal scholars agree with Tribe's conclusion that this phrase does not limit impeachment to criminal conduct,*[3] *reconciling this conclusion with the constitutional text has been a challenge. As one of the legal academy's leading experts on impeachment, Frank Bowman, concedes: "[t]aken at face value, the words [high crimes and misdemeanors] seem to say that impeachable conduct is limited to 'crimes'—offenses defined by criminal statutes and punishable in criminal courts."*[4]

In this Article, co-authored by a law professor and a linguistics professor, we offer what we believe is a new and persuasive approach that arises directly from the constitutional text itself for extending the scope of impeachment to non-criminal conduct. We reach this conclusion by applying the science of linguistics to a computer-assisted review of digitized texts written around the period when the Constitution was drafted and ratified. The result of this empirical research is the proposal that "other high crimes and misdemeanors" in the constitutional text should be interpreted as "other high crimes" and "other high misdemeanors." Our linguistic analysis further establishes that "high misdemeanor" was a phrase used during the Founding Era to refer to non-criminal misconduct that requires removal from office. We corroborate this analysis with historical research showing that for more than 130 years

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[2] LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 34 (2018).

[3] *Id.* at 45 ("The argument that only criminal offenses are impeachable is deeply and profoundly wrong."). *See infra* notes 20–21 and accompanying text for similar conclusions by other legal scholars.

[4] Frank O. Bowman III, *The Common Misconception About 'High Crimes and Misdemeanors'*, ATL. (Oct. 22, 2019), https://www.theatlantic.com/ideas/archive/2019/10/what-does-high-crimes-and-misdemeanors-actually-mean/600343/ [https://perma.cc/GY7Q-N59Z].

following the Founding Era, the U.S. House of Representatives recurrently enacted articles of impeachment using the term "high misdemeanor" to refer to non-criminal misconduct affecting governance.

INTRODUCTION

FOR THE DELEGATES WHO GATHERED IN PHILADELPHIA in 1787 to draft a federal constitution, one of the most difficult decisions was how to achieve the benefits, while avoiding the dangers, of vesting the executive power of the new nation in a single person.

On July 20, 1787, the Convention debated this question: "Shall the Executive be removeable on impeachments?"[5] George Mason declared, "No point is of more importance than . . . the right of impeachment. . . . Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?"[6] James Madison, himself a future president, said he:

> [T]hought it indispensable that some provision should be made for defending the Community . . . [The Chief Executive] might pervert his administration into a scheme of peculation [illegal use of public funds] . . . He might betray his trust to foreign powers. . . . In the case of the Executive . . . corruption was . . . within the compass of probable events, and . . . might be fatal to the Republic.[7]

Edmund Randolph warned that "[t]he Executive will have great opportunitys [sic] of abusing his power . . . Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections."[8] At the end of debate, the question was answered "yes" by a vote of eight states to two.[9]

When presidents have faced the possibility of impeachment and removal from office, the most frequent and primary defense has been that the Constitution's impeachment provision is limited to cases of criminal conduct. Defending President Andrew Johnson at Johnson's 1868 Senate impeachment trial, Benjamin Curtis asserted that the impeachment clause only applies to "criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done."[10] When President Richard Nixon resigned in 1974 after a majority of the House Judiciary Committee approved articles of impeachment, the ten Republican committee members who

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[5] 2 THE RECORDS OF THE FEDERAL CONVENTION 1787, at 69 (Max Farrand ed., 1911) [hereinafter RECORDS II].

[6] *Id.* at 65; *infra* note 40.

[7] RECORDS II, *supra* note 5, at 65–66.

[8] *Id.* at 67.

[9] *Id.* at 69.

[10] CONG. GLOBE, 40th Cong., 2d Sess. 134 (Supp. 1868).

had voted in committee against impeachment explained they had done so because "[t]he language of the Constitution indicates that impeachment can lie only for serious criminal offenses."[11] In 1987 the House Select Committee to Investigate Covert Arms Transactions with Iran assumed that commission of a crime was an essential predicate for impeachment[12] and did not recommend that President Reagan be impeached, despite a finding "that fundamental processes of governance were disregarded and the rule of law was subverted."[13]

Similarly, when Alan Dershowitz appeared on behalf of President Donald Trump at his first Senate impeachment trial in 2020,[14] he argued, "the key point in this impeachment case . . . is that purely non-criminal conduct, including

[11] H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE U.S., H.R. REP. NO. 93-1305, at 365 (1974).

[12] Philip C. Bobbitt, *Impeachment: A Handbook*, 128 YALE L.J.F. 515, 525, 561 (2018). A majority of the members of the House Committee were Democrats. *See Understanding the Iran-Contra Affairs: Key Players*, BROWN U., https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/h-keyplayers.php [https://perma.cc/3756-ZW26].

[13] *See* U.S. S. SELECT COMM. ON SECRET MIL. ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & U.S. H.R. SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REP. OF THE CONG. COMMS. INVESTIGATING THE IRAN-CONTRA AFF., S. REP. NO. 100-216, at 11 (1987).

[14] The first Trump impeachment "centered around a half-hour phone call in July [2019]. On it, he [Trump] pressured Ukraine's president [Volodymyr Zelensky] to announce investigations into former Vice President Joseph R. Biden Jr. and other Democrats at the same time he was withholding nearly $400 million in vital military assistance." Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (Feb. 10, 2021), https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html [https://perma.cc/WJ4Q-RTBL].

abuse of power[15] and obstruction of Congress,[16] are outside the range of impeachable offenses."[17] Writing an opinion column for the *Washington Post*, Laurence Tribe called the Dershowitz argument "bogus."[18] Tribe said, "The argument that only criminal offenses are impeachable has died a thousand deaths in the writings of all the experts on the subject, but it staggers on like a vengeful zombie."[19] Tribe's opinion column supported the conclusion that impeachment should not be limited to criminal offenses with quotations from statements made at the time the Constitution was ratified, reference to the fact that there was no federal criminal law when the Constitution was written, and the point that there is a pragmatic need to remove a president for violations of the public trust even if there is no violation of criminal law.[20] Other legal scholars joined Tribe in condemning the Dershowitz position.[21]

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[15] The first article of impeachment was entitled "Abuse of Power" and alleged: "President Trump abused the powers of the Presidency by ignoring and injuring national security and other vital national interests to obtain an improper personal political benefit. He has also betrayed the Nation by abusing his high office to enlist a foreign power in corrupting democratic elections." Abuse of Power, HR 755, 116th Cong. (2019).

[16] The second article of impeachment was entitled "Obstruction of Congress" and alleged:

> The House of Representatives has engaged in an impeachment inquiry focused on President Trump's corrupt solicitation of the Government of Ukraine to interfere in the 2020 United States Presidential election. As part of this impeachment inquiry, the Committees undertaking the investigation served subpoenas seeking documents and testimony deemed vital to the inquiry from various Executive Branch agencies and offices, and current and former officials. In response, without lawful cause or excuse, President Trump directed Executive Branch agencies, offices, and officials not to comply with those subpoenas.

Obstruction of Congress, HR 755, 116th Cong. (2019).

[17] 166 CONG. REC. S611 (daily ed. Jan. 27, 2020) (statement of Alan Dershowitz).

[18] Laurence H. Tribe, *Trump's Lawyers Shouldn't Be Allowed to Use Bogus Legal Arguments on Impeachment*, WASH. POST (Jan. 19, 2020, 5:19 PM), https://www.washingtonpost.com/opinions/2020/01/19/trumps-lawyers-shouldnt-be-allowed-use-bogus-legal-arguments-impeachment/ [https://perma.cc/6HTB-3ARJ].

[19] *Id.*

[20] *Id.* For a more extended explanation, see TRIBE & MATZ, *supra* note 2, at 25–68; MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 103–11 (1996); FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 235–52 (2019); and Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 HARV. L. REV. 689, 695 n.21 (2018) (reviewing TRIBE & MATZ, *supra* note 2) ("The academic consensus on this point [impeachment does not require proof of a crime] is strikingly universal, uniting the best serious scholarly books on impeachment over the last fifty years and scholars across the ideological spectrum."). Several contemporary scholars, however, take the position that "high crimes and misdemeanors" can only apply to criminal acts. Nikolas Bowie, Response, *High Crimes Without Law*, 132 HARV. L. REV. F. 59, 63 (2018) (responding to TRIBE & MATZ, *supra* note 2); Robert G. Natelson, *New Evidence on the Constitution's Impeachment Standard: "High . . . Misdemeanors" Means Serious Crimes*, 21 FEDERALIST SOC'Y REV. 24, 29 (2020).

[21] Charlie Savage, *'Constitutional Nonsense': Trump's Impeachment Defense Defies Legal Consensus*, N.Y. TIMES (Jan. 20, 2020, 6:36 PM), https://www.nytimes.com/2020/01/20/us/politics/trump-impeachment-legal-defense.html [https://perma.cc/4AAT-WKZV].

The context in which the impeachment provision was adopted has also been invoked to argue that "high crimes and misdemeanors" does not refer only to crimes. In the final days of the Convention, on September 8, 1787, the Convention took up consideration of a draft impeachment provision that had been reported out of the Committee of Eleven, reading "He [the President] shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for Treason, or bribery."[22]

George Mason objected, asking "[w]hy is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of Treason."[23] Mason mentioned "Hastings" to refer to an impeachment proceeding that had just started in the British Parliament against the former Governor-General of India, Warren Hastings, alleging many forms of misconduct but not treason.[24] Mason continued, arguing that "[a]ttempts to subvert the Constitution may not be Treason as above defined," and moved to add "maladministration" after "bribery."[25]

James Madison objected to Mason's proposed amendment, saying, "[s]o vague a term [i.e., maladministration] will be equivalent to a tenure during pleasure of the Senate."[26] Mason responded by withdrawing "maladministration" and moving instead to insert "other high crimes & misdemeanors agst. [against] the State."[27] The impeachment provision as thus amended passed by a vote of eight states to three.[28]

This admittedly brief and rather cryptic account from the Convention is cited by Bowman to argue that the Constitution's drafters intended "high crimes and misdemeanors" to function as a legal term of art, borrowing from a long prior history of the British parliament using this phrase in impeachment proceedings:[29]

> The words became traditional. . . . "[H]igh crimes and misdemeanors" was a phrase the drafters of British articles of impeachment habitually used to preface their description of any conduct for which Parliament thought an official should be impeached; it did not refer to a specified set of impeachable offenses. . . . The framers . . . adopted a parliamentary phrase they knew reached beyond the narrowly criminal to political misconduct in a broad sense. . . . [I]n approving "high Crimes and Misdemeanors," the Founders impliedly endorsed . . . an

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[22] RECORDS II, *supra* note 5, at 499, 550.

[23] *Id.* at 550.

[24] BOWMAN, *supra* note 20, at 39–41.

[25] RECORDS II, *supra* note 5, at 550.

[26] *Id.*

[27] *Id.* The phrase "against the State" was removed during a final editing process by the Committee on Style. *See id.* at 582, 600.

[28] *Id.* at 550.

[29] BOWMAN, *supra* note 20, at 244.

> understanding that the phrase was subject to constant redefinition . . . in light of . . . contemporary needs.[30]

A. Why the Word "Misdemeanors" is in the Impeachment Provision

There is considerable persuasive force in the arguments from contemporary legal scholarship summarized above for why non-criminal misconduct can be the basis of impeachment proceedings. Our research adds yet another argument that arises directly from the constitutional text and provides a different explanation as to why "misdemeanors" is in the impeachment provision. This answer is based on interdisciplinary research made possible by a methodology known as corpus linguistics.[31]

Corpus-linguistic methodology has developed thanks to dramatic progress in the past thirty years in computer technology, making it possible to acquire, store, and process large amounts of digitized data representing actual language use. Such a data set is called a "corpus" (plural: "corpora"). More than a dozen recent court decisions make reference to corpus linguistics as a resource for interpretation of legal texts, including decisions by four state supreme courts,[32] and over forty law review articles have been published over the past five years

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[30] *Id.* at 45–46, 244, 245–46. Tribe and Matz are less certain than Bowman that "high crimes and misdemeanors" was deliberately intended to incorporate centuries of prior Parliamentary practice, but they still assume that the entire phrase was intended to be "an open-ended term." TRIBE & MATZ, *supra* note 2, at 38, 40–41. Hoffer and Hull take the view that a well-developed practice of impeachment in the states was a more important precedent for the Convention delegates than British parliamentary practice. PETER CHARLES HOFFER & N. E. H. HULL, IMPEACHMENT IN AMERICA, 1635–1805, at 96 (1984) ("The states' experience with impeachment encouraged the framers of the federal Constitution to adopt the procedure. The prime movers behind incorporation of impeachment . . . were intimately connected with state impeachment law and cases.").

[31] One of us, Römer-Barron, is General Editor of the book series STUDIES IN CORPUS LINGUISTICS and on the editorial board of the INTERNATIONAL JOURNAL OF CORPUS LINGUISTICS. *See About Me*, UTE RÖMER-BARRON, https://uteroemer.weebly.com/about-me.html [https://perma.cc/9U7S-NDNK].

[32] *See* Clark D. Cunningham, *Cases Using or Discussing Corpus-Based Linguistic Analysis*, RESOURCES ON L. & LINGUISTICS, http://www.clarkcunningham.org/L2-Cases.html [https://perma.cc/ACD8-JWRK].

discussing corpus linguistics.[33] For this Article, we analyzed texts written during the Founding Era from a wide range of sources, all available in digitized form on public websites.

The first result of our corpus-based linguistic analysis is our proposal that "other high crimes and misdemeanors" in the constitutional text be interpreted as "other high crimes" and "other high misdemeanors." Our further corpus linguistic analysis establishes that *high misdemeanor*[34] was a phrase used during the Founding Era to refer to non-criminal misconduct that requires removal from office. Our historical research then reveals that the U.S. House of Representatives recurrently enacted articles of impeachment using the term "high misdemeanor" to refer to non-criminal misconduct affecting governance, in the nineteenth century and even extending into the twentieth century.

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[33] *See* Clark D. Cunningham, *Articles on Law and Corpus Linguistics*, RESOURCES ON L. & LINGUISTICS, http://www.clarkcunningham.org/L2-Articles.html [https://perma.cc/PD9R-EQSY]. An important development has been an increase in articles co-authored by both law professors and linguistics professors. *See, e.g.*, William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503 (2021) (written by two law professors, one of whom, Slocum, also has a Ph.D. in linguistics) and a professor of linguistics); Tammy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?*, 36 GA. ST. U. L. REV. 491 (2020) (written by a professor of linguistics and a professor of law); Thomas R. Lee, Lawrence B. Solum, James C. Phillips, & Jesse A. Egbert, *Corpus Linguistics and the Original Public Meaning of the Sixteenth Amendment*, 73 DUKE L.J. ONLINE 159 (2024) (written by three law professors and a linguistics professor). The law professor co-author of this Article, Cunningham, has been co-authoring with linguists since publication of Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994), *cited with approval in* Dir., Off. of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272 (1994); Staples v. United States, 511 U.S. 600, 623 (1994) (Ginsburg, J., concurring); United States v. Granderson, 511 U.S. 39, 53 n.10 (1994); Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2127 & n.52 (1995) (calling the article "accessible and useful to judges"). More recently, he has collaborated with linguistics professor Jesse Egbert on an amicus brief using corpus linguistics to investigate the original meaning of "emolument" in U.S. CONST. art. I, § 9, cl. 8, *noted in In re* Trump, 958 F.3d 274, 286 (4th Cir. 2020) (en banc), *vacated as moot sub nom.* Trump v. District of Columbia, 141 S. Ct. 1262 (Jan. 25, 2021) (mem.); Wilson v. Safelite Grp., Inc., 930 F.3d 429, 447 (6th Cir. 2019) (Stranch, J., concurring). They also collaborated on an amicus brief applying linguistic analysis to the meaning of "execute a search warrant," *cited with thanks in* Nelson v. State, 863 S.E.2d 61, 64 n.4 (Ga. 2021). Also, both authors have collaborated on an amicus brief on the original meaning of "cases" in U.S. CONST. art. III, § 2, *cited with thanks in* Wright v. Spaulding, 939 F.3d 695, 700 n.1 (6th Cir. 2019). The research for this Article was previously co-presented by the authors at three linguistics conferences, two of which were international; for each conference, their presentation was selected through a blind peer review process. International Computer Archive of Modern and Medieval English (ICAME) 2022 (Cambridge, UK); Corpus Linguistics International Conference 2021 (University of Limerick, Ireland); Sixth Annual Conference on Law & Corpus Linguistics, Brigham Young University School of Law 2021 (United States).

[34] We use italics to refer to singular, plural and variant spellings of "high misdemeanor." In Founding Era texts "misdemeanor" is also sometimes spelled "misdemeanour," "misdemesnor," or "misdemenor."

This combination of corpus-based linguistic analysis and historical evidence provides persuasive evidence that the inclusion of "misdemeanors" in the impeachment provision expands the scope of impeachable conduct to include non-criminal misconduct affecting governance.

B. Linguistic Analysis of the Impeachment Provision: Scientific Methodology Used

When properly executed, corpus linguistic research results meet the scientific standards of "generalizability," "replicability," and "validity."[35]

To meet the standard of generalizability, a corpus must be sufficiently large and varied that it represents the entire population to be studied. For most of our research, the population to be studied was defined as literate, English-speaking residents of the thirteen states at the time the Constitution was drafted and ratified, i.e., from 1787–1790. To represent this population, we used a corpus we compiled from documents in the Founders Online archive, created and maintained by the National Archives, containing the public papers of John Adams, Benjamin Franklin, Alexander Hamilton, John Jay, Thomas Jefferson, James Madison, and George Washington.[36] Founders Online is a free resource available on the internet. We downloaded a data set of more than 180,000 documents, containing over 67 million words, and primarily used a publicly available program for analyzing corpora called *AntConc* that is effective in finding and revealing patterns in language use.[37] We also made use of another very large Founding Era database, the *Corpus of Founding Era American English*

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[35] For more information about corpus linguistics and its application to legal interpretation, see generally Clark D. Cunningham, *Foreword: Lawyers and Linguists Collaborate in Using Corpus Linguistics to Produce New Insights Into Original Meaning*, 36 GA. ST. U. L. REV., at vi (2020); Clark D. Cunningham & Jesse Egbert, *Using Empirical Data to Investigate the Original Meaning of "Emolument" in the Constitution*, 36 GA. ST. U. L. REV. 465 (2020); Haoshan Ren, Margaret Wood, Clark D. Cunningham, Noor Abbady, Ute Römer, Heather Kuhn & Jesse Egbert, *"Questions Involving National Peace and Harmony" or "Injured Plaintiff Litigation"? The Original Meaning of* "Cases" *in Article III of the Constitution*, 36 GA. ST. U. L. REV. 535 (2020).

[36] *About Founders Online*, FOUNDERS ONLINE, https://founders.archives.gov/about [https://perma.cc/BQ4R-SRRF]. Many of the documents contained in Founders Online were not authored by the "Founders," such as correspondence written to them and materials relating to their various official roles. *See id.*

[37] *AntConc*, LAURENCE ANTHONY'S WEBSITE, https://www.laurenceanthony.net/software [https://perma.cc/M8X7-UH9X]. We used a feature of Founders Online that allows the retrieval of plain-text transcription in machine-readable format to download data for analysis by *AntConc*. *Frequently Asked Questions*, FOUNDERS ONLINE, https://founders.archives.gov/help/FAQ#Q4.2 [https://perma.cc/ZY3Q-WWUU]; *Founders Online API Documentation*, FOUNDERS ONLINE, https://founders.archives.gov/API/docdata/ [https://perma.cc/X2YD-F8FX].

("COFEA"), comprised of more than 126,000 texts, containing over 136 million words.[38] COFEA is also a free resource available on the internet.[39]

Replicability is defined as the degree to which a method produces consistent results, allowing a different researcher applying the same method to duplicate the outcome. Throughout this Article we disclose the methods used for our linguistic analysis and the corpora to which our methods were applied and provide in an online appendix the actual data produced.[40]

Validity refers to how well a method measures results defined by well-formed research questions and how well those results reflect real-world patterns. We began by observing systemic features of real language use in the Founding Era, which suggested that "misdemeanors" in the impeachment provision should be interpreted as "high misdemeanors." We then confirmed that *high misdemeanor* was a term that appeared frequently in Founding-Era texts. We next determined that the use of "high" in combination with "misdemeanor" described misconduct that was a threat to governance, such as obstruction of governmental action, attacks on governmental authority, and abuse of power by officials. Manual review of specific instances of use revealed that the accusation that an official had committed a high misdemeanor could be the basis for removal from office without that misconduct necessarily being a crime. This pattern observed in Founding Era texts continued into the nineteenth century as a practice used by the U.S. House of Representatives in writing articles of impeachment.[41]

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[38] *About the Corpus*, CORPUS OF FOUNDING ERA AM. ENG., https://lawcorpus.byu.edu/cofea/concordances;field=concordance%3BtextId%3Byear%3Bauthor%3Bgenre [https://perma.cc/3BVF-Q7W8]. Unlike Founders Online, COFEA does not have a feature to download data in a format that can be used for *AntConc* analysis, so we used online search and analysis tools that are provided on the COFEA website. *About the BYU Law Corpus Tools*, CORPUS OF FOUNDING AM. ENG., https://lawcorpus.byu.edu/ [https://perma.cc/CH8K-RU8A] (select "Search" on the COFEA home page; then, select the "?" button).

[39] COFEA currently requires registration using a Google or Gmail account to guard against hacking.

[40] To access the appendix online, see Clark D. Cunningham & Ute Römer-Barron, *Impeachment can be Based on Non-Criminal Misconduct*, CLARKCUNNINGHAM.ORG, http://www.clarkcunningham.org/Impeachment-Appendix.html [https://perma.cc/RX5L-ADHM]. The appendix and all documents linked to the appendix are also archived at Harvard Dataverse: https://doi.org/10.7910/DVN/I5MRS5.

[41] *See* Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 613 (1999) (concluding that of the sixteen articles of impeachment issued by the House of Representatives up to 1999, twelve included "misuses of power that were not indictable federal offenses, at least at the time that they were approved"). The examples we list below are among the twelve impeachments referenced by Gerhardt. *Id.* at 614.

I. LINGUISTIC ANALYSIS OF THE STRUCTURE OF THE IMPEACHMENT PROVISION: "OTHER HIGH CRIMES AND MISDEMEANORS" INTERPRETED AS "OTHER HIGH CRIMES" AND "OTHER HIGH MISDEMEANORS"

The first step in our inquiry leading to the conclusion that the scope of impeachable conduct might include "high misdemeanors" was a textual analysis of the impeachment provision:

> 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.[42]

The methods of corpus linguistics provide evidence that, in modern American English, when an adjective precedes a *coordinating noun construction* (a sequence of a noun followed by "and" then by another noun) the adjective typically modifies both nouns. A computerized search in the Corpus of Contemporary American English (COCA)[43] for all sequences in the form "adjective noun and noun," produces as the most frequent example "young men and women," where obviously "women" are described as "young," not just "men." Two other sequences that appear among the most frequent examples of this pattern are "fresh fruits and vegetables" and "black men and women" – likewise the adjective obviously modifies the second noun as well as the first.[44] Hence, in modern American English, if a phrase is written in the form "other high [Noun1] and [Noun2]," it is plausible to interpret the phrase as the equivalent of "other high [Noun1] and other high [Noun2]."

We then investigated whether this modern American English language usage might correspond with patterns of language use from the Founding Era. Because

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[42] U.S. CONST. art. II, § 4.

[43] COCA is generally considered to be the corpus used most widely for linguistic research into modern American English. It contains more than one billion words of text (25+ million words per year from 1990-2019) from eight genres: spoken language, fiction, popular magazines, newspapers, academic texts, TV and movies subtitles, blogs, and other web pages. *See Overview*, CORPUS OF CONTEMP. AM. ENG., https://www.english-corpora.org/coca/ [https://perma.cc/STR7-DLWP].

[44] This COCA search was conducted by inserting "ADJ NOUN and NOUN" into the search window on the COCA website. The results (with clickable links from each sequence to lists of all the appearances of that sequence in COCA, including source information for that appearance) can be viewed at https://www.english-corpora.org/coca/?c=coca&q=125823644. CORPUS OF CONTEMP. AM. ENG., https://www.english-corpora.org/coca/?c=coca&q=125823644 [https://perma.cc/2TNF-DZW3]. "Young men and women" appears 1219 times; "fresh fruits and vegetables" appears 341 times; and "black men and women" 274 times. The COCA search also produced a small number of results in which the first word, tagged as an adjective, does not modify the second noun, e.g. "high school and college" and "gay men and lesbians." In the first example, "high school" is a compound noun, not a free combination of adjective plus noun; in the second example, the noun "lesbians" already encodes the meaning of "gay." Neither "high college" nor "gay lesbians" appear as adjective plus noun sequences in COCA. *Id.*

we were searching for use of very common words—"other" and "high"—we used a sub-corpus of the Founders Online database that we believed would be sufficiently representative while yielding a manageable set of results: the official papers of James Madison.[45] The Madison Papers cover the period from 1751 to 1836, during which Madison served as a delegate to the Constitutional Convention, a member of the House of Representatives in the First Congress, as a Secretary of State, and as President.[46] At the time we downloaded this dataset it was comprised of 27,416 files, totaling 10.8 million words, drawing from "Madison's public and private correspondence, his public actions and speeches, and his political writings."[47] Many of the texts were not written by Madison himself.[48]

We found forty-nine examples in the Madison Papers using phrases in the form "other [Noun1] and [Noun2]."[49] The context generally made clear that "other" applied to both nouns, for example:

> unless indeed, other channels and modes should have been found for bringing them to an issue
>
> should peace take place and other interests and views arise
>
> engaged against the other princes and states.[50]

The Madison Papers contained 101 examples of phrases in the form "high [Noun1] and [Noun2]," primarily used to conclude correspondence.[51] Most of

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[45] *See James Madison*, CORPUS OF FOUNDING ERA AM. ENG., https://founders.archives.gov/?q=%20Author%3A%22Madison%2C%20James%22&s=1111211111&r=1 [https://perma.cc/KNZ3-5KG9].

[46] *See About the Papers of James Madison*, FOUNDERS ONLINE, https://founders.archives.gov/about/Madison [https://perma.cc/FB3R-ZSMZ].

[47] *See Correspondence and Other Writings of Seven Major Shapers of the United States*, FOUNDERS ONLINE, https://founders.archives.gov/ [https://perma.cc/7WYV-62G6] (current as of June 19, 2019); *About the Papers of James Madison*, *supra* note 46.

[48] *See Correspondence and Other Writings of Seven Major Shapers of the United States*, *supra* note 47. National Archives Founders Online contains 19,677 texts where Madison was the recipient compared to only 8,662 texts authored by Madison. *See* FOUNDERS ONLINE, https://founders.archives.gov/ [https://perma.cc/GQ35-3WH4].

[49] *See Madison Papers: Usage of "Other Noun + Noun"*, *in* Cunningham & Römer-Barron, *supra* note 40. Working with the *AntConc* corpus analysis software, we used the search string "other * and" to extract all instances of "other" followed by any one word followed by "and" from the corpus. *Id.* The resulting 711 concordance lines were then manually filtered for instances of the "other [Noun1] and [Noun2]" construction, producing forty-nine concordance lines that are presented in spreadsheet format in the Appendix. *Id.*

[50] *Id.*

[51] *See Madison Papers: Usage of "High Noun + Noun"*, *in* Cunningham & Römer-Barron, *supra* note 40. Working with the *AntConc* corpus analysis software, we used the search string "high* and" to extract all instances of "high" followed by any one word followed by "and" from the corpus. The resulting 313 concordance lines were then manually filtered yielding 101 examples of the "high [Noun1] and [Noun2]" construction presented in spreadsheet format in the Appendix. *Id.*

these phrases were consistent with an interpretation that "high" applied to both nouns. For example, sometimes correspondence closed with the phrase "high esteem and respect."[52] Other letters concluded with "high respect and esteem."[53] The apparent interchangeability of these phrases we took as evidence that both "high respect" and "high esteem" were intended to be communicated when "high" preceded the two nouns.

As a cross-check, we searched COFEA for any instances of phrases in the form "high [Noun1] and high [Noun2]." Although COFEA contains over 136 million words and over 126,000 texts,[54] we could only find one instance of a phrase in this form.[55] We take this result as evidence that writers in the Founding Era, when wanting to modify two nouns with the adjective "high," generally did not feel it necessary to repeat "high" before the second noun.[56]

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[52] See examples compiled in *supra* note 51.

[53] *Id.*

[54] *About the Corpus*, *supra* note 38.

[55] A search using the query "high */n and high */n" produced only this example:

> [T]here has been among us a party for some years, consisting chiefly not of the descendants of the first settlers of this country but of *high churchmen and high statesmen*, imported since, who affect to censure this provision for the education of our youth as a needless expence, [sic] and an imposition upon the rich in favour [sic] of the poor.

John Adams, *A Dissertation on the Canon and the Feudal Law* (Sept. 30, 1765), FOUNDERS ONLINE (emphasis added), http://founders.archives.gov/documents/Adams/06-01-02-0052-0006 [https://perma.cc/6EHS-FZUF]. However, this does not appear to be an actual counter-example, because "high churchmen" was probably used as compound noun (like "high school,' *see* CORPUS OF CONTEMP. AM. ENG., *supra* note 44) rather than as an adjective + noun sequence. *See High Church*, COLLINS ENG. DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/high-church [https://perma.cc/RF4E-LTWM] ("High-Churchman" is a noun derived from "High Church"); *High Churchman,* OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/high-churchman_n [https://perma.cc/K9TP-9SGG] ("A (male) member of the Anglican communion who gives high importance to ritual, priestly authority, the Sacraments, and historical continuity with Catholicism; a member of the High Church . . . Originally applied in the late 17th and early 18th centuries to those who opposed the toleration of differences in church polity and Christian practice, and demanded strict enforcement of the laws against Catholic and Protestant dissenters as well as the passing of such additional measures as the Occasional Conformity Act of 1711 . . . The epithet was originally derogatory . . . [Example]: 1791 He was a zealous high-churchman and royalist, and retained his attachment to the unfortunate house of Stuart. J. Boswell, *Life of Johnson* anno 1709").

[56] It is also noteworthy that the principle of applying a modifier to all the nouns listed thereafter is clearly exemplified earlier in the impeachment provision: "Impeachment for" applies to all the following nouns, not just "Treason" and likewise "Conviction of." *See* U.S. CONST. art. II, § 4.

II. In the Founding Era, Placing "High" Before the Word "Misdemeanor" Indicated Misconduct Affecting Governance

Although *high misdemeanor* has largely disappeared from American vocabulary,[57] we found over 150 occurrences in Founding Era texts.[58]

In his *Commentaries on the Laws of England*, published in England in the 1760s, William Blackstone offered the following explanation for the significance of placing "high" before the word "treason": According to Blackstone, "treason" had a broad reference, derived from a French word (trahison) meaning "betraying, treachery, or breach of faith."[59] Blackstone further explained:

> [T]reason is . . . a general appellation . . . to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior . . . and the inferior so abuses that confidence. . . . [T]herefore for a wife to kill her . . . husband, a servant his lord . . . are denominated *petit* treasons. But when disloyalty so rears its crest as to attack even majesty itself, it is called by way of eminent distinction *high* treason . . . .[60]

We found evidence in Founding-Era American English that placing "high" before "crime" had an effect similar to Blackstone's description of "high treason." In most of the examples we found, the context indicated that "high" was not simply used to mark the crime as grave or serious but because the crime—such as rioting or desertion from the army—affected governance. For this investiga-

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[57] *See "High Misdemeanor" Has Largely Disappeared from American Vocabulary*, *in* Cunningham & Römer-Barron, *supra* note 40. Figure 1 in the Appendix provides supportive Google Books data. We also searched the one-billion-word Corpus of Contemporary American English ("COCA") and found only eight instances of *high misdemeanor*. *See id.* fig.2.

[58] After loading the corpus we created from Founders Online into the *AntConc* software, we used the search string "high misdem*" in the *AntConc* "Concordance" tool to extract all instances of "high" followed by "misdemeanor" (capturing singular and plural forms and different spelling variants) from the corpus. This analysis produced twenty-seven concordance lines, which are presented in spreadsheet format in the Appendix. *Search Results from Founders Online*, *in* Cunningham & Römer-Barron, *supra* note 40. For COFEA we used the online search function by entering "high misdem*" as the query terms and then used the export function to create a spreadsheet of the resulting 157 concordance lines, which also is posted in the Appendix. *Search Results from Corpus of Founding Era American English (COFEA)*, *in* Cunningham & Römer-Barron, *supra* note 40. Many of the examples from Founders Online also appear among the COFEA examples. Forty-six of the COFEA examples come from the same source, the impeachment of John Nicholson by the Pennsylvania legislature, discussed below at text accompanying note 118–136. Twenty-eight of the COFEA examples relate to the same provision in the Articles of Confederation authorizing interstate extradition. *See infra* notes 87–99.

[59] 2 William Blackstone, Commentaries *75; *Trahison*, Collins, https://www.collinsdictionary.com/dictionary/french-english/trahison [https://perma.cc/K4HV-8NHZ].

[60] 2 Blackstone, *supra* note 59, at *75.

tion we searched the public papers for all seven "founders" archived on Founders Online—John Adams, Benjamin Franklin, Alexander Hamilton, John Jay, Thomas Jefferson, James Madison, and George Washington—in a data set of more than 180,000 documents,[61] containing over 67 million words. We found such examples as these:

> It is a high crime to disobey the king's lawful commands.[62]
>
> I have just finished a pretty elaborate plan for the commutation of death for that of compulsory labour [sic] in a *military-national* Penitentiary in the case of Desertion from our army, & other high crimes in soldiers now punishable with death.[63]
>
> [T]he king[']s fiscal declared that he coud [sic] not find in the matter Submitted to him any ground of accusation; but that he was afterwards induced to found a charge upon some Roman law . . . which constituted a conspiracy against the ⟨m⟩onarch[']s favorite, a high crime against the state.[64]

In 1799 three farmers from Pennsylvania were convicted of treason and sentenced to hang for their roles in leading an armed uprising protesting federal taxation.[65] In 1800, President John Adams wrote the following in explanation of his decision to pardon these three: "Was it any Thing more than a Riot, high handed, aggravated daring and dangerous indeed . . . ? This is a high Crime, but can it Strictly amount to Treason?"[66]

We found even greater evidence that "high" was used in combination with "misdemeanor" and that doing so indicated conduct affecting governance.

Blackstone discusses the word "misdemeanor" without the modifier "high" at the beginning of his introductory chapter to the Fourth Book of his Commentaries, entitled "Of the Nature of Crimes, and Their Punishment," where he says, in an oft-quoted sentence: that "crimes and misdemeanors . . . properly

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[61] *See About Founders Online*, *supra* note 36.

[62] Letter from John Adams to the Inhabitants of the Colony of Massachusetts-Bay (Mar. 13, 1775) [hereinafter Adams to Massachusetts Letter], https://founders.archives.gov/documents/Adams/06-02-02-0072-0009 [https://perma.cc/BM86-JBJA].

[63] Letter from Benjamin Waterhouse to John Adams (Dec. 29, 1817), https://founders.archives.gov/documents/Adams/99-02-02-6832 [https://perma.cc/X5N8-CNCH].

[64] Letter from George William Erving to James Madison (Jan. 29, 1808), https://founders.archives.gov/documents/Madison/99-01-02-2624 [https://perma.cc/W39P-EV74].

[65] Patrick Grubb, *Fries Rebellion*, THE ENCYC. OF GREATER PHILA. (2015), https://philadelphiaencyclopedia.org/essays/fries-rebellion/ [https://perma.cc/SHT4-APJL].

[66] Letter from John Adams to Benjamin Stoddert (May 20, 1800), https://founders.archives.gov/documents/Adams/99-02-02-4354 [https://perma.cc/5B8B-JS94].

speaking, are mere synonymous terms."[67] Dershowitz cited this section of Blackstone in his Senate argument as evidence that "crime" and "misdemeanor" were synonymous in the Founding Era.[68] Dershowitz, however, neglected to mention that Blackstone treats the phrase "high misdemeanor" quite differently in a section called "Of Misprisions and Contempts Affecting the King and Government" which discusses "offences more immediately against the king and government."[69] Blackstone introduces the phrase "high misdemeanor" as describing conduct that is less grave than treason, stating that "the king might remit a prosecution for treason, and cause the delinquent to be censured . . . merely for a high misdemeanor."[70] He goes on to describe six general categories of "high misdemeanors":[71]

1. "[*M*]*al-administration* of such high officers, as are in public trust and employment . . . usually punished by . . . parliamentary impeachment"
2. "Contempts against the king's *prerogative*"
3. "Contempts . . . against the king's *person* and *government* . . . by speaking or writing against them . . . giving out scandalous stories . . . or doing any thing that may tend to lessen him in the esteem of his subjects"
4. "Contempts against the king's *title*, not amounting to treason"
5. "Contempts against the king's *palaces* or *courts of justice*"
6. "Lastly, to endeavour [sic] to dissuade a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand mute"[72]

Blackstone's categories seem to represent three ways that a "high misdemeanor" could affect the government: (a) an attack on governmental authority (categories 2, 3, 4); (b) obstruction of government (categories 5, 6); and (c) misconduct by government officials (category 1).

We searched all of Founders Online and COFEA for every use of *high misdemeanor* and found many examples where the placement of "high" before "misdemeanor" seemed to indicate that the referenced conduct affected gov-

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[67] 4 WILLIAM BLACKSTONE, COMMENTARIES *5.

[68] *See* 166 CONG. REC. S376 n.17 (daily ed. Jan. 21, 2020).

[69] *See* 4 BLACKSTONE, *supra* note 67, at *119–25.

[70] *Id.* at *119.

[71] Blackstone's use of terminology in this chapter is not a model of clarity. He starts by introducing the term "misprision," which he defines as all "high offences as are under the degree of capital, but nearly bordering thereon." *Id.* He then distinguishes between "negative" misprisions, which consist of concealing a crime such as treason, and "merely positive" misprisions which "are generally denominated *contempts or high misdemeanors*." *Id.* at *119–21.

[72] *Id.* at *121–24, *126.

ernance, including all three types of governmental impact described by Blackstone. Below, we provide several of those examples, organized under headings that correspond to these three distinct types of governmental impact.[73]

A. Attack on Governmental Authority

In 1763 "An Authentick [sic] account of the proceedings against John Wilkes, Esq., Member of Parliament"[74] was published in Philadelphia. The Wilkes case was of enormous interest to Americans in the years leading up to the American Revolution.[75] King George III had Wilkes arrested for "being the Author . . . of a most infamous and seditious Libel intitled the North Briton Number 45: tending to inflame the Minds and alienate the Affections of the People from his Majesty."[76] Lord Chief Justice Charles Pratt ruled that Wilkes was privileged from arrest as a member of Parliament.[77] Noting that the only exceptions to parliamentary privilege were treason, felony or breach of the peace, Chief Justice Pratt ruled "Mr. Wilkes stood accused of writing a Libel, a Libel in the Sense of the Law was a *High Misdemeanour*; [sic] but did not come within the Description of *Treason*, *Felony*, or *Breach of the Peace*."[78]

In a 1773 newspaper letter authored by John Adams, the following appeared: "To deny the supreme authority of the state, is a high misdemeanor; to oppose it by force, an overt act of treason."[79]

In 1800 President John Adams wrote to Secretary of State Thomas Pickering that "the present desultory manner of publishing the Laws, Acts of the President, and proceedings of the Executive departments is infinitely disgraceful to the Government and Nation," noting that in Great Britain "[i]t is a high misdemeanor to publish any Thing as from Royal Authority which is not so."[80]

B. Obstruction of Government

In 1792 U.S. Treasury Secretary Alexander Hamilton wrote to U.S. Chief Justice John Jay, describing the "Whiskey Rebellion" in western Pennsylvania as

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[73] *See infra* notes 74–88 and accompanying text.

[74] *An Authentick Account of the Proceedings Against John Wilkes, Esq*, [hereinafter *Authentick Account*], UNIV. MICH. LIBR. DIGIT. COLLECTIONS, https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;rgn=main;view=text;idno=N07474.0001.001 [https://perma.cc/R9FH-84KJ].

[75] *See* Clark D. Cunningham, *Apple and the American Revolution: Remembering Why We Have the Fourth Amendment*, 126 YALE L.J.F. 218, 223–24 (2016).

[76] *Authentick Account*, *supra* note 74, at 16.

[77] *Id.* at 28–29.

[78] *Id.*

[79] Letter from Adams to Massachusetts, *supra* note 62.

[80] Letter from John Adams to Timothy Pickering (Apr. 23, 1800), https://founders.archives.gov/documents/Adams/99-02-02-4276 [https://perma.cc/HAW6-8WQP].

a "determined and persevering . . . spirit of opposition to the laws."[81] He went on, explaining that:

> an avowed object [of the proceedings at Pittsburgh] is to—"obstruct the operation of the law." This is attempted to be qualified by a pretence [sic] of doing it by "every legal measure." But "legal measures to obstruct the operation of a law" is a contradiction in terms. I therefore entertain no doubt, that a high misdemeanour [sic] has been committed.[82]

In 1800, in the trial of John Fries, Supreme Court Justice Samuel Chase, sitting as trial court judge, issued an opinion holding "if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute . . . they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force . . . they are guilty of . . . treason."[83]

C. Abuse of Power by Government Officials

In 1784 Jeremy Belknap mentioned in his "The History of New-Hampshire" that during the colonial period one Abraham Corbett was "called to account" for issuing "warrants in the king's name . . . which was construed a high misdemeanor, as he had never been commissioned by the authority of the colony."[84]

Also in 1794 Articles of Impeachment were issued by the state legislature of Pennsylvania against John Nicholson, the Comptroller General of Pennsylvania, alleging:

> John Nicholson, with a view to promote and procure his own emolument, did . . . certify to the Governor, that certain debts . . . were redeemable and payable, when no fund was, by law, provided for paying the same; thereby committing a high misdemeanor, misleading the other officers of government, and causing money, without a previous appropriation, to be drawn from the treasury in violation of the constitution.[85]

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[81] Letter from Alexander Hamilton to John Jay (Sept. 3, 1792), https://founders.archives.gov/documents/Hamilton/01-12-02-0242 [https://perma.cc/4R46-5CU5].

[82] *Id.* (emphasis omitted).

[83] Case of Fries, 9 F. Cas. 924, 930–31, 940 (C.C.D. Pa. 1800).

[84] 1 JEREMY BELKNAP, THE HISTORY OF NEW-HAMPSHIRE 107 (Philadelphia, Robert Aiken 1784), https://quod.lib.umich.edu/e/evans/n14479.0001.001 [https://perma.cc/GRR3-HLTL].

[85] SENATE OF COMMONWEALTH OF PA., WHEN SITTING FOR THE PURPOSE OF TRYING AN IMPEACHMENT 5–6 [hereinafter Nicholson Impeachment], http://www.clarkcunningham.org/L2/Appendix/NicholsonImpeachment.pdf [https://perma.cc/TSQ6-B2FE].

III. FOUNDERS' CORRESPONDENCE ON THE MEANING OF "HIGH MISDEMEANOR" IN THE ARTICLES OF CONFEDERATION

In January 1784, the Governor of South Carolina submitted a demand to the Governor of Virginia for the extradition of a Virginia citizen named George Hancock, pursuant to the provision of the 1777 Articles of Confederation authorizing interstate extradition of "any Person guilty of or charged with 'treason, felony, *or other high misdemeanor*.'"[86] The allegation was that Jonas Beard, "a Justice of the [P]eace [and] a member of the [South Carolina] legislature," had been "violently assaulted" by Hancock "during the sitting of the Court of General Sessions."[87]

At the time, Edmund Randolph was Attorney General of Virginia.[88] He was later a very influential delegate to the Constitutional Convention and served as America's first Attorney General under George Washington.[89] In a letter to Thomas Jefferson, dated January 30, 1784, Randolph carefully analyzed whether the conduct alleged by South Carolina was a "high misdemeanor."[90]

> The next consideration was the definition of a high misdemeanor. But neither in vulgar import, nor in the construction of british law . . . is an ordinary assault so stiled [sic]. I say an ordinary assault; because not a syllable of the accusation advances the offence to the rank of a high misdemeanor. For "the sitting of the court of general sessions" may mean the term, not the being on the bench: Mr. Beard, tho' a justice of the peace might not be connected with that court.[91]

The Virginia Executive Council subsequently advised the Governor that the Articles of Confederation "[do] not require" the delivery of a citizen "in such

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[86] *See* Letter from Edmund Randolph to Thomas Jefferson (Jan. 30, 1784) (emphasis added), https://founders.archives.gov/documents/Jefferson/01-06-02-0377 [https://perma.cc/3L9E-4M55]. At this time, Jefferson was a delegate from Virginia to the Congress of the Confederation. *Biographies of the Secretaries of State: Thomas Jefferson (1743–1826)*, OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, https://history.state.gov/departmenthistory/people/jefferson-thomas [https://perma.cc/F93F-3FLZ].

[87] Letter from James Madison to Thomas Jefferson (Mar. 16, 1784), https://founders.archives.gov/documents/Madison/01-08-02-0002 [https://perma.cc/YG33-SZQX].

[88] *Virginia Former Attorneys General*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/attorneys-general/past-attorneys-general/virginia-former-attorneys-general/ [https://perma.cc/3T6Y-ZTRG].

[89] *Biographies of the Secretaries of State: Edmund Jennings Randolph (1753–1813)*, OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, https://history.state.gov/departmenthistory/people/randolph-edmund-jennings [https://perma.cc/QD8F-XCUY].

[90] Letter from Edmund Randolph to Thomas Jefferson, *supra* note 86.

[91] *Id.*

cases as . . . the Governor of South Carolina has stated this to be," and that therefore the extradition request should be denied.[92]

This handling of the Hancock extradition request clearly reflects an interpretation that even a serious crime[93] is not a "high misdemeanor" unless governance is affected. South Carolina failed to allege specifically that Beard was currently sitting as a judge of the Court of General Sessions at the time of the assault and thus show that a "high misdemeanor" was committed.

Prior to August 28, 1787, the draft Constitution contained an interstate extradition provision almost identical to Article IV of the Articles of Confederation:

Articles of Confederation, Art IV	Draft Constitution, Art IV
If any Person guilty of, or charged with treason, felony *or other high misdemeanor*[94] in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.[95]	Any person charged with treason, felony *or high misdemeanor* in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence.[96]

According to James Madison's notes of the Convention's proceedings for August 28, however, "the words 'high misdemesnor [sic],' were struck out, and

[92] *Id.* (quoting MS Va. Council Jour., Vi; 16 Feb. 1784).

[93] South Carolina alleged that as a result of being beaten "with [a] fist & switch over the face head and mouth . . . [Beard] was obliged to keep [to] his room" for three days and "call in the assistance of a physician." Letter from James Madison to Thomas Jefferson, *supra* note 87.

[94] ARTICLES OF CONFEDERATION of 1781, art. IV, para. 2 (emphasis added). The dissent of ten Republican members of the House Judiciary Committee to the recommendation to impeach Richard Nixon briefly makes the argument that this provision in the Articles of Confederation indicates that "high misdemeanor" must have been understood to refer to a crime as serious as treason or felony. H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 365–66 (1974). However, the construction "[Noun 1], [Noun 2] or other [Noun 3]" usually indicates that [Noun 1] and [Noun 2] are examples of a larger category represented by [Noun 3], not that [Noun 3] is limited by the meanings of [Noun 1] and [Noun 2]. *See* Clark D. Cunningham & Ute Römer-Barron, *Did January 6 Defendants (Including Donald Trump) "Otherwise Obstruct" an Official Proceeding? Linguistic Analysis for the* Fischer *Case Before the Supreme Court*, GA. STATE U. COLL. L., LEGAL STUD. RSCH. PAPERS (2025) (manuscript at 1–2), https://ssrn.com/abstract=4709559 [https://perma.cc/CV5X-HY8J] (analyzing use of "or otherwise"); Cunningham & Egbert, *supra* note 35, at 476–81 (analyzing use of "or other emoluments"). It is also possible that this provision of the Articles of Confederation was poorly drafted, as evidenced by the Hancock controversy and the decision of the Constitutional Convention to change the language.

[95] ARTICLES OF CONFEDERATION of 1781, art. IV, para. 2.

[96] RECORDS II, *supra* note 5, at 443 n.29 (emphasis added).

'other crime' inserted, in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited."[97]

Randolph chaired the Virginia delegation to the Constitutional Convention,[98] and Madison is known to have communicated with both Randolph and Thomas Jefferson about the Hancock extradition case,[99] so it is possible the Hancock controversy at least partially informed the Convention's reported view that "high misdemeanor" had a more limited, technical meaning than "other crimes." If delegates like Madison were aware of Randolph's interpretation in the Hancock case that "high misdemeanor" did not apply to even a serious crime like the alleged assault by Hancock absent a connection to interference with governance, that would explain why the phrase "other crime" was substituted so as to make the scope of the proposed extradition provision in the Constitution broader than its predecessor provision in the Articles of Confederation.

IV. Notable Examples of "High Misdemeanor" Used to Refer to Non-criminal Misconduct

In his argument to the Senate on behalf of President Trump, during his first term, Alan Dershowitz specifically quoted with approval a prior Senate speech made in defense of an impeached president.[100] Defending President Andrew Johnson, Benjamin Curtis (a former Supreme Court justice) told the Senate that the impeachment clause only applied to "criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done."[101] Or as Dershowitz then paraphrased, claiming that "[c]rimes are only what are in the statute book."[102]

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[97] *Id.* at 443. The final, ratified version of the Constitution states:

> A Person charged in any State with Treason, Felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

U.S. Const. art. IV, § 2.

[98] *Edmund Randolph*, Ctr. for Civic Educ., https://www.civiced.org/framers/edmund-randolph [https://perma.cc/4WMW-V2UB].

[99] *See* Letter from James Madison to Thomas Jefferson, *supra* note 87 ("The Executive of S. Carolina, as I am informed by the Attorney [General, Edmund Randolph,] have [sic] demanded of Virginia the surrender of a citizen of Virga . . . Mr. R. [Randolph] thinks Virginia not bound to surrender the fugitive untill [sic] she be convinced of the fact, by more substantial information, & of its amounting to a high misdemesnor [sic].").

[100] 166 Cong. Rec. S610 (daily ed. Jan. 27, 2020).

[101] *Id.* (statement of Alan Dershowitz quoting Justice Curtis).

[102] *Id.*

Modern dictionary definitions of "crime" provide several indicators of whether conduct is criminal: (1) it violates a law, (2) punishment is the consequence, and (3) punishment comes from the government. The Collins COBUILD English Language Dictionary, developed using corpus linguistics methodology and spearheaded by first-generation corpus linguist John Sinclair,[103] defines "crime" as "an illegal action or activity for which a person can be punished by law."[104] Black's Law Dictionary defines crime as "an act committed or omitted, in violation of a public law."[105] The Merriam-Webster Dictionary defines crime as "an illegal act for which someone can be punished by the government."[106] The Law.com dictionary defines crime as "a violation of a law in which there is injury to the public or a member of the public and a term in jail or prison, and/or a fine as possible penalties."[107]

We manually examined every example of *high misdemeanor* in Founders Online and COFEA looking for contextual evidence that the referenced conduct violated a law and/or resulted in government punishment such as imprisonment or fine. Many examples from both sources did carry such indicators suggesting that the referenced conduct was a crime, usually because the example itself was a statute or the context referred to some form of punishment.[108] Our searches, however, also produced uses of *high misdemeanor* where even examination of the full context failed to reference the violation of a law or government imposition of punishment, particularly when the possible consequence of the conduct was removal from office. Our conclusion was that in the Founding Era

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[103] *Sinclair Open Lecture Series*, U. OF BIRMINGHAM, https://www.birmingham.ac.uk/research/centres-institutes/centre-for-corpus-research/sinclair-open-lecture-series [https://perma.cc/W6X4-A4KF].

[104] *Crime*, COLLINS ENG. DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/crime [https://perma.cc/Y8US-R2UQ].

[105] *Crime*, BLACK'S LAW DICTIONARY (2d ed. 1910).

[106] *Crime*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/crime [https://perma.cc/CVD5-YRDL].

[107] *Crime*, LAW.COM, dictionary.law.com/Default.aspx?typed=crime&type=1 [https://perma.cc/465H-EGCW].

[108] See annotated spreadsheets for high misdemeanor found in both Founders Online and COFEA in the Appendix. Cunningham & Römer-Barron, *supra* note 40.

it was possible to describe misconduct as a *high misdemeanor* even if that misconduct was not a crime.[109]

The National Archives' Founders Online collection provides one measure for the Founding Era; the collection spans the period from the birth of Benjamin Franklin in 1706 through the death of James Madison in 1836.[110] The following are notable examples of texts alleging misconduct as a "high misdemeanor" that did not appear to us to be describing the misconduct as criminal, beginning with one famous text that slightly predates the birth of Franklin and ending with an example shortly before the death of Madison.

A. Massachusetts Bay Colony Charter Revoked for "High Misdemeanors" (1681–84)

In 1681, Edward Randolph, a royal collector of customs assigned to the Massachusetts Bay Colony, submitted to the Crown seven complaints against "a

[109] In a brief essay published in 2018 by the Federalist Society Review, Robert G. Natelson did address the possibility that the impeachment clause referred to "high misdemeanors" as well as "high crimes," but he took the position at that time that "high misdemeanors . . . refer[s] to breaches of fiduciary duty." Robert G Natelson, *Impeachment: The Constitution's Fiduciary Meaning of "High . . . Misdemeanors"*, 19 FEDERALIST SOC'Y REV. 68, 68 (2018). Two years later, however, Natelson completely changed his mind to assert that instead "'high misdemeanors' means . . . serious . . . crimes." Natelson, *supra* note 20, at 29. We do not read the brief analysis (seven pages) in this second essay as inconsistent with our findings that *high misdemeanor* could be used in Founding Era America to refer to non-criminal misconduct. Disregarding the section in Natelson's second essay that is limited to "English Legal Sources" and based almost entirely on eighteenth century British dictionary definitions, we do not see in his section on American sources convincing evidence that "high misdemeanor" always meant "serious crime" in Founding Era America. His first three examples involve the phrase "great misdemeanor" rather than "high misdemeanor." *Id.* at 28. Natelson then cites the phrase "treason, felony, or *other* high misdemeanor," the extradition provision from the Articles of Confederation, but without recognition of Edmund Randolph's analysis that "high misdemeanor" in that provision referred not to serious crime but to crime affecting governance. *Id.* He then cites a series of statutes enacted by Congress prior to 1800 that named various crimes as "high misdemeanors," but what clearly demarcates these crimes as "high" is their impact on governance: corruption in the newly created Department of Treasury and "accepting a commission in foreign military forces; enlisting in a foreign army; outfitting a warship for a foreign government; warring against a nation with which America is at peace; conspiring to impede the operation of law." *Id.* at 29 & n.69. Finally, he mentions four state court cases, but at least three of those four cases appear to involve *high misdemeanor* as affecting governance: a juror accepting a bribe, tampering with jury selection, and returning from banishment for treason without permission. *Id.*

[110] *See* FOUNDERS ONLINE, https://founders.archives.gov/ [https://perma.cc/GA6T-K929].

faction" of the colonial government, entitled "Articles of high Misdemeanor."[111] The seven "Articles of high Misdemeanor" generally do not complain of criminal conduct but rather that the colonial government neglected or abused its authority. For example:

> [Article] III. The said faction have [sic] refused to pay me severall [sic] summes [sic] of money which I was forced to deposit in court before I could proceed to triall [sic] of causes relating to his Majesty's concerns . . . .[112]

> [Article] V. The said faction continue [sic] to exercise the power of governor and court of assistants . . . which, for want of education . . . they are uncapable to manage.[113]

Interestingly, when Randolph alleged one type of potentially criminal conduct by the colonials—coining their own money—he specifically described that conduct as both a "crime" and "misdemeanor":

> [Article VI. [C]oining of money (acknowledged in their agent[']s petition to his Majesty a great *crime and* misdemeanor, who then craved his Majesty's *pardon* to the government for the same) is continued to this day . . . .[114]

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[111] *Copy of Edward Randolph's Articles of High Misdemeanor Exhibited Against the General Court Sitting 15th February 1681*, *in* A COLLECTION OF ORIGINAL PAPERS RELATIVE TO THE HISTORY OF THE COLONY OF MASSACHUSETS-BAY 526–28 (Thomas Hutchinson, ed., Boston, Thomas & John Fleet 1769) [hereinafter *Randolph's Articles of High Misdemeanor*], http://name.umdl.umich.edu/N08849.0001.001 [https://perma.cc/RM9N-MRUK]. A photographic image of an eighteenth century reprinting of Randolph's Articles is posted in the Appendix. *See Randolph's 1681 Articles of High Misdemeanor*, *in* Cunningham & Römer-Barron, *supra* note 40*; see also Edward Randolph Condemns the Massachusetts Bay Company 12 June 1683*, AM. HIST.: FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, https://www.let.rug.nl/usa/documents/1651-1700/edward-randolph-condemns-the-massachussetts-bay-company-12-june-1683.php [https://perma.cc/X4YM-HVR3] (describing Randolph's second set of articles of high misdemeanor against the Governor and Company of Massachusetts).

[112] *Randolph's Articles of High Misdemeanor*, *supra* note 119, at 527.

[113] *Id.*

[114] *Id.* at 527–28 (emphasis added).

Randolph submitted a second set of "Articles of high misdemeanor" in 1683,[115] and in 1684 King Charles II responded by revoking the charter of the Massachusetts Bay Colony[116] and creating the "Dominion of New England" to take its place.[117]

B. Pennsylvania's Comptroller Impeached for "High Misdemeanors" (1794)

For the young American republic, one of the most complicated questions of public finance related to debts owed by the prior national government constituted under the old Articles of Confederation, a topic that was the subject of correspondence in 1792 between Pennsylvania's Comptroller General, John Nicholson, and U.S. Treasury Secretary Alexander Hamilton.[118] Nicholson made a personal purchase of "New Loan Certificates" issued by the Commonwealth of Pennsylvania in satisfaction of debts owed under the Articles of Confederation and then redeemed them in exchange for federal securities under a law providing for liquidation of Revolutionary War debts.[119] The propriety of his doing so became the subject of impeachment proceedings in the state legislature in 1794.[120]

Pennsylvania had just adopted a new constitution in 1790; it provided that "[t]he Governor, and all other civil officers, under this commonwealth, shall be liable to impeachment *for any misdemeanor in office*."[121] The "main architect" of the 1790 constitution was James Wilson, who was also a delegate to the

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[115] *Edward Randolph Condemns the Massachusetts Bay Company 12 June 1683*, *supra* note 111.

[116] Rebecca Beatrice Brooks, *Why Was the Massachusetts Bay Colony Charter Revoked?*, HIST. OF MASS. BLOG (Jan. 14, 2020), https://historyofmassachusetts.org/massachusetts-bay-colony-charter-revoked/ [https://perma.cc/L8HQ-YA5J].

[117] Lorraine, *Edward Randolph – The Hated Colonialist*, DOVER HISTORIAN (Nov. 21, 2013), https://doverhistorian.com/2013/11/21/edward-randolph-colonialist/ [https://perma.cc/8AJ5-3759]. Probably due in part to this royal takeover of the Massachusetts Bay Colony, the name of Edward Randolph appeared to be notorious in the Founding Era, see, for example:

> The adversary and enemy; the grand accuser of the Colony, was Edward Randolph, a man of most arbitrary principles, and indefatigable in his endeavours [sic] to distress the Colony, and set up arbitrary government. He was at last the "messenger of death," and arrived in 1673, with powers to demand an absolute resignation of all the liberties of the Colony into the royal hands.

AMOS ADAMS, A CONCISE, HISTORICAL VIEW OF THE PERILS, HARDSHIPS, DIFFICULTIES AND DISCOURAGEMENTS WHICH HAVE ATTENDED THE PLANTING AND PROGRESSIVE IMPROVEMENTS OF NEW-ENGLAND 24 (1769), http://name.umdl.umich.edu/N08704.0001.001 [https://perma.cc/EGQ2-388P].

[118] *See* Letter from John Nicholson to Alexander Hamilton (July 26, 1792), https://founders.archives.gov/documents/Hamilton/01-12-02-0092 [https://perma.cc/BXC3-73EB].

[119] *Id.* at n.1 (describing the circumstances surrounding the letter).

[120] *Id.*

[121] PA. CONST. of 1790, art. IV, § 3 (1874) (emphasis added).

Constitutional Convention.[122] Wilson has been described as "second only to James Madison" in terms of influence at the convention.[123]

It is striking that, only two years after ratification of the U.S. Constitution, Wilson drafted a very different impeachment provision for Pennsylvania that simply authorized impeachment "for any misdemeanor in office."[124] If it is assumed that Wilson expected that state officers in Pennsylvania could be impeached for "high crimes" like bribery, then his drafting decision to use "any misdemeanor in office" presumably was intended to cover a broad range of misconduct.[125]

Such a drafting decision would be consistent with research results we have obtained indicating that in the Founding Era "misdemeanor" was not a synonym for crime but instead a broader term that often included crimes. In particular we found in Founding Era texts[126] a number of instances where "misdemeanor" was used as a "catch-all" term at the end of lists that sometimes were all specific crimes and sometimes a mix of crimes and other types of misconduct, such as "cowardice" or "injustice."[127] For example:

> all Treasons Murders Felonies or other Misdemeanors whatsoever[128]

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[122] Nicholas Mosvick, *Forgotten Founders: James Wilson, Craftsman of the Constitution*, NAT'L CONST. CTR. (July 13, 2020), https://constitutioncenter.org/blog/forgotten-founders-james-wilson-craftsman-of-the-constitution [https://perma.cc/489V-QF3P].

[123] *James Wilson*, OYEZ, https://www.oyez.org/justices/james_wilson [https://perma.cc/AJ8K-DQW7]. He was also appointed as a U.S. Supreme Court Justice by George Washington and was the first law professor appointed at what has become the University of Pennsylvania School of Law. *See* Mosvick, *supra* note 122.

[124] PA. CONST. of 1790, art. IV, § 3 (1874).

[125] *Id.*

[126] *See supra* notes 36–38 and accompanying text.

[127] We have found other evidence that crime and misdemeanor were not used as synonyms, *e.g.*

Variations of the phrase "crimes or misdemeanors" (singular and plural forms) appear twenty-three times in Founders Online and sixty-four times in COFEA. Synonyms rarely, if ever, appear as "NOUN1 or NOUN2."

A search was done in Founders Online for collocates—terms strongly associated with a word—for both crime and misdemeanor. Synonyms would be expected to have significant overlapping of collocates. Instead, the results show very distinctive usage profiles, which is inconsistent with the words functioning as synonyms. More specific information about these search can be found at *Corpus evidence that "crime" and "misdemeanor" were not used as synonyms*, Cunningham & Römer-Barron, *supra* note 40 ("the Appendix").

[128] *Bill for the Establishment of Courts of Assize* (Dec. 2, 1784), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0088 [https://perma.cc/Y8JK-CBYQ] (proposed legislation, Virginia General Assembly).

> all officers accused of cowardice, plundering, embezzlement of public monies and other misdemeanors[129]
>
> prevent and punish Riots, Perjuries, and other Misdemeanors[130]
>
> all Treasons, Misprisions of Treason, Murders, Felonies, Burglaries, Trespasses, and other Misdemeanours whatsoever[131]
>
> injustice, corruption or other misdemeanours [sic] in an office were sufficient causes for removal[132]

Although the 1790 Constitution used just the word "misdemeanor," the Pennsylvania House alleged commission of a "*high* misdemeanor" in each of the seven articles of impeachment against Nicholson.[133]

The Nicholson articles of impeachment repeatedly alleged that Nicholson took action "under the colour [sic] of his office" to "promote and procure his own emolument," but such crimes as theft and embezzlement were never mentioned in these articles.[134] Instead, in each article the specifically alleged conduct was summarized in words matching the category of official misconduct/abuse of power, with variations of the following:

> thereby committing *a high misdemeanor* . . . in violation of the confidence reposed in him as a public officer . . . to the risque [sic] and injury of the commonwealth.[135]

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[129] *Additional Report of the Committee to Digest the Resolutions of the Committee of the Whole Respecting Canada* (June 17, 1776), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-01-02-0165 [https://perma.cc/UY9R-M9LD].

[130] JONATHAN BLENMAN, REMARKS ON ZENGER'S TRYAL, TAKEN OUT OF THE BARBADOS GAZETTE'S; FOR THE BENEFIT OF THE STUDENTS IN LAW, AND IN OTHERS IN NORTH AMERICA 45 (1770) (emphasis omitted), http://name.umdl.umich.edu/N09066.0001.001 [https://perma.cc/536C-7MMX].

[131] FRANCES MASERES, THE TRIAL OF DANIEL DISNEY 4 (1768), http://name.umdl.umich.edu/N08568.0001.001 [https://perma.cc/MZD5-X9CU].

[132] Letter from John Adams to the Boston Gazette (Jan. 18, 1773), https://founders.archives.gov/documents/Adams/06-01-02-0096-0003 [https://perma.cc/GS5E-LXUV].

[133] Nicholson Impeachment, *supra* note 85, at 4–7 (emphasis added).

[134] *Id.* at 4. A preface to the presentation of the Nicholson articles of impeachment to the Pennsylvania state senate used the phrase "for high crimes and misdemeanors in the discharge of his official duties," *id.*; however, none of the seven actual articles of impeachment used the words "crime(s)" or "high crime(s)," *see id.* at 4–7.

[135] *Id.* at 5 (emphasis added).

The required two-thirds vote to convict was not met in the Pennsylvania Senate for any of the Nicholson articles of impeachment, and indeed there was a majority vote to acquit for all but two of the articles.[136]

C. Senator William Blount Expelled for a "High Misdemeanor" (1797)

William Blount had served as the first governor of the Tennessee territory and simultaneously as the U.S. Superintendent of Indian Affairs for the Southern Department.[137] In 1796, he was appointed to the U.S. Senate from the new state of Tennessee.[138] In the same year he became involved in a plot to undermine Spanish control of Florida and Louisiana through attacks by Indian tribes supported by the British navy.[139] In April 1797, Blount sent a letter to an Indian interpreter named James Carey referring to aspects of this plot.[140] The letter came into the hands of President John Adams who, on July 3, 1797, submitted it to the Senate, which referred the letter to "a select commmittee [sic] to consider and report what in their opinion it is proper the senate should do thereon."[141]

On July 8, 1797, the committee returned its report, which stated in part:

> The plan hinted at in this extraordinary letter, to be executed under the auspices of the British, is so capable of different constructions and conjectures, that your committee at present forbear giving any decided opinion respecting it . . . But, when they [the committee] consider his attempts to seduce Carey from his duty, as a faithful interpreter, and to employ him as an engine to alienate the affections and confidence of the Indians, from the public officers of the United States residing among them; the measures he has proposed to excite a temper which must produce the recall or expulsion of our superintendent from the Creek nation; his insidious advice tending to the advancement of his own popularity and consequence, at the expense and hazard of the good opinion which the Indians entertain of this Government, and of the treaties subsisting between us and them, your committee have no doubt that Mr. Blount's conduct has been incon-

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[136] *Sequestered John Nicholson Papers*, PA. ST. ARCHIVES, https://www.phmc.state.pa.us/bah/dam/mg/mg96.htm [https://perma.cc/A3Q2-P6QA].

[137] *William Blount*, LIBR. OF CONG., https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/to-form-a-more-perfect-union/william-blount/ [https://perma.cc/LZR7-KR7W].

[138] BOWMAN, *supra* note 20, at 115.

[139] Letter from David Henley to George Washington n.2 (June 11, 1797), https://founders.archives.gov/documents/Washington/06-01-02-0146 [https://perma.cc/3KNV-5NTM].

[140] *Id.*

[141] Senate Resolution on William Blount (July 4, 1797), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-29-02-0371 [https://perma.cc/T95R-RA8V].

> sistent with his public duty, renders him unworthy of a further continuance of his present public trust in this body, and *amounts to a high misdemeanor*.[142]

The committee not only avoided giving a definite "construction" to the letter but also did not name as a crime any of the misdeeds they listed.[143] What the misdeeds did have in common was that all were described as having an adverse effect on the federal government. All three types of governmental impact can be seen in the committee report: attack on governmental authority, obstruction of government, and official misconduct.[144] The Senate subsequently found Blount "guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator," resulting in a resolution of expulsion, adopted with only one dissenting vote.[145]

D. President John Adams Asked to Remove Revenue Official for a "High Misdemeanor" (1798)

A letter dated February 8, 1798, written by U.S. Secretary of the Treasury Oliver Wolcott to President John Adams, recommended that Joshua Wentworth, a supervisor of revenue, be removed from office for the "high misdismeanour [of] misapplying public money."[146] Wolcott, however, did not state that Wentworth had committed a crime or that he should be prosecuted.[147]

Although the letter as posted in a digitized format on Founders Online contains some deleted text, it appears that the only specifically alleged misconduct is that on January 5, 1798, when presented with a claim for $5,500, Wentworth

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[142] 7 ANNALS OF CONG. 43 (1851) (emphasis added).

[143] *See id.*

[144] *See id.*

[145] *Id.* at 43–44. Each house of Congress is empowered to expel a member by a two-thirds vote. U.S. CONST. art. I, § 5. Blount subsequently became the subject of the first impeachment proceedings brought under the Constitution, based on evidence of the plot referenced in the letter to Carey. 7 ANNALS OF CONG. 43 (1851). The impeachment trial ended when a majority of Senators approved a resolution that the Senate lacked jurisdiction, although it was ambiguous whether the lack of jurisdiction was because Blount was no longer a Senator or because members of Congress were not subject to the impeachment provision. *See* BUCKNER F. MELTON, JR., THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT 232 (1998). The articles of impeachment did not use the phrase "high misdemeanor." *See id.* at 267–71. The articles were prefaced "Articles exhibited by the House of Representatives . . . against William Blount, in maintenance of their impeachment against him for high crimes and misdemeanors." *Id.* at 267. The phrase "high crimes and misdemeanors" did not appear again in the articles, which concluded instead, "and the House of Representatives . . . do demand that the said William Blount may be put to answer the said *crimes and misdemeanors*." *Id.* at 271 (emphasis added).

[146] Letter from Oliver Wolcott, Jr. to John Adams (Feb. 8, 1798), https://founders.archives.gov/documents/Adams/99-02-02-2330. [https://perma.cc/579V-CJ94].

[147] *See id.*

stated that he could not "immediately pay the same."[148] Yet an accounting on January 26, 1798, showed that Wentworth was on that date holding $6,493.90 in public funds—an amount more than sufficient to pay the January 5 claim.[149]

Perhaps Wolcott suspected that the reason Wentworth declined payment on January 5 was that he had temporarily pocketed public funds entrusted to him, but, if so, he apparently did not feel a need to explicitly find that Wentworth had engaged in embezzlement to reach the conclusion that Wentworth's "misapplying public money" was sufficient to conclude that he was "guilty of a high misdemeanour [sic]."[150]

E. President Thomas Jefferson Accused in House of a "High Misdemeanor" (1809)

In 1809, U.S. Representative Josiah Quincy introduced a motion to investigate President Thomas Jefferson regarding his failure to accept the request of Benjamin Lincoln to resign from his federal post as Collector for the port of Boston.[151] Quincy alleged that President Jefferson refused to allow Lincoln to resign, despite his claimed infirmities preventing him from carrying out his duties, to delay filling the position until Jefferson's favored candidate, Henry Dearborn, the current Secretary of War, was ready to take Lincoln's place.[152] Quincy prefaced his remarks by observing "this House have [sic] 'the sole power of impeachment,'"[153] and then accused President Thomas Jefferson of committing "a high crime or misdemeanor" and "a high misdemeanor."[154] Nothing in Quincy's presentation indicated that President Jefferson had violated a statute or was subject to criminal punishment.[155] Quincy's speech can be read as accusing President Jefferson of both obstruction of government and abuse of power.[156]

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[148] *Id.* (emphasis omitted).

[149] *Id.*

[150] *Id.*

[151] 19 ANNALS OF CONG. 1173–75 (1853). This is also posted in the Appendix. *See* Cunningham & Römer-Barron, *supra* note 40.

[152] 19 ANNALS OF CONG. 1174–75 (1853).

[153] *Id.* at 1173.

[154] *Id.* at 1173, 1175.

[155] *See id.* at 1173–75.

[156] *Id.* The motion was subsequently defeated 171 to one. TRIBE & MATZ, *supra* note 2, at 151–52.

V. USE OF "HIGH MISDEMEANOR" IN ARTICLES OF IMPEACHMENT PASSED BY THE HOUSE OF REPRESENTATIVES

A. Impeachment of Federal Judge John Pickering (1804)

In 1804, U.S. District Judge John Pickering became the first federal official to be convicted by the Senate and removed from office pursuant to Article II, Section 4, of the Constitution.[157] Presented to the Senate were "Articles exhibited by the House of Representatives . . . against John Pickering . . . in maintenance and support of their impeachment against him for high crimes and misdemeanors."[158] Following this prefatory language were three articles of impeachment all related to Pickering's handling of a case involving a ship called the *Eliza*; each alleged that his conduct was "contrary to his trust and duty as judge . . . [and] against the law[s] of the United States," but did not specifically use any of the words "high crimes and misdemeanors."[159] The fourth article was based on other conduct, specifically that "on the 11th and 12th days of November . . . 1802"[160] he appeared on the bench "in a state of total intoxication" and was "then and there" guilty of "invok[ing] the name of the Supreme Being" in a "most profane and indecent manner" and "of *other high misdemeanors*, disgraceful to his own character as a judge and degrading to the honor of the United States."[161] The Senate voted to convict on each of the four articles, nineteen to seven, and then twenty to six to remove him from office.[162]

B. Impeachment of Federal Judge James Peck (1830)

In 1826, James Peck, a judge in the U.S. District Court for the District of Missouri, "cause[d] to be published" in a St. Louis newspaper his explanation of a recent decision he had issued in a case involving a family named Soulard.[163] Counsel for the Soulard family then submitted a letter to another paper in St. Louis identifying what he considered to be errors in Judge Peck's decision.[164] Judge Peck responded by issuing an order finding counsel to be in contempt,

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[157] *See* BOWMAN, *supra* note 20, at 126, 137–38.

[158] 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 689–90 (1907) (emphasis omitted). The articles of impeachment against Judge Pickering, as well as the other articles of impeachment discussed in this section, are also reproduced in *Articles of Impeachment*, Cunningham & Römer-Barron, *supra* note 40 ("the Appendix").

[159] *See id.* at 690–92.

[160] *Id.* at 692.

[161] *Id.* (emphasis added).

[162] BOWMAN, *supra* note 20, at 317–18.

[163] HINDS, *supra* note 158, at 786.

[164] *Id.*

ordering him to be arrested and imprisoned for twenty-four hours, and suspending him from practice before that district court for eighteen months.[165]

The U.S. House of Representatives adopted a single article of impeachment that did not mention the phrase "high crimes," but only impeached Judge Peck for "high misdemeanors in office."[166] The article of impeachment stated that Judge Peck's actions were "to the great disparagement of public justice, the abuse of judicial authority, and to the subversion of the liberties of the people of the United States."[167]

In his Senate trial, taking place in 1831, Judge Peck was acquitted by a vote of twenty-two (not guilty) to twenty-one (guilty).[168]

C. Impeachment of President Andrew Johnson (1868)

In 1868, Andrew Johnson, who had succeeded to the presidency following the assassination of Abraham Lincoln in 1865, was engaged in a wide-ranging power struggle with the Republicans who controlled both houses of Congress.[169] In 1867 Congress had passed, over Johnson's veto, the Tenure of Office Act ("Act"),[170] a statute of dubious constitutionality that stated that seven of the most important cabinet officers could be removed only with the advice and consent of the Senate.[171] The congressional Republicans were particularly motivated to protect Secretary of War William Stanton, a holdover from the Lincoln administration, whom they viewed as supportive of their policies regarding reconstruction of the southern states.[172] The statute specifically provided that any removals contrary to the Act "shall be deemed . . . to be, *high misdemeanors*."[173] According to one expert, this provision was "plainly" intended to create a predicate for impeaching Johnson.[174]

On February 21, 1868, in deliberate defiance of the Act, Johnson fired Stanton as Secretary of War and appointed an Army general, Lorenzo Thomas, as acting secretary.[175] Stanton refused to accept the removal order or to surrender

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[165] BOWMAN, *supra* note 20, at 319.

[166] HINDS, *supra* note 158, at 786.

[167] *Id.* at 788.

[168] BOWMAN, *supra* note 20, at 319.

[169] For an excellent overview of this struggle see *id.* at 146–79.

[170] Tenure of Office Act, ch. 154 Stat. 430 (1867). The text of the Act is in the Appendix. *See* Cunningham & Römer-Barron, *supra* note 40.

[171] BOWMAN, *supra* note 20, at 163.

[172] *Id.*

[173] Tenure of Office Act § 6 (emphasis added). The Act made commission of such a high misdemeanor a crime punishable by a fine, not to exceed $10,000, imprisonment, not to exceed five years, or both. *Id.*

[174] BOWMAN, *supra* note 20, at 163.

[175] *Id.* at 166.

the keys to his office.[176] On February 24, by a vote of 126 to forty-seven, the House approved eleven articles of impeachment against Johnson.[177]

The first eight articles of impeachment all related to different aspects of the removal of Stanton and the appointment of Thomas to replace him.[178] Articles I, II, III, V, VII, and VIII only alleged commission of "a high misdemeanor in office," referencing the Tenure of Office Act and did not also allege commission of a "high crime."[179] Articles IV and VI, however, only alleged commission of a "high crime in office" and did not also allege commission of a high misdemeanor.[180] What differentiated these two articles was the allegation that Johnson had conspired with Thomas in violation of an 1861 criminal statute, "An Act to define and punish certain conspiracies."[181]

Article IV alleged that Johnson had conspired with Thomas "by intimidation and threats . . . to hinder and prevent" Stanton from holding the office of Secretary of War and thus was "guilty of a high crime in office."[182] The 1861 law made it a high crime if two or more persons conspire "by force, or intimidation, or threat to prevent any person from . . . holding any office . . . under the United States."[183]

Article VI alleged that Johnson had conspired with Thomas "by force to seize . . . property of the United States in the Department of War . . . then . . . in the custody and charge of Edwin M. Stanton" and thus was guilty of "a high crime in office."[184] The 1861 law made it a high crime if two or more persons conspire "by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States."[185]

Article IX, though not directly based on the removal of Stanton, did reference the Tenure in Office Act in alleging commission of a high misdemeanor in office.[186] This article claimed that, on February 22, 1868, Johnson had told Major-General William Emory to take orders directly from him rather than through "the General of the Army" in order to prevent execution of the Act.[187] The article did not also allege commission of a high crime.[188]

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[176] *Id.*

[177] *Id.*

[178] HINDS, *supra* note 158, at 863–65.

[179] *Id.*

[180] *Id.* at 864–65.

[181] *Id.*

[182] *Id.* at 864.

[183] Act of July 31, 1861, ch. 33, 12 Stat. 284. *See* An Act to define and punish certain Conspiracies (July 31, 1861) in the Appendix.

[184] HINDS, *supra* note 158, at 865.

[185] Act of July 31, 1861, ch. 33, 12 Stat. 284.

[186] HINDS, *supra* note 158, at 866.

[187] *Id.*

[188] *See id.*

Article X, however, alleged commission of "a high misdemeanor in office" without any reference either to the Stanton removal or the Tenure in Office Act.[189] Instead, it alleged that Johnson committed "a high misdemeanor in office" by making a series of speeches critical of Congress:

> [U]nmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the Government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United States convened in divers parts . . . did . . . make and deliver with a loud voice certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress . . . amid the cries, jeers, and laughter of the multitudes then assembled.[190]

After this passage, Article X then went on for several pages, quoting portions of speeches given by Johnson on August 18, 1866, September 3, 1866, and September 8, 1866.[191] Article X did not allege commission of a "high crime."[192]

Although the final article of impeachment, Article XI, was written as "a catch-all summarizing all the previous allegations,"[193] it did not allege commission of "high crimes and misdemeanors" but only "a high misdemeanor in office."[194] Article XI did include the following new allegation:

> Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, and in disregard of the Constitution and laws of the United States, did heretofore, to wit, on the 18th day of August, 1866, at the city of Washington, and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-ninth Congress of the United States was not a

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[189] *Id.* at 866–68.

[190] *Id.* at 866, 868.

[191] *Id.* at 866–68.

[192] *See id.*

[193] BOWMAN, *supra* note 20, at 166.

[194] HINDS, *supra* note 158, at 868–69.

> Congress of the United States authorized by the Constitution to exercise legislative power under the same; but, on the contrary, was a Congress of only part of the States, thereby denying and intending to deny that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying and intending to deny the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States.[195]

Although the preface and conclusion to the Johnson Articles of Impeachment referred to "high crimes and misdemeanors in office,"[196] the careful parsing of "high misdemeanors" and "high crimes" into eleven different articles is inconsistent with an interpretation of the impeachment's "other high crimes and misdemeanors" clause as a "term of art" or fixed phrase that cannot be broken down into its component parts. Like the 1830 House of Representatives that impeached Judge Peck, the 1868 House applied the impeachment provision as if it were written "high crimes and high misdemeanors." By impeaching President Johnson in Article X for making "loud . . . harangues . . . against Congress" in particular, the 1868 House applied "high misdemeanor" as including non-criminal conduct—presumably the "attack on government" type of high misdemeanor.[197]

D. Impeachment of William Belknap, Former Secretary of War (1876)

In 1876, the House of Representatives launched an investigation into an alleged kickback scheme involving Secretary of War William Belknap.[198] Belknap resigned during the investigation, but the House still moved forward to adopt five articles of impeachment.[199] Articles I, III, and IV specifically alleged that Belknap was guilty of "high crimes and misdemeanors in office," but Articles II

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[195] *Id.* As of 1866, the states of the former Confederacy (with the exception of Tennessee) had not yet been allowed to elect representatives to Congress; President Johnson therefore had recurrently argued that "Congress was not really Congress" in the absence of delegates from the southern states. *See* BOWMAN, *supra* note 20, at 162–63.

[196] HINDS, *supra* note 158, at 863, 869.

[197] HINDS, *supra* note 158, at 866. The famous argument by Curtis that impeachment only applies to "high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done" was addressed solely to Article X. CONG. GLOBE, 40th Cong., 2d Sess. 134 (Supp. 1868) ("I come to the last one, concerning which I shall have much to say, and that is the tenth article, which is all of and concerning the speeches of the President."). But in arguing the meaning of "other high crimes and misdemeanors," Curtis never acknowledged that Article X only alleged commission of a "high misdemeanor"—a point also not acknowledged by contemporary legal scholars who cite Curtis with approval. 166 CONG. REC. S611 (daily ed. Jan. 27, 2020) (statement of Alan Dershowitz); Bowie, *supra* note 20, at 65.

[198] BOWMAN, *supra* note 20, at 122–23.

[199] *Id.* at 123.

and V only alleged that he was guilty of a "high misdemeanor" in office.[200] Article II alleged that Belknap had received $1,500 from Caleb Marsh "in consideration" of "corruptly permit[ing]" John Evans to maintain a trading post at a military fort.[201] Article V alleged a number of payments between 1870 and 1876 from Evans to Marsh for Marsh to "induce" Belknap to permit Evans to maintain the trading post.[202]

The primary issue before the Senate was not whether Belknap had engaged in impeachable conduct but whether the Senate retained jurisdiction after Belknap left office (a central issue in the second Trump impeachment).[203] Although, on an initial vote on this issue, the Senate voted thirty-seven to twenty-nine that it did have jurisdiction, when it came to the vote on conviction, the Senate vote was only thirty-five to twenty-five to convict, which did not reach the two-thirds requirement.[204]

E. Impeachment of Judge Charles Swayne (1905)

Even into the twentieth century,[205] the U.S. House of Representatives continued to apply the impeachment provision as if it were written "high crimes

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[200] HINDS, *supra* note 158, at 910–14.

[201] *Id.* at 912.

[202] *Id.* at 914.

[203] BOWMAN, *supra* note 20, at 123; 167 CONG. REC. S589–609 (daily ed. Feb. 9, 2021) (discussing arguments over Senate jurisdiction to impeach President Trump after he left office).

[204] BOWMAN, *supra* note 20, at 123.

[205] In 1913, former President (and future Chief Justice) William Howard Taft said in an address to the American Bar Association:

> Under authoritative construction by the highest court of impeachment, the Senate of the United States, a *high misdemeanor* for which a judge may be removed is misconduct involving bad faith or wantoness [sic] or recklessness in his judicial actions, or in the use of his official influence for ulterior purposes. By the liberal interpretation of the term "*high misdemeanor*" which the Senate has given there is now no difficulty in securing the removal of a judge for any reason that shows him unfit.

Merrill E. Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 U. KAN. CITY L. REV. 3, 22 (1939) (emphasis added).

and high misdemeanors."[206] In 1905, the House approved twelve articles of impeachment against federal judge Charles Swayne.[207] Articles II and III made similar allegations that Swayne had overstated claims for travel expenses and thus committed the "high crime . . . of obtaining money from the United States by a false pretense" and *also* by such misconduct committed a "high misdemeanor in office."[208] Article I also claimed Swayne submitted a false claim for travel expenses but only alleged he was "guilty of a high crime and misdemeanor in his said office" without separately stating commission of a "high misdemeanor."[209]

The other nine articles only alleged that Swayne was guilty "of a high misdemeanor in office." Articles IV and V alleged Judge Swayne improperly received benefits from a receiver he appointed relating to the use of a railroad car under the control of the receiver and was thereby guilty of "an abuse of judicial power and of a high misdemeanor in office."[210] Articles VI and VII alleged that when the boundaries of the judicial district to which he had been appointed were altered, Judge Swayne failed to change his residence to a location within the new boundaries and thus was guilty of a high misdemeanor in office.[211] Articles VIII and IX alleged that Judge Swayne imprisoned an attorney named E.T. Davis for ten days for contempt of court, and thereby "misbehaved himself in his office of judge, and was . . . guilty of an abuse of judicial power and of a high misdemeanor in office."[212] Articles X, XI, and XII alleged similar improper imprisonment of other attorneys for contempt of court and that Judge Swayne

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[206] For two impeachments in the early twentieth century the House of Representatives used just the word "misdemeanor" rather than the phrase "high misdemeanor" in impeachment articles that did not allege commission of "high crimes and misdemeanors." In 1912 the House of Representatives passed thirteen articles of impeachment against Judge Robert Archbald of the U.S. Court of Appeals for the Third Circuit alleging various abuses of power. H.R. REP. No. 946 (1912). Articles I, II, and V alleged that Judge Archbald was guilty of "high crime[s] and misdemeanor[s] in office" but Article III, IV, and Articles VI–XIII only alleged that he was "guilty of a misdemeanor." *Id.* at 30–52. The Senate reached the required two-thirds votes for Articles I, II, III, IV, and XIII and removed Judge Archbald from office. 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 706–08 (2d ed. 1936). In 1926, the House of Representatives passed five articles of impeachment against U.S. District Judge George English, all of which involved various alleged abuses of office. ARTICLES OF IMPEACHMENT PRESENTED AGAINST GEORGE W. ENGLISH), *see* Appendix., S. DOC. NO. 101, at 1–14 (1926). Without use of the phrase "high crimes and misdemeanors," each article alleged only that Judge English was "guilty of a misdemeanor in office." *Id.* Judge English resigned after the articles were passed by the House, and both the House and Senate concurred in a decision to discontinue impeachment proceedings. 3 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES 2219–20 (1994).

[207] HINDS, *supra* note 158, at 960–63. Also available in the Appendix

[208] *Id.* at 960–61 (emphasis added).

[209] *Id.* at 960.

[210] *Id.* at 961–62.

[211] *Id.* at 962.

[212] *Id.* at 962–63.

"misbehaved himself in his office of judge and was . . . guilty of an abuse of judicial power and of a high misdemeanor in office."[213]

Articles II and III provide interesting evidence that the 1905 House of Representatives treated the same conduct—a judge "obtaining money from the United States by a false pretense"—as both a "high crime" *and* a "high misdemeanor."[214] Articles VIII–XII, like the 1830 impeachment of Judge Peck, treat the misuse of the judicial contempt power as a "high misdemeanor."[215]

The Senate trial did not result in the removal of Judge Swayne; a majority voted "not guilty" on each article.[216]

F. Impeachment of Federal Judge Halsted Ritter (1936)

Even as late as the mid-1930s, the phrase "high misdemeanor" continued to play a role in Congressional impeachment discourse. On June 1, 1933, the House of Representatives approved a resolution authorizing the Judiciary Committee to investigate the official "conduct" of U.S. District Judge Halsted Ritter "to determine whether . . . he had been guilty of any high crime *or* misdemeanor."[217] The use of the disjunctive "or" in this resolution accurately foreshadowed the ultimate articles of impeachment, passed by the House in 1936, in which four out of seven articles only used the phrase "high misdemeanor" in the concluding allegation paragraph.[218]

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[213] *Id.* at 963.

[214] *Id.* at 960–61.

[215] *Id.* at 962–63.

[216] BOWMAN, *supra* note 20, at 326.

[217] 3 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES 2205 (1994) (emphasis added).

[218] *Id.* at 2205, 2214–32. On March 2, 1936, Articles I–IV were adopted, but on March 30, 1936, Article III was amended to read as Article II and Articles IV–VII were added. *Id.* at 2214–23, 2227–32. Also see Appendix.

Articles I, II	Articles III, IV, V, VI	Article VII
"Wherefore the said Judge Halsted L. Ritter was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor."[219]	"Wherefore[,] the said Judge Halsted L. Ritter was and is guilty of a high misdemeanor in office."[220]	"Wherefore the said Judge Halsted L. Ritter was and is guilty of misbehavior, and was and is guilty of high crimes and misdemeanors in office."[221]

In the Senate, Judge Ritter filed an answer stating "that the facts set forth [in the articles of impeachment] did not constitute impeachable high crimes and misdemeanors."[222] The response by the House Managers did not use the phrase "high crimes and misdemeanors," but instead replied that the articles "set forth impeachable offenses, misbehaviors, *and* misdemeanors."[223]

The Senate voted on each article, but only Article VII reached the required two-thirds vote threshold required for conviction.[224] Article VII incorporated the preceding six articles under an omnibus allegation that Judge Ritter's conduct brought "his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice."[225]

CONCLUSION

Courts are not permitted to have any role in the interpretation or application of the Constitution's impeachment provision.[226] Therefore, not only is there no judicial precedent on the meaning of "high crimes and misdemeanors," but not even guidance from judicial opinions. In drafting and voting on articles of impeachment the House can look at prior impeachments but is not bound by the

[219] *Id.* at 2216, 2219.

[220] *Id.* at 2220, 2228–29. The phrase "high crime and misdemeanor" does appear elsewhere in each of these articles. *See id.* A special circumstance may explain why Articles III and IV alleged "high misdemeanor." These articles accused Judge Ritter of practicing law while a federal judge in violation of a provision of the federal code. *Id.* at 2219, 2228. At that time, it stated that if a federal judge engaged in the practice of law that person was guilty of a high misdemeanor. Act of Mar. 3, 1911, ch. 231, § 258, 36 Stat. 1161 (codified as amended at 28 U.S.C. § 454). Articles V and VI, however, did not allege violation of this statute, but rather alleged income tax evasion. 3 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES 2229 (1994).

[221] 3 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES 2229–32 (1994).

[222] *Id.* at 2238.

[223] *Id.* at 2239 (emphasis added).

[224] *Id.* at 2244.

[225] *Id.* at 2229–30.

[226] Nixon v. United States, 506 U.S. 224, 234–35 (1993) (explaining why the Supreme Court has no authority to review the conviction and removal of office of federal judge Walter Nixon by the Senate pursuant to the impeachment provision).

actions of prior Congresses, nor do prior Senate impeachment trials provide binding precedent for future Senate trials.

The constitutional text itself, however, offers resources for Congressional deliberation and action that do not appear, at least currently, to be fully utilized. Interpreting "other high crimes and misdemeanors" as if written "other high crimes" and "other high misdemeanors" with the advantage of understanding Founding Era language use provides two significant benefits. First, the recurrent argument "no crime, no impeachment" can be refuted by direct appeal to the constitutional text itself. Second, resurrecting "high misdemeanor" as part of impeachment discourse provides Congress with a coherent way—grounded on actual language usage from the founding era and utilized by Congress for over 130 years—to distinguish clearly between two types of impeachable conduct: crime that affects governance and non-criminal misconduct that affects governance.