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Impeachment Grounds: Part I: Pre-Constitutional Convention Materials

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Summary

This is a collection of selected background materials pertinent to the issue of what constitutes impeachable misconduct for purposes of Article II, section 4 of the United States Constitution quoted below. It includes excerpts from Blackstone, Wooddeson, and the impeachment clauses in pre-Constitutional Convention state constitutions. It is the first of six segments that together with footnotes comprise, *Impeachment Grounds: A Collection of Selected Materials*, CRS Report 98-882.

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

Blackstone

“The high court of parliament: which is the **supreme court** in the kingdom, not only for the making, but also for the execution, of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. But an impeachment before the lords of the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a present to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom. A commoner cannot however be impeached before the lords for any capital offence, but only for high misdemeanor; a peer may be impeached for any crime.” IV BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 256 (1769) (transliteration supplied).



Although the phrase had apparently become fairly common in impeachment cases by then, Blackstone makes no reference to the phrase “high crimes and misdemeanors.” He does, nevertheless, provide a detailed outline of the classification of crimes in his day:

“We are now arrived at the fourth and last branch of these commentaries; which treats of *public wrongs*, or *crimes* and *misdemeanor*. For we may remember that, in the beginning of the preceding volume, wrongs were divided into two sorts or species; the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book: we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemeanors.” *Id.* at 1.

* * *

“A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms: though, in common usage, the word, ‘crimes,’ is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of ‘misdemeanors’ only.

“The distinction of public wrongs from private, of crimes and misdemeanor from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity. . . . [T]reason, murder, and robbery are properly ranked among crimes; since besides the injury done to individuals, they strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

“In all cases the crimes include an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community,” *Id.* at 5.

* * *

“The third general division of crimes [after offenses against God and offenses against the law of nations] consists of such, as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign. . . . Every offence therefore more immediately affecting the royal person, his crown, or dignity, is in some degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by residence: and these may be distinguished into four kinds; 1. Treason. 2. Felonies injurious to the king’s prerogative. 3. *Praemunire*. 4. Other misprisions and contempts.

“Treason . . . imports a betraying, treachery, or breach of faith. It therefore happens only between allies, faith the mirror: for treason is indeed a general appellation, made use of by the law, 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, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such his superior or lord,” *Id.* at 74-5.

* * *

“Felony, in the general acceptation of our English law, comprizes every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted . . . Treason itself . . . was antiently comprised under the name of felony,” ID. at 94.

* * *

“The fourth species of offences, more immediately against the king and government, are intituled misprisions and contempts.

“Misprisions (a term derived from the old French, *mespris*. a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprision is contained in every treason and felony whatsoever. . . . Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.

“Of the first, or negative kind, is what is called *misprision of treason*; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto,” ID. at 119-20.

* * *

“Misprisions, which are merely positive, are generally denominated *contempts* or *high misdemeanors*; of which

“The first and principal is the *mal-administration* of such high offices, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability,” ID. at 121.

* * *

“Lastly, to endeavor to dissuade a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand mute; (all of which are impediments to justice) are high misprisions, and contempts of the king’s courts, and punishable by fine and imprisonment. . . .

“The order of our distribution will next lead us to take into consideration such crimes and misdemeanors as more especially affect the *common-wealth*, or public polity of the kingdom. . . .

“The crimes and misdemeanors, that more *especially* affect the common-wealth, may be divided into five species; *viz.* offences against public *justice*, against the public *peace*, against public *trade*, against public *health*, and against the public *police or oeconomy*: of each of which we will take a cursory view in their order.

“First then, of the offences against public *justice*: some of which are felonious, whose punishment may extend to death, others only misdemeanors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity,” ID. at 126-28.

* * *

“16. The next offence against public justice is when the suit is past its commencement, and come to trial. And that is the crime of wilful and corrupt *perjury*; which is defined by sir Edward Coke, to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully*, *absolutely*, and *falsely*, in a matter *material* to the issue or point in question. . . . *Subornation* of perjury is the offence of *procuring another* to take such a false oath, as constitutes perjury in the principal. The punishment of perjury and subornation,

at common law, has been various. It was antiently death; afterwards banishment, or cutting out the tongue; and then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony. . . .

“17. Bribery is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behavior in his office,” *Id.* at 136-39.

Wooddeson

“In the last lecture two distinct modes of criminal prosecution were reserved for future inquiry, namely, proceedings on impeachments, and penal acts of parliament occasionally passed against particular offenders: the former is designed to occupy our present consideration.

“It is certain that magistrates and officers intrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community, and at the same time in a manner not properly cognizable before the ordinary tribunals. The influence of such delinquents, and the nature of such offences, may not unsuitably engage the authority of the highest court, and the wisdom of the sagest assembly. The commons, therefore, as the grand inquest of the nation, become suitors for penal justice; and they cannot consistently either with their own dignity, or with safety to the accused, sue elsewhere but to those who share with them in the legislature.

“On this policy is founded the origin of impeachments: which began soon after the constitution assumed its present form. In the year 1321. . . .

“All the king’s subjects are impeachable in parliament, but with this distinction, that a peer may be so accused before his peers of any crime, a commoner (tho perhaps it was formerly otherwise) can now be charged with misdemeanors only, not with any capital offence. For when Fitzharris, in the year 1681, was impeached of high treason, the lords remitted the prosecution to the inferior court, tho it greatly exasperated the accusers. Such kind of misdeeds however as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper and have been the most usual grounds for this kind of prosecution. Thus, if a lord chancellor be guilty of bribery, or of acting grossly contrary to the duty of his office, if the judges mislead their sovereign by unconstitutional opinions, if any other magistrate attempt to subvert the fundamental laws, or introduce arbitrary power, these have been deemed cases adapted to parliamentary inquiry and decision. So where a lord chancellor has been thought to have put the seal to an ignominious treaty, a lord admiral to neglect the safeguard of the sea, an ambassador to betray his trust, a privy counselor to propound or support pernicious and dishonorable measures, or a confidential advisor of his sovereign to obtain exorbitant grants or incompatible employments, these imputations have properly occasioned impeachments; because it is apparent how little the ordinary tribunals are calculated to take cognizance of such offences, or to investigate and reform the general polity of the state. . . .” 2 WOODDESON’S LECTURES, *Lecture 40*, 596-97, 601 (1792 ed.).

Pre-Constitutional Convention State Constitutions

Nine of the states had impeachment provisions in their state constitutions when the Constitutional Convention met in Philadelphia in 1787:

“Every officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly, either when in office, or after his resignation or removal for mal-administration: All impeachments shall be before the president [governor] or vice-president and council [upper house of the legislature, who shall hear and determine the same,” Pa.Const. §22 (1776).

“That the Governor, and other officers, offending against the State, by violating any part of this Constitution, maladministration, or corruption, may be prosecuted, on the impeachment of the General Assembly, or presentment to the grand jury of any court of supreme jurisdiction in this State,” N.C.Const. Art.23 (1776).

“The president, when he is out of office, and within eighteen months after, and all others offending against the State, either by maladministration, corruption, or other means, by which the safety of the commonwealth may be endangered, within eighteen months after the offence was committed, shall be impeachable by the house of assembly before the legislative council . . .” Del.Const. Art.23 (1776).

“The Governor, when he is out of office, and other, offending against the State, either by mal-administration, corruption, or other means, by which the safety of the State may be endangered, shall be impeachable by the House of Delegates. . .” Va.Const. (1776).

“That the judges of the supreme court shall continue in office for seven years, the judges of the inferior courts of common pleas in the several counties, justices of the peace, clerks of the supreme court, clerks of the inferior courts of common pleas and quarter sessions, the attorney-general and provincial secretary shall continue in office for five years; and the provincial treasurer shall continue in office for one year; and that they shall be severally appointed by the council and assembly in manner aforesaid, and commissioned by the governor, or, in his absence, by the vice president of the council; provided always, that the said officers severally shall be capable of being re-appointed at the end of the terms severally before limited, and that any of the said officers shall be liable to be dismissed, when adjudged guilty of misbehavior by the council, on an impeachment of the assembly,” N.J.Const. XII (1776).

“That the power of impeaching all officers of the State, for mal and corrupt conduct in their respective offices, be vested in the representatives of the people of the assembly . . .” N.Y.Const. Art. XXXIII (1777).

“ . . . [A] court shall be instituted for the trial of impeachments . . . to consist of the president of the senate, for the time being, and the senators, chancellor, and judges of the supreme court, or the major part of them. . .” N.Y.Const. Art. XXXII (1777).

“Every officer of State, whether judicial or executive, shall be liable to be impeached by the General Assembly, either when in office, or after his resignation, or removal for mal-administration. All impeachments shall be before the Governor or Lieutenant

Governor and Council, who shall hear and determine the same,” Vt.Const. Ch.2, §20 (1777).

“The house of representatives shall be the grand inquest of this commonwealth; and all impeachments made by them, shall be heard and tried by the senate,” Mass.Const. Pt.2, Ch.1, §3, Art.VI (1780).

“The senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and mal-administration in their offices. . .” Mass.Const. Pt.2, Ch.1, §2. Art.VIII (1780).

“The house of representatives shall be the grand inquest of the state; and all impeachments made by them, shall be heard and tried by the senate,” N.H.Const. Pt.2, Art.17 (1784)

“The senate shall be a court, with full power and authority to hear, try, and determine, all impeachments made by the house of representatives against any officer or officers of the state, for bribery, corruption, malpractice or maladministration in office...” N.H.Const. Pt.2, Art. 38 (1784)