

**Congress of the United States**  
Washington, DC 20510

December 19, 1998

Dear Colleague:

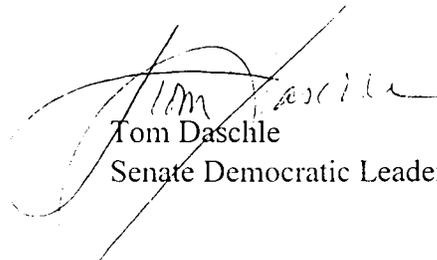
In response to questions about the role and procedures of the Senate in receiving and acting on Articles of Impeachment, we are releasing today a memorandum prepared by the Office of Legal Counsel. This document reviews the historical background of the Senate's constitutional responsibilities and summarizes existing rules.

It should be understood that Senate Legal Counsel has provided an overview that focuses on current rules and past practices. The memorandum does not attempt to forecast how the Senate will proceed on the pending Articles. Moreover, as Senate Legal Counsel notes, "the rules have been amended from time to time...." It is the Senate's prerogative to decide how best to implement these rules.

Sincerely,



Trent Lott  
Senate Majority Leader



Tom Daschle  
Senate Democratic Leader

## United States Senate

OFFICE OF SENATE LEGAL COUNSEL  
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### IMPEACHMENT ISSUES

Our office has prepared the following memorandum summarizing the Senate's procedures for an impeachment trial and the historical record relating to the definition of an impeachable offense. Set forth below, following a recitation of the relevant constitutional provisions and their historical background, is a summary treatment of these topics.

#### I. Constitutional Provisions

##### *Article I, Section 2, Clause 5*

The House of Representatives ... shall have the sole Power of Impeachment.

##### *Article I, Section 3, Clauses 6 and 7*

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

##### *Article II, Section 2, Clause 1*

The President ... shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

##### *Article II, Section 4*

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.

##### *Article III, Section 1*

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour....

##### *Article III, Section 2, Clause 3*

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; ....

## II. Historical Background

The Framers of the Constitution debated impeachment issues against the backdrop of an extensive history of British Parliamentary impeachment. The Framers borrowed from this tradition, for example, dividing the power of impeachment and conviction between the House and the Senate as the British had between the House of Commons and the House of Lords. The Framers also employed a British term of art, "high Crimes and Misdemeanors," in the constitutional definition of impeachable offenses, a standard explored in greater detail below.<sup>1</sup>

The Framers, however, self-consciously departed from the British model of impeachment in a variety of ways. After extensive debate, the Framers subjected the President to impeachment, whereas no remedy could be had against the British monarch. While Parliament employed the power to impeach ordinary citizens, only "[t]he President, Vice President and all civil Officers of the United States," art. II, § 4, are subject to impeachment under the Constitution.<sup>2</sup>

Perhaps most significantly, whereas impeachment in England often resulted in the imposition of criminal punishment, even death, the Constitution provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualifica-

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<sup>1</sup> The Framers were also significantly influenced by state and colonial impeachment practices. See Peter Charles Hoffer and N.E.H. Hull, *Impeachment in America: 1635-1805*, at 96 (1984).

<sup>2</sup> The phrase "civil Officers of the United States" has been read to include all non-military, executive or judicial branch officers appointed pursuant to the Appointments Clause (art. II, § 2, cl. 2). The Senate's 1797 dismissal of charges against Senator William Blount has generally been understood to establish that Members of the House and Senate are not subject to impeachment. See Elizabeth B. Bazan, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice* at 22 (Congressional Research Service, February 27, 1998). Of course, Senators and Representatives are subject to expulsion from the body in which they serve pursuant to the constitutional provision empowering "Each House [to] . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." Art. I, § 5, cl. 2.

tion to hold and enjoy any Office of honor, Trust or Profit under the United States." Art. I, § 3, cl. 7. These two limitations -- on those subject to impeachment and the consequences resulting from conviction -- reflect an understanding that the central purpose of impeachment under the Constitution was not to punish an individual for wrongdoing but rather to protect the Republic from a federal official's malicious influence by depriving him of power.<sup>3</sup> Criminal punishment, if any, is dispensed in the ordinary course through the criminal justice system, independent of the impeachment process.<sup>4</sup>

The federal impeachment process also uniquely blends the political accountability of a representative body with the adjudicatory obligations of a court. After much debate, and over the repeated objections of James Madison among others, the Constitutional Convention rejected various proposals to commit the power of impeachment and conviction to the judiciary and instead divided it between the two Houses of Congress.<sup>5</sup> This choice followed in part from the grudging realization that only a politically accountable, representative body like the Senate would "possess the degree of credit and authority" necessary to act on claims that a prominent federal official should be removed from power.<sup>6</sup> Moreover, the Framers distinguished between impeachment and ordinary criminal trials, recognizing that the tribunal designated to try impeachments "can never be tied down by such strict rules, either in the

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<sup>3</sup> See Raoul Berger, *Impeachment: The Constitutional Problems* 79 (1973) ("Removal would enable the government to replace an unfit officer with a proper person, leaving 'punishment' to a later and separate proceeding, if indeed the impeachable offense were thus punishable.").

<sup>4</sup> See U.S. Const. art. I, § 3, cl. 7, which provides that "the Party convicted [in an Impeachment Trial] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

<sup>5</sup> Hoffer and Hull, *Impeachment in America: 1635-1805*, at 97-100.

<sup>6</sup> *The Federalist* No. 65 (Hamilton) at 497 (F. Wright ed., 1961).

delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security."<sup>7</sup>

Yet by invoking language of judicial process -- such as "try," "convict[]," and "Judgment" -- to describe impeachment procedures, the Framers emphasized what Alexander Hamilton termed the Senate's "judicial character" when sitting for impeachment trials.<sup>8</sup> This constitutional language responded to the Framers' fears that impeachment trials would "seldom fail to agitate the passions of the whole community, and to divide it into parties."

though a majority vote was sufficient to convict in the British House of Lords.<sup>11</sup> In addition, the Framers sought to differentiate impeachment from ordinary legislative business by requiring that Senators "be on Oath or Affirmation" when sitting for an impeachment trial. U.S. Const. art. I, §3, cl. 6.<sup>12</sup>

The House of Representatives has voted to impeach fifteen federal officials -- President Johnson, Secretary of War Belknap, Senator Blount, and twelve federal judges including Justice Samuel Chase. Fourteen of those impeachments were followed by trials in the Senate, which resulted in convictions of seven federal judges.<sup>13</sup>

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<sup>11</sup> See Hoffer and Hull, *Impeachment in America: 1635-1805*, at 102-03.

<sup>12</sup> The form of oath to be administered to the Members of the Senate and the Presiding Officer sitting in the trial of impeachments is as follows: "I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of \_\_\_\_\_, now pending, I will do impartial justice according to the Constitution and laws: So help me God." *Senate Manual*, S. Doc. No. 104-1, at 184 (1995). In his recent monograph on the impeachment trials of Justice Chase and President Johnson, Chief Justice Rehnquist quoted with apparent approval the following statement by Senator Fessenden, a Republican of Maine, made in response to the suggestion that he should take heed of the public outcry for President Johnson's impeachment:

To the suggestion that popular opinion demands the conviction of the President on these charges, I reply that he is not now on trial before the people, but before the Senate . . . . The people have not heard the evidence as we have heard it. The responsibility is not on them, but upon us. They have not taken an oath to "do impartial justice according to the Constitution and the laws." I have taken that oath. I cannot render judgment upon their convictions, nor can they transfer to themselves my punishment if I violate my own. And I should consider myself undeserving of the confidence of that just and intelligent people who imposed upon me this great responsibility, and unworthy of a place among honorable men, if for any fear of public reprobation, and for the sake of securing popular favor, I should disregard the convictions of my judgment and my conscience.

William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 242 (1992).

<sup>13</sup> See Bazan, *Impeachment: An Overview of Constitutional Provisions, Procedure, and*

### III. Impeachment Procedures

We summarize below the procedures governing impeachment in the House and trial in the Senate and then briefly discuss the duties of an individual Senator in connection with an impeachment trial. This section then concludes with an analysis of the likelihood that issues raised during an impeachment would be subject to judicial review.

#### A. *Impeachment by the House of Representatives*

The word "impeach" means to bring an accusation against. After the House of Representatives has impeached a federal official, the accused is tried before the bar of the Senate to determine whether he will be convicted and removed from office. Mirroring English Parliamentary practice, the Framers of the Constitution vested the power of impeachment in the House, with trial to follow in the Senate. Thus, the House alone decides whether to initiate impeachment proceedings.<sup>14</sup> Although nineteenth-century House impeachment investigations were often conducted off the record without participation by the accused, the more recent practice has been to allow the accused, through counsel, to mount a defense in committee hearings (often before the Judiciary Committee or a subcommittee thereof). These hearings take the form of an adjudicatory proceeding, wherein witnesses called by the committee or the respondent are examined by counsel for the committee, counsel for the accused, and Members.<sup>15</sup>

If at [REDACTED] conclusion of [REDACTED] gs the [REDACTED] [REDACTED] by majority vote to recommend impeachment, the full House considers the resolution to impeach together with

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(...continued)  
*Practice* at 18-20.

<sup>14</sup> See, e.g., Warren S. Grimes, *The Role of the United States House of Representatives In Proceedings To Impeach and Remove Federal Judges*, in 1 Research Papers of the National Commission on Judicial Discipline and Removal 39, 40 (1993).

<sup>15</sup> *Id.* at 52.

the articles of impeachment reported out of committee.<sup>16</sup> Articles of impeachment are roughly analogous to counts of a criminal indictment in that they serve to notify the accused of the charges against him and set the limits for the jurisdiction of any trial in the Senate.<sup>17</sup>

Affirmative votes by a simple majority of the Members present and voting are sufficient to impeach.<sup>18</sup> Following the adoption of a resolution and articles of impeachment, the House appoints from among its own Members managers to present the case against the accused in the Senate, notifies the Senate of the impeachment and appointment of managers, and grants appropriate powers and funds to the managers.

*B. Trial in the Senate*

The Senate has created rules to guide the conduct of an impeachment trial.<sup>19</sup> The present form of the Rules of Procedure and Practice in the Senate When Sitting On Impeachment Trials ("Impeachment Rules")<sup>20</sup>, can be traced back to 1868, when those Rules were comprehensively revised in preparation for the trial of President Andrew Johnson. The rules have been amended from time to time since and have typically been reviewed prior to the conduct of a trial in the Senate.

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<sup>16</sup> 3 Lewis Deschler, *Deschler's Precedents of the United States House of Representatives*, ch. 14, § 8 at 518-19 (1977).

<sup>17</sup> See Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* at 33 (1996).

<sup>18</sup> See *id.* at 125 (listing as an "explicit constraint[]" on the impeachment power "the need for the House to have a majority to impeach.").

<sup>19</sup> For a fuller discussion than is provided herein of the historical precedents underlying those rules, see *Procedure and Guidelines for Impeachment Trials in the United States Senate*, S. Doc. No. 99-33 (1986), which was prepared in anticipation of the 1986 impeachment trial of Judge Claiborne.

<sup>20</sup> See *Senate Manual*, S. Doc. No. 104-1, at 177-85.

The Constitution vests "the sole Power of Impeachment" in the House, and thus the Senate has no formal role in the impeachment process unless and until the House notifies the Senate that it has approved articles of impeachment.<sup>21</sup> Pursuant to the Senate Impeachment Rules, upon notification that the House has appointed managers and directed them to carry the articles of impeachment to the Senate, the Secretary of the Senate "shall immediately inform the House [] that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment."<sup>22</sup> At the time appointed by the Secretary's message, the House managers are escorted to their seats in the Senate chamber by the Sergeant at Arms, who then recites the proclamation calling for silence and order in the chamber set forth in Impeachment Rule II. The House managers next exhibit the articles of impeachment, by having one manager read aloud the resolution impeaching the accused and the articles of impeachment.

Pursuant to Rule III of the Impeachment Rules the Senate proceeds to "consideration" of the articles. Impeachment Rule III provides that the Senate shall proceed to consideration of the articles of impeachment exhibited by the House managers no later than 1:00 p.m. the following day, but recent practice has been to proceed to consideration of the articles immediately after their exhibition to the Senate.<sup>23</sup> Consideration of the articles

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<sup>21</sup> See 3 *Deschler*, ch. 14, § 9, at 530-34. Throughout the House's nine-month-long Watergate inquiry during the Fall of 1973 and Spring and Summer of 1974, the Senate took no formal action on the subject until July 29, 1974, when it approved a resolution authorizing the Rules Committee to review the Senate's rules governing impeachment proceedings. See *id.*, ch. 14, § 15.8, at 633-34.

<sup>22</sup> Impeachment Rule I. The Secretary's message establishes the date and time for the presentation of the articles. See 3 *Deschler*, ch. 14, § 9.5, at 536.

<sup>23</sup> See, e.g., *Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr., a Judge of the United States District Court for the Southern District of Mississippi*, S. Doc. No. 101-22, at 7 (1989).

requires the administration of an oath -- first to the presiding officer<sup>24</sup> and in turn by him to all Senators then present and to the other Senators as they shall appear -- that, "in all things appertaining to" the impending impeachment trial the presiding officer and the Senators "will do impartial justice according to the Constitution and laws." The Senate issues a writ of summons to the accused, reciting the articles and advising him to appear before the chamber at a set date and time to file his answer. The accused may appear in person or through counsel; if the accused fails to answer the articles, the trial proceeds on a plea of not guilty.<sup>25</sup>

The resolution commanding the issuance of a summons to the accused also sets forth a schedule governing both the date by which the accused shall answer and the date by which the House shall file its reply to the answer (formally styled a "replication").<sup>26</sup> Like a complaint and answer in an ordinary court case, the articles, the accused's answer, and the House's subsequent reply serve to identify the issues in dispute between the parties and thus narrow the range of matters to be decided by the tribunal.<sup>27</sup> The Senate has discretion to

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<sup>24</sup> During the judicial impeachments of the 1980s, the Vice President presided over proceedings on the Senate floor, and in his absence, the President pro tempore served as the presiding officer. *See, e.g., Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, A Judge of the United States District Court for the District of Nevada*, S. Doc. No. 99-48, at 6 (1986). Cognizant of a Vice President's conflict of interest in an impeachment trial of the President, which could result in the elevation of the Vice President to the Presidency, the Framers provided that "When the President of the United States is tried" before the Senate, "the Chief Justice shall preside." U.S. Const. art. I, § 3, cl. 6. Accordingly, Impeachment Rule IV directs the presiding officer of the Senate, in the event of the impeachment of the President, to notify the Chief Justice of the time and place appointed for the consideration of the articles of impeachment and request his attendance.

<sup>25</sup> Impeachment Rule VIII.

<sup>26</sup> *See, e.g., Senate Proceedings in the Impeachment Trial of Judge Nixon*, S. Doc. No. 101-22, at 8

adjust this schedule to meet the needs of a particular case; in the recent past, the accused has been afforded between two and three weeks in which to prepare an answer, and the House ten or twelve days in which to reply.<sup>28</sup>

Prior to the presentation of evidence, the full Senate has entertained and decided motions by the accused to resolve procedural questions or to dismiss particular articles as failing to state an impeachable offense. For example, during the 1986 impeachment trial of Judge Claiborne, the Senate rejected the accused's motion to establish that the House managers were obligated to prove his guilt "beyond a reasonable doubt" to obtain a conviction, and that ruling has been understood to have left to the judgment of each Senator the appropriate standard of proof in an impeachment trial.<sup>29</sup>

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Once such preliminary issues have been resolved and the issues have been framed, the Senate proceeds to the taking of evidence.<sup>30</sup> During the judicial impeachments of the

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<sup>28</sup> See, e.g., *Senate Proceedings in the Impeachment Trial of Judge Nixon*, S. Doc. No. 101-22, at 8.

<sup>29</sup> See *Senate Proceedings in the Impeachment Trial of Judge Claiborne*, S. Doc. No. 99-48, at 150. See also *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee Hastings*, S. Hrg. No. 101-94, Pt. 1, at 74-75 (1989) (statement of Senate Legal Counsel Davidson) ("Judge Claiborne moved to have the Senate establish a standard of evidence, moved to have established the standard of truth beyond a reasonable doubt . . . and the Senate determined overwhelmingly . . . that each member, as on any vote in the Senate, needs to establish his or her standards for that vote. The Senate has never presumed to instruct its members what quality of evidence, or what historical basis each member must have in order to determine that vote.").

<sup>30</sup> Although Impeachment Rule XI creates the option of taking evidence in committee, that rule was not meant to apply in the event of an impeachment trial of the President. In S. Rep. No. 93-1125 (1974), the Rules Committee, while considering an amendment to Rule XI, wrote:

During consideration of this amendment to Rule XI, [ ] Chairman [Cannon] observed that the committee authorized by the rule was an extremely valuable device in impeachment trials of lesser civil officers, since in periods of extreme legislative

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1980s, in which the Senate received evidence before a select committee, the House managers were assisted by outside counsel. In the committee hearings, it was customary for the managers to conduct the direct examination of the witnesses called by the prosecution, leaving to outside counsel cross-examination of defense witnesses.<sup>31</sup>

Unless the Senate orders otherwise, once the trial has commenced, the Senate shall continue in session from day to day (Sundays excepted) until final judgment is rendered and so much longer as the Senate judges necessary. The taking of evidence in the impeachment trial of President Andrew Johnson lasted just over a month, with the Senate typically sitting in trial from noon until four or five in the afternoon, six days a week.<sup>32</sup> During the 1989 impeachment trial of Judge Hastings, the select committee taking evidence heard the testimony of fifty-five witnesses on eighteen days during a one-month period, typically

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activity it enables the Senate to discharge both its legislative and impeachment responsibilities. *However, nothing but action by the full Senate on all aspects of a presidential impeachment was conceivable.* Senator Scott, who along with other Committee members endorsed the Chair's views, asked that the legislative history on the resolution directing the review of the rules clearly reflect that this was the general understanding of the members of the Committee.

*Id.* at 32 (emphasis added). Indeed, when Senator (later Justice) Sutherland, prompted by the burden imposed on the Senate's legislative business by the 1912-13 impeachment trial of Judge Archbald, proposed a resolution to amend the Impeachment Rules to allow the taking of evidence by committee, he declared that he thought it "very desirable that that course should be followed in the future, except where [the President, Vice President, Cabinet member, or Supreme Court Justice] should be involved." 49 Cong. Rec. 698 (1912). When defending the use of Rule XI committees in judicial impeachments in the 1980s, the Senate Legal Counsel relied on this history in assuring the judiciary of the Senate's understanding that in a Presidential impeachment all evidence would be taken on the floor of the Senate rather than in committee.

<sup>31</sup> See, e.g., *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.*, S. Hrg. No. 101-247, Pt. 2, at 17, 206 (1989).

<sup>32</sup> William H. Rehnquist, *Grand Inquests*, at 224-25 (1988).



of, or disobedience to, its authority [and] orders."<sup>37</sup> The Senate may also adopt a resolution authorizing the Senate Legal Counsel to bring a civil action in U.S. District Court for the enforcement of a Senate subpoena against a recalcitrant witness.<sup>38</sup> If a witness asserts a Fifth Amendment objection to a Senate subpoena, the Senate may also direct the Senate Legal Counsel to obtain a court order immunizing a witness's testimony or document production from subsequent use in criminal cases against him.<sup>39</sup>

Rule XVII of the Impeachment Rules provides that "[w]itnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side." The accused may elect to testify but has never been required to appear.<sup>40</sup> Senators may pose questions (to a witness, a manager, or counsel for the accused) by submitting them in writing to the presiding officer, but Senators' questions to witnesses are subject

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<sup>37</sup> Impeachment Rule VI.

<sup>38</sup> In aid of the 1989 impeachment trial of Judge Hastings, this Office sought and obtained an order from the U.S. District Court for the District of Columbia directing a key witness, William A. Borders, Jr., to testify before the Impeachment Trial Committee. Mr. Borders nonetheless refused to testify and was held in civil contempt of court and incarcerated until the Senate voted to convict and remove Judge Hastings nearly two months later. *Senate Proceedings in the Impeachment Trial of Judge Hastings*, S. Doc. No. 101-18, at 1591-92, 1599-1600, 1603-04.

<sup>39</sup> See 2 U.S.C. § 288b(d)(1); 18 U.S.C. § 6002, 6005(b)(1).

<sup>40</sup> See 3 *Deschler*, ch. 14, §12.11, at 574. President Andrew Johnson acceded to the advice of his counsel that he boycott his impeachment trial in the Senate. See 1 Robert C. Byrd, *The Senate, 1789-1989: Addresses on the History of the United States Senate*, S. Doc. No. 100-20, at 287 (1988). More recently, all three federal judges impeached by the House in the 1980s addressed the Senate during their impeachment trials. See *Senate Proceedings in the Impeachment of Judge Claiborne*, S. Doc. No. 99-48, at 140-46; *Proceedings of the United States Senate in the Impeachment Trial of Alcee L. Hastings, A Judge of the United States District Court for the Southern District of Florida*, S. Doc. No. 101-18, at 648-52 (1989); *Senate Proceedings in the Impeachment Trial of Judge Nixon*, S. Doc. No. 101-22, at 304-90.

to an objection by counsel on the same grounds as questions from the managers or counsel.<sup>41</sup> Under Rule XXIV debate is not permitted in open session, and thus as one commentator has observed, when in open session during an impeachment trial Senators "are not permitted, unless they suspend or modify the applicable rules by a majority vote, to engage in colloquies, or to participate in any argument."<sup>42</sup>

While Rule XX provides that all evidence shall be taken in open session, the rules provide for closed debate on decisions and orders, in which case "no member shall speak for more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate."<sup>43</sup> During the 1989 impeachment trial of Judge Nixon, the Senate waived the time limit and allowed unlimited debate (in closed session).<sup>44</sup>

Voting on any question occurs publicly, and when voting on the ultimate question of conviction, the yeas and nays shall be taken on each article separately, a vote of guilty by two-thirds of the Senators present on any article resulting in conviction of the respondent on that article and his removal from office. The presiding officer puts the question; thereafter each Senator rises in his place to answer guilty or not guilty when his name is called. Once voting on an article of impeachment has started, voting shall continue on all articles unless the

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<sup>41</sup> Impeachment Rule XIX.

<sup>42</sup> Gerhardt, *The Federal Impeachment Process* at 34.

<sup>43</sup> Impeachment Rule XXIV.

<sup>44</sup> *Senate Proceedings in the Impeachment Trial of Judge Nixon*, S. Doc. No. 101-22, at [redacted].

Senate adjourns for a period less than a day or sine die.<sup>45</sup> A motion to reconsider the vote by which an article of impeachment is sustained or rejected is not in order.<sup>46</sup>

Removal from office follows automatically from conviction on any article.<sup>47</sup>

Disqualification from holding any "Office of honor, Trust or Profit under the United States," U.S. Const. art. I, § 3, cl. 7, requires a separate vote, in which a simple majority can so disqualify the accused.<sup>48</sup> Of the seven federal judges convicted in impeachment trials, only two -- Judge Humphreys (convicted in 1862 for rebellion against the Union) and Judge Archbald (convicted in 1913 for bribery) -- have been disqualified in addition to being removed.<sup>49</sup> During the three judicial impeachments of the 1980s, no vote was taken on the question of disqualification.

C. *The Role of a Senator in an Impeachment Trial*

No precise analogue exists for the role of a Senator in an impeachment trial. The proceeding is judicial in character, but it takes place in a politically accountable body and is

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<sup>45</sup> Impeachment Rule XXIII. During voting on the numerous articles of impeachment against Judge Hastings, the Senate decided by unanimous consent to dispense with voting on several of the articles after convictions had been obtained on the first five. *Senate Proceedings in the Impeachment Trial of Judge Hastings*, S. Doc. No. 101-18, at 696. Similarly, after the House managers had fallen one vote short of conviction on three of the eleven articles of impeachment against President Andrew Johnson, the Senate adjourned sine die without voting on the remaining articles. See Rehnquist, *Grand Inquests* at 234-35.

<sup>46</sup> Impeachment Rule XXIII.

<sup>47</sup> See 3 *Deschler*, ch. 14, § 13.9, at 584. In the trials of Judges Pickering, Humphreys, and Archbald, the Senate, after having voted to convict, took a separate vote on removal from office. Since the trial of Judge Ritter in 1936, it has been the understanding of the Senate that removal follows automatically from conviction. For an example of a judgment of conviction ordering removal of the accused from office, see *Senate Proceedings in the Impeachment Trial of Judge Hastings*, S. Doc. No. 101-18, at 705.

<sup>48</sup> See 3 *Deschler*, ch. 14, § 13.10, at 585.

<sup>49</sup> G. [redacted], [redacted] *Impeachment Process* at 78 n.20.

free from the more rigid constraints applicable to courts of law. Recusal based on familiarity or partiality in relation to the accused would be inappropriate; the Framers entrusted the oath and the conscience of each Senator to supply the requisite impartiality.<sup>50</sup> Senators serve as both judge and jury, making ultimate determinations as to both the legal and the factual issues presented by the case. Though Impeachment Rule VII gives the presiding officer the power to pass on evidentiary or other "incidental" questions as an initial matter, the full Senate retains the power to overrule those decisions. For example, it remains for each Senator to pass on the legal question of what standard of proof must be met to convict the accused.<sup>51</sup> Unlike ordinary legislative business, an impeachment trial casts the Senator in a relatively passive role. The House managers and defense counsel shape the issues and direct the course of the proceeding, subject to the procedural rules and decisions of the Senate. Senators do not pose questions directly, but rather do so through the presiding officer. And although the taking of evidence and voting are public, debate occurs in closed session and, under the Impeachment Rules, according to strict limits. Senators can and often do, however, submit for the record written statements supplying their reasons for their vote for or against conviction. Should a Senator be called as a witness, Rule XVIII provides that "he shall be sworn, and give his testimony standing in his place."

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<sup>50</sup> Charles L. Black, Jr., *Impeachment: A Handbook* 11 (1974). It should be noted, however, that the notion of recusal does have a limited role to play in the impeachment process. For example, Senators Coats, Jeffords, Lott, and Mack sought and obtained the unanimous consent of the Senate to refrain from participation in the impeachment trial of Judge Hastings because they had each served in the House of Representatives when it had voted to impeach Judge Hastings. See *Senate Proceedings in the Impeachment Trial of Judge Hastings*, S. Doc. No. 101-18, at 15-17.

<sup>51</sup> S. Doc. No. 101-18, at 29.

D. *Judicial Review*

The Supreme Court has recognized that the Constitution commits the impeachment trial function to the Senate. In *Walter L. Nixon, Jr. v. United States*, 506 U.S. 224 (1993), the Supreme Court, in an opinion by Chief Justice Rehnquist, held that the courts had no role in reviewing Judge Nixon's challenge to his conviction and removal. Judge Nixon had argued that the Senate's use of a committee to receive evidence violated the Impeachment Trial Clause, U.S. Const. art. I, § 3, cl. 6, which provides that "The Senate shall have the sole Power to try all Impeachments." The Supreme Court concluded that the text and history of the Clause manifest the Framers' intent that the Senate have sole responsibility over impeachment trials. *Nixon*, 506 U.S. at 230-34. The Court also found that judicial review of impeachment trials would be inconsistent with the need for finality in impeachment matters. *Id.* at 236.

The *Nixon* decision indicates that judicial review of the Senate's proceedings or determinations in an impeachment trial would be highly unlikely. To be sure, the *Nixon* case did not exclude all possibility of judicial intervention in the impeachment process.<sup>52</sup> But the Court's opinion does strongly suggest that the role of the judiciary in impeachment is severely limited and that the possibility of judicial review is extremely remote.

#### IV. Impeachable Offenses

The Constitution provides for removal "from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, § 4. There has been little controversy over the years concerning the meaning of treason, which is

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<sup>52</sup> See *Nixon*, 506 U.S. at 230 (suggesting that it might be within the capacity of the judiciary to enforce the Constitution's requirements that Senators be under oath, that a two-thirds vote is necessary to convict, and that the Chief Justice preside in the event of the trial of the President); see also *id.* at 253 (Souter, J., concurring in judgment) ("One can envision different and unusual circumstances that might justify a more searching review of impeachment proceedings.").

defined in the Constitution, *see* art. III, § 3, or bribery, a common law crime. By contrast, the phrase "other high Crimes and Misdemeanors" has been the subject of intense debate. This section of the memorandum traces the evolution of this standard during the Philadelphia Constitutional Convention of 1787 and then briefly discusses salient comments about this standard made during the state ratifying conventions, the First Congress, and the early Republic. We conclude with a listing of the thirty articles of impeachment on which the Senate has voted for conviction.

A. *Constitutional Convention of 1787*

Though the Framers intentionally borrowed from the British impeachment tradition, they also "agreed to deviate" from this model and decided to "put a uniquely American stamp on the federal impeachment process."<sup>53</sup> In particular, throughout the debates in the Constitutional Convention the Framers "sought to define impeachable offenses precisely."<sup>54</sup>

On July 20, 1787, early in the debate on the subject of Presidential impeachment, many delegates suggested that the President should be impeached and removed on a showing of "malpractice," "neglect of duty," or "corruption."<sup>55</sup> Others opposed impeachment, arguing that the President would be answerable to the electors for any misconduct and that subjecting him to the threat of impeachment would leave him too dependent on the branch of government with the power to remove him.<sup>56</sup> On September 4, 1787, shortly before the conclusion of the Convention, the Committee of Eleven, to which the Convention had

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<sup>53</sup> Gerhardt, *The Federal Impeachment Process* at 10. *See also* Hoffer and Hull, *Impeachment in America* at 96-97.

<sup>54</sup> *Id.* at 97.

<sup>55</sup> *See* 2 Max Farrand, ed., *The Records of the Federal Convention of 1787*, at 64-69 (1974).

<sup>56</sup> *Id.* at 64-67.

committed the thorny issues it had been unable to resolve, proposed that the President should be impeached, convicted, and removed only when he had committed "treason or bribery."<sup>57</sup> Four days later, when the Convention turned its attention to the standard for conviction and removal, George Mason objected to the committee's proposal as too "restrained."<sup>58</sup> He observed that "Treason as defined in the Constitution will not reach many great and dangerous offences," and that "[a]s bills of attainder<sup>59</sup> which have saved the British Constitution are forbidden, it is the more necessary to extend [] the power of impeachments."<sup>60</sup> He moved that the words "or maladministration" be added after "bribery" to the list of impeachable offenses. *Id.*

Madison objected, arguing that "[s]o vague a term will be equivalent to a tenure during [the] pleasure of the Senate."<sup>61</sup> Mason responded by withdrawing "maladministration," and substituting in its place "other high crimes and misdemeanors against the State."<sup>62</sup> The phrase "high crimes and misdemeanors" can be traced back to English practice, where it had been used for centuries in impeachments by Parliament.<sup>63</sup> The Convention subsequently

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<sup>57</sup> *Id.* at 495.

<sup>58</sup> *Id.* at 550.

<sup>59</sup> At English common law a bill of attainder was a legislative act that imposed criminal penalties, including death, upon named individuals or groups. See Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 Va. L. Rev. 475, 477-79 (1984). The Constitution bars such acts by the Congress, U.S. Const. art. I, § 9, cl. 3, and by the states, *id.* art. I, § 10, cl. 1.

<sup>60</sup> 2 Farrand, *The Records of the Federal Convention* at 550.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See Berger, *Impeachment: The Constitutional Problems* at 76 ("when the Convention adopted Mason's substitution of 'high crimes and misdemeanors' for the 'vague'

(continued...)

replaced the word "State" with "United States," to avoid any "ambiguity."<sup>64</sup> This impeachment provision was further amended by adding "The vice-President and other Civil officers of the U.S. shall be removed from office on impeachment and conviction as aforesaid."<sup>65</sup> On September 12, 1787, the Committee of Style -- which had no authority from the Convention to alter the substantive meaning of the clause -- reported what became the final version, having edited it down to one sentence and having deleted the words "against the United States" from the definition of impeachable offenses.<sup>66</sup>

*B. The State Ratification Debates*

*The Federalist Papers*, a collection of essays written by Alexander Hamilton, James Madison, and John Jay urging the New York convention to ratify the proposed Constitution, is the most prominent document from the ratification debates in the states. Hamilton addresses the Constitution's mechanism for impeachment and removal of federal officials in *Federalist Nos. 65, 66, 69, and 79*. The focus of his argument in those essays is on the choice of the Senate as the forum for trial, predicting that both the President and federal judges will be appropriately restrained from exceeding the limits on their respective powers by the threat of impeachment. By contrast, *The Federalist Papers* include comparatively little discussion of what constitutes an impeachable offense. In *Federalist No. 65*, Hamilton describes impeachable offenses as

those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated

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(...continued)

'maladministration' he had first suggested, the Framers inferably had the English cases in mind as giving content to the phrase.").

<sup>64</sup> 2 Farrand, *The Records of the Federal Convention* at 551-52.

<sup>65</sup> *Id.* at 552.

<sup>66</sup> *Id.* at 600.

POLITICAL, as they relate chiefly to injuries done immediately to the society itself.<sup>67</sup>

Distinguishing an impeachment from criminal prosecution, Hamilton later observes that in the trial of impeachments the Senate "can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security."<sup>68</sup>

The scope of impeachable offenses received somewhat greater attention in the North Carolina and Virginia ratification conventions. In the former, James Iredell, who later served as a U.S. Supreme Court Justice, cautioned that "it is not easy to describe" the type of "crime" for which impeachment would be an appropriate remedy. He nonetheless offered some general observations:

The power of impeachment is given by this Constitution, to bring great offenders to punishment. . . . This power is lodged in those who represent the great body of the people, because the occasion for its exercise will arise from acts of great injury to the community, and the objects of it may be such as cannot be easily reached by an ordinary tribunal.<sup>69</sup>

Later in the debate, Iredell stated that an impeachable offense must reflect "an error of the heart, and not of the head," insisting that impeachment would be an inappropriate response to an official's good-faith mistakes in judgment.<sup>70</sup> "According to these principles," Iredell concluded that "the only instances, in which the President would be liable to impeachment, would be where he had received a bribe, or had acted from some corrupt motive or other."<sup>71</sup>

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<sup>67</sup> *The Federalist No. 65* (Hamilton) at 426 (emphasis in original).

<sup>68</sup> *Id.* at 428.

<sup>69</sup> 4 Jonathan Elliot, *Debates on the Adoption of the Federal Constitution* 113 (1974).

<sup>70</sup> *Id.* at 125-26.

<sup>71</sup> *Id.*

When answering arguments that the President could dupe the Senate into approving treaties injurious to the nation, however, Iredell asserted that "[t]he President must certainly be punishable for giving false information to the Senate."<sup>72</sup> At another point in the debate, he indicated that an offense might properly be grounds for impeachment even though it was not punishable under the criminal law.<sup>73</sup> Finally, Governor Johnston, who later represented North Carolina in the Senate, commented that a federal official would remain subject to civil suit and criminal indictment and that, accordingly, impeachment would be reserved for "great misdemeanors against the public."<sup>74</sup>

Responding to fears articulated at the Virginia convention that the President would abuse his power, Madison repeatedly referred to impeachment as a sufficient safeguard. For example, when George Mason argued that the President could use his pardon power to "pardon crimes which were advised by himself . . . before indictment, or conviction" to "stop inquiry and prevent detection,"<sup>75</sup> Madison answered that "if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him."<sup>76</sup> Likewise, Madison answered the claim that the President might rush the ratification of a treaty before Senators from more distant states

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<sup>72</sup> *Id.* at 127.

<sup>73</sup> *Id.* at 114 (observing that a person impeached, convicted, and removed from office would also be "liable to a trial at common law, and may receive such common-law punishment as belongs to a description of such offences, *if it be punishable by that law.*") (emphasis added).

<sup>74</sup> *Id.* at 48.

<sup>75</sup> 3 Elliot, *Debates on the Adoption of the Federal Constitution* at 497.

<sup>76</sup> *Id.* at 498.



Debate" on the Presidential power of removal, opponents to the recognition of such a power argued that the President might abuse it by removing highly qualified officers for improper reasons. To this danger, Madison answered that the President's abuse of his removal power, though not an indictable crime, would subject him to impeachment and conviction:

What will be the motives which the President can feel for such abuse of his power, and the restraints that operate to prevent it? In the first place, he will be impeachable by this House, before the Senate for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.<sup>81</sup>

To the same effect, Abraham Baldwin, who had represented Georgia in the Philadelphia Convention, insisted that if the President "in a fit of passion, [removed] all the good officers of the Government," he "would be obliged to do the duties himself; or, if he did not, we would impeach him, and turn him out of office, as he had done others."<sup>82</sup>

*D. Commentators of the Early Republic*

Although not part of the official debates in the state ratification conventions or the First Congress, the writings of two oft-quoted commentators bear mention here because they have been given special force by scholars. The first author, James Wilson, served as a delegate to the Philadelphia Convention and later as one of the first justices on the Supreme Court. His familiarity with constitutional law led his contemporaries to regard him as second only to Madison in his knowledge of the design of the Constitution. Wilson stressed the critical distinction between impeachments and criminal punishment. He wrote that

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<sup>81</sup> 1 Annals of Congress 497-98 (J. Gales ed. 1789). Elbridge Gerry of Massachusetts disagreed with Madison's conclusion that impeachment provided an appropriate remedy for an abuse of the removal power: "It is said, that the President will be subject to an impeachment for dismissing a good man. This in my mind involves an absurdity. How can the House impeach the President for doing an act which the Legislature has submitted to his discretion?" *Id.* at 502.

<sup>82</sup> *Id.* at 559.

impeachments are "proceedings of a political nature . . . confined to political characters, to political crimes and misdemeanors, and to political punishments."<sup>83</sup>

A generation later, in his 1833 scholarly treatise on constitutional law, Justice Joseph Story sought to explicate the reach of the impeachment power as grounded in British Parliamentary history and the early experience under the Constitution. Story equated the offenses subject to impeachment with those "as may affect the rights, duties, and relations of the party accused to the public in his political or official character, either directly or remotely."<sup>84</sup> Specifically addressing the question whether "any acts are impeachable, except such, as are committed under colour of office," Justice Story noted the conclusion of a recent "learned commentator," William Rawle, that the "'legitimate causes of impeachment . . . can have reference only to public character, and official duty. . . . In general, those offences, which may be committed equally by a private person, as a public officer, are not the subjects of impeachment."<sup>85</sup> Story viewed the issue as not having "been judicially settled by the court having, properly, cognizance" of it, and "reasonably [to be] left to the high tribunal, constituting the court of impeachment, when the occasion shall arise."<sup>86</sup>

#### *E. Senate Convictions*

Because the Senate acts as both judge and jury in an impeachment trial, the Senate's conviction on a particular article of impeachment reflects the Senate's judgment not only that the acc[redacted] en[redacted] in the mi[redacted]duct und[redacted]lying the [redacted]le but also [redacted]the [redacted]cle

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<sup>83</sup> J. Wilson, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament," *James Wilson, Works*, 2:721 (quoted in Gerhardt, *The Federal Impeachment Process* at 21).

<sup>84</sup> 2 Joseph Story, *Commentaries on the Constitution* § 810, at 278 (1833).

<sup>85</sup> 2 *id.* § 799, at 269-70 (quoting William Rawle, *A View of the Constitution of the United States* 213 (2d ed. 1829)).

<sup>86</sup> 2 *id.* §§ 800, 803, at 270, 273.

stated an impeachable offense.<sup>87</sup> Accordingly, the thirty articles on which the Senate has voted to convict, which are set forth in chronological order in the appendix to this memorandum, provide insight into the Senate's past understanding of the standard for conviction.<sup>88</sup>

That said, all seven individuals convicted by the Senate were serving as federal judges. Bearing that in mind, some commentators have suggested that these precedents may be of limited force when applied to impeachment of a President, noting that while federal judges enjoy a provisional life tenure, subject only to their continued "good Behaviour," U.S. Const. art. III, § 1, a President's fixed term provides regular accountability through popular elections.<sup>89</sup>

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<sup>87</sup> Black, *Impeachment* at 13.

<sup>88</sup> Although debates among Senators during an impeachment trial occur in closed session, on numerous occasions Senators have afterwards submitted for the record written statements setting forth the rationale for their votes for or against conviction. In addition to the full Senate's ultimate judgment, these statements reflect the Members' understanding of the words "high Crimes and Misdemeanors."

<sup>89</sup> See, e.g., John R. Labovitz, *Presidential Impeachment* 92-93 (1978).