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# History of Impeachment


*"There is no evil under the sun but what is to be dreaded from men, who may do what they please with impunity: They seldom or never stop at certain degrees of mischief when they have power to go farther; but hurry on from wickedness to wickedness, as far and as fast as human malice can prompt human power."*

*"It is nothing strange, that men, who think themselves unaccountable, should act unaccountably."*

— Thomas Gordon, *Cato's Letters* No. 33 (1721)

Every day, articles appear in the media calling for the impeachment of President Donald Trump. Many desired the same fate for Trump's White House predecessor, Barack Obama. But others did not, including avowed socialists elected to Congress last fall who do not want to wait for (or chance the results of) the 2020 elections to evict a president they despise from the Oval Office.

On Wednesday, freshman Democratic congresswoman Rashida Tlaib (D-Mich.), who is also a member of the Democratic Socialists of America, held a press conference where she announced that by the end of March she would introduce a bill to impeach President Donald Trump. "Later on this month, I will be joining folks and advocates across the country to file the impeachment resolution to start the impeachment proceedings," Representative Tlaib told those gathered at the media event. Besides being one of the first two representatives proudly belonging to the Democratic Socialists of America — the other is fellow first-term representative Alexandria Ocasio-Cortez (D-NY) — Tlaib drew bipartisan rebuke when on her first day in Congress she said, speaking of the president, that she would "impeach the motherf*****!"

Apparently, we live in a day much like that in which the eminent jurist Samuel Pufendorf lived, a world so full of distrust and disorder in politics that he described all government officials as being "led away by a private Interest, which is opposite to that of the State; or else, being divided into Factions, they are more concern'd to ruin their Rivals, than to follow the Dictates of Reason."

Of course, it is the likelihood of such abuse of power and position that impeachment was included in our governing document and in the constitution of Great Britain, from which the Framers took many of their constitutional cues. Accordingly, our review of the history of impeachment will begin with a quick trip across the pond, where the power of impeachment was established in order to protect the people from the dangers of despotism. Much of the form and function of the British version of impeachment will seem very familiar to American readers.

**English Origins of Impeachment**

During the days of the so-called Good Parliament of 1376, several important and influential men in the household of Edward III were tried and convicted by the two houses of Parliament working together. William Latimer, Richard Lyons, and many of their fellow advisors were subjected to the jurisdiction of

Parliament and tried on charges of being corrupt courtiers. This is believed by most scholars and historians to have been the first impeachment carried out in Parliament.

After Latimer, Lyons, and company were charged, tried, and convicted by joint jurisdiction of the Houses of Commons and Lords, impeachment was used to punish perfidy of royal counselors during the reigns of Richard II, Henry IV, Henry V, and Henry VI. The tactic was slowly transforming into an effective restraint on usurpation. As Henry VI's reign ended, however, many other methods of maintaining constitutional purity developed alongside impeachment. These other remedies — attainder, for example — were so often used, in fact, that impeachment fell out of regular use.

Impeachment as a tool to thwart would-be tyrants did not make a constitutional comeback until the reign of James I, over 140 years after its last use by Parliament.

Going forward from 1621, impeachment re-emerged as what one writer described as "a potent means of attacking its [Parliament's] enemies." The English Civil War was a watershed era in British history that fomented the fear of tyrants and royal overreach in the men who would become American colonists. The lessons learned from the execution of republican heroes Algernon Sidney and Henry Vane the Younger, for example, served as a warning to early Anglo-Americans about the chaos and cruelty that rained on the people during the reign of a monarch mad with power.

During the 18th century in England, republicans known as "Commonwealth men" printed page after page of polemical attacks on the perversions of royal prerogatives committed by kings and their courtiers. Two of the most influential of these enemies of tyranny were John Trenchard and Thomas Gordon. It has been said that without the words of these two now-forgotten men, our Founding Fathers would not have so quickly and thoroughly developed their own concept of constitutionally protected liberty. Working as partners, Trenchard and Gordon wrote the inimitable *Cato's Letters*, published from 1720-1723. Each essay featured scathing and unflinching attacks on the crescendo of kingly corruption and aristocratic wickedness, as well as humble and heartfelt calls to return to the virtue that is the *sine qua non* of self-government.

*Cato's Letters* Number 33 is an excellent example of the series and will serve as an able segue into the history of impeachment in America. Here are a few key selections from that denouncement of despotism that formed some of the earliest lessons taught to our Founding Fathers at their mothers' knees:

"Considering what sort of a creature man is, it is scarce possible to put him under too many restraints, when he is possessed of great power: He may possibly use it well; but they act most prudently, who, supposing that he would use it ill, inclose him within certain bounds, and make it terrible to him to exceed them."

"However the world may be deceived by the change of names into an abhorrence of the one, and an admiration of the other; it is all one to a nation, when they are to be slaughtered, whether they be slaughtered by the hangman or by dragoons, in prison or in the field; nor is ambition better than cruelty, when it begets mischief as great."

"And thus men quitted part of their natural liberty to acquire civil security. But frequently the remedy proved worse than the disease; and human society had often no enemies so great as their own magistrates; who, where-ever they were trusted with too much power, always abused it, and grew mischievous to those who made them what they were."

**Impeachment in America Before 1787**

Almost immediately, the Englishmen who colonized America established colonial governments that governed with very little oversight from the mother country. Legislatures were created whose lawmaking authority came from consent of the governed, rather than the permission of Parliament. And each of the colonies drafted a constitution.

These state constitutions were immeasurably influential on the men who, having lived under the state constitutions for decades, were tasked with writing a constitution for the union of sovereign states.

In their book *Impeachment in America, 1635-180*5, Peter Hoffer and Natalie Hull described the relationship between state constitutions and the constitution of 1787, including in the latter's dependence on the former for the definition and deployment of the power of impeaching government officers. Hoffer and Hull wrote:

> The transformation of impeachment from a check against monarchical misdeeds to an instrument of republican government was first explored in state governments before 1787.... Between 1776 and 1787, state politicians drafted and tested various provisions for impeachment. Delegates to the federal convention — Madison, Randolph, Paterson, Mason, and Hamilton — supported by the voices and votes of other knowledgeable state leaders, fashioned national impeachment provisions along lines laid down in the states' constitutions.

In every state constitution in force at the time of the calling of the Convention of 1787, the lower branch of the legislature possessed the authority to impeach officers of the state government, though the trial of the impeached magistrate was handled differently in the several states.

In Virginia and Maryland, the state courts tried the impeached. In New York and South Carolina, the state senate and state judiciary joined together as a special court. In Pennsylvania, the General Assembly could impeach, and trials were conducted by the president of that body and the executive council. In the remaining eight states, the upper branch of the state legislature was the body responsible for trying the impeached state official.

It is worth noting, though, that in Virginia and Delaware the executive was immune from impeachment during his term of office.

It's no wonder that these state constitutions were so influential on the federal constitution, as many of the delegates to the Constitutional Convention of 1787 took leading roles in the writing of their state constitutions.

**Impeachment in the U.S. Constitution**

The Virginia Plan — written by James Madison and presented by Virginia governor Edmund Randolph — included a provision granting to the national judiciary the power of "impeachment of all national officers." It is important to note, however, that that provision did not specifically name the executive as one among those "national officers."

On June 2, the venerable John Dickinson of Pennsylvania proposed placing the power of removing the executive in the hands of Congress. His provision required that a majority of the legislatures of the states call for impeachment before the process could begin in Congress.

As recorded by James Madison, here is how Dickinson explained his position on impeachment:

> It was necessary, he said, to place the power of removing somewhere. He did not like the plan of impeaching the great officers of state. He did not know how provision could be made for removal of them in a better mode than that which he had proposed.

Roger Sherman of Connecticut rose and spoke in support of Dickinson's motion, adding that in his opinion, "The National Legislature should have power to remove the Executive at pleasure."

George Mason of Virginia — the universally admired co-author (along with the much younger Madison) of that state's Declaration of Rights — also backed Dickinson's proposal.

"Some mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen. [I oppose] decidedly the making the Executive the mere creature of the Legislature, as a violation of the fundamental principle of good government," Mason declared.

Mason's fellow Virginian, James Madison, joined with James Wilson in speaking against Dickinson's motion. In his *Records of the Debates of the Federal Convention of 1787*, Madison recorded the reasons for his and Wilson's opposition. Madison wrote that he and Wilson observed in Dickinson's proposed impeachment process:

> that it would leave an equality of agency in the small with the great States; that it would enable a minority of the people to prevent the removal of an officer who had rendered himself justly criminal in the eyes of a majority; that it would open a door for intrigues against him in States where his administration, though just, might be unpopular; and might tempt him to pay court to particular States whose leading partizans he might fear, or wish to engage as his partizans. They both thought it bad policy to introduce such a mixture of the State authorities, where their agency could be otherwise supplied.

Always wary of weakening the union, Madison saw the mixture of state and federal authority in the impeachment process placing too much power over the president in the hands of state legislators.

Ultimately, both Dickinson's proposal and Madison's amendment to it were rejected by a majority of the delegates. Near the end of the day, delegates agreed that the executive "be removable on impeachment and conviction of malpractice or neglect of duty." Noticeably absent from the agreed process was just which body was to be authorized to do the impeaching!

There were, however, those delegates who thought the executive should not be impeachable while he was in office (as was the case in the state of Virginia). Speaking for those in favor of an unimpeachable executive, Gouverneur Morris said, "This is a dangerous part of the plan. It will hold him [the federal executive] in such dependence that he will be no check on the Legislature, will not be a firm guardian of the people and of the public interest."

Charles Pinckney echoed this opinion, asserting that impeachment of the executive by the legislature "would in that case hold them as a rod over the Executive and by that means effectually destroy his independence."

Rufus King agreed, too, explaining that he thought it necessary that the people could rely on the "vigor of the Executive as a great security for the public liberties," adding that impeachment by the legislature would defy the "primitive axiom that the three great departments of government should be separate and independent; and that an Executive should not be impeachable unless he held office during good

behavior [that is, for life, so long as he did not engage in bad behavior]."

Here again, George Mason rose and reminded the convention of a more fundamental political precept: equality under the law. "Shall any man be over justice?" Mason asked.

Benjamin Franklin, Elbridge Gerry, and James Wilson pounded their desks in agreement.

The debate continued off and on for nearly three months. On September 4, delegates agreed to the following language: "He shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason or bribery."

Pinckney and others restated their opposition based on their perception that the legislature would hold the possibility of impeachment over the president, and he would be afraid to veto a bill lest the legislature begin impeachment proceedings.

George Mason suggested adding the language "high crimes and misdemeanors against the state," abandoning his earlier suggestion that the executive be impeachable for "maladministration."

With his typical foresight, James Madison objected to the "maladministration" standard, insisting that it would introduce imbalance into the three branches of the federal government by making the executive too dependent on the legislature, who would possess the power to get rid of any president who was obstructing the will of Congress.

On September 12, the convention approved the version of the process we have.

Finally, while the *Federalist Papers* and other essays written by advocates of the proposed Constitution promoted that document's impeachment process, there were opponents — the so-called Anti-Federalists — who predicted that impeachment would be so rare as to serve as no real check on a president bent on usurping unconstitutional powers.

Luther Martin, a delegate to the Convention of 1787 who wrote a series of essays opposing the Constitution called "The Genuine Information," summed up the suspicions of those who foresaw futility in the co existing constitutional provisions that gave the president power to appoint many federal officers — many of whom would likely be former legislators — and gave legislators the power to impeach the president.

Here's the problem as Martin, and most of the Anti-Federalists, saw it:

> The president … cannot be impeached but by the house of delegates, and that the members of this house are rendered dependant [sic] upon, and unduly under the influence of the president, by being appointable [sic] to offices of which he has the sole nomination, so that without his favour [sic] and approbation, they cannot obtain them, there is little reason to believe that a majority will ever concur in impeaching the president, lest his conduct be ever so reprehensible, especially too, as the final event of that impeachment will depend upon a different body, and the members of the house of delegates will be certain, should the decision be ultimately in favour [sic] of the president, to become thereby the objects of his displeasure, and to bar to themselves every avenue to the emoluments of government.

**"High Crimes and Misdemeanors"**

When viewed in hindsight, it appears that Martin and the Anti-Federalists accurately predicted the rarity of impeachment, even of presidents who egregiously abuse their office. Donald Trump is the 45th

president under the Constitution, and only eight of them have faced impeachment and only two (Andrew Johnson and Bill Clinton) were actually impeached.

Furthermore, not a single president has been impeached, convicted, and removed from office. Not one in nearly 230 years of presidents of the United States.

Perhaps part of the problem is that "high crimes and misdemeanors" are not defined by the Constitution. To supply the missing meaning, we'll have to turn once again to the pages of history written at the time of the Founding. As with so many key terms contained in the Constitution, "high crimes and misdemeanors" was not defined because it didn't need to be. If your employer told you that you'd be fired if you took a day off in the summer, you wouldn't go looking in the employee handbook for a definition of "summer." Here's a brief rehearsal of the universal understanding of "high crimes and misdemeanors" provided by the Constitutional Rights Foundation:

> The convention adopted "high crimes and misdemeanors" with little discussion. Most of the framers knew the phrase well. Since 1386, the English parliament had used "high crimes and misdemeanors" as one of the grounds to impeach officials of the crown. Officials accused of "high crimes and misdemeanors" were accused of offenses as varied as misappropriating government funds, appointing unfit subordinates, not prosecuting cases, not spending money allocated by Parliament, promoting themselves ahead of more deserving candidates, threatening a grand jury, disobeying an order from Parliament, arresting a man to keep him from running for Parliament, losing a ship by neglecting to moor it, helping "suppress petitions to the King to call a Parliament," granting warrants without cause, and bribery. Some of these charges were crimes; others were not. The one common denominator in all these accusations was that the official had somehow abused the power of his office and was unfit to serve.

For further enlightenment, we turn to the seminal scholarly analysis of the his- tory of impeachment, Raoul Berger's *Impeachment: The Constitutional Problems*. Berger's in-depth historical analysis of the impeachment reveals that "high crimes and misdemeanors" were political crimes against the state as a political entity, whereas "misdemeanors," when used as a term by itself, was the traditional designation for criminal actions involving individuals.

"In sum, 'high crimes and misdemeanors' appear to be words of art confined to impeachments, without roots in the ordinary criminal law and which, so far as I could discover, had no relation to whether an indictment would lie in the particular circumstance," Professor Berger adds.

Both accounts of the provenance of "high crimes and misdemeanors" as justifications for impeaching an executive — be he king or president — speak of "political crimes." Accordingly, in order to complete the inquiry into the history of these terms, "political crimes" must also be defined. During the impeachment hearing for Richard Nixon, the House Committee on the Judiciary defined "political offenses" as "constitutional wrongs that subvert the structure of government or undermine the integrity of office and even the Constitution itself."

In light of even this cursory recitation of the history of "high crimes and misdemeanors," it is a mystery why that standard is so rarely applied to those federal officials whose behavior has seemed to satisfy those requirements for removal from office.

In order to determine the appropriate standard that should guide the process from beginning to end, here are the words of Alexander Hamilton:

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The subjects of … [an impeachment court's] jurisdiction are those offenses 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 POLITICAL, as they relate chiefly to injuries done immediately to the society itself. [Emphasis in original.]

As laid out in the history above, the critical question is not so much which acts qualify as high crimes or misdemeanors; the most important inquiry is whether the president is suspected of abusing the trust placed in him by the people and whether that abuse injures the people or the Constitution that binds them in a union.

The answer to that question can only be determined by the people, acting through their elected representatives in the House of Representatives and the Senate, who must be candidates committed to protecting the public from tyranny, protecting the Constitution from tyrants, and impeaching anyone — from president to Supreme Court justice — who threatens the liberties of the people or the Constitution written to protect those liberties.

*Photo: AP Images*

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