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The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment

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THE CONSTITUTIONAL CASE FOR THE IMPEACHABILITY
OF FORMER FEDERAL OFFICIALS: AN ANALYSIS OF THE
LAW, HISTORY, AND PRACTICE OF LATE IMPEACHMENT

BRIAN C. KALT*

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I. INTRODUCTION

Can federal officials be impeached even after they have left office? Or do the potential remedies of impeachment—removal, disqualification, and possibly others—disappear when an official leaves office? To put these questions in perspective, consider the following hypotheticals:

1. The Republican Party wins a series of stunning electoral victories and obtains the presidency and a two-thirds majority in both houses. The Party decides to deliver the *coup de grâce* and impeach all of the popular leaders of the opposition—many of whom have just been narrowly voted out of office—in order to prevent them from fielding viable candidates in the next presidential election.¹

2. A federal judge is about to be impeached for gross incompetence. Before the House can vote on the case, however, the judge resigns and flees the country. The House sees no practical reason to pursue the judge, but is wary of setting a precedent that impeachment may be stopped in its tracks on the whim of the offender.²

3. The Secretary of Defense is discovered to have been involved in a complicated bribery scheme during his earlier service in another federal post. He finds out that the House is going to impeach him, but he resigns hours before the vote and argues that he is now unimpeachable. The House wishes to proceed in order to disqualify him from federal office and take away his pension, to protect its jurisdiction, and to set a precedent that the Secretary's nuanced conduct in the bribery scandal constitutes an impeachable offense.³

1. This is an exaggerated version of the attempt by Jeffersonian Republicans after the 1800 elections to remove holdover Federalist judges via impeachment. See EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES* 10, 91-92 (1999) (describing Jeffersonian efforts); see also PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 151 (1984) (describing impeachment of Republican William Blount as "opening gambit" in Federalist plan to disqualify and thus "ward off potential [Republican] candidates"); see generally David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 *WAKE FOREST L. REV.* 219 (1998) (describing Jeffersonian assault on Federalist judges, particularly through use of impeachment).

2. This is an adaptation of the common situation of federal judges resigning to avoid impeachment and the tension between the House's reluctance to pursue offenders and its concern for preserving its powers. See *infra* Part VI.A.7.

3. This is an adaptation of the case of Secretary of War William Belknap. In the actual case, however, Belknap's conduct was not particularly nuanced; it did not occur in

4. In the middle of the President's term, the Secretary of State is caught in a politically charged sting operation. The House impeaches the Secretary, and it is obvious that the Senate will convict. To help salvage the Secretary's political career (bigger comebacks have happened), the President fires him minutes before the Senate is to take its vote but denounces the "overzealous" Congress and appoints the ex-Secretary to be a personal advisor and emissary on foreign policy issues. The ex-Secretary argues that he cannot be convicted because he is no longer in office.⁴

All of these are examples of potential "late impeachments," an attempt by Congress to impeach and try a federal official after he has left office. There is no simple constitutional answer as to whether, in any or all of these scenarios, Congress can pursue a late impeachment. The text of the Constitution says nothing explicit about the timing of impeachment, neither expressly authorizing late impeachment nor ruling it out. Pre-constitutional impeachment practices in England and America included late impeachment but are of uncertain applicability. The debates surrounding the framing and ratification of the Constitution provide fodder for debate but little clarification. Precedent from actual late impeachment cases is favorable to late impeachment but is ambiguous. Scholarly opinion, too, is generally favorable but divided. In short, though it has spurred heated and detailed debate, the question of late impeachability is close and unsettled.

Regardless of how close the question of late impeachment is, however, there can be only one answer.⁵ Either Congress can pursue late impeachments, or it cannot. The premise of this article is that Congress can pursue late impeachments, based on analysis of the text, structure, historical underpinnings, and precedent of the Constitution's impeachment provisions.⁶

a different federal office; and his pension was not an issue in his impeachment trial. *See infra* Part VI.A.5 (discussing Belknap case) and Part VII.B. (discussing pension issue).

4. This is a very loose adaptation of the case of Texas Governor James Ferguson, who resigned just before the judgment against him was pronounced and his punishment approved. He was disqualified from future office, but his wife was soon elected governor based in part on her promise that she would follow her husband's "advice." *See infra* Part VI.B.2.c.

5. One can argue that late impeachment is constitutional in certain limited cases. I reject that argument. *See infra* Part V.C.

6. This typology of constitutional argument is taken from PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982). Bobbitt enumerates five different categories of constitutional interpretation: the four used here ("textual,"

Whether late impeachment *should* be pursued is a wholly separate question, and one that is easier to answer.⁷ In a pragmatic sense, Congress will rarely have a good reason to pursue late impeachment. Then again, it rarely has cause to pursue *any* impeachment. The impeachment power provides a significant incentive for federal officials to behave properly, and so the practical importance of late impeachment lies just as much in the offenses it prevents as in the ones it redresses.

In any case, if the Senate had ever been confronted with an ex-officer clearly *worth* convicting, it likely would have convicted and settled the question. It is possible, if not particularly common, for Congress to possess power that it chooses not to use. Late impeachment may prove practical and worthwhile in the future if the offense is heinous enough, if the stakes are raised high enough, or if the offender is situated just so. Even if it is not worthwhile, there may be enough members of Congress who believe otherwise to force the issue. Because such a case would be highly charged, both politically and emotionally, it is better to hold this constitutional debate now, with cooler heads and purely hypothetical defendants.⁸

II. IMPEACHMENT BASICS AND THE SIMPLE ARGUMENTS FOR AND AGAINST LATE IMPEACHMENT

The Constitution gives the House of Representatives the sole power to impeach⁹ and the Senate the sole power to try impeachments, with a two-thirds majority required to convict.¹⁰

“historical,” “structural,” and “doctrinal”) and “prudential” interpretation. *Id.* at 7. This article does not make a prudential argument because such arguments are “actuated by the political and economic circumstances surrounding the decision” by the prudentialist decision-maker. *Id.* at 61. Because this article is an effort to argue in the abstract, there are no applicable “circumstances” to discuss. *See infra* note 8. Some practical considerations are discussed in Part VIII, *infra*.

Bobbitt suggests, somewhat tentatively, adding a sixth mode to the canon: the “ethical” argument that derives decisions from the ethos of the American polity. *See* BOBBITT, *supra*, at 93-94. Given the uncertain status of this mode in the canon, it is not treated separately here.

7. *See infra* Part VIII.

8. It is worth stating near the outset that this article is not about impeaching any particular ex-official. I have argued elsewhere that a late impeachment of President Clinton is possible, but those arguments are now largely moot, and, anyway, were primarily concerned with abstract constitutional principles. *See* Brian Kalt, “*And Stay Out!*: The Constitutional Case for Post-Presidential Impeachment,” JURIST (Mar. 1, 2001), at <http://jurist.law.pitt.edu/pardonop3.htm>; Brian Kalt, *And Stay Out: Impeachment Should Remain on the Table for Clinton*, NAT’L POST (Toronto), June 9, 1999, at A14.

9. *See* U.S. CONST. art. I, § 2, cl. 5.

10. *See id.* § 3, cl. 6.

When the President is on trial in the Senate, the Chief Justice presides.¹¹ The “judgment” (*i.e.*, sentence) in an impeachment case cannot “extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States.”¹² The President cannot use his pardon power to prevent, preempt, or undo an impeachment,¹³ but once impeached and convicted, a person is still subject to the regular criminal process.¹⁴

The most important constitutional clause concerning late impeachability is Article II, Section 4, which states: “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.”¹⁵

Those who believe that late impeachment is unconstitutional rely very heavily upon this clause.¹⁶ First of all, they say the clause provides for impeaching only “[t]he President, Vice President, and all civil officers.” “Officer” means “officer,” not “ex-officer.”¹⁷

11. *Id.*

12. *Id.* cl. 7. In my own view, this disqualification does not affect the convict’s ability to serve in Congress, because the Constitution uses the term “office” exclusively of serving in Congress. *See, e.g., id.* § 6, cl. 2 (“[N]o Person holding any office under the United States, shall be a Member of either House [of Congress] during his Continuance in Office.”); *id.* art. II, § 1, cl. 2 (“[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”) (emphasis added). But others are not so sure—Judge Alcee Hastings was impeached, convicted, but not disqualified; when he was elected to Congress, some speculated that he might be disqualified retroactively. *See* MICHAEL J. GERHARDI, *THE FEDERAL IMPEACHMENT PROCESS* 60-61 (2d ed. 2000).

13. *See* U.S. CONST. art. II, § 2, cl. 1; Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 *YALE L.J.* 779, 785-86 (1996) (explaining broad interpretation of impeachment exception to pardon power).

14. *See* U.S. CONST. art. I, § 3, cl. 7.

15. *Id.* at art. II, § 4.

16. Those who have written against late impeachability include Justice Joseph Story, *see infra* Part VII.A; a significant minority in the Senate, *see infra* Part VI.A; and commentators, *see* ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS* 16 (1992); Robert C. Stelle, Note, *Defining High Crimes and Misdemeanors: A Call for Stare Decisis*, 15 *J.L. & POL.* 309, 358 (1999) (mentioning “rule” that “former federal officers [can]not be impeached”); Jorge E. Souss, *Impeach Clinton? Why Not Impeach O.J.?*, *JURIST* (Mar. 1, 2001), at <http://jurist.law.pitt.edu/pardonop4.htm>. Hoffer and Hull seem to assume that late impeachment is inappropriate as well. *See* HOFFER & HULL, *supra* note 1, at 257 (regarding Blount case as federal precedent against late impeachability).

17. Throughout this article, the term “civil officers” will be used as a catch-all including not just federal civil officers but also the President and Vice President. Technically this may be incorrect, as the Constitution distinguishes the President and Vice President from civil officers. Article II, § 4 does not say “all *other* civil officers,” after all. The distinction appears to be that the President and Vice President are elected, *see*

As one lawyer, speaking in the midst of an actual late impeachment, put it: “A half-grown boy reads in a newspaper that *the* President occupies the *White House*, if he would understand from that that all Ex-Presidents are in it together he would be considered a very unpromising lad.”¹⁸

The second part of the classic argument against late impeachment is based on punishment. There is no way to “remove[]” an ex-officer “from Office” as these critics say Article II, Section 4 requires.¹⁹ If Article II, Section 4 applies to ex-officers, they contend, then its removal provision makes no sense—not a conclusion about the Constitution and its Framers that one should make lightly.²⁰ In a broader sense, some critics have argued, impeachment is not about punishing individuals anyway; it is about protecting the office from bad occupants.²¹ Under this theory, once an offender is out of office—by whatever means—no proper purpose for impeachment remains.²²

The third part of the argument, a *reductio ad absurdum* logically derived from the first two, is that any interpretation of Article II, Section 4 permitting late impeachment must permit *any* impeachment. To these critics, the only interpretive choices are either limiting impeachment to sitting officeholders or

U.S. CONST. art. II, § 1, cl. 1, while civil officers of the United States are commissioned by the President, *see id.* § 3. On the other hand, the Constitution refers repeatedly to the President and Vice President as holding “office.” *See, e.g., id.* at art. I, § 3, cl. 5; *id.* at art. II, § 1, cl. 1, 5, 8; *id.* at amend. XII.

18. CONGRESSIONAL RECORD CONTAINING THE PROCEEDINGS OF THE SENATE SITTING FOR THE TRIAL OF WILLIAM W. BELKNAP, LATE SECRETARY OF WAR 71 (Government Printing Office, Washington 1876) [hereinafter BELKNAP TRIAL] (argument of defense counsel); *accord* Souss, *supra* note 16 (“The word ‘President’ appears 14 other times in Article II, and in every single case it is undisputed that it refers to the person serving as President, not to a former President.”); BELKNAP TRIAL, *supra*, at 132 (opinion of Senator Boutwell); *cf. id.* at 40 (recording *absurdum* suggestion by defense counsel in late impeachment case that trials of former presidents would have to be presided over by chief justices).

19. This leaves open the question of what to do with someone who has left one federal office but who is currently holding another. Should such a person—who is an officer, after all—be susceptible to impeachment for offenses committed in his previous office? *See infra* Part V.E. (discussing different models of impeachability and treatment of offenses in former offices).

20. *See, e.g., infra* note 355 and accompanying text (Belknap case); *infra* text accompanying note 499 (Justice Story); Souss, *supra* note 16.

21. *See, e.g.,* Jonathan Turley, “From Pillar to Post”: *The Prosecution of American Presidents*, 37 AM. CRIM. L. REV. 1049, 1052 (2000) (“Impeachment serves a distinct, non-punitive function. The Impeachment Clause is designed to protect the office of the presidency . . .”).

22. *See, e.g., infra* text accompanying notes 500-01.

ignoring the mention of “officers” and “remov[al]” and extending impeachment to all manner of private citizens. In other words, they see no principled constitutional basis to distinguish between private citizens who used to hold office and those who did not.²³

That, in short, is the simple argument against late impeachment. (The complicated argument against late impeachment consists of various rebuttals to the argument in favor of late impeachment, and thus will emerge in pieces in the remainder of this article.) Unsurprisingly, given the closeness of this question, the argument against late impeachment is not unreasonable, and it has attracted significant historical and scholarly support.²⁴ Nevertheless, it also has problems—textual, structural, historical, and precedential—that in the end tip the constitutional scales against it.

The argument *for* late impeachment is, relatively speaking, not as simple. It has several parts, each of which will be developed in its own Part of this article. A brief summary before embarking is useful. Textually, the Constitution does not address the appropriate timing of impeachments, and those readings that suggest it does are flawed.²⁵ Structurally, late impeachment provides a more coherent and sensible framework for the timing of impeachment. Barring late impeachment would weaken the deterrent effect of impeachment and would allow malfeasors and Presidents to nullify Congress’s impeachment powers in a way that is incompatible with the Constitution’s structure.²⁶ Historically, late impeachment was practiced before (and during) the drafting of the Constitution, but unlike other questionable aspects of impeachment, it was not criticized in the pre-constitutional era or explicitly trimmed back in the final document.²⁷ Finally, doctrinally, there is subsequent precedential support for late impeachment, not the least of

23. See, e.g., Souss, *supra* note 16 (“Instead of impeaching the former President, why not impeach acquitted murderer O.J. Simpson, whose personal approval ratings are even lower than Mr. Clinton’s? Ridiculous, you say? Well, not quite, if we use the same flawed logic being disseminated by those who claim that a former officer of the United States is subject to impeachment.”); *infra* note 356 and accompanying text (Belknap case).

24. See, e.g., *infra* Part VI.A (historical support); notes 496-501, 511-12, 518, and accompanying text (scholarly support).

25. See *infra* Part IV.

26. See *infra* Part V.

27. See *infra* Part III.

which is the fact that the Senate once ruled specifically that it had jurisdiction over a late impeachment trial.²⁸

None of these arguments, alone or together, can conclusively prove that late impeachment is constitutional. The arguments in favor of late impeachment have caveats and flaws. Remember, this is a close constitutional case. Nevertheless, the constitutional case for late impeachment has more strengths and fewer flaws than the case against it.

III. HISTORY

While it is ordinarily proper to begin a constitutional argument with text and structure, in this case it is useful to begin with history. The history of impeachment practice will shed light on the meaning of the word “impeachment,” which is important for textual understanding. Specifically, pre-constitutional history demonstrates that impeachment is limited to public offenses and offenders, refuting the concern that allowing late impeachment would mean allowing the impeachment of any private citizen. This history also sheds light on the structure of constitutional impeachment, which is important for structural understanding. History shows the importance of the deterrent effect of impeachment, of which late impeachment is an important structural component. At the same time, history also provides independent evidence—it reveals that allowing late impeachment is feasible, desirable, and precedented.

A. *English Impeachment*

English impeachment is the ultimate foundation of American impeachment.²⁹ To be sure, American impeachment in 1787 was also influenced by colonial and state experiences,³⁰ but English impeachment informed those colonial and state experiences,

28. See *infra* Part VI.

29. See THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to British impeachment as “[t]he model from which the idea of this institution [American impeachment] has been borrowed”); see also RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 3-4, 217 (1973) (describing English influences on American impeachment); GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 141 (1969) (describing English Whig roots of American impeachment).

30. See HOFFER & HULL, *supra* note 1, at 268 (arguing that colonial and state impeachment precedents “were far more important in influencing federal law than English examples”).

and it further provided parallel precedents for the federal Framers to consider.

Impeachment was practiced in England sporadically from the fourteenth century to the early nineteenth century.³¹ The last significant burst of activity occurred in the seventeenth and early eighteenth centuries; impeachments slowed to a trickle by the 1720s and cease to be discussed after 1806.³²

In essence, English impeachment was a criminal prosecution that began in the House of Commons instead of before a grand jury and that was tried before the House of Lords instead of the criminal courts. Because of this unique structure, it was directed particularly at public officials and public offenses.

Initiating prosecution in the House of Commons rather than through a regular grand jury was not unique to impeachment; there was also the bill of attainder, in which Parliament would pass *ad hoc* legislation to punish an offender. Because a bill of attainder was a legislative act, however, it required the approval of both Parliament and the King.³³ By contrast, impeachment was a judicial process in which the House of Lords had the last word and the King had no voice. Impeachment was also less *ad hoc* and developed its own common law of sorts.³⁴

As impeachment did not require royal approval, it became a popular mechanism in the seventeenth century for Parliament to control the King's high officers.³⁵ Parliament could not control the King directly—other than extra-legally—but it could impeach and convict his subordinates. Parliament's struggle to assert its authority over the King through impeachment came to a head in 1679. In that year, King Charles II pardoned the Earl of Danby in order to preempt Parliament's investigation of the King's questionable dealings; Parliament responded shortly thereafter by limiting the pardon power to prevent such preemptive strikes in the future.³⁶ However, the rise of the

31. See BERGER, *supra* note 29, at 1-3 (summarizing English impeachment history).

32. See J. Hampden Dougherty, *Inherent Limitations upon Impeachment*, 23 *YALE L.J.* 60, 68-69 (1913) (giving chronological breakdown of English impeachments).

33. See BERGER, *supra* note 29, at 28 (discussing attainder and requirement of royal assent).

34. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* *259 (stating that while attainders are new laws, "an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law").

35. See WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES* 210 (Da Capo Press 1970) (2d ed. 1829) (discussing impeachment and lack of royal control).

36. See *infra* text accompanying notes 258-260.

parliamentary impeachment power signaled a corresponding weakening in the independent power of the Crown and thus, paradoxically, a decline in the need for impeachment. Once Parliament had cemented its control, and once the cabinet became responsible to the government rather than the King, there was much less reason to impeach anybody.³⁷

Even though reining in the King's ministers was the most significant use of impeachment, Parliament could and did impeach private citizens. English impeachment was not technically limited to public offenses or public offenders. Anyone (except the royal family) could be impeached, in essence because Parliament could do whatever it wanted (except to the royal family).³⁸ By the time of Blackstone in the mid-1700s, however, the well settled rule was that a commoner could only be impeached for "high" offenses (*i.e.*, those against the state) and that only peers could be impeached for both public and private offenses.³⁹

The impeachment of peers for private misconduct was based on the fact that the ordinary courts were not equipped to try such significant defendants—peers required, quite literally, a jury of their peers.⁴⁰ As for the impeachment of commoners, the limitation of parliamentary jurisdiction to public offenses was significant. One must remember that Britain does not separate its powers; impeachment trials were held before a judicial body—the House of Lords—that sat as a court in other sorts of cases as well.⁴¹ What made impeachment cases special was that the prosecution was directed by the House of Commons, the "grand inquest" of the nation for offenses against the state.⁴² For

37. See HOFFER & HULL, *supra* note 1, at 28 (describing rise and fall of impeachment in England); see also Theodore W. Dwight, *Trial by Impeachment*, 6 AM. L. REG. 257, 282 (new series) (1867) ("There is no *political* reason for impeachment at the present time, as the power of the Commons is never resisted by a minister or the Executive. In fact, it may be said in a representative government, that the absolute cessation of impeachments indicates that the legislative department has triumphed over the executive and his agents.").

38. HOFFER & HULL, *supra* note 1, at 4 ("[T]he Commons could impeach anyone in the realm except, perhaps, the royal family.").

39. See 4 BLACKSTONE, *supra* note 34, at *259-60. Blackstone mentioned that commoners could not be impeached for capital offenses but provided a counterexample involving an impeachment for high treason. *Id.* at *260 n.2.

40. See *id.* at *260-61.

41. HOFFER & HULL, *supra* note 1, at 3 (describing judicial role of House of Lords, which continues to this day).

42. *E.g.*, 4 BLACKSTONE, *supra* note 34, at *259 (defining impeachment as "a presentment to the most high and supreme court of criminal jurisdiction by the most

mere offenses against the peace by mere commoners, the regular judicial process was adequate.

For reasons of national institutional structure, then, impeachment was used to prosecute public offenders or public offenses, cases that “the ordinary magistrate either dare[d] not or [could] not punish.”⁴³

By 1787, English impeachment had further narrowed in scope. For over a century, “impeachment [had] c[o]me to stand for a justifiable concern among the Commons for misconduct in high places.”⁴⁴ The last (and anomalous) impeachment of a common private citizen was that of Doctor Sacheverell in 1709 for sedition.⁴⁵ Even before Sacheverell, virtually all cases involved either treason by peers or, more commonly, mismanagement by government officials.⁴⁶ To the extent that impeachment had been used in the memory of anyone living in 1787, then, it was for cases of public offenses by public figures.⁴⁷

Late impeachment was never a disputed issue in England. Initially, the bounds of impeachment were largely unlimited, and timing was no exception. Late impeachment was only an

solemn grand inquest of the whole kingdom”); 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 237 (Boston, Hilliard, Gray, & Co. 1833) (quoting Blackstone’s successor Wooddeson that Parliament and not “ordinary tribunals” are equipped to deal with “political” offenses). The “grand inquest” language recurs in discussions of impeachment. *See, e.g., infra* note 276 and text accompanying notes 85, 87, and 302.

43. 4 BLACKSTONE, *supra* note 34, at *260-61. Blackstone was speaking here only of impeaching public officers. *See also* BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, book 11, ch. 6, at 159 (Thomas Nugent trans., Hafner Publishing Company 1949) (1748) (“It might also happen that a subject intrusted with the administration of public affairs may infringe the rights of the people, and be guilty of crimes which the ordinary magistrates either could not or would not punish.”). Justice (and Framers) James Wilson made the same point in his famous *Lectures on Law* in 1791. *See* 1 *THE WORKS OF JAMES WILSON* 426 (Robert Green McCloskey ed., 1967), available at http://press-pubs.uchicago.edu/founders/documents/a1_2_5s15.html (“We find the commons appearing as the grand inquest of the nation, about the latter end of the reign of Edward the third. They then began to exhibit accusations for crimes and misdemeanors, against offenders who were thought to be out of the reach of the ordinary power of the law.”).

44. HOFFER & HULL, *supra* note 1, at 6 (characterizing English impeachment from 1650s onward).

45. *See id.* at 4 (describing Sacheverell case).

46. *See id.* at 8 (describing two “well-defined” categories into which all impeachments fell after early 1700s).

47. *See* 2 RICHARD WOODDESON, *A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND* *601 (London, Payne 1792) (“All the king’s subjects are impeachable in parliament Such kinds 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.”); BELKNAP TRIAL, *supra* note 18, at 109 (opinion of Senator Mitchell) (making similar historical point and arguing that American impeachment incorporated English impeachment as it existed in 1787, not 1376).

issue if the defendant was an officeholder. Additionally, punishments upon conviction in an impeachment court were severe—loss of property and even death were not uncommon⁴⁸—and so punishment in impeachment cases was not mooted if the target left office.⁴⁹ But late impeachment remained as a sensible option even as impeachment became more focused on public offenses by public officials, and the punishments became more restrained.⁵⁰ Impeachment was more about creating a culture of accountability than it was about removing bad men from office, which could be accomplished by other means anyway, and late impeachment exemplified this fact.⁵¹

Lord Chancellor Macclesfield was impeached and convicted for bribery in 1725, after he had left office.⁵² After that, no public officers were impeached⁵³ until 1786, when impeachment proceedings began against Warren Hastings, the first Governor-General of India, for his conduct in that post.⁵⁴ Like Macclesfield, Hastings had already left office,⁵⁵ but this fact was not an issue—accountability was. After several articles of impeachment against Hastings were approved over a period of more than a year, the House of Commons impeached Hastings on April 3, 1787,⁵⁶ shortly before the constitutional convention began in Philadelphia on May 25th. The trial in the House of

48. See HOFFER & HULL, *supra* note 1, at 3 (describing English impeachment punishments).

49. *Cf. infra* Part V.B (discussing disqualification in American impeachment).

50. Lord Chancellor Macclesfield, for instance, was removed from office (not the one he was being impeached about) and fined £30,000. HOFFER & HULL, *supra* note 1, at 8 (describing Macclesfield case).

51. *Cf. infra* Part V.A (discussing accountability and deterrent effect of impeachment).

52. See 16 THOMAS BAYLY HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 767-68 (London, T.C. Hansard 1816).

53. The only other case in the interim was that of Jacobite conspirator Lord Lovat, who was impeached, convicted, and executed for high treason in 1746. He was a peer, not a private citizen, but he was not a minister of government. His trial is reported at 18 HOWELL, *supra* note 52, at 529-858.

54. See A. MERVYN DAVIES, STRANGE DESTINY: A BIOGRAPHY OF WARREN HASTINGS 373-74 (1935) (discussing instigation of impeachment proceedings against Hastings by Edmund Burke). Davies's book is unabashedly pro-Hastings but relates the chronology of events clearly. See *infra* Part III.C.1.c (discussing the American Framers' views on the Hastings case).

55. Hastings had resigned his post in 1785. See DAVIES, *supra* note 54, at 334-35.

56. See *id.* at 383; see also *id.* at 377-83 (discussing impeachment proceedings in House of Commons).

Lords proceeded sporadically, until 1795, when Hastings was acquitted.⁵⁷

After Hastings, there was only one other impeachment in English history, and it too was a late impeachment. In 1806, Lord Melville was impeached for acts committed in an office he had held decades earlier; like Hastings, Melville was acquitted but not due to any suggestion that the impeachment was untimely.⁵⁸

To summarize, by 1787 English impeachment was understood as being directed against public offenses by public offenders, for which Parliament was the proper venue for prosecution. The goal of impeachment was public accountability, not simply punishment. Late impeachments, such as those against Macclesfield, Hastings, and Melville, were thus perfectly appropriate.⁵⁹

B. *Pre-Constitutional American Impeachment*

In the eighteenth century, impeachments were relatively common in the colonies, and later in the states. Peter Charles Hoffer and N.E.H. Hull have argued convincingly that American impeachment practice was deeply rooted and widely practiced, and it developed its own characteristics independently of the (comparatively fewer) contemporary English cases.⁶⁰ Moreover, the impeachment power in the states was generally rooted in textual authorization from the states' constitutions. The colonial and state experiences with impeachment thus directly informed the federal constitutional impeachment power. Although late impeachment was less firmly established in pre-constitutional America than it was in England, it was known and accepted.

1. Colonial and State Cases

Among the defining characteristics of impeachment on this side of the Atlantic was its uniformly public character: Even

57. See *id.* at 411-12 (recounting Hastings's acquittal).

58. See BELKNAP TRIAL, *supra* note 18, at 54 (discussing Melville case during an American late impeachment trial). The lengthy Melville case is reported in 29 HOWELL, *supra* note 52, at 549-1482.

59. See BELKNAP TRIAL, *supra* note 18, at 363 (opinion of Senator Norwood) (citing Macclesfield, Hastings, and Melville precedents).

60. See HOFFER & HULL, *supra* note 1, at 268 (arguing that colonial and state precedents "were far more important in influencing federal law than English examples"). This is a point that pervades Hoffer and Hull's book.

more so than in England, private citizens were only pursued through the regular criminal process or attainder but not impeachment, which was reserved for officers.⁶¹

When the colonies broke formally from England and wrote their own constitutions, they made these limitations on impeachment clear. In every state where the legislature had the power to impeach, private citizens were excepted.⁶² By 1787, then, “impeachment” had come to mean a process for the legislature to inquire into and prosecute public offenses by public officials.

With the exception of Pennsylvania, no colonial legislature actually had authority to initiate and try impeachments.⁶³ Parliament in England was the proper body to initiate and try such cases, and so colonial impeachment constituted a usurpation of sorts.⁶⁴ Nevertheless, the need to hold public officials accountable—and oust them if necessary—occasionally became too important for colonial officials to leave to distant England. Hoffer and Hull have found sixteen cases of impeachment, near impeachment, or quasi-impeachment in the years between 1635 and 1776.⁶⁵

When the colonies declared themselves independent states and wrote constitutions, most of them provided an impeachment power for their respective legislatures. Impeachments picked up where they left off, holding public officials accountable for their public offenses.

61. See *id.* at 14 (“From the first . . . the American cases showed pronounced departures from English precedent. The Americans accused were invariably officeholders . . .”). But see *id.* at 28-30 (describing Massachusetts case of merchant captain Samuel Vetch, whose case was labeled an attainder but which resembled impeachment in some respects).

62. Cf. *infra* Part III.B.2.

63. See, e.g., FRAME OF GOVERNMENT OF PENNSYLVANIA OF MAY 5, 1682, at § XIX (“[T]he General Assembly shall continue so long as may be needful to impeach criminals . . .”); see also CHARTER OF PRIVILEGES OF OCTOBER 28, 1701, at § 2 (granting Assembly the power to impeach “criminals”); FRAME OF GOVERNMENT OF PENNSYLVANIA OF NOVEMBER 1, 1696 (same); FRAME OF GOVERNMENT OF PENNSYLVANIA OF FEBRUARY 2, 1683 (same).

The Massachusetts judicial code provided before 1684 for “impeachment,” but by the General Court. See HOFFER & HULL, *supra* note 1, at 11, 28.

64. See HOFFER & HULL, *supra* note 1, at 9 (“Americans first adopted impeachment because they grasped its utility and were not told to desist, and continued to impeach even when proprietors and crown councillors explicitly told the colonists to stop”); BELKNAP TRIAL, *supra* note 18, at 149 (opinion of Senator Dawes) (discussing inherent colonial power to impeach).

65. See HOFFER & HULL, *supra* note 1, at 15-56 (describing colonial impeachment cases, as well as others that resembled impeachment).

It was in the pre-constitutional state period that late impeachment first occurred in America. In 1781, ex-governor Thomas Jefferson of Virginia was subjected to preliminary impeachment proceedings for his conduct in office, though in the end he was not impeached.⁶⁶ In February 1787, Vermont impeached former assemblyman Jonathan Fassett for participating in a rebellion. The impeachment followed the decision by the Assembly not to reseat Fassett, so he was out of office when impeached and when tried.⁶⁷ He was convicted and disqualified from future state office.⁶⁸ In both Virginia and Vermont, however, late impeachment was specifically referenced in the state constitution.⁶⁹

2. State Constitutions

The federal Constitution was not the first modern written constitution; it was preceded by twelve state constitutions that influenced it heavily. As such, pre-1787 state constitutions are obviously useful sources for understanding the federal impeachment power.⁷⁰

Twelve states (all but Connecticut and Rhode Island, and including Vermont) wrote constitutions before the federal Constitution was drafted in 1787. Ten of the twelve (all but Georgia and Maryland) had impeachment provisions in their state constitutions. Given the revolutionary spirit of anti-monarchism prevailing in the states, it was hardly surprising that this strong check on executive power was written into most constitutions.⁷¹ The biggest dispute was over what body should try impeachments; the question of the timing of trials animated less debate.⁷²

The following are excerpts from state constitutional impeachment provisions, in chronological order of adoption.

66. *See id.* at 85-86 (describing Jefferson case).

67. *See id.* at 84-85 (describing Fassett case).

68. *Id.* at 85.

69. *See infra* text accompanying notes 74 and 83.

70. *See* Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911, 925 (1993) (discussing broad influence of state constitutions on federal Constitution).

71. *See* WOOD, *supra* note 29, at 141 ("Nothing indicates better how thoroughly Americans were imbued with Whig apprehensions of misapplied ruling power than their rather unthinking adoption of this ancient English procedure . . .").

72. *See id.* at 142 (describing state debates over the proper body to try impeachments).

The specifications of who can be impeached are italicized, and specifications of timing are in boldface.

Virginia (6/1776)

The *Governor, when he is out of office, and others, 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. Such impeachment to be prosecuted . . . in the General Court, according to the laws of the land. If found guilty, he or they shall be either for ever disabled to hold any office under government, or be removed from such office *pro tempore*, or subjected to such pains or penalties as the laws shall direct.⁷³

. . . [T]he *Judges of the General Court* . . . may, in like manner, [be] impeach[ed]⁷⁴

New Jersey (7/1776)

[T]he *Judges of the Supreme Court* . . . [,] *the Judges of the Inferior Court of Common Pleas in the several Counties, Justices of the Peace, Clerks of the Supreme Court, Clerks of the Inferior Court of Common Pleas and Quarter Sessions, the Attorney-General, and Provincial Secretary, . . . and the Provincial Treasurer* . . . shall be liable to be dismissed, when adjudged guilty of Misbehaviour by the Council on an Impeachment of the Assembly.⁷⁵

Delaware (9/1776)

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 committed**, shall be impeachable by the house of assembly before the legislative council If found guilty, he or they shall be either forever disabled to hold any office under government, or removed from office *pro tempore*, or subjected to such pains and penalties as the laws shall direct. And *all officers* shall be

73. VA. CONST. of 1776, art. XVI (emphasis added).

74. *Id.* at art. XVII (emphasis added).

75. N.J. CONST. of 1776, art. XII (emphasis added).

removed on conviction of misbehavior at common law, or on impeachment, or upon the address of the general assembly.⁷⁶

Pennsylvania (9/1776)

The general assembly of the representatives of the freemen of Pennsylvania . . . may . . . impeach *state criminals*.⁷⁷

*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*⁷⁸

North Carolina (12/1776)

[T]he Governor and other Officers offending against the State, by violating any Part of this Constitution, Mal-Administration, or Corruption, may be prosecuted on the Impeachment of the General Assembly⁷⁹

New York (4/1777)

[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; except that when an impeachment shall be prosecuted against the chancellor, or either of the judges of the supreme court, the person so impeached shall be suspended from exercising his office until his acquittal⁸⁰

[T]he 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 in assembly; but that it shall always be necessary that two third parts of the members present shall consent to and agree in such impeachment. That previous to the trial of every impeachment, the members of the said court shall respectively be sworn truly and impartially to try and determine the charge in question, according to

76. DEL. CONST. of 1776, art. 23 (emphasis added).

77. PA. CONST. of 1776, ch. II, §9 (emphasis added). Pennsylvania's pre-independence Frames of Government gave the colonial assembly the power to impeach "criminals." See *supra* note 63.

78. PA. CONST. of 1776, ch. II, § 22 (emphasis added).

79. N.C. CONST. of 1776, art. XXIII (emphasis added).

80. N.Y. CONST. of 1777, art. XXXII.

evidence; and that no judgment of the said court shall be valid unless it be assented to by two third parts of the members then present; nor shall it extend farther than to removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit under this State. But the party so convicted shall be, nevertheless, liable and subject to indictment, trial, judgment, and punishment, according to the laws of the land.⁸¹

Vermont (7/1777)

[T]he General Asembly [sic] of the Representatives of the Freemen of *Vermont* . . . may . . . impeach *State criminals*.⁸²

*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 maladministration*⁸³

South Carolina (3/1778)

[T]he form of impeaching *all officers of the State* for mal and corrupt conduct in their respective offices, not amenable to any other jurisdiction, be vested in the house of representatives. But . . . it shall always be necessary that two-third parts of the members present do consent to and agree in such impeachment. That the senators and such of the judges of this State as are not members of the house of representatives, be a court for the trial of impeachments, under such regulations as the legislature shall establish, and that previous to the trial of every impeachment, the members of the said court shall respectively be sworn truly and impartially to try and determine the charge in question according to evidence, and no judgment of the said court, except judgment of acquittal, shall be valid, unless it shall be assented to by two-third parts of the members then present . . .

. . .⁸⁴

81. *Id.* at art. XXXIII (emphasis added).

82. VT. CONST. of 1777, ch. 2, § 8 (emphasis added). The substance of this provision remained in the revised Vermont Constitution of 1786, ch. 2, § 9.

83. VT. CONST. of 1777, ch. 2, § 20 (emphasis added). The substance of this provision remained in the revised Vermont Constitution of 1786, ch. 2, § 21.

84. S.C. CONST. of 1778, art. XXIII (emphasis added). An earlier (1776) constitution for South Carolina made no provision for impeachment.

Massachusetts (3/1780)

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.⁸⁵

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; but, previous to the trial of every impeachment, the members of the senate shall, respectively, be sworn truly and impartially to try and determine the charge in question, according to the evidence. Their judgment, however, shall not extend further than to removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit under this commonwealth; but the part so convicted shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land.⁸⁶

New Hampshire (6/1784)

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.⁸⁷

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 office⁸⁸

Their judgment, however, shall not extend further than removal from office, disqualification to hold or enjoy any place of honor, trust, or profit, under this state, but the party so convicted, shall nevertheless be liable to indictment, trial,

85. MASS. CONST. of 1780, pt. I, ch. I, § 3, art. 6. In 1778, Massachusetts rejected a proposed constitution that would have vested in the House "the power of impeaching all officers of the State for mal-conduct in their respective offices." JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY, FROM THE COMMENCEMENT OF THEIR FIRST SESSION, SEPTEMBER 1, 1779, TO THE CLOSE OF THEIR LAST SESSION, JUNE 16, 1780, at 255, 262 (Boston, Dutton and Wentworth 1832).

86. MASS. CONST. of 1780, pt. I, ch. I, § 2, art. 8 (emphasis added).

87. N.H. CONST. of 1784, pt. II, art. 17.

88. *Id.* at art. 38 (emphasis added). The earlier (1776) constitution for New Hampshire made no provision for impeachment.

judgment, and punishment, according to the laws of the land.⁸⁹

Several important patterns emerge from these state provisions.

First, they make clear the poor drafting of the federal Constitution—which specifies only that officers shall be removed if convicted, not directly that Congress has the power to impeach officers in particular—given the abundance of clear constructions in the state constitutions. In each of these state provisions (with the exception of New Jersey), the designation of who can be impeached appeared alongside the grant of authority to the legislature to pursue it.⁹⁰ In six states (Massachusetts, New Hampshire, New York, Pennsylvania, South Carolina, and Vermont), the authorization took the form of a limited grant of power: *i.e.*, “the legislature has the power to pursue public offenders through impeachment.” In the other three (Delaware, North Carolina, and Virginia), the authorization took the form of an explicit limitation on the officers themselves: *i.e.*, “public officers can be pursued through impeachment by the legislature.” Though it is conceivable that others could be impeachable as well, the fact that there is no provision for anyone else to be impeached suggests that only officers are subject to that form of penalty.⁹¹ Only New Jersey foreshadowed the poor wording of the federal Constitution, in which impeachment is only mentioned obliquely in a removability provision that gives little inkling as to whether others (removed or not) may be impeachable as well.

A second pattern is that in each constitution, late impeachment was either required, permitted, or not discussed, but was nowhere explicitly forbidden. The first state constitution to feature impeachment,⁹² Virginia’s, was practically English in scope: it almost seemed to allow impeachment of anyone, not

89. *Id.* at art. 39.

90. Justice Story noted that the purported limits on who could be impeached and for what would have been better placed in Article I of the Constitution rather than Article II. *See* 2 STORY, *supra* note 42, at 255 (“By some strange inadvertence, this part of the constitution has been taken from its natural connexion, and with no great propriety arranged under that head, which embraces the organization, and rights, and duties of the executive department.”).

91. *See infra* text accompanying notes 189-97.

92. New Hampshire and South Carolina drafted constitutions before Virginia did, but neither provided for impeachment. *See* N.H. CONST. of 1776; S.C. CONST. of 1776

just officers, who offended against the state,” and it did not limit the potential range of penalties. The principal limit it imposed was that the Governor could not be impeached until he left office. Implicitly, other officials could be impeached in *or* out of office. To the Virginia drafters, then, late impeachment was not only potentially worthwhile, it was the only acceptable way to proceed against the Governor. To be sure, this may reflect the fact that the Governor’s term was only one year and that he was chosen by the legislature, making removal less important.⁹³ But for the Governor, at least, impeachment was very clearly about accountability rather than removal.

The Delaware Constitution adopted the Virginia formulation, with a slight variation. Delaware added an eighteen-month statute of limitations for impeachments, tolled for the “president” (Delaware’s title for governor) until he left office. Other officeholders could be subjected to late impeachment, too, if they left office before the eighteen-month period expired. In Delaware as in Virginia, then, late impeachment was possible for any official and was the *only* way to proceed against a governor.

Another early effort, the Pennsylvania Constitution of 1776, gave late impeachment a more nuanced treatment. Like Virginia, impeachment almost seemed as if it were not limited to state officers;⁹⁴ the General Assembly was authorized to impeach any “state criminal,” just as it had been for decades before.⁹⁵ But an executive or judicial state official *qua* state official could not be impeached once his term of service had expired naturally. If he was still in office or if he had resigned or been removed, he could be impeached. Late impeachment was possible, in other words, but only against those officers who had left office under abnormal circumstances. This made it clear that impeachment was about accountability and not just removal, so much so that the officer could not preempt proceedings by resigning or by being so bad that the legislature removed him in advance of his

93. See *infra* text accompanying note 102 (explaining limitation of Virginia impeachment to officers).

94. See VA. CONST. of 1776, art. IX.

95. See *infra* text accompanying note 103 (explaining inherent limitation of Pennsylvania and Vermont impeachment to officers).

96. See *supra* note 63.

impeachment trial.⁹⁷ Vermont copied Pennsylvania's formulation.

Five other states' impeachment provisions—North Carolina,⁹⁸ New York, South Carolina, Massachusetts, and New Hampshire—did not specify that late impeachment was acceptable, but neither did they forbid it. Writing as they were against the backdrop of the Virginia and Pennsylvania formulations that provided for late impeachment, one might have expected these newer efforts to be explicit if they were making such a fundamental change.

To be sure, one can argue that they were being explicit—by conspicuously omitting the Virginia/Pennsylvania broader timing language. But the Virginia language was a *limit* on timing; Virginian Governors and Delawarean Presidents could *only* be impeached after leaving office, so removing that language would presumably have added an option (*i.e.*, regular impeachment), not subtracted one. Pennsylvania (and Vermont) barred impeachment of officers whose terms had expired naturally; removing that language just as easily could have been meant to expand impeachment as to restrain it. Moreover, after explicitly allowing late impeachment, Pennsylvania used the term “officer” to describe those who were officers when they committed crimes, not just those who were officers at the time of impeachment. Later constitutions, speaking only of officers without reference to timing, could just as easily have been using the term with similar breadth.

Furthermore, four of these states *were* explicit in placing other limits on impeachment that earlier state constitutions lacked. New York invented—and specified—the requirements of two-thirds majorities, a special oath for impeachment judges, and a ban on punishments greater than removal and disqualification. South Carolina, Massachusetts, and New Hampshire followed suit, in part. The eventual language in the U.S. Constitution closely tracked the language of these four states' constitutions.

97. See PA. CONST. of 1776, ch. II, § 34 (making probate officers removable at the will of the general assembly).

98. Note that North Carolina's provision was much narrower in scope than its counterparts. It used impeachment as a first step in allowing criminal prosecution of officeholders. It did not specify removal—or anything else—as a penalty. It simply substituted the General Assembly for a grand jury in the regular criminal process, in the case of public offenses. See *supra* note 79.

Despite adding these specific limitations on the impeachment powers, these four states added no specific limitation on the timing of impeachment. Significantly, though, they did specify that the offenses covered by impeachment were only those committed while in office. This made clear that impeachment did not reach private conduct or private parties. Moreover, it made clear that impeachment was not designed just to remove bad men from office—private offenses committed prior to taking office were exempt from review via impeachment. Thus, impeachment in these four states was not designed to keep criminals out of public office, it was designed to keep officers from becoming public criminals.

A critic of late impeachment could argue that things like two-thirds majority requirements are not self-evident and, therefore, require specification, and that late impeachment is similarly counterintuitive and also requires specification. Virginia specified late impeachment and not two-thirds majorities; New York specified two-thirds majorities and not late impeachment. But as noted above, the Virginia, Delaware, Pennsylvania, and Vermont formulas made specific reference to late impeachment in the context of limiting it, while using language that suggested that late impeachment was otherwise implicitly permissible. Therefore, allowing late impeachment is the self-evident proposition, not the counterintuitive one, and failure to explicitly bar it while specifying other limitations on the impeachment power is a telling omission.

Another potential point against state late impeachment is that the Virginia, Delaware, Pennsylvania, and Vermont constitutions, which explicitly allowed late impeachment, also suggested that any “state criminal” or “offend[er] against the state” could be impeached, not just officers.¹⁰⁰ By contrast, the newer constitutions specifically limited impeachment to officers.¹⁰⁰ A critic thus could argue that late impeachment was implicitly permissible only in those states where holding office

99. See HOFFER & HULL, *supra* note 1, at 70 (describing “vagueness” of Virginia language that might have allowed for impeachment of private citizens and ex-officers); BELKNAP TRIAL, *supra* note 18, at 121 (opinion of Senator Allison) (arguing that Virginia and Delaware Constitutions allowed impeachment of non-officers); *supra* text accompanying notes 77-78 (stating Pennsylvania’s impeachment provisions); *supra* text accompanying notes 82-83 (stating Vermont’s impeachment provisions).

100. In Massachusetts, a proposal to allow impeachment of non-officers was specifically proposed and rejected. See *supra* note 85; HOFFER & HULL, *supra* note 1, at 76.

was not a requirement for impeachability. In states where private citizens could not be impeached, it would not be self-evident that impeachment could reach people who were no longer in office. But even to the extent that this might be true as a matter of technical textual construction, it does not resonate with the actual practice of impeachment. There are no instances of impeachment being used against private citizens—other than ex-officers—in any state.¹⁰¹ Indeed, read in context, the text of the older constitutions supports this more limited construction. For instance, the grounds specified for impeachment in Virginia and Delaware—maladministration and corruption—would seem to apply only to public officials, and there is evidence that the Virginia language was meant to expand the class of offenses, not the class of offenders.¹⁰² In Pennsylvania and Vermont only maladministration was specified, and the term “state criminal” appears to refer only to officers (*i.e.*, administrators, allegedly mal). Later case law bears out this interpretation.¹⁰³

In sum, state impeachment provisions fell into two broad categories. The first group both provided for and implied the underlying propriety of late impeachment. The second group, which more directly influenced the federal Constitution, did not attempt to limit the scope of late impeachment enshrined in earlier state constitutions. States designed impeachment as a means of ensuring accountability for official action rather than simply a mechanism for removing “bad men” from office. In some states late impeachment was actually performed and

101. *But cf.* HOFFER & HULL, *supra* note 1, at 29-30 (discussing Vetch case, which involved private citizen and had impeachment-like qualities despite being labeled attainder).

102. *See* ROBERT P. SUTTON, REVOLUTION TO SECESSION: CONSTITUTION MAKING IN THE OLD DOMINION 43 (1989) (describing a draft of the Virginia constitution which clarifies that “safety of the State” language was part of the definition of impeachable offenses for executive officers).

103. *See* State v. Campbell, 2 Tyl. 177, 182 (Vt. 1802) (“In cases of mal administration there is a peculiar and manifest propriety in . . . bringing *State criminals*, as they are styled in the constitution, to trial before this high national tribunal, where the solemnity and publicity of the trial will either publicly purge their *official characters* from imputed crime, or make their *mal-administration* known to the citizens at large, and especially to those in whom rests commonly the *election to office*.”) (emphasis added). Harris v. Huntington, 2 Tyl. 129, 144-45 (Vt. 1802) (“It is to be observed, that though it is true the house of representatives have no power to try persons for crimes, yet it does not follow that they may not examine into the conduct of *officers of government*. The constitution gives the power to the house of representatives . . . to impeach *state criminals*.”) (emphasis added).

authorized, and where it was not, it was at least compatible with the text and structure of state impeachment.

3. The Articles of Confederation

The Articles of Confederation, drafted in November 1777, did not contain any provision for the impeachment of national officers. In 1786, as it became apparent that a stronger national government was needed, the Congress appointed a committee (which included two eventual delegates to the constitutional convention) to draft amendments to the Articles.¹⁰⁴ The amendments were reported in August 1786, six months before the constitutional convention was called but were never acted upon.¹⁰⁵

Among the amendments were two that touched on the issue of impeachment. The proposed Article 9 authorized the unicameral Congress to “institute a federal Judicial Court for trying and punishing all Officers appointed by Congress for all crimes, offences and Misbehaviour in their Offices”¹⁰⁶ The proposed Article 20, directed at ensuring sufficient attendance in Congress, authorized Congress to punish delegates who failed to attend when required by Congress or withdrew without either permission from Congress or a recall from their state, though the punishment could not be “further extended than to disqualifications any longer to be members of Congress, or to hold any Office of trust or profit under the United States, or any individual State”¹⁰⁷

Neither of these provisions used the word “impeachment.” Both, however, established the power to punish officials for dereliction, and both were directed at accountability, not removal *per se*. Indeed, the punishment for AWOL delegates to Congress presupposed that the party was, in a sense, out of office.

These proposed amendments to the Articles of Confederation, while not shedding abundant light on the

104. 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 163 (Merrill Jensen ed., 1976) (mentioning that future framers Charles Pinckney and William Houstoun were on this “grand committee”).

105. *Id.*

106. *Id.* at 167.

107. *Id.* at 167-68.

question of late impeachment, nevertheless provide more positive data.

C. *The Framers and the Ratifiers*

The Framers established the federal constitutional impeachment power against the backdrop of English, colonial, and state impeachment doctrine described above. Their intent with regard to late impeachment is unclear. The notes on the convention debates are sketchy at best and do not directly address the issue of late impeachment. They do, however, provide tantalizing bases for an inference that late impeachment was acceptable to the Framers or, if not intended, was at least not intentionally subtracted from the congressional impeachment power. This is especially significant given that a well-known English impeachment case—a late impeachment—was proceeding as the convention sat.

Many Framers considered the state ratification debates—which, unlike the convention debates, were not secret—the most valid source for construing the original understanding of the provisions in the Constitution.¹⁰⁸ Unfortunately, the state ratification debates provide only sketchy evidence toward resolving the puzzle of late impeachment. They do suggest, though, that the impeachment power was understood as being quite broad. While the federal impeachment power was more closely connected with removal than its state counterparts had been, it remained grounded in a desire for accountability and deterrence. Late impeachment may not serve the former goal, but it certainly serves the latter.

I. The Convention

By the time of the constitutional convention, the revolutionary ideology had been transformed in significant ways. The fear of executive power that informed state constitutions had shifted; now the legislature was the branch to constrain, and

108. See, e.g., Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512 (1988) (“When we talk popularly about the framers’ intent, we really should be more precise and refer to the ratifiers’ intent, what Alexander Hamilton in *The Federalist Papers* called ‘the intention of the people.’”). Alex Kozinski & Harry Susman, *Original Mean[der]ings*, 49 STAN. L. REV. 1583, 1603 (1997) (discussing Madison’s reliance on the ratifiers’ intent in interpreting the Constitution)

tolerance for executive power had increased.¹⁰⁹ That said, impeachment was still considered a necessary check on executive (and judicial) power.

Delegates came to the convention aware of their own state constitutions and precedents, and of English precedents.¹¹⁰ The Framers discussed impeachment at length and on several separate occasions at the convention. The issue of late impeachment never arose explicitly, but several of the discussions provide bases for inferences about the Framers' understanding of late impeachment, and suggest that late impeachment was accepted.¹¹¹

a. *Initial Proposals*

Impeachment was placed on the table almost from the start of the convention. On May 29, Edmund Randolph offered the "Virginia Plan," which formed the baseline for subsequent discussion over the next few weeks. In it, Randolph followed the Virginia state structure of having impeachment trials in regular courts: He proposed that the federal supreme court would "hear and determine . . . impeachments of any National officers."¹¹²

On June 2, the Committee of the Whole, working from Randolph's proposal, came to discuss the removability of the President. John Dickinson of Delaware proposed that the

109. See WOOD, *supra* note 29, at 409 ("Where once the magistracy had seemed to be the sole source of tyranny, now the legislatures through the Revolutionary state constitutions had become the institutions to be most feared."); see also HOFFER & HULL, *supra* note 1, at 60 ("Without a king to shield wrongdoers in office, without an aristocracy to protect their own from public outcry, was there any need for impeachment?").

110. BELKNAP TRIAL, *supra* note 18, at 363 (discussing familiarity of Framers with state constitution impeachment provisions); HOFFER & HULL, *supra* note 1, at 96 (discussing familiarity of Framers with state impeachment law and cases); BERGER, *supra* note 29, at 87 n.160 (describing American familiarity with English impeachment law). Hoffer and Hull go further in downplaying the English influence, saying that English impeachment precedent "had receded into a dim past," despite the contemporaneous Hastings case. HOFFER & HULL, *supra* note 1, at 96. They also criticize Berger's assumptions, asserting that the Framers used English cases as "counterexamples and passing illustrations" rather than relying on them as good law. *Id.* at 266-70.

111. Other discussions on impeachment, particularly the exhaustive discussions over which body should try impeachments, are not discussed in this Part, as they do not implicate the late impeachment issue.

112. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed., 1911) [hereinafter RECORDS]. At the same time, Charles Pinckney introduced his own draft constitution, which gave the House the power to impeach and established the Senate and Supreme Court as the impeachment court, paralleling the structure in South Carolina. Pinckney provided separately for the removal of the President via impeachment. This account of Pinckney's Plan is based on that pieced together by Farrand. See 3 *id.* at 606, 608.

President be removable by Congress on the request of a majority of state legislatures, a notion that no other delegation supported.¹¹³ The next removability proposal, however, was approved: The delegates voted to make the President “removable on impeachment and conviction of mal-practice or neglect of duty.”¹¹⁴ At this stage in the drafting, then, impeachment applied to all national officers, while removability and the standards for it were discussed only in the context of a sitting President.

Significantly, four states voted against making the President removable on impeachment: Maryland (which had no provision for impeachment in its state constitution), Virginia, Delaware, and Pennsylvania.¹¹⁵ Recall that in the Virginia and Delaware constitutions, the governor was not impeachable while in office.¹¹⁶ At home, these states supported the idea of impeachment for officers in general and for the governor in particular. At the convention, their delegations offered no objection to a parallel structure for the federal Constitution. It is readily inferable, therefore, that while the Virginia and Delaware delegations opposed the idea of removing a sitting President by impeachment, they would not have objected to *late* impeachment of the President.¹¹⁷ Pennsylvania too allowed late impeachment, and its delegation may have felt the same way as Virginia and Delaware.

The next development came on June 15, with the introduction of William Paterson’s “New Jersey Plan,” a broad counterproposal to Randolph’s Virginia Plan. The New Jersey Plan also provided for impeachment trials of “federal officers” to be performed in the federal courts, but separately advanced the Dickinson proposal that the President be removable by Congress on application of a majority of state legislatures.¹¹⁸ Once again this proposal went nowhere, but like Randolph, Paterson had provided a general power to impeach national officers and a

113. See 1 *id.* at 85-87.

114. 1 *id.* at 78.

115. 1 *id.* at 79.

116. See *supra* text accompanying notes 74 & 76.

117. To the contrary, though, Dickinson had made his proposal for state-based removal of the President because “[h]e did not like the plan of impeaching the Great Officers of State.” 1 RECORDS, *supra* note 112, at 85.

118. 1 *id.* at 244.

wholly separate provision ensuring the removability of the President.

On June 18, Alexander Hamilton proposed a broad plan as well, in which it was specified that “The Governour [*i.e.*, President,] Senators and all officers of the United States to be liable to impeachment for mal- and corrupt conduct; and upon conviction to be removed from office, & disqualified for holding any place of trust or profit”¹¹⁹ Here and elsewhere,¹²⁰ Hamilton seemed to believe that removal was a required component of the impeachment penalty, which suggests that he viewed late impeachment as impossible. On the other hand, Hamilton’s later writings on impeachment in *The Federalist Papers*—construing the Constitution as actually written and not his own unadopted proposals—can be construed more favorably to late impeachment.¹²¹

b. *Removing the President*

In late July, an intense debate raged over the impeachability of the President, which remained in the working draft (based on the Virginia Plan). Some, fearing that the proposed legislature was already much more powerful than the proposed President, did not want to place the President at the mercy of the Congress; instead, they would have advanced accountability by replacing impeachment with short terms and the possibility of re-election.¹²² Many of the comments emphasized the importance of being able to remove a sitting President through impeachment; this focus gives an undue impression that late impeachment was not considered possible, when in fact the issue simply was peripheral.¹²³ The same was true of comments on the other extreme, which argued against *any* impeachment of the President, implicitly excluding late impeachment as well, but not addressing the timing issue *per se*.¹²⁴

In one instance, however, the debate avoided these extremes and provided a glimpse, albeit vague, of some Framers’

119. 1 *id.* at 292.

120. See 3 *id.* at 626-27 (discussing a plan by Hamilton that was not presented, which would have limited punishment to removal or removal plus disqualification)

121. See *infra* text accompanying note 145.

122. See 2 RECORDS, *supra* note 112, at 53. At that point in the debate, the President was impeachable, served six years, and could not be reelected. 2 *id.* at 51

123. See, e.g., 2 *id.* at 66-67 (comments of Pinckney and King)

124. See, e.g., 2 *id.* at 65-69 (comments of Madison, Randolph, and Morris)

understandings of late impeachment (to the extent that Madison's notes of the occasion are reliable). On July 20, immediately after Charles Pinckney and Gouverneur Morris moved to strike the provision authorizing removability of the President, the following exchange occurred:

Mr. P[inckney] observd. he ought not to be impeachable whilst in office.

Mr. Davie. If he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected. He considered this an essential security for the good behaviour of the Executive.

Mr. Wilson concurred in the necessity of making the Executive impeachable whilst in office.

Mr. Govr. Morris. . . . In case he should be re-elected, that will be sufficient proof of his innocence. . . .

Col. Mason. No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? . . . One objection agst. [the Electoral College] was the danger of their being corrupted by the Candidates: & this furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?¹²⁵

This debate was not really about impeachment—it was about removability.¹²⁶ The clause that Pinckney was trying to eliminate provided that the President was “to be removeable,”¹²⁷ not that he “be impeachable.” National officers were generally impeachable; the issue here was, as Pinckney put it, whether the President (whose term was otherwise definite and limited) ought to be “impeachable *whilst in office*.” In other words, Pinckney arguably presupposed the possibility of late impeachment, and was concerned only with whether “regular” impeachment was acceptable as well.¹²⁸

125. 2 *id.* at 64-65.

126. See *id.* at 185-86 (recording draft from Committee of Detail placing removability provision between provisions for presidential oath and vice presidential succession); 2 *id.* at 499 (recording recommended language from Committee of Eleven placing removability provision in same clause as succession provision).

127. 2 *id.* at 64.

128. But see BELKNAP TRIAL, *supra* note 18, at 119 (opinion of Senator Allison) (flatly stating—without citing any support—that Pinckney opposed any impeachment of the President at any time).

William Davie responded to Pinckney that “regular” impeachment was important because if it were not available, the President would attempt to win reelection by any means necessary. Davie, who came from North Carolina, where late impeachment was not discussed in the constitution, could have meant two things by this. First, Davie might have presupposed that late impeachment was possible and argued that if *only* late impeachment were available, a malfeasing President would entrench himself in office to avoid it.¹²⁹ Alternatively, Davie could have meant that a President could entrench himself in office if he corruptly won reelection and there was no other means of removing him—in which case late impeachment would never be an issue.

Madison next described James Wilson as using the same “whilst in office” construction.

Gouverneur Morris had more faith than Davie in the Electoral College, but George Mason shared Davie’s concern about a President who would do anything to get reelected. Notably, however, Madison quoted Mason as speaking of the right of impeachment being “continued,” as opposed to it merely being “available.” This suggests that to Mason, the issue was whether impeachment would be suspended during the President’s term or instead would be continuous. The word “continued” makes little sense if the only options were either impeachment in office or none at all. In other words, Mason appeared to presuppose late impeachability.

Mason’s final comment, that a President could “escape punishment” for fixing an election by fixing the next one, reveals a similar presupposition. If late impeachment were not an option, then reelection would not allow the President to “escape” anything: Once his new term ended, he would not have to face impeachment. Of course, Mason might also have feared a President stealing *every* election and staying in power for life. If he were able to win every election and was not susceptible to removal, then he would indeed escape punishment.¹³⁰ But as

129. *See id.* at 53 (argument of House manager in late impeachment trial discussing Davie statement, and arguing: “What good would it do him to be re-elected if he could not be impeached anyway if he was out of office?”); *id.* at 150 (opinion of Senator Dawes).

130. This concern of Davie’s and Mason’s was mooted by the Twenty-Second Amendment U.S. CONST. amend. XXII (“No person shall be elected to the office of the President more than twice . . .”). Now, the President must leave office eventually

with Davie, if this is what Mason meant, then his comments did not implicate late impeachment at all.

This brief exchange about whether the President should be impeachable “whilst in office” therefore provides some evidence to support the notion that late impeachment was considered possible by the Framers. The corps of national officers was to be impeachable; the only question was whether to exempt the *sitting* President. The impeachability of a *former* President—and thus of any former officer—was implicit or, at the very least, not ruled out. In the process, moreover, the notion was reinforced that impeachment is about accountability and deterrence (“providing essential security for the good behaviour of the Executive,” as Davie put it) and not just removability.¹³¹

c. *The Hastings Paradigm*

The next exchange providing inferences on the Framers’ understanding of late impeachment did not come until September 8, in the debate on defining impeachable offenses. Again, Madison’s notes provide the crucial implications:

The clause referring to the Senate, the trial of impeachments agst. the President, for Treason & bribery, was taken up.

Col. Mason. Why 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*. Attempts to subvert the Constitution may not be Treason as above defined— As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments. He movd. to add after “bribery” “or maladministration.” Mr. Gerry seconded him—

Mr. Madison So vague a term will be equivalent to a tenure during pleasure of the Senate.

Mr. Govr Morris, it will not be put in force & can do no harm— An election of every four years will prevent maladministration.

(unless he can contrive some way to become President without being elected) This makes removability less important and, conversely, makes late impeachment more relevant.

131. See *infra* Part V.A.

Col. Mason withdrew “maladministration” & substitutes “other high crimes & misdemeanors” (agst. the State).¹³²

Mason’s offhand tone (if it was not just Madison’s offhand notes) in referring to Hastings suggests that those present were familiar with the famous case.¹³³ What is more readily inferable is that Mason wanted someone in Hastings’s position to be impeachable.¹³⁴ Mason’s proposal, which broadened the range of impeachable offenses to include all high crimes and misdemeanors, was intended to ensure that a President who acted like Hastings would be susceptible to impeachment.

If Mason and the Framers knew anything about the Hastings case, though, they knew that Hastings was being subjected to a late impeachment. Yet, that aspect of Hastings’s case attracted no negative comment. While late impeachment was not relevant to the discussion of removable impeachable offenses, Mason’s comments are relevant to the larger question of how much the Framers meant to distinguish American impeachment from English impeachment. If aspects of the Hastings case—such as the fact that Hastings was out of office—were seen as unacceptable, it would be surprising if Mason would have used it as an example of a good impeachment and even more surprising if this attracted no dissent. Conversely, if the Hastings case was seen as an appropriate model, the fact that Hastings was out of office surely must have registered.

More generally, in defining impeachable offenses Mason moved away from the American “maladministration” standard¹³⁵

132. 2 RECORDS, *supra* note 112, at 550 (emphasis added) (footnote omitted)

133. Even an opponent of late impeachment conceded generations later that Hastings’s “case was present to all minds, and was debated by all lips.” BELKNAP TRIAL, *supra* note 18, at 98 (opinion of Senator Howe); see also Arthur Bestor, *Impeachment*, 49 WASH. L. REV. 255, 284 (1973) (book review) (“As the proposed Constitution went before the ratifying conventions of the several American states in 1788, the most spectacular impeachment trial of the age got under way in the House of Lords.”)

Reference was made to Hastings in the First Congress as well, at which point the proceedings were still ongoing; it was mentioned unfavorably as an example of how slow impeachment trials could be. 1 ANNALS OF CONG. 373 (1789) (statement of Rep. Vining).

134. Then again, maybe knowledge of Hastings’s case was spotty in the New World. After all, one of the charges against Hastings was for bribery (though not labeled as such in the articles of impeachment), see generally John T. Noonan, Jr., *The Bribery of Warren Hastings: The Setting of a Standard for Integrity in Administration*, 10 HOFSTRA L. REV. 1073 (1982), a fact that undermines Mason’s entire argument about broadening the list of impeachable offenses so as to ensure the inclusion of cases like Hastings’s.

135. Most state constitutions used this formulation. See *supra* text accompanying notes 74-89.

to the English “high crimes and misdemeanors” standard.¹³⁶ American federal impeachment was thus placed squarely in the context of the English experience, where not just high crimes and misdemeanors but late impeachment were the order of business.¹³⁷

d. Late Adjustments

Late in the convention, the provision for removing the President was expanded to make clear that he was not the only official subject to impeachment. To the provision for removing the President upon impeachment and conviction, the convention simply added the Vice President and civil officers to the list unanimously and without debate.¹³⁸ This late change ended the distinction in the text between the general impeachment power and its specific application to presidential removal. It is also the source of the poor construction of Article II, Section 4.¹³⁹

One last item implicitly raised the issue of late impeachment, and at first glance it might seem to suggest that it was *not* intended. On September 14, John Rutledge and Gouverneur Morris proposed to suspend impeached officers pending their trial and acquittal.¹⁴⁰ This proposal, which was rejected,¹⁴¹ suggests that impeachment was for sitting officers only. As with the earlier discussions on impeachment, though, it appears that this simply reflected the importance of removability to the Framers. It was not necessarily the case that *all* impeachments would involve sitting officers; Rutledge and Morris simply wanted to consider suspension as a remedy for those that did.

136. See BERGER, *supra* note 29, at 59-73 (describing English use of “high crimes and misdemeanors” concept).

137. See *supra* text accompanying notes 52-58.

138. 2 RECORDS, *supra* note 112, at 546, 552.

139. The late impeachment dilemma is not the only one created by this sloppy craftsmanship—the Framers also neglected to provide explicitly for someone other than the Vice President to preside over an impeachment trial of the Vice President. See Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849 (2000) (arguing against the ability of the Vice President to preside over his own impeachment trial); see also Kalt, *supra* note 13, at 795-96 (discussing incongruity of Vice President presiding over his own impeachment trial).

140. 2 RECORDS, *supra* note 112, at 612.

141. *Id.* at 612-13.

e. Conclusion

Quite a bit about impeachment went without saying in the debates, and the fact that something as admittedly peripheral as late impeachment was one of them should not be surprising. Nevertheless, the mention of Hastings and the debate on whether the President should be removable “whilst in office” provides some evidence for the notion that late impeachability was a given and that “regular” impeachment (for the President at least) was the controversial question.

Regardless of what the Framers knew or thought of the Hastings case, they clearly gave Congress a more restricted impeachment power than that possessed by Parliament. One can argue that when the Framers meant to eliminate an impeachment power from the English baseline, they did so explicitly.¹⁴² Conversely, when they were not explicit—as with late impeachment—they must not have intended such a limit. If the British could impeach Hastings after he had left office, this argument would go, so too could the Americans impeach an ex-officer, in the absence of a constitutional statement to the contrary.

2. Ratification

Further insight on the original understanding of late impeachment can be gleaned from ratification sources. *The Federalist Papers* present neither direct evidence about the

142. See, e.g., BELKNAP TRIAL, *supra* note 18, at 87 (opinion of Senator Sherman) (“The precedents of impeachment of persons not in office for offenses committed while in office were well known, and if this had been considered an abuse to be guarded against it would have been done in the same clear manner that the Constitution guards against excessive punishment in cases of impeachment.”); *id.* at 129 (opinion of Senator Bayard) (cataloguing explicit changes in Constitution away from English practice and not including prohibiting late impeachment).

These explicit changes include: the two-thirds majority requirement for conviction; limitation of impeachment to high crimes and misdemeanors by civil officers, *but see* Part IV.B.1; the limitation on presidential pardons to prevent their use to undo an impeachment judgment; and the limitation on punishment to removal and disqualification.

On a separate note, English impeachment procedures were brought into American practice as a baseline when Senate President Thomas Jefferson incorporated them into his manual. See THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES § LIII (1801); see also Edwin Brown Firmage & R. Collin Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023, 1031 (describing English procedure and Jefferson’s adoption of it).

original understanding of late impeachment, nor much valid basis for inference. There are, however, some invalid bases that bear mention given the prominence of *The Federalist* as a source for deciphering original understanding.

The first discussion of impeachment in *The Federalist* mentions late impeachment explicitly but does not discuss whether it is possible under the federal Constitution. In *The Federalist* 39, James Madison compared the republican character of the proposed constitutional government with those in the states. He wrote:

In several of the States, however, no explicit provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia he is not impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office.¹⁴³

Taken out of context, Madison's statement that the President "is impeachable at any time during his continuance in office" would seem to rule out late impeachment. But Madison was not speaking of the limits of the federal impeachment power; rather, he was speaking of its expansion. Unlike certain states where the governor cannot be impeached at all or can only be impeached after he leaves, Madison explained, the President can be impeached while he is in office.¹⁴⁴ Later, Alexander Hamilton made the identical point, noting that "[T]he President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Virginia and Delaware."¹⁴⁵ One can debate whether a President who is only impeachable while in office is "on worse ground" than one who can only be impeached after leaving office—Hamilton *may* have been supporting the idea of late impeachability. At worst, though, late impeachment was simply beside the point to Madison and Hamilton and not ruled out.

The only other potentially relevant discussions of impeachment in *The Federalist* concerned removability, and so, as

143. THE FEDERALIST NO. 39, at 397 (James Madison) (Clinton Rossiter ed., 1961)

144. Cf. *supra* Part III.C.1.b (discussing removability of President, implying his late impeachability).

145. THE FEDERALIST NO. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

in several debates in the convention,¹⁴⁶ focused disproportionately on the impeachment of sitting officers.¹⁴⁷ As before, the fact that “regular” impeachment was more likely and more important—and that the discussion of impeachment reflects that fact—does nothing to rule out the possibility of late impeachment.

Impeachment was also discussed by opponents of ratification in the loosely organized canon known as the *Anti-Federalist Papers*. Here too, late impeachment was not addressed, but some inferences are available.

As in *The Federalist*, at least one anti-Federalist author discussed the removability of the President in terms that might seem to crowd out late impeachment—if read out of context. Luther Martin (who was a convention delegate, but who walked out and refused to sign the final document) objected that the Constitution made it too hard to remove the President via impeachment, given the likely contours of congressional politics.¹⁴⁸ This would not be a problem if late impeachment were possible; the presidential leverage over Congress that Martin worried about would be mooted once the President left office. Thus, one might conclude that Martin did not think that late impeachment was possible; if he did, he would not have complained so stridently. But Martin was not thinking in such subtle terms. Martin was concerned that the President would be “a King in name, as well as in substance,” who could “establish himself in office not only for his own life, but even if he chooses, to have that authority perpetuated to his family.”¹⁴⁹ Martin dismissed impeachment as irrelevant, because the President could “set [it] at defiance.”¹⁵⁰ This would be so for late impeachment too, if the President never left office. As with Hamilton and Madison, then, for Martin the timing of impeachment was beside the point.

In the actual state convention debates on ratification, impeachment was raised as an issue on several occasions, but again late impeachment was not addressed directly.

146. See *supra* text accompanying note 123.

147. See, e.g., THE FEDERALIST NO. 77, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.* NO. 79, at 474.

148. See Luther Martin, *Mr. Martin's Information to the General Assembly of the State of Maryland*, in 2 THE COMPLETE ANTI-FEDERALIST 27, 68-69 (Herbert J. Storing ed., 1981)

149. 2 *id.* at 68 (emphasis removed).

150. 2 *id.* at 69.

One concern about impeachment among opponents of the Constitution was that the Senate was established as the tribunal for trial. Relatedly, many debaters assumed that senators themselves were civil officers, subject to impeachment. For instance, John Brooks expounded at the Massachusetts ratifying convention as follows:

When men are answerable, and within the reach of responsibility, they cannot forget that their political existence depends upon their good behavior. The Senate can frame no law but by consent of the Representatives, and is answerable to that house for its conduct. If that conduct excites suspicion, they are to be impeached, punished, (or prevented from holding any office, which is great punishment.)¹⁵¹

Brooks supported the impeachability of senators, in other words, and understood impeachment as being about much more than just removal. Apropos of late impeachment, Brooks understood removal, disqualification, or any combination thereof as a threat to one's political existence, a threat that provided proper incentives for "good behavior."¹⁵² Once again, we see impeachment conceived as a way to guarantee propriety in office—a goal to which late impeachment would contribute—rather than simply to remove malefactors from office.

An exchange at the North Carolina ratifying convention contained language that implicated late impeachment. In the context of a discussion of who was subject to impeachment, delegates puzzled over the Constitution's vague language and worried that *state* officers and even private citizens might be susceptible to impeachment.¹⁵³ Governor Samuel Johnston rejected this notion, stating: "Removal from office is the punishment—to which is added future disqualification. How could a man be removed from office who had no office?"¹⁵⁴ Johnston's interpretation would seem to preclude late impeachment. If removal is a necessary element of punishment,

151. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 45 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES]; see also 2 *id.* at 168-69 (recording Samuel Stillman making the same point)

152. One can read—but should not read too much—into Brooks's use of the word "or," implying that disqualification alone was a possible punishment (as it would necessarily be in a late impeachment case).

153. See 4 ELLIOT'S DEBATES, *supra* note 151, at 32-34.

154. 4 *id.* at 35; see also 4 *id.* at 49 (recording Archibald Maclaine making similar comments).

then how could an ex-officer be impeached? But Johnston's comment seems to be directed more at dispelling the notion that ordinary citizens could be impeached than at discussing the acceptable timing of impeachment trials. Late impeachment does not present the problem of pursuing an individual who "had no office," and thus does not really conflict with Johnston's underlying interpretation.¹⁵⁵

Finally, another comment at the North Carolina convention further reinforces that impeachment was designed not simply for removal, but as a way of promoting accountability in office. Framer, Ratifier, and later U.S. Supreme Court Justice James Iredell stated:

[Impeachment] will be not only the means of punishing misconduct, but it will *prevent* misconduct. A man in public office who knows that there is no tribunal to punish him, may be ready to deviate from his duty; but if he knows there is a tribunal for that purpose, although he may be a man of no principle, the very terror of punishment will perhaps deter him.¹⁵⁶

Iredell's statement is perhaps the clearest one by a Framer that impeachment is intended as a structural incentive for executive and judicial officials to behave. As will be discussed further below, in the argument from constitutional structure, late impeachment is an important component of this function.¹⁵⁷ Because the impeachment process is so cumbersome, it is only with late impeachment that the incentive effects of impeachment extend to the later portions of an executive officer's term. Without late impeachment, as Iredell puts it, there is effectively "no tribunal to punish" such a malfeasing officer, who would then be all too "ready to deviate from his duty."¹⁵⁸

155. Other comments may have reflected views on late impeachment, but not necessarily. *See, e.g.*, 3 *id.* at 516 (recording James Madison at Virginia convention, stating that a criminal President in league with senators would still be vulnerable to impeachment, as one-third of the Senate turned over every two years). It is unclear whether Madison was referring to impeachment after the President's term ended, or simply impeachment during the President's term after new senators were elected.

156. 4 *id.* at 32 (emphasis added).

157. *See infra* Part V.A.

158. Although the criminal law provides additional incentives, impeachment covers offenses that may fall short of criminal wrongdoing or that are too political for the ordinary judicial process to handle appropriately. Impeachment also provides

D. *The Argument from History*

Impeachment in 1787 meant pursuing public offenses committed by public officials. Private citizens were exempt from such inquiries—except to the extent that they had *been* public offenders who had since left office.

There was clear precedent for late impeachments in America and an even clearer one in England. Several states made clear that late impeachments were preferred or even required, and no states specifically barred them. If regular impeachments were more common than late impeachments in America, it was only because they were more worthwhile, not because they were the only way to proceed. American impeachment was designed not solely to remove misbehaving officers, but to provide incentives against their misbehavior in the first place, a goal for which late impeachment provides essential support.

When the Constitution was debated, drafted, and debated again, this tradition of late impeachment was not addressed head on. Several other limits were placed on impeachment, however. Another one—preventing impeachment of the President “whilst in office” and presupposing his late impeachability—was almost adopted as well. But no provision on late impeachment was introduced, suggesting that it was not part of the historical baggage of the word “impeachment” that the Constitution took pains to shed.

IV. TEXT

The text of the Constitution places several significant limits on the impeachment power, but it neither explicitly authorizes nor explicitly forbids late impeachments. Indeed, read over-literally, it does not even limit impeachment to civil officers, let alone sitting officers.¹⁵⁹ But regardless of whether impeachment is limited to civil officers or is not limited at all, the text of the Constitution does not foreclose the possibility of late impeachment. The textual argument against late impeachment is a defensible one, to be sure, but it is not the best interpretation of the text.

punishments that the criminal law does not. *See infra* notes 235 and 271 and accompanying text.

159. For convenience, the term “civil officers” is used here to refer not just to federal civil officers but also the Vice President and the President. *See supra* note 17.

A. Everything but Article II, Section 4

The Constitution establishes that the House and Senate have the main responsibility for construing the breadth of their own impeachment powers. They are given the sole powers to impeach¹⁶⁰ and to try impeachments,¹⁶¹ and they are also given the authority to make their own rules for their proceedings.¹⁶² Because the Constitution commits these matters to their discretion, their determinations generally are not susceptible to judicial review.¹⁶³ Further strengthening Congress's dominion, the President's otherwise plenary power to pardon is void with regard to impeachments.¹⁶⁴

The Constitution does, however, provide some specific limits on the impeachment power in Article I, Section 3: The Senate must sit on oath or affirmation; the Chief Justice presides when the President is tried; a two-thirds majority is required for conviction; and the outer limit of the Senate's sentence upon conviction is removal plus disqualification from holding office.¹⁶⁵

160. U.S. CONST. art. I, § 2, cl. 5.

161. *Id.* § 3, cl. 6.

162. *Id.* § 5, cl. 2.

163. *Nixon v. United States*, 506 U.S. 224, 234 (1993) (“[T]he Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments.”); *see also id.* at 253-54 (Souter, J., concurring) (“If the Senate were to . . . convict[], say, upon a coin toss, or upon a summary determination that an officer of the United States was simply a ‘bad guy,’ judicial interference might well be appropriate.” (internal quotation marks and citation omitted)).

This is not to say that the House can impeach anyone it wants at a whim, it simply means that the House is the lead interpreter of the Constitution on this issue. Allowing judicial review would not change the standard, it would just add a safeguard by adding another institutional interpreter of the standard. But few besides the cynical would say that with judicial review the House could impeach anyone that the *Supreme Court* wants it to impeach. Just as the Supreme Court would be presumed to apply the requisite constitutional standard, so too is the House bound by the Constitution. There is, of course, a rich literature on the subject of non-judicial constitutional interpretation. *See, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27-30, 37-50 (1988) (defining “catholic” and “protestant” approaches to interpretive authority); Neal Kumar Katval, *Legislative Constitutional Interpretation*, 50 *DUKE L.J.* 1335 (2001); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *GEO. L.J.* 217 (1994). *But see* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *HARV. L. REV.* 1359 (1997) (arguing in favor of judicial supremacy).

164. *See supra* text accompanying note 13; *infra* text accompanying note 262. *But see* Kalt, *supra* note 13, at 790-93 (postulating other limitations on the pardon power).

165. U.S. CONST. art. I, § 3, cls. 6-7. While removal is mandatory (if applicable) upon conviction, disqualification is not; the overwhelming majority of sentences upon conviction have not included disqualification. *See infra* note 522. *But see* Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 *DUKE L.J.* 1, 72 n.349 (1999) (contending that “the failure to seek disqualification with a removal is

It also provides some limitations elsewhere, in Article II, Section 4, which will receive separate consideration below.¹⁶⁶

Another limit that the Constitution places is that impeachments must be “impeachments,” a point that is no less important for being obvious. If the word “impeachment” connotes something limited—*i.e.*, if only certain actions can occur within the true meaning of the word “impeachment”—then the reach of the congressional impeachment power is similarly limited.¹⁶⁷

An analogous if extreme example may make this point better. Congress can grant letters of marque and reprisal,¹⁶⁸ but it cannot grant titles of nobility.¹⁶⁹ A letter of marque and reprisal is a document that gives permission to a private citizen to outfit a warship and plunder the ships of foreign enemies.¹⁷⁰ The Constitution does not offer this definition, but the term “letter of marque and reprisal” had a meaning and a context in 1787, such that the power granted by the Constitution to Congress in this regard was specific and limited.¹⁷¹ Congress cannot simply name you a hereditary Baron, label the appointment a letter of marque and reprisal, and declare that Baron is not a title of nobility. The point is not that the Constitution defines the terms “title of nobility” and “marque and reprisal”—it does not. The

conceptually difficult to understand”). Furthermore, once a two-thirds majority has been obtained for conviction, only a simple majority is required to disqualify the defendant. *See* BUSHNELL, *supra* note 16, at 239 (describing thirty-nine to thirty-five vote that disqualified Judge Robert Archbald); *see also* GERHARDI, *supra* note 12, at 78-79 (noting Senate practice of requiring only a majority for disqualification but arguing that two-thirds should be required).

166. *See infra* Part IV.B.

167. *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (“[O]ur constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word.”); RAWLF, *supra* note 35, at 210 (“Impeachments are thus introduced as a known definite term, and we must have recourse to the *common law of England* for a definition of them.”); *cf. infra* note 351 and accompanying text. Admittedly, as legal realist and then-House Minority Leader Gerald Ford put it, an “impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history.” 116 CONG. REC. 11,913 (1970) (statement of Rep. Ford). But the House (and the Senate) has a duty to root its “considerations” in the Constitution, and historically it has done so.

168. U.S. CONST. art. I, § 8, cl. 11.

169. *Id.* § 9, cl. 8.

170. *See generally* Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 692-96 (1972). *But see generally* Jules Lobel, “Little Wars” and the Constitution, 50 U. MIAMI L. REV. 61, 67-69 (1995) (arguing for broader definition of marque and reprisal as embodying the concept of imperfect war).

171. For those who disfavor looking to the original understanding, “letter of marque” has the same meaning today. *See* BLACK’S LAW DICTIONARY 917 (7th ed. 1999)

point, rather, is that a “letter of marque and reprisal” is what it is and nothing more. The limits of the meaning of the term “marque and reprisal” represent congruent limits on the power actually given to Congress to grant the letters.

There is a sound basis for attributing a limited definition to the word “impeachment” in the United States in 1787, namely that it comprehended only proceedings concerning public officials’ conduct of their jobs.¹⁷² Put another way, if the House were to try to impeach me, a private citizen, for stealing office supplies from the private law school where I teach, its action would be as void as your baronage. As a House manager put it in an actual late impeachment trial, “[T]he jurisdiction of the Senate by the very naming of impeachment *per se* is confined to official crimes.”¹⁷³ A congressional prosecution of a private citizen simply would not be an “impeachment.”¹⁷⁴

At first glance, the English precedents might seem to suggest otherwise, because English impeachment technically was not limited to public offenses or public offenders.¹⁷⁵ But the impeachment of peers for private misconduct was based on the fact that the ordinary courts were not equipped to try such significant defendants.¹⁷⁶ In the United States, with no nobility, this form of impeachment did not translate. As for the impeachment of commoners, in practice this at least was limited to state offenses—the domain of Parliament—and had in any case fallen into desuetude long before 1787.¹⁷⁷

Though English impeachment evolved to include these limits, American impeachment included them all along. Private citizens were pursued through the regular criminal process or through attainder, but not through impeachment.¹⁷⁸ When the newly independent states wrote their constitutions, they made

172. “Impeachment” certainly had such a limited connotation once the Constitution became well established, but this simply reflects the influence of subsequent interpretation, a sort of textual bootstrap that does not advance this argument. See, e.g., *State v. Hill*, 55 N.W. 794, 796 (Neb. 1893) (“Here none but public officers are subject to impeachment.”); 2 STORY, *supra* note 42, at 233 (“The offences, to which the power of impeachment has been, and is ordinarily applied, as a remedy, are of a political character.”).

173. BELKNAP TRIAL, *supra* note 18, at 54.

174. This is so regardless of what Article II, § 4 has to say about who can be impeached and for what. See *infra* Part IV.B.

175. See *supra* text accompanying note 38.

176. See *supra* text accompanying note 40.

177. See *supra* note 47 and accompanying text.

178. See *supra* text accompanying note 61.

this limitation on impeachment clear.¹⁷⁹ The single exception to this was that former public officials—technically private citizens at the time of trial—were impeached for prior public actions.¹⁸⁰ By 1787, then, “impeachment” had come to mean a process for the legislature to inquire into and prosecute public offenses committed by public officials.

If the federal constitutional provisions on impeachment discussed above had been the only ones written into the federal Constitution, it would be much clearer that late impeachment is allowed. Even those who adhere to a wholly literalist reading of the Constitution devoid of context would concede that, other than explicit limits specified in the text, the congressional impeachment power is as broad as the word “impeachment” itself. While the definition of impeachment can be restricted to exclude private offenses and private offenders, there is nothing inherent in the notion of impeachment that requires the process to begin or conclude while the defendant is *still* a public official.

B. Article II, Section 4

There is, of course, one other significant clause on impeachment in the Constitution, 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.”¹⁸¹ This clause has been interpreted fairly decisively as limiting the impeachment power further, so that it reaches only civil officers and only high crimes and misdemeanors. Because some have construed the limitation to “civil officers” additionally as restricting the timing of impeachment, Article II, Section 4, plays a uniquely important part in the interpretation of late impeachment.

1. The Over-Literal Reading: Helpful but Wrong

This limiting construction is not the only one possible for Article II, Section 4. Another reading of the provision—which I will concede has been soundly rejected, even though it would

179. See *supra* Part III.B.2.

180. See *supra* text accompanying notes 66-69.

181. U.S. CONST. art. II, § 4.

make the case for late impeachment a slam dunk—is the over-literal one. Under this reading:

The Constitution does not undertake to define the nature and form of impeachment, or its scope and boundaries. . . . [T]he House of Representatives may impeach for other offenses, abuses, failures, and wrongs than those included in the terms “treason, bribery, and other high crimes and misdemeanors.” [I]t may impeach other parties than the “President, Vice President, and other civil officers of the United States.”¹⁸²

The basis of this argument is that Article II, Section 4 provides on its face only a mandatory sentence: if a civil officer is impeached and convicted of a high crime or misdemeanor, he must be removed. It does not say that *only* civil officers can be impeached. It does not say that impeachment can *only* be for high crimes or misdemeanors. It says one thing, and one thing alone: *if* the party is a civil officer, and *if* the charge is a high crime or misdemeanor, *then* conviction requires removal. In other words, Congress can also pursue non-officers, non-high crimes, or both at once, and can either remove the convict in such cases or not. Under such a limited interpretation of Article II, Section 4, late impeachment is obviously within the power of Congress—as is the impeachment of jaywalkers or family pets.¹⁸³

Such an approach—parsing the text of a clause in isolation from the rest of the Constitution, oblivious to the general context and larger structure of the document—commits the error described by Laurence Tribe as mistaking a gap in a map for a hole in the space it describes.¹⁸⁴ Impeachment has a context and a meaning deeper than that yielded by wooden, out-of-context readings of constitutional clauses. A better practice is to reason based on broader textual clues, structure,

182. BELKNAP TRIAL, *supra* note 18, at 146 (opinion of Senator Key).

183. This debate most recently erupted over the Clinton impeachment, in which some commentators argued that impeachment need not be for high crimes and misdemeanors. *E.g.*, Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 29 YALE L. & POL'Y REV. 53, 62-77 (1999) (arguing that Article II, § 4 does not define impeachable offenses, but merely requires the removal from office of the stated class upon conviction of various serious offenses). Those who took a less literal view of Article II, Section 4, such as Professor Akhil Amar, offered the “jaywalking” scenario as rebuttal. Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 323 (1999). For his part, Isenbergh argued that impeachment would be limited to those criminal offenses that were historically the subject of impeachment. Isenbergh, *supra*, at 97.

184. Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1239-45 (1995).

context, and history and to deduce what must fill the space that the map has failed to describe.

To be fair, the over-literalist argument sketched out above is something of a straw man (with due respect intended to those who actually subscribe to it) constructed by those who oppose late impeachment. Such opponents have argued that if Article II, Section 4 allowed for late impeachment, it would not offer any limits at all on impeachment; therefore, late impeachment must not be allowed.¹⁸⁵ But this syllogism is not valid. Even if Article II, Section 4 does not limit impeachment to civil officers, neither does it *authorize* Congress to impeach offenders who never served in office. As discussed above, the impeachment power is inherently limited by the bounds of the definition of the term “impeachment” itself, and these bounds do not include impeaching wholly private citizens.¹⁸⁶ They do, however, include late impeachment.

Therefore, while the over-literalist argument is too unpopular an interpretation on which to rest the case for late impeachment, one should reject the *reductio ad absurdum* argument leveled against it by the opponents of late impeachment. The parade of horrors marshaled by the over-literalists is in reality a short one, including as potential additional targets for impeachment only members of Congress and perhaps state officials but *not* people who have never been in office. There are structural and precedential reasons to exclude members of Congress and state officials from the domain of federal impeachment;¹⁸⁷ moreover, one who starts with the literalist reading but is not averse to using other interpretive tools can limit impeachment to “civil officers” without using Article II, Section 4 and without implying a limitation on the timing of proceedings that would exclude late impeachment.¹⁸⁸

185. See *supra* text accompanying note 23.

186. See *supra* text accompanying notes 167-80.

187. Although the federal Constitution does constrain state officials as well as federal ones, these constraints are few and very specific (*e.g.*, the limits on state governments in Article I, § 10; the oath requirement in Article VI, § 3). Regarding members of Congress, see *infra* note 197.

188. A lingering problem with such a reading is that it would not limit impeachable offenses to high crimes and misdemeanors. To be sure, this is not wholly unreasonable, given the implication in Article III, § 1 that judges can be impeached for mere lapses in “behavior” that fall short of high misdemeanors. Congress has seemed to apply this lower

2. The *Expressio Unius* Reading: Four Possible Interpretations

In any case, Article II, Section 4 does limit impeachment to civil officers.¹⁸⁹ More precisely, it has been *used* to limit impeachment to civil officers. The over-literalists are correct that there are no explicit limits in the text, and their critics are often guilty of citing Article II, Section 4 as if the text clearly says something that it does not.¹⁹⁰ The limiting effect of Article II, Section 4 is based on one of two contemporaneous understandings of the clause, which was subsequently adopted by Congress and scholars.¹⁹¹ This understanding takes Article II, Section 4 as a sort of *expressio unius*¹⁹² description of impeachment that mentions who can be impeached and for what, and that implicitly excludes any other subjects not listed.¹⁹³ Congress's very first impeachment case reached this issue,¹⁹⁴ and with the passage of years it has largely become settled,¹⁹⁵ though

standard to judges, though it has purported to use the "high crimes and misdemeanors" standard in each case. *See infra* note 198.

189. The Blount case is taken as settling this matter. *See infra* note 300; *see also* 2 STORY, *supra* note 42, at 257-64 (noting Blount precedent and declaring that impeachment is limited to civil officers and high crimes and misdemeanors).

The term "civil officer" is used here to include the President and Vice President. *See supra* note 17.

190. *See, e.g.*, Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 715 & n.37 (1988) (citing only Article II, § 4 for proposition that "[t]he Constitution limits the impeachment power to 'all civil Officers of the United States'"); 2 STORY, *supra* note 42, at 255-57 (discussing same).

191. James Wilson, Framers and original Supreme Court Justice, advanced this interpretation. 1 JAMES WILSON, *supra* note 43, at 426 ("In the United States . . . impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments. The president, vice president, and all civil officers of the United States . . . are liable to impeachment . . ."). Professor Akhil Reed Amar surveys this and other similar statements by Framers and the scholarly consensus in Amar, *supra* note 183, at 333-34.

192. The full phrase is *expressio unius est exclusio alterius* to explicitly mention one thing is to (implicitly) exclude others.

193. Amar, *supra* note 183, at 332 ("[T]he mainstream view holds that (by *expressio unius*) Article II protects private citizens from impeachment; and here Article II has worked perfectly, confirming many Founding statements that impeachment was limited to 'officers.'").

194. *See infra* Part VI.A.1.

195. *See supra* note 189.

some scholars still disagree,¹⁹⁶ and others offer a few subtle distinctions.¹⁹⁷

The *expressio unius* view further notes that Article II, Section 4's discussion of impeachment—covering civil officers who commit high crimes and misdemeanors, and who are removed if convicted—is the only place that the Constitution addresses

196. For an entertaining exchange on the subject—not limited to discussion of *who* can be impeached but also for *what* they can be impeached—see the exchange between Professor Akhil Reed Amar of Yale Law School and Stuart Taylor Jr. of the National Journal in Amar, *supra* note 183, at 317-41.

197. My own view of impeachability and the definition of impeachable offenses is that § 4 gives the impeachment standard only for executive officers and leaves removal in the legislative and judicial branches to the Expulsion and Good Behavior Clauses respectively. See U.S. CONST. art. I, § 5, cl. 2; *id.* at art. III, § 1.

This view of Article II, § 4 makes the following textual and structural case: Congress can pursue any public offense by a public official; anything else would not be an “impeachment.” See *supra* note 167 and accompanying text. There are three types of officials that might be subject to this sort of assault: legislative, executive, and judicial

Legislative officials are subject to expulsion, not impeachment, but this makes sense given that (1) expulsion is specified in the Constitution, U.S. CONST. art. I, § 5, cl. 2; (2) expulsion requires a two-thirds vote in the expelling house, which represents a slightly different, but not appreciably lower consensus than impeachment, *see id.*; and (3) while the punishment via expulsion is more limited than that for impeachment, there is a sound basis for distinguishing between single elected officials in large legislative bodies on the one hand and lifetime-appointed judges, un-elected executive officers, and the nationally powerful President and Vice President on the other hand. See GERHARDT, *supra* note 12, at 75-77 (discussing textual and structural arguments against the impeachability of members of Congress); *cf.* A Native of Virginia (James Monroe), *Observations upon the Proposed Plan of Federal Government*, in 1 THE WRITINGS OF JAMES MONROE (Stanislaus Murray Hamilton ed., New York, G.P. Putnam's Sons 1898), available at http://press-pubs.uchicago.edu/founders/documents/a1_2_5s12.html (“The Senators having a power over their own members, have the right of expulsion. Why then should they be impeachable?”).

Executive officials are subject to impeachment as described in Article II, § 4. The President, Vice President, and the non-elected, non-military officers of the executive branch can be impeached for high crimes and misdemeanors. If they are convicted, they are removed and possibly disqualified from future service as well. Although § 4 appears only to require a certain punishment upon a certain type of conviction, the alternative is a complete lack of standards, and so an *expressio unius* reading of this clause is appropriate. Article II, § 4 is meant to constrain not just the executive officers subject to it but the Congress applying it as well.

Judges (and here is where this interpretation differs from the one described in the main text) are subject to impeachment not just for high crimes and misdemeanors, but also for misbehavior. U.S. CONST. art. III, § 1. Because executive officials serve for limited terms, it makes sense to have a higher threshold for removal than judges, who would otherwise not be removable for, say, chronic drunkenness. Indeed, impeachment has touched such private misconduct. See, e.g., *infra* Part VI.A.4 (describing case of Judge Delahay, a reputed drunk); VAN TASSEL & FINKELMAN, *supra* note 1, at 91-95 (describing case of Judge John Pickering, convicted for “total intoxication” among other things). Although the Senate has purported to apply the same standard of high crimes and misdemeanors to judges, and many commentators believe that the high crimes/misbehavior distinction is not constitutionally significant, it is clear that judges have faced a lower threshold. See *infra* note 198.

such issues of scope. Therefore, this must be all there is.¹⁹⁸ In a sense, this reading views the silence about the scope of impeachment as implicitly adding the words “The only way that impeachments go is that . . .” before “[t]he President, Vice President and all civil Officers of the United States, [are] removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” It is of no moment that Article II, Section 4 only purports to provide a mandatory punishment and that it is set apart from the provisions in Article I that spell out and limit congressional impeachment power.¹⁹⁹

But let’s get to the point. Even if this is “all there is” in the text—that is, that impeachment only applies to “civil officers”—what does that necessarily tell us about the timing of impeachment? Very little. Indeed, it not only tells us very little about the timing of the trial, it also says nothing about the timing of the offense. Thus, there are four possible versions of the scope of impeachment within the *expressio unius* reading:

198. See BELKNAP TRIAL, *supra* note 18, at 98 (opinion of Senator Howe) (“[W]e have not a suggestion as to who may be impeached. I myself find that in the fourth section, second article, and I can find it nowhere else.”); *id.* at 123 (opinion of Senator McMillan).

Federal judges are also impliedly impeachable for misbehavior, which seems to undermine this reading of the clause as exclusive. This is especially so given that judges are civil officers. See U.S. CONST. art. II, § 2, cl. 2 (stating that the President “shall appoint . . . Judges of the supreme Court, and all *other* Officers of the United States”) (emphasis added); *id.* at art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their *Offices* during good Behaviour . . .”) (emphasis added). Congress has not invoked the Good Behavior Clause, and has purported to apply the single standard of Article II, § 4 to judges.

Many commentators believe that there is one unified standard. See, e.g., GERHARDT, *supra* note 12, at 83-86 (discussing this view); Jeff Sessions & Andrew Sigler, *Judicial Independence: Did the Clinton Impeachment Trial Erode the Principle?*, 29 CUMB. L. REV. 489, 512 (1999) (citing consensus, including Justice Story); Cass Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 304 (1998) (“I do not believe that this argument is convincing. Judges may not be removed from office for bad behavior; they may be removed only for high crimes and misdemeanors.”). Others do not. See, e.g., BERGER, *supra* note 29, at 122-80 (arguing for separate judicial removal standard); Amar, *supra* note 183, at 327 (expressing belief in separate standards and noting that “[t]houghtful scholars are not of one mind on this point”).

Either way, judges have undoubtedly been held to a lower standard. See VAN TASSEL & FINKELMAN, *supra* note 1, at 8; Sunstein, *supra*, at 304 (“[H]istory has unambiguously converged on the judgment that there is a lower threshold for judges than for presidents.”). Given this historical reality, and given the mixed consensus among commentators, it is reasonable to conclude that judges are indeed held to a lower standard.

199. See *supra* note 90.

1. “Civil officer” limits the timing of both the offense and the trial. A person can only be impeached if he was a civil officer when he committed the offense and if he is currently a civil officer.²⁰⁰ (This “conservative” view describes every convicted impeachment defendant to date.)

2. “Civil officer” limits the timing of the offense but not the trial. A person can be impeached at any time, as long as he was a civil officer when he committed his offense. (The “late impeachment” view.)

3. “Civil officer” limits the timing of the trial but not the offense. A person can be impeached regardless of when the offense was committed, as long as he is currently a civil officer. (The Clinton/“Whitewater” view, or, in the spirit of bipartisanship, the Bush/“Iran-Contra” view.)

4. “Civil officer” limits neither the timing of the offense nor the trial. A person can be impeached at any time, regardless of when his offense was committed, as long as he was a civil officer at some point in his life. (The “radical” view.)

This breakdown can be placed in a two-by-two chart:

		<i>Must the party presently be in office?</i>	
		<i>Yes</i>	<i>No</i>
<i>Must the offense have occurred while the offender was in office?</i>	<i>Yes</i>	<i>1 (conservative)</i>	<i>2 (late)</i>
	<i>No</i>	<i>3 (Whitewater)</i>	<i>4 (radical)</i>

Interpretation #4, the radical version of late impeachment, is immediately problematic. It eviscerates the limitations inherent in the word “impeachment,” because it allows people to be impeached who not only committed offenses wholly unconnected with their service, but who are not currently serving in any office. By using the term “officer” neither as a basis to define the offense nor as a basis to define the defendant in any relevant way, #4 expands impeachment beyond all reasonable compass. It renders the use of the term “officer” an illogical and arbitrary formalism.

The principal benefit of Interpretation #2 is that, by basing congressional jurisdiction on the status of the offender at the time of the offense, it reinforces the notion that “impeachment” for “high crimes and misdemeanors” is limited to offenses

200. This view possibly could be divided into two separate variants. The office in which the suspect committed the offense may or may not be the same as the office in which the suspect is currently serving. This issue is discussed further below, in Part V.f

committed by public officers *qua* public officers.²⁰¹ In other words, if impeachment is supposed to be about offenses that, as *The Federalist* put it, “proceed from the misconduct of public men . . . [and] may with peculiar propriety be denominated POLITICAL,”²⁰² it only makes sense that the term “civil officers” refers to the offender at the time of the offense, regardless of what has happened to him in the lengthy interim of discovery, accusation, debate, impeachment, more debate, and conviction. Indeed, this is the clear scope of the impeachment powers specified in the state constitutions written before 1787.²⁰³ It also tracks the way English impeachment was timed, which is significant given the textual fact that the Framers explicitly changed the rules where they found English practice unsuitable—and they made no such explicit change with regard to the timing of trials.²⁰⁴

The principal defects in #2 are that it makes the term “civil officer” appear to apply to people who are no longer civil officers and that it may moot Article II, Section 4’s mention of removal by applying to people who have no office from which to be removed. But removal is just a penalty on conviction—if applicable—and does not purport to be a further description of *who* is impeachable. Put another way, the removal requirement is a check on officers, not a protection for them. Moreover, removal is not the only penalty facing the target of an impeachment.²⁰⁵

Criminal statutes that specify penalties in similar ways generally are interpreted this way; thus, the Constitution should be also.²⁰⁶ To take just one example, the federal statute on bribing agricultural inspectors specifies:

201. See BELKNAP TRIAL, *supra* note 18, at 154 (opinion of Senator Kernan) (asserting similar argument).

202. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *supra* note 191 (reporting similar comment from James Wilson).

203. See *supra* Part III.B.2.

204. See *supra* note 142 and accompanying text.

205. See *infra* Part V.B and VIII.A (discussing disqualification penalty) and Part VIII.B (discussing possibility of other penalties).

206. See, e.g., BELKNAP TRIAL, *supra* note 18, at 148 (opinion of Senator Dawes) (citing embezzling statutes forbidding certain conduct by “officers”); *id.* at 154 (opinion of Senator Kernan) (citing statute providing that “every officer” committing certain crimes “shall, upon conviction, be removed from office and forever thereafter be incapable of holding any office under the United States”); *id.* at 364 (opinion of Senator Wadleigh) (arguing that “such a construction would be absurd” if applied to such statutes).

[A]ny inspector . . . or other officer or employee of the United States . . . who shall receive . . . any gift, money, or other thing of value . . . shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine . . . and by imprisonment not less than one year nor more than three years.²⁰⁷

Few people would read this statute and conclude that because it mentions only current employees and officers, and because it specifies removal from office as a mandatory punishment, that one who has left office cannot be prosecuted under this provision. Indeed, former Secretary of Agriculture Mike Espy was indicted under this statute three years after leaving office.²⁰⁸ Although Espy was eventually acquitted, it was not because he had already left office; his trial proceeded to the merits.²⁰⁹

Another constitutional provision presents a similar interpretive challenge—and has been read the same way by Congress. Article I, Section 5, Clause 2 provides: “Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”²¹⁰ Congress has used this power to discipline members who have already left office.²¹¹

Interpretation #3 has textual appeal (“officers” are “officers,” and ex-officers are not), as well as an admitted degree of coherence. Playing off of the reference in Article II, Section 4 to removal, it focuses on the fact that only current officers can be turned out of office. If they are already gone from office, the Removal Clause is rendered mere surplusage.²¹² Under this view,

207. 21 U.S.C. § 622 (1994).

208. Bill Miller, *Espy Acquitted in Gifts Case*, WASH. POST, Dec. 3, 1998, at A1 (summarizing chronology of Espy case).

209. *United States v. Espy*, 145 F.3d 1369, 1371 (D.C. Cir. 1998) (attaching no legal significance to fact that “Espy is not subject to removal because he is no longer Secretary of Agriculture”); Miller, *supra* note 208.

210. U.S. CONST. art. I, § 5, cl. 2.

211. *See infra* Part VI.A.3 (discussing cases of Representatives Whittemore and Deweese).

212. *See, e.g.*, 14 ANNALS OF CONG. 430-31 (1805) (speech of Luther Martin in impeachment trial of Justice Samuel Chase) (“The President, Vice President, and other civil officers can only be impeached. . . . In the first article, section the third, of the Constitution, it is declared that, judgment in all cases of impeachment, shall not extend further than removal from office, and disqualification to hold any office of honor, trust, or profit, under the United States. This clearly evinces, that no persons but those who hold offices are liable to impeachment.”); *infra* text accompanying note 355 (same argument made in Belknap late impeachment case); Souss, *supra* note 16.

impeachment is less about trying a certain kind of offense than it is about keeping a certain kind of person out of office.²¹³ An officer who committed a high crime and left office would face impeachment only if he returned to office. The same would be true if he committed the high crime as a private citizen (after all, the two examples of high crimes in the Constitution—treason and bribery—are both offenses that can be committed by private citizens).

Despite its coherence, Interpretation #3 tries to make Article II, Section 4 do too much work. Is the mention of removal meant to restrict the result of impeachment—and thereby the timing of impeachment trials—or is it just meant to limit the terms of malfeasance of civil officers who would otherwise serve for fixed terms (the President and Vice President), at the pleasure of the President (executive civil officers), or for life (judges)? If removal were the only possible judgment in impeachment cases, the former interpretation would be more likely. But removal is *not* the only possible judgment mentioned in the text; disqualification is possible too.²¹⁴ Removal is a mandatory sentence for sitting officers upon conviction, but it is not the sole end of impeachment. While the other parts of Article II, Section 4 look backward to precedent conditions for impeachment, removal looks forward to its results. Thus Article II, Section 4 says “removal requires conviction” and even that “conviction guarantees removal,” but it does not clearly or necessarily say “impeachability equals removability.” In sum, Interpretation #3 is a relatively plausible textual reading of Article II, Section 4, but it is not the only possible one, and it has deep flaws.

Interpretation #1 has some benefits of both #3 and #2. It takes full stock of the word “officer” and the removal provision, but it also dovetails with the contextual notion that impeachment is to be directed at public officials *qua* public officials. However, #1 also suffers a drawback of #3, in that it reads too much into the removal provision. Moreover, it opens up a potential textual

213. An excellent piece of evidence that this is not the true meaning of impeachment is the simple fact that late impeachment was practiced in England and the states in the years before the drafting of the Constitution. This is more a historical point than a textual one, though. See *supra* Part III.A (English precedent); Part III.B.1 (state precedent).

214. U.S. CONST. art. I, § 3, cl. 7. The possibility of other punishments is discussed in Part VIII.B, *infra*.

dilemma: Can an officer be impeached in a second office for something he did in a prior office? To the extent that such an officer is impeachable, it becomes less tenable to distinguish between Interpretations #1, #2, and #3. In all, though, Interpretation #1 is a plausible one as a matter of pure text. As discussed in detail below, however, it has significant flaws in the realms of structure and precedent.²¹⁵ Additionally, similar provisions in state constitutions have not been held to limit impeachment to sitting officers.²¹⁶

3. Conclusion

It is easy to argue that if the Constitution meant to allow late impeachment, it would have made that point much more clearly.²¹⁷ On the other hand, the same can be said about precluding late impeachment. If one were to focus solely on the text of the Constitution's impeachment provisions—ignoring their history, structure, and precedents—one could best conclude that impeachment may reach public misconduct by civil officers who have left office. But one could also reasonably conclude that impeachment can reach only sitting civil officers. Because the text of the Constitution does not clearly and directly address the proper timing of impeachment, it is necessary to consult history, structure, and precedent to address the question of late impeachment. Indeed, it is only by consulting history, structure, and precedent that one can definitively conclude that Article II, Section 4 limits impeachment to civil officers in the first place.

V. STRUCTURE

While the plain text of the Constitution's impeachment provisions does not provide a complete solution to the puzzle of late impeachment, the larger structure of the document—its internal consistency and its recurrent themes²¹⁸—provides much more fodder for discussion. The Constitution's structure reveals

215. See *infra* Part V.E (structure); Part VI.A (precedent).

216. See *infra* text accompanying notes 448-52.

217. Vermont (*supra* text accompanying note 83) and New Jersey (*infra* note 441) currently have language that makes late impeachability explicit.

218. See generally CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 717 (1999).

that late impeachment is the only way to avoid several incongruous, untenable, and/or presumptively undesired consequences. Although there are some structural arguments against late impeachment, they are outweighed by the ones in its favor.

A. *The Deterrent Effect of Impeachment*

Impeachment is a part of the larger constitutional structure of checks and balances. When impeachment came back into vogue in England during the seventeenth century, it was as a means for the legislature (Parliament) to scrutinize and rein in the executive (the King and his ministers).²¹⁹ When the states wrote their first constitutions, having just fought a revolution against overweening executive power, they almost all included similar impeachment provisions.²²⁰ By the time of the constitutional convention, overweening *legislative* power was the principal concern.²²¹ While impeachment was included in the Constitution from the outset of the debates, there was intensive discussion over whether the President should be impeachable while in office.²²² Nevertheless, the final document contained a strong impeachment provision that kept the executive and judicial branches under the watchful eye of Congress.

With impeachment, then, the Constitution provided “a bridle in the hands of the legislative body upon the executive [and judicial] servants of the government.”²²³ Not only can Congress truncate the otherwise fixed terms of the President and Vice President and the life terms of judges, it can banish executive officers out from under the President. The President can protect his minions from criminal prosecution with a pardon, but he can do nothing to prevent or undo their impeachment. Moreover, the President cannot remove the Vice President or any judges, and some early interpreters argued that nothing in the Constitution even guaranteed him the power to remove his appointees unilaterally.²²⁴ In a structural sense, early removal is

219. See *supra* text accompanying notes 35-37.

220. See *supra* text accompanying note 71.

221. See *supra* text accompanying note 109.

222. See *supra* Part III.C.1.b.

223. THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

224. Alexander Hamilton, no shrinking violet when it came to construing executive powers, wrote in *The Federalist* that presidents could not remove appointees without

the province of Congress as much as, if not more than, that of the executive.

But what is the purpose of this check? Is it to get rid of malfeasing officers? Or is it to prevent them from malfeasance in the first place? To some degree it is both, of course,²²⁵ but from the standpoint of constructing a government of laws and not men, the system of checks and balances seems more directed at “prevent[ing] corruption and tyranny”²²⁶ in the first place than it is at retrospective punishment. As *The Federalist* put it: “[S]o far as the fear of punishment and disgrace can operate, that motive to good behavior is amply afforded by the article on the subject of impeachments.”²²⁷

Consider this analogy. Is the true power of the requirement of Senate confirmation that the Senate can reject nominees it does not like—a power it uses infrequently—or that it forces the President to not nominate unacceptable people in the first place? Imagine the sorts of appointments to high office that Presidents would make if Senate approval were not required. Unless one believes that appointments would be the same with or without the requirement of Senate approval, the incentive effect of this check and balance is obvious.²²⁸

This pattern is even more true of impeachment. Impeachment is tremendously cumbersome, and the Senate has not shown much interest in convicting any but the most obviously guilty offenders. There have only been seventeen impeachments—about one every thirteen years on average—and only seven convictions, all in cases of judges.²²⁹ There have

Senate approval. *Id.* NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961). It was only after a lengthy debate in the First Congress—which included numerous Framers—that the President was given the *legislative* authority to remove cabinet officers. 1 ANNALS OF CONG. 383-99 (1789).

225. Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 769 (1999) (“[I]mpeachment emerged from the Constitutional Convention as a check and deterrent.”) (emphasis added).

226. VAN TASSEL & FINKELMAN, *supra* note 1, at 3.

227. THE FEDERALIST NO. 64, at 396 (John Jay) (Clinton Rossiter ed., 1961).

228. *Cf.* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1500 & n.3 (1990) (making same point regarding the President’s veto power, and noting that “[t]he framers well understood this political science law of anticipated response”).

229. Even these seven convictions did not spare the Republic from any dire hazard. As Raoul Berger once put it, “Once employed to topple [English] giants—Strafford, Clarendon, Hastings—impeachment has sunk in this country to the ouster of dreary little judges for squalid misconduct.” BERGER, *supra* note 29, at 3.

been more cases of resignation in the face of possible impeachment than there have been actual cases of impeachment.²³⁰ More to the point, there likely have been countless high crimes and misdemeanors that were never committed in the first place because of the mere *possibility* of impeachment. Imagine a United States in which the President knew that no matter what he did, he would be able to remain in office for four years. Can anyone doubt that the temptation to abuse power—particularly to get reelected—would not have occurred more often in such a system than it has in our real one?

No executive officer has ever been removed from office through impeachment, but every executive officer has been constrained by the possibility of it. By the same token, late impeachment may rarely be worth pursuing in fact, but its presence may nevertheless represent an effective way to deter officeholders from malfeasance.

Even in actual cases of its application, the purpose of the impeachment power is broader than removal of particular officers; it has the loftier goal of causing better administration by promoting ultimate accountability. In the words of one commentator:

The only things that can be done—and the things that must be done if the abuse of power is not to become a precedent for subsequent and perhaps even graver abuses and usurpations—is to render the perpetrator incapable of further wrongdoing and to make his punishment serve as a warning to his successors. Impeachment serves the latter purpose fully as much as the former²³¹

Late impeachment is an important contributor to these aims, and barring late impeachment would undermine them.²³² If impeachment cannot touch an officer once he has left office, then it provides significantly less incentive for the officer to

230. See *infra* note 411.

231. Bestor, *supra* note 133, at 277. Even opponents of late impeachment have noted strongly that impeachment is a “curb upon the exercise of power in the possession of those subject to impeachment.” BELKNAP TRIAL, *supra* note 18, at 40 (recording argument of defense counsel in late impeachment case).

232. The deterrent effect is discussed in this Part; the incapacitating effect is discussed in the next. See *infra* Part V.B. The deterrent point was made clearly in the Belknap case. See *infra* note 353 (examples from Belknap trial) and text accompanying notes 379-81.

behave. More precisely, it provides an incentive for him to behave only early in his term, to conceal his wrongdoing long enough to run out the clock, and to skip out of office if congressional action becomes a serious issue.²³³ By contrast, if he is amenable to impeachment and disqualification for the rest of his days, an officer will have an added incentive to conduct himself appropriately to the very end of his term. To the extent that he does not conduct himself properly, it will at least be harder for him to escape scrutiny forever, as elections intervene and seats in Congress change hands. This accountability will provide some deterrence to others, if not the officer himself.

To be sure, many impeachable offenses can be pursued in parallel as criminal offenses in ordinary courts, and ex-officers still must contend with those potential sanctions. But those sanctions exist when the officers are still in office too.²³⁴ And impeachment reaches offenses and provides punishment that the criminal process does not or cannot.²³⁵ Barring late impeachment does not increase the effect of criminal sanctions as a deterrent; it merely limits the effect of impeachment as a deterrent.

On another note, criminal sanctions provide a keen analogy to the deterrent effect of impeachment. Imagine a larceny statute that allows a sentence of restitution and jail time. Imagine now that a defendant can terminate the criminal proceeding entirely by returning the stolen money. No thief would ever face jail time, because he could simply pay restitution if and when he was caught and preempt the proceedings. Imagine further that the statute of limitations in this larceny statute was very short, or better yet that it expired at a set date

233. See BELKNAP TRIAL, *supra* note 18, at 129 (opinion of Senator Bayard) (“The train could be laid and the slow-match lighted with close calculation, and the incendiary retire to the place of safety outside the jurisdiction charged with his punishment.”)

234. RAWLE, *supra* note 35, at 215 (“[T]he ordinary tribunals as we shall see, are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency.”). *But see* Akhil Reed Amar & Brian G. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11 (1997) (arguing that presidents are immune from criminal prosecution while in office).

235. See RAWLE, *supra* note 35, at 211 (“[P]olitical offences . . . would be difficult to take cognizance of in the ordinary course of judicial proceedings.”); *id.* at 217 (“[T]he sentence which this court is authorized to impose cannot regularly be pronounced by the courts of law.”). For more on this point, see *infra* note 274 and accompanying text (discussing impeachment cases that criminal law will not reach), and notes 244 and 249 (discussing criminal statutes that prescribe removal and disqualification as potential punishment and constitutional problems with them).

every four years. The incentive not to steal would shrink to zero as the limitation date approached. Only the meekest of thieves would be deterred by such a statute. But this is just the sort of incentive structure that impeachment would be limited to if late impeachment were not permitted.

B. *Removal, Disqualification, and Mootness*

If one believes that the central purpose of impeachment is removal of the offender, it would follow that late impeachment is not necessary to protect the deterrent effect of impeachment. Returning to the larceny example in the previous Part, if the only sentence for convicted thieves were restitution, it would be no great tragedy if a thief could preempt a prosecution against him by making restitution. Similarly, if the main idea of impeachment is removal, what difference does it make whether the officer leaves office through impeachment, resignation, removal by the President, or expiration of his term? A member of Congress can resign to avoid expulsion, and no one quarrels with that.²³⁶ If Congress can force someone from office with the threat of impeachment instead of having to perform an actual cumbersome impeachment and trial, that is a *good* thing.²³⁷

This point, true as far as it goes, overlooks the significance of disqualification (not to mention other possible consequences of impeachment).²³⁸ The addition to the Constitution of disqualification as a possible penalty was not a throwaway.²³⁹ All but one of the pre-1787 state constitutions that specified

236. See BELKNAP TRIAL, *supra* note 18, at 131 (opinion of Senator Boutwell) (making same point).

237. See Firmage & Mangrum, *supra* note 142, at 1094 (“Resignation need not represent the defeat of the impeachment process but instead may be just one aspect of its successful operation.”); BELKNAP TRIAL, *supra* note 18, at 85 (opinion of Senator Frelinghuysen) (“[I]f he resigns, removal, the main object of impeachment, is effected.”).

238. See *infra* Part VIII.B.

239. See *infra* Part VIII.A. Some have argued that disqualification is a pointless exercise, because it is implausible that a convicted official would be elected or nominated and confirmed. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 116 (opinion of Senator Eaton) (arguing that disqualification is irrelevant, presuming that the Senate confirmation process and electoral college will keep convicted officers out of future office). This may diminish the importance of disqualification, but even as a practical matter, there is a chance that such officials could stage a comeback. See Part VIII.A, *infra*, discusses some of these practical considerations. Most famously, Judge Alcee Hastings was elected to the House of Representatives after being impeached, convicted, and removed from office. See *supra* note 12.

possible punishments included disqualification among them.²¹⁰ Especially in an age of long, varied careers, it was very significant that an impeachment conviction said not only “get out!” but added an emphatic and irreversible “and stay out!” It is bad to be removed from office, but it surely is no small blot to be “sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments” of the United States without hope of pardon.²¹¹ This fact was recognized in 1787 and after even by critics of late impeachment, one of whom exaggerated only a bit when he said:

[A] man who stands convicted of high crimes and misdemeanors committed while in office, and is sentenced by the court of impeachment to perpetual disqualification, is held by public opinion to be a living, moving infamy, a moral leper, shunned by his fellow man and without hope of pardon this side [of] the grave.²¹²

A critic might still argue that disqualification functions structurally as leverage: If removal were the only possible penalty, parties would have little to lose in fighting impeachment tooth and nail. By upping the ante, the addition of disqualification provides an incentive for officials to resign, essentially dealing themselves a plea bargain down to simple removal and saving Congress tremendous resources. Indeed, many more officers facing impeachment have resigned (dozens) than have been convicted and disqualified (two).²¹³ But this view is not tenable. Either disqualification is a significant punishment, or it is not. If it is not, then it does not serve the plea-bargain purpose. If it is a significant punishment (one certainly *hopes* that it is), it should not be presumed lightly that

240. See *supra* Part III.B.2.

241. THE FEDERALIST NO. 65, at 399 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

242. BELKNAP TRIAL, *supra* note 18, at 92-93 (opinion of Senator Maxey); *accord id.* at 153 (opinion of Senator Dawes) (“Like the leper he stands alone, shunned by all clean men.”); FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 301-02 (Burt Franklin 1970) (1849) (argument in impeachment case of William Blount); see also, e.g., State v. Hill, 55 N.W. 794, 796 (Neb. 1893) (rejecting late impeachment in state case but stating that “[a]ll will concede that disqualification to hold office is a punishment much greater than removal”); CONG. GLOBE, 29th Cong., 1st Sess. 641 (1846) (statement of Rep. Adams) (“[I]f any public officer ever put himself in a position to be tried by impeachment, he would have very little of my good opinion, if he did not think disqualification from holding office for life a more severe punishment than mere removal from office”).

243. See *infra* notes 411 and 522.

the Constitution allows it to be evaded so easily. Moreover, the more likely disqualification is to be significant—that is, the more likely the target is to want to return to government—the more important it is to actually apply it. Returning to the plea bargain analogy, consider that a possible death sentence may convince murderers to plead guilty in order to get a life sentence. But if such a sentence arrangement were solely up to the murderer, then no one would ever get the death penalty, a problem given that sometimes the prosecutor actually *wants* to seek the death penalty and that it is precisely in those cases that the murderer would be most likely to receive it.

It is more likely that disqualification is meant to serve as an actual punishment.²⁴⁴ As a result, impeachment (unlike expulsion) is not just about removal, and late impeachment is essential. Without it, a party by resigning, or a President by firing him, can flout any attempt by Congress to disqualify.²⁴⁵ Although the party would be submitting to removal, the significant penalty of disqualification (and possibly others²⁴⁶) would be taken off of the table. To be sure, some parties would stand and fight their impeachment. If they felt that they had a chance to prevail, they might not resign even to the end. But parties who know that they will be convicted—the worst offenders, roughly speaking—would have no reason not to resign. The outer bounds of the impeachment power would thus be scaled back, not because the offender merited lenient treatment but paradoxically because he did not. The Senate would be rendered, as one senator put it in a late impeachment case “the only court in Christendom whose jurisdiction . . . depends on the volition of the accused.”²⁴⁷

C. *The Indistinguishable Stages of Impeachment*

Late impeachment presents a line-drawing issue. Virtually every opponent of late impeachment concedes that at a certain point in an impeachment proceeding, the target loses the ability to end Congress’s jurisdiction by resigning. Take an extreme

244. Indeed, the First Congress established it as punishment for other offenses as well. Though this is a constitutionally problematic infringement on the President’s appointment power, it shows that disqualification was taken seriously in the 1780s. *See infra* note 549.

245. *See infra* Part V.D.

246. *See infra* Part VIII.B.

247. BELKNAP TRIAL, *supra* note 18, at 359 (opinion of Senator Norwood).

case: An officer is impeached, tried, and resigns between the casting of the 66th and 67th votes to convict.²⁴⁸ Few would argue that such a conviction would not be valid. This is the view not just of late-impeachment opponents issuing dicta to avoid looking extreme; this is a distinction drawn by state courts that have reviewed analogous state cases. The question then becomes one of line drawing. Can the officer strip jurisdiction by resigning before the Senate vote starts? Before the trial starts? Before the House vote starts? Before the House debate begins? Before the House committee proceedings begin?

In some states, there is an arguable textual and structural basis for drawing a distinction between the stages of impeachment. For instance, when the Nebraska Supreme Court rejected late impeachment in *State v. Hill*,²⁴⁹ state law provided: “An impeachment of any state officer shall be tried, notwithstanding such officer may have resigned his office, or his term of office has expired.”²⁵⁰ This language more easily supports the notion that impeachment is limited to sitting officers but that trial is not.²⁵¹

In the federal Constitution, however, there is no such basis to distinguish between the stages of the impeachment proceedings. The only possible source of a limitation on the timing of impeachment comes from Article II, Section 4, which states that “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.” If the mention of removal means that only those who can be removed can be “impeach[ed] . . . and convict[ed],” then resignation would stop the proceedings even at the very last possible moment of the Senate vote before conviction.²⁵² Similarly, if only currently sitting “civil officers” can be impeached and convicted, an effective resignation would stop proceedings.

248. An even more extreme case is possible: resigning after the vote but before the pronouncement of judgment. See, e.g., *infra* Part IV.B.2.c (discussing case of Texas governor James Ferguson).

249. 55 N.W. 794, 798 (Neb. 1893). The *Hill* case is discussed in detail in Part VI.B.2.b.

250. *Hill*, 55 N.W. at 798 (quoting NEB. COMP. STAT. ch. 19, § 8 (1891)).

251. Indeed, this is the conclusion that the *Hill* Court reached. See *id.* Another example is the New Hampshire language specifying that the Senate shall try “all impeachments made by” the House. See *supra* text accompanying note 87.

252. See BELKNAP TRIAL, *supra* note 18, at 111 (opinion of Senator Mitchell).

If one is not troubled by the possibility of the defendant terminating the tribunal's jurisdiction, then this is not a problem.²⁵³ But while one might wish to give Congress the *option* of declaring victory and ending proceedings, it is quite another matter to say that Congress is constitutionally disabled from continuing impeachment proceedings in such a situation.

If late impeachment is permitted, then this line-drawing problem is mooted. But some critics of late impeachment, aware of this problem, have drawn a line at the beginning of "the proceedings." They declare that once jurisdiction is established in the House, there is nothing that the defendant can do to prevent impeachment proceedings but that any other late impeachment is forbidden.²⁵⁴ In doing so, they raise another line-drawing issue. One must then determine when the proceedings begin: When an accusation is made on the floor of the House? When the matter is referred to a committee? Others draw the line at impeachment itself. Once the House impeaches, they argue, the Senate has jurisdiction to finish the process. If the defendant resigns before the House completes its vote, however, the case ends.²⁵⁵

These distinctions may make sense as a matter of abstract equity or as a matter of *ideal* structure, but they do not have any basis in the text or structure of the Constitution. If the Constitution limits impeachment in the House and trial in the Senate to sitting, removable "officers," then it necessarily follows that a target of impeachment can end the proceedings any time he chooses. The fact that this conclusion is unacceptable to most opponents of late impeachment shows that opposition to late impeachment, while stemming from bare textualism, cannot remain there without either intolerable results or inherent self-contradiction.

253. See, e.g., *id.* at 43 (defense counsel in late impeachment case conceding that resignation would be effective at any stage). But see *id.* at 68 (defense counsel dismissing question as unnecessary to decision of case). Obviously, this Article maintains that there are significant structural problems with taking such power away from Congress. See *infra* Parts V.B (discussing structural importance of disqualification, which could easily be mooted if late impeachment is impossible) and V.D (discussing structural restrictions on the President in cases of impeachment).

254. See, e.g., BELKNAP TRIAL, *supra* note 18, at 83 (opinion of Senator Frelinghuysen in Belknap case that resignation cannot end trial once begun); *id.* at 101 (opinion of Senator Christiancy) (hinting at same); *infra* note 493 and accompanying text.

255. E.g., BELKNAP TRIAL, *supra* note 18, at 126 (opinion of Senator Ingalls).

D. Pardons, Presidential Removal, and the Impeachment as Inquest

The Constitution specifically forbids the President from using his pardon power in cases of impeachment.²⁵⁶ A President's ability to flout impeachment by removing the official in question—perhaps simply by reassigning him to a post on his staff that does not require Senate confirmation²⁵⁷—is structurally incompatible with the impeachment exception to the presidential pardon power. It seems illogical that the President could use his removal power to achieve the same end indirectly. Alternatively, it seems strange that a more respectful President could be forced to choose between leaving the offender in office or removing him promptly but preventing him from being fully punished.

The impeachment exception to the pardon power arose from the case of the Earl of Danby in the late seventeenth century.²⁵⁸ King Charles II pardoned Danby not because Danby was innocent but because the King was guilty of questionable dealings with France. Had the impeachment trial gone forward, the evidence uncovered would have embarrassed the King; by pardoning Danby, Charles prevented the investigation.²⁵⁹ Parliament later precluded pardons from barring an impeachment in an effort to prevent a recurrence of this assault on its authority.²⁶⁰

In the United States there is no reason that Congress cannot pursue the President directly, and Congress can launch investigations short of impeachments. So there is less danger that a President might pardon a subordinate to prevent a congressional investigation. Moreover, because a President is no king and serves for a maximum of ten years,²⁶¹ the general possibility exists that a future administration will be able to

256. U.S. CONST. art. II, § 2, cl. 1.

257. *See supra* text accompanying note 4 (presenting such a hypothetical).

258. Kalt, *supra* note 13, at 783-84 (describing case of the Earl of Danby and subsequent parliamentary trimming of the royal pardon power).

259. *See id.* Charles had no particular interest in protecting Danby himself; the Earl languished in the Tower of London for years, despite his pardon. *Id.* at 784 n.39.

260. *Id.* at 784 & n.40 (discussing 1701 Act of Settlement).

261. U.S. CONST. amend. XXII. *Cf. supra* note 130. Before the passage of the Twenty-Second Amendment—including the framing era—the fact that a President possibly could serve forever provided a reason to emphasize removability when discussing impeachment. These views are consistent, or at least not inconsistent, with late impeachability. *See supra* text accompanying notes 125-31, 149-50.

criminally investigate the President and his minions. But regardless of the potential for criminal proceedings in a new administration, Congress is the grand inquisitor of the United States, with the explicit power to investigate the conduct of executive and judicial branch officials outside the confines of the criminal law. Even though Congress can hold hearings and launch investigations without resorting to impeachment, impeachment is the only process that the Constitution provides for investigating public officials' conduct and for rendering a formal verdict on abuses of the public trust.

In other words, impeachment is supposed to check presidential excesses, and the Constitution explicitly prevents the President from assaulting congressional impeachment jurisdiction via the pardon power. It does not logically follow, then, that the President could remove a subordinate and thereby terminate the highest of congressional inquests. As a member of the House about to vote on a late impeachment incredulously put it to an opponent:

Will you say to the country that he whom you have placed in power at the other end of this avenue is able to rob an American Congress of a right and a power that a King of Great Britain could not take from Parliament? [Applause on the floor and in the galleries.] Is that your theory?²⁶²

This would be a curious theory indeed.

Moreover, it would be strange if the impeachment power was limited in a way that gave a President *deferring* to Congress an incentive to allow a malfasant officer to remain in office. The President also has the power to remove executive officials, but without late impeachability, a President would be hamstrung if disqualification of the official were appropriate as well. Impeachment would be necessary to level such a punishment, and if late impeachment were impossible, the President would have to choose between a full penalty and immediate removal. Disqualification would be most appropriate in the worst cases—the very cases in which immediate removal by the President

262. 4 CONG. REC. 1432 (1876) (statement of Rep. Blackburn). The Constitution actually protects impeachment from pardons even more strongly than the English system did. The English pardon exception prevented the king from preempting an impeachment trial but did not prevent him from pardoning the target after conviction. The American pardon exception prevents the President from preempting *or* undoing an impeachment. See *supra* note 13.

would be most important for the country—and so barring late impeachment presents yet another structural hiccup.²⁶³

As a final note, there is no question that a broader impeachment power carries with it a greater possibility of abuse, especially given that the President has no ability to stop an impeachment, and the courts have little more. This is not, however, a reason to give the President questionable powers against impeachment. Congress can abuse impeachment whether or not late impeachment is part of its arsenal, but the Constitution provides structural safeguards against such abuses.²⁶⁴ Presidential power is not one of them.

E. *The Four Interpretations*

Recall the four possible interpretations of the scope of impeachment timing:²⁶⁵

		<i>Must the party presently be in office?</i>	
		<i>Yes</i>	<i>No</i>
<i>Must the offense have occurred while the offender was in office?</i>	<i>Yes</i>	<i>1 (conservative)</i>	<i>2 (late)</i>
	<i>No</i>	<i>3 (Whitewater)</i>	<i>4 (radical)</i>

Analyzing each possibility from a structural standpoint, severe defects emerge in Interpretations #1, #3, and #4. Interpretation #2 is not perfect, but it is the least problematic.

The “radical” approach to impeachment (#4) would allow anyone who had once been a civil officer to face impeachment, regardless of when he committed his offense. A view this broad would not dissuade sitting officers from misconduct in office, nor would it serve the purpose of removing “bad” officers. It would function only to disqualify “bad” people from future federal office, but there seems to be no basis under the

263. It is perhaps not a coincidence that the only federal late impeachment trial occurred during a time when the presidential removal power was restricted. The Belknap case fell in the shadow of the Tenure of Office Act, which made it difficult for the President to remove, or even suspend, members of his Cabinet. *See BELKNAP TRIAL*, *supra* note 18, at 62 (House manager noting limitations on presidential removal power and asking, “Must a defaulting Treasurer of the United States be left in charge of the entire Treasury until conviction and sentence?”). It does not appear, however, that most proponents of late impeachment considered this argument significant. In any case, the Act was later correctly declared unconstitutional. *Myers v. United States*, 272 U.S. 52, 176 (1926).

264. *See infra* Part VIII.G.

265. *See supra* Part IV.B.2.

Constitution to distinguish between former officeholders and mere private citizens in this regard. If a private citizen should be disqualified from ever holding federal office again because of something he did as a private citizen, why should it matter whether or not he held a federal office at some other point in his life? Once again, the radical approach would transform the designation that “civil officers” are susceptible to impeachment from a check against federal officeholders into an illogical and arbitrary formalism.²⁶⁶ There is no structural support for such an interpretation.

The “conservative” approach (#1) would allow only impeachments against sitting civil officers, for offenses committed in that office. A Supreme Court justice would not be impeachable for offenses committed as a circuit court judge.²⁶⁷ A Secretary of State would not be impeachable for offenses committed in his earlier job as Secretary of the Treasury. More problematically, a second-term President might not be impeachable for offenses committed in his first term. Perhaps the terms could be treated as continuous, so that a second-term President would be impeachable for actions in his first term if the terms were consecutive; this is a common interpretation of impeachment in states.²⁶⁸ Under this interpretation, however, Grover Cleveland would not have been impeachable in 1893 for something he had done as President in 1888, even though Bill Clinton would have been impeachable in 1998 for something he had done as President in 1993. Again, this distinction seems to lack a structural basis.

Proponents of this approach would likely respond that an intervening election or Senate confirmation would justify a bar on impeachment. If someone can convince the President and(/or?) Senate or the electorate that he is worthy of office despite his past offenses, Congress should not be allowed to reverse that determination.²⁶⁹ But why should election vindicate

266. *See id.*

267. This issue was implicated, but not decided definitively, in the analogous Archbald case. *See infra* Part VI.A.5.

268. This issue has arisen in state cases enough that it is discussed in the *Corpus Juris Secundum*. It has been held that continuous terms in the same office are considered one unit for impeachment purposes, but discontinuous terms or different offices are not. *See* 67 C.J.S. *Officers* § 120(c) (1978).

269. *See Two Proceedings of the Senate and the House of Representatives of the United States in the Trial of Impeachment of Robert W. Archbald*, S. DOC. NO. 62-1140, at 1634-35 (1913) [hereinafter *Archbald Trial*] (opinion of Senator Bryan) (arguing against a similar sort of

Clinton and not Cleveland? Moreover, even if an impeaching Congress should take this factual matter into account, there is no guarantee that anyone would know of the past illicit conduct at the time of reelection or reconfirmation. One need look no further than Watergate for an example of presidential misconduct that was only uncovered after an intervening election. Indeed, by its very nature, electoral chicanery like the Watergate break-in is the *last* sort of high crime that should be placed beyond the reach of impeachment.²⁷⁰ In any case, the fact that confirmation or election would solve this problem in *some* of these cases is no reason to bar impeachment in *all* of these cases.

The “Whitewater” interpretation (#3), which allows impeachment for any past actions so long as the party is currently a civil officer, would solve the structural problems of the “conservative” approach. It is worth noting, of course, that if an officer is being impeached under Interpretation #3 for an offense committed in a previous office, this is a form of late impeachment. In other words, the Whitewater view allows late impeachment, but only if the defendant is serving in a new office.

Interpretation #3 has an admittedly strong structural underpinning: If impeachment is about removal, then this approach fulfills that objective in the broadest possible way. A civil officer is removed from his current office if he is deemed unfit for that office, regardless of when his unfitness manifested itself. As Jorge Souss put it:

[A]re we supposed to believe that if we now discovered that Christine Todd Whitman or Stephen Breyer (to pick two “officers of the United States” at random) were serial killers back in the early 1980s that Congress could not impeach them? Or that if George W. Bush robbed a jewelry store on the morning of January 20, a few hours before being sworn in, that he would not be subject to impeachment for such behavior? Such results would be unimaginable, and for good reason.²⁷¹

This interpretation also has an answer for a converse problem: Suppose a President robbed a jewelry store not an hour before

late impeachability and stating “[b]oth the President when he nominates and the Senate when it advises and consents, ought to be satisfied, it seems to me, with the character and qualifications of the citizen”).

270. See *supra* text accompanying notes 125-31 (convention debates discussing this issue).

271. See Souss, *supra* note 16.

he took the oath but an hour before his successor did? Should he be able to elude impeachment? And what about the official whom the President cannot pardon but can fire?²⁷² The Whitewater interpretation would provide that impeachment could not occur in such situations unless and until the culprit returned to office,²⁷³ but it would deny that this is a problem, given the possibility of regular criminal prosecution.

This is fine for Souss's jewelry store owner, but it is of cold comfort once one returns to the real subject of impeachment, public offenses. What about a President who waits until the last day of his administration to abuse his authority as Commander in Chief? Or to issue corrupt pardons? Or to commit any other abuse of the public trust that cannot, should not—or, as a practical matter, will not—be covered by the criminal justice system?²⁷⁴ Surely, it is no coincidence that neither William Blount nor William Belknap, the only two men subjected to late impeachment, were ever criminally prosecuted for their offenses.²⁷⁵ And what of the fact that criminal liability is available for all impeachments, not just late ones? Under the "Whitewater" reasoning, the possibility of criminal prosecution would preclude any "regular" impeachment as well.

Impeachment addresses great offenses against the public—offenses that the criminal law may not touch or that ordinary criminal justice is not equipped to handle properly. As Alexander Hamilton wrote in *The Federalist*, impeachment cases are placed under the purview of Congress in large part because the very nature of the offenses at issue makes them inextricably politicized. Thus, the House—not regular prosecutors and

272. See *supra* Part V.D.

273. The Whitewater interpreter could make good use of the fact that impeachment would reemerge as an option if the target were to return to office. In a way, this would accomplish not just removal but disqualification. Therefore, the argument would follow, there really would be no reason to pursue a late impeachment, because both constitutionally permissible ends of an impeachment conviction would be off the table.

But disqualification would not completely disappear from the table. The fact that the offender would face potential impeachment if he returned to office would not mean that he could not return to office. It would mean only that if he did and if he was not confident that Congress had shifted its predilections in his favor, he would be in the same position as before he resigned.

274. See Turley, *supra* note 165, at 56 ("At a time of lost public confidence in the integrity of the government, the conduct of a former official can demand a political response. This response in the form of an impeachment may be more important than a legal response in the form of a prosecution.")

275. BUSHNELL, *supra* note 16, at 37 (Blount); *id.* at 189 (Belknap); see also *infra* Part VIII.A.

courts—is the proper body to lead it.²⁷⁶ The Whitewater view misses the point in its argument that impeachment is for current officers and that anyone else is left to the criminal law alone. Impeachment draws its institutional reason for being from the nature of the offense, not the nature of the defendant's employment at the time of trial. If it did not, there would be no reason to limit it to high crimes and misdemeanors.

The “late” interpretation (#2) comprehends this point and each of the others above as well. It recognizes Congress' power to use impeachment to inquire “into the conduct of public men,” however late in their terms their offenses occur, and however long their offenses have been secreted. In doing so, it allows impeachment to present a full incentive for properly performing the duties of federal office. It vindicates the significant structural role of disqualification.²⁷⁷ It permits Congress to fulfill its constitutional duty to deter, investigate, rule upon, and fully punish high crimes and misdemeanors, regardless of how willing the defendant and/or President are to subvert Congress's jurisdiction with evasion and chicanery. Finally, and most specifically, it precludes the President from evading the constitutional bar on his power to pardon in cases of impeachment, and it eliminates any incentive to keep criminals in office to ensure that they remain eligible for punishment.

VI. PRECEDENT

Unlike the speculative and inferential arguments detailed in the previous Parts of this Article, the arguments from precedent in this Part are concrete and directly address the issue of late impeachment. In two cases—those of William Blount and William Belknap—the Senate debated late impeachment at length. Unfortunately for our purposes, it did not reach a decisive result in either case. In Belknap's case, the Senate did formally accept late impeachment, but while enough senators

276. See THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves?”).

277. If an ex-officer is serving in a new office at the time of the impeachment and conviction, disqualification would amount to removal as well. In any case, removal would seem to be required by Article II, § 4 even if disqualification is not.

agreed to allow the trial to go forward on the merits, enough senators disagreed to acquit Belknap. Still, the Belknap case proposes that the House can impeach and the Senate can try officials even after they have left office. Even as the case shows how controversial late impeachment is, if it stands for anything, it stands for late impeachability.

In other cases, Congress has declined to press late impeachments, allowing officials to resign and the cases to drop. But the fact that Congress had no need or reason to pursue these officials did not mean that Congress lacked the authority to do so. Indeed, in some of these cases senators explicitly recognized this authority. In all, the actual precedents relating to late impeachment are consistent with the conclusion that late impeachment is available to Congress, even if it is not always a worthwhile remedy to pursue.

Impeachment precedents are not formally binding on Congress, as its members are responsible only to the voters and not to any higher court. In each case, each representative and senator needs to determine whether a proceeding is constitutionally permissible.²⁷⁸ This Part of the Article does not suggest that Congress would be unable to decide that late impeachment could be inappropriate or even impermissible. Rather, it is intended to show that when given the opportunity, Congress has recognized the possibility of late impeachment.

Filling out the historical record, state proceedings provide still more evidence that late impeachment is possible, some of which rests on state constitutional language quite similar to that in the federal Constitution. Even more so than in the federal context, though, these precedents send mixed messages.

A. *Federal Cases*

There is precedent for late impeachment in the federal system. While there are cases in which impeachment was abandoned upon the resignation of the target, in no case was late impeachment specifically deemed *unallowable*. In fact, official House precedent, citing the *Blount* and *Belknap* cases, indicates that the “[a]ccused may be tried after resignation.”²⁷⁹

278. See *infra* note 372 and accompanying text.

279. 3 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 307 (1907) (describing “nature of impeachment”); see *infra* Parts VI.A.1 (Blount case) & VI.A.5 (Belknap case).

1. Blount

The first federal impeachment case, that of Senator William Blount, was a late impeachment and was dismissed by the Senate for lack of jurisdiction. This lack of jurisdiction did not, however, arise from the fact that Blount had already left office. Blount was a delegate to the federal Constitutional Convention from North Carolina, served as governor of the Southwest territory for six years, and was one of Tennessee's first United States senators.²⁸⁰

Blount apparently became involved in a British plot to take Florida and Louisiana from Spain, a United States ally. After hearing the charges against Blount, forwarded by President Adams, the House of Representatives impeached him on July 7, 1797.²⁸¹ The next day, the Senate expelled Blount for his "high misdemeanor" by a vote of twenty-five to one and adjourned until November.²⁸² During this recess, Blount was ordered to appear before a Senate select committee. He refused to return from Tennessee, however, and the Senate impeachment trial began without him in December 1798.²⁸³ The trial took only a few days and never got to the merits.²⁸⁴

Before arguing anything else, Blount's representatives, Jared Ingersoll and A.J. Dallas, asked the Senate to dismiss the impeachment case:

[A]lthough true it is, that he, the said William Blount, was a Senator of the United States from the State of Tennessee, at

Some have argued that one successful impeachment, against Judge West Humphreys in 1862, was a late impeachment. *See* 43 CONG. REC. 324 (1875) (statement of Rep Butler). Humphreys had abandoned his judicial post to accept one in the Confederacy. *Id.* Thus, he can be said to have left office before his impeachment. *See id.* But Humphreys had never resigned, and it was only with the successful (and uncontested) impeachment that he was officially removed from office. *See id.* at 325 (statement of Rep Tremain). *See generally* BUSHNELL, *supra* note 16, at 115-24 (describing Humphreys case)

280. BUSHNELL, *supra* note 16, at 27 (outlining Blount's career); *see also* Lawrence Kestenbaum, *William Blount (1749-1800)*, THE POLITICAL GRAVEYARD, at <http://www.politicalgraveyard.com/bio/blount.html> (last modified May 13, 2001).

281. BUSHNELL, *supra* note 16, at 27-28.

282. 5 ANNALS OF CONG. 43-46 (1797).

283. BUSHNELL, *supra* note 16, at 31.

284. Vice President Jefferson, who presided over the trial, must have been surprised at how swiftly it proceeded once it finally began. Earlier he had written of the case, "Articles of impeachment were yesterday given in against Blount. . . . Is a Senator impeachable? Is an ex-Senator impeachable? You will readily conceive that these questions, to be settled by twenty-nine lawyers, are not likely to come to speedy issue." WHARTON, *supra* note 242, at 315 n.* (quoting Jefferson's correspondence).

the several periods in the said articles of impeachment referred to, yet that he, the said William, is not now a Senator, and is not, nor was at the several periods so as aforesaid referred to, a civil officer of the United States, nor is he, the said William, in and by the said articles, charged with having committed any crime or misdemeanour in the execution of any civil office held under the United States, nor with any mal-conduct [sic] in a civil office, or abuse of any public trust in the execution thereof.²⁸⁵

Blount's argument was that senators are not subject to impeachment, and even if they are, he was no longer a senator. Even if *that* did not matter, he claimed, he was not charged with committing his offenses as a public officer—that is, a private citizen could have been charged with the same actions.

In his argument to the Senate, James Bayard, the leader of the House managers, attempted to refute all of Blount's alternative arguments at once. He countered that Article II, Section 4 did not purport to limit the Senate's jurisdiction; therefore, it did not limit impeachment to civil officers.²⁸⁶ To Bayard, American impeachment was coextensive with English impeachment unless a specific exception was mentioned in the Constitution.²⁸⁷ This would mean that, as Blackstone had recounted a few decades earlier with regard to England, private citizens would be impeachable for offenses against the public; the allegations against Blount at least qualified as that.²⁸⁸

Turning to the late impeachment issue, Bayard argued that it was irrelevant that Blount was no longer a senator because he had been one "at the time the articles were preferred [sic]."²⁸⁹ Technically, this was not true, because, as in most early impeachments, the actual impeachment was voted upon before specific articles were adopted.²⁹⁰ In Blount's case, the House did not approve the articles until January, 1798, several months after

285. *Id.* at 260.

286. *Id.* at 263. *See supra* Part IV.B.1 (discussing and rejecting this view of Article II, § 4).

287. WHARTON, *supra* note 242, at 264-65. *See also supra* note 142 and accompanying text.

288. *See supra* note 39 and accompanying text.

289. WHARTON, *supra* note 242, at 271.

290. *See* BUSHNELL, *supra* note 16, at 30 (describing order in Blount case); GERHARDT, *supra* note 12, at 26 (describing modern change to voting on articles concurrently with vote on impeachment).

Blount's expulsion from the Senate.²⁹¹ Blount, however, had been a senator when he was impeached, and Bayard made a strong point that "no subsequent event, grounded on the wilful act, or caused by the delinquency of the party, can vitiate or obstruct the proceeding."²⁹²

Bayard sidestepped the harder question of whether an official can be impeached after leaving office and limited himself to the stronger argument that an official impeached while in office can be *tried* after leaving office. Bayard did not concede anything; he simply limited his discussion to the easiest case. While Bayard's distinction may have made sense from a strategic standpoint, no historical, structural, or textual basis exists to distinguish between late impeachments and late trials.²⁹³

Blount's representatives made a similar effort to narrow their argument to their strongest possible point, addressing late impeachment in the process. Dallas conceded that "there was room for argument, whether an officer could be impeached after he was out of office; not by a voluntary resignation to evade prosecution, but by an adversary expulsion . . ." ²⁹⁴ Dallas's point was that late impeachment might be appropriate if the party had resigned, but it could not be appropriate if the party had been expelled—especially if he were expelled from the same Senate that would try him. Ingersoll put it more strongly later in the trial:

I certainly never shall contend, that an officer may first commit an offence, and afterwards avoid punishment by resigning his office; but the defendant has been expelled. Can he be removed at one trial, and disqualified at another, for the same offence? . . . Is there not reason to apprehend the strong bias of a former decision would be apt to prevent the influence of any new lights brought forward upon a second trial?²⁹⁵

Thus, while Dallas and especially Ingersoll apparently conceded that late impeachment was possible, they found that late impeachment of an expelled senator made little structural

291. WHARTON, *supra* note 242, at 252.

292. WHARTON, *supra* note 242, at 271.

293. *See supra* Part V.C.

294. WHARTON, *supra* note 242, at 284. *See also supra* note 197 (discussing structural interplay of impeachment and expulsion, supporting notion that no members of Congress can be impeached).

295. WHARTON, *supra* note 242, at 296.

sense. Notably, they did not raise any practical arguments against late impeachment—they did not argue that there is no good reason to impeach someone already out of office.

In any event, the Senate agreed to reject the case and not hear the merits. A resolution specifying that “William Blount was a civil officer of the United States . . . and, therefore, liable to be impeached by the House of Representatives,” was rejected fourteen to eleven.²⁹⁶ In other words, a majority of the Senate did not believe that Blount had been a civil officer. The Senate also accepted a second resolution, which said only that Blount’s plea was sufficient and that the Senate had no jurisdiction, by the same vote, and the case was dismissed.²⁹⁷ The three senators who had been delegates to the constitutional convention (John Langdon, Alexander Martin, and George Read) voted with the majority on both votes.²⁹⁸

Some critics of late impeachment have pointed to the indefinite nature of the resolution dismissing the case, noting that it approved only Blount’s alternative pleading, which included not just the senator/officer issue but also the late impeachment issue.²⁹⁹ Nevertheless, the previous resolution, rejected by the same fourteen to eleven vote, focused only on the senator/officer issue, so if the Blount result can be said to have definitively settled anything, it is that senators are not civil officers. Indeed, the Blount case is generally regarded as standing only for that principle and for the corollary that only civil officers are subject to impeachment.³⁰⁰

2. Calhoun and Webster

Two non-impeachment cases expose the rise and fall of another side of the impeachment power. Impeachment serves not just as a means of trying public offenses, but as a means of investigating them and vindicating the innocent. This broader

296. *Id.* at 315-16.

297. *Id.* at 316.

298. *Id.*

299. *E.g.*, BUSHNELL, *supra* note 16, at 38; HOFFER & HULL, *supra* note 1, at 257; *infra* note 360 and accompanying text.

300. *See, e.g.*, *State v. Hill*, 55 N.W. 794, 797 (Neb. 1893) (rejecting late impeachment but conceding that Blount case provides no precedent on the question); GERHARDT, *supra* note 12, at 49 (concluding that the precedent of the Blount case is unclear); RAWLE, *supra* note 35, at 170 (discussing binding nature of Blount precedent, with which author disagreed); 2 STORY, *supra* note 42, at 258 (rejecting idea that Blount decision “turned upon” late impeachment question).

notion of impeachment as the constitutionally preferred means of investigating federal officials' actions has much to commend it, though in practice it has not gained acceptance. In 2001, impeachment is seen as something to be *avoided* if one is innocent.

The case of John C. Calhoun shows the potential use of impeachment as a defensive technique to bring accusations into the open and resolve them with Congress's decisive investigative power, rather than letting them fester and thrive on innuendo. If a congressional committee examines a case and finds it not worthy of impeachment, the would-be target can proclaim vindication. Then-Vice President Calhoun was seeking such vindication when, in 1827, opponents began circulating rumors of his financial misconduct when he had served as Secretary of War.³⁰¹

Despite the fact that he no longer held the office at issue, Calhoun appealed to the House as the "grand inquest of the nation"³⁰² to investigate the accusations:

In claiming the investigation of the House, I am sensible, that, under our free and happy institutions, the conduct of public servants is a fair subject of the closest scrutiny and the freest remarks . . . but when such attacks assume the character of *impeachable* offenses, . . . an officer thus assailed, however base the instrument used, if conscious of innocence, can look for refuge only to the Hall of the immediate Representatives of the People.³⁰³

The investigation took place and Calhoun was officially cleared.³⁰⁴ By raising the stakes beyond that of a mere congressional investigation, Calhoun had forced his accusers to put up or shut up and laid to rest the accusations against him.

301. See 3 CONG. DEB. 575 (1827). Because Calhoun was Vice President at the time of the rumors, some who reject late impeachment might have found him susceptible to impeachment anyway. See *supra* Part V.E (discussing "Whitewater" interpretation, which allows for impeachment of sitting officers for offenses committed in previous offices).

302. 3 CONG. DEB. 574 (1827); cf. *supra* text accompanying notes 42-43, 85, 87; Part V.D (using term "grand inquest" to describe lower-house impeachment role).

303. 3 CONG. DEB. 574-75 (1827).

304. *Id.* at 1123-24, 1143. Since there was no impeachment, Congress avoided the issue of whether the Vice President presides over the Senate when it is trying him. See *also supra* note 139 and accompanying text (discussing this constitutional dilemma).

Nineteen years later, a similar situation faced Senator Daniel Webster.³⁰⁵ The great Whig leader had served as Secretary of State under President Tyler. Now, three years after he had left that post (and four years before he returned to it), Webster found himself accused of improperly using secret funds.³⁰⁶ The accusations were scurrilous and unfounded, but they were made on the floor of the House of Representatives and received significant attention over the following months.³⁰⁷ Some House members, including at least one Webster proponent, surmised that pursuing impeachment was a possible avenue to resolve the issue—an interpretation that his attackers were all too happy to support.³⁰⁸

Not all of Webster's defenders welcomed impeachment. One argued strenuously that late impeachment was not possible.³⁰⁹ It was in this context that Representative and ex-President John Quincy Adams made his famous comments defending Webster but upholding late impeachability.³¹⁰ On the latter, he said:

I take occasion to say that I differ with the . . . gentlemen who have stated that the day of impeachment has passed I hold no such doctrine. I hold myself, so long as I have the breath of life in my body, amenable to impeachment by this House for everything I did during the time I held any public office.³¹¹

Adams's statement was not universally accepted. One colleague mused aloud that removal was the only purpose of

305. For a fair description of the Webster case, see BELKNAP TRIAL, *supra* note 18, at 151 (opinion of Senator Dawes).

306. CONG. GLOBE, 29th Cong., 1st Sess. 636 (1846) (statement of Rep. C.J. Ingersoll).

307. The committee appointed to investigate the matter released its report in June, in which it declared that "there is no proof in relation to any of the charges to impeach Mr. Webster's integrity, or the purity of his motives in the discharge of the duties of his office." *Id.* at 946.

308. *See, e.g., id.* at 636 (statement of Rep. C.J. Ingersoll) (attacking Webster and wondering aloud whether Webster's alleged offenses "will be deemed impeachable misdemeanors in office").

309. *E.g., id.* at 638 (statement of Rep. Bayly) ("I would like to know how you can impeach an officer. when he is no longer an officer?"); *id.* at 640 (statement of Rep. Winthrop) (agreeing with Bayly). Bayly was a Democrat and thus not a partisan of Webster's; he apparently disagreed only with the more scurrilous aspects of Ingersoll's charges. *See id.* at 638. Winthrop was a Whig.

310. *Id.* at 641 (statement of Rep. Adams) (defending Webster on merits but disagreeing with Rep. Bayly on late impeachment).

311. *Id.*

impeachment, and so late impeachment made no sense.³¹² Adams responded eloquently that disqualification is a worse punishment than removal and that without late impeachment, the offender could skirt it:

[E]very officer impeachable by the laws of the country, is as liable, twenty years after his office has expired, as he is whilst he continues in office; and if such is not the case, if an officer could thus ward off the pains of impeachment, what would be the value of the provision . . . ?³¹³

Webster was never impeached. He did not seem particularly anxious to try the impeachment process as a method of clearing his name, and he was able to end the controversy by releasing documents that clarified his role.³¹⁴ Still, this episode shows that late impeachment was on representatives' minds, even when it was far from likely to occur. These two cases thus provide a glimpse into congressional understanding of late impeachability during this time, and show that it had substantial support.

3. Whittemore and Deweese

Article I, Section 5, Clause 2 provides: "Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."³¹⁵ This presents a keen analogy to the issue of late impeachment—it begs the question of whether an ex-"member" can be punished, just as Article II, Section 4 begs the question of whether an ex-civil officer can be impeached.

In 1870, the House of Representatives used its Article I, Section 5 power to censure Representatives Benjamin Franklin Whittemore and John Deweese for selling commissions to the Naval Academy.³¹⁶ The House had prepared to expel them, but

312. *Id.* (statement of Rep. Bayly) ("Is not the judgment, in case of impeachment, removal from office?").

313. *Id.* (statement of Rep. Adams). Adams appeared to be talking more about himself than Webster. Adams also mentioned Presidents as being impeachable after leaving office, and his own tenure had expired almost twenty years before this. Those discounting Adams's statement in later years have thus portrayed his position as a contrarian conceit. *See infra* note 367.

314. *See supra* note 307.

315. U.S. CONST. art. I, § 5, cl. 2.

316. CONG. GLOBE, 41st Cong., 2d Sess. 1544-47 (1870) (recording resolution condemning Whittemore's conduct as unworthy of a representative of the people); *id.* at 1616-17 (recording resolution condemning Deweese's conduct as unworthy of a

their resignations mooted this effort.³¹⁷ Still, the House unanimously concluded that it could censure these “members” even after they had left Congress.³¹⁸

The Deweese case, the second of the two, spurred another question—whether the House could investigate members from *previous* Congresses; while Whittemore and Deweese had left the present Congress, they had been members of it.³¹⁹ There was serious debate on this question, with no conclusive answer.³²⁰ In wrestling with this issue, Representative Bingham, the author of the Fourteenth Amendment, stated that it was “perfectly clear” to him that the House could not pursue ex-members of previous Congresses.³²¹ Bingham added, however, that “there might be some room for inquiry” over the power to *impeach* an ex-member but for the fact that the Blount case had established that legislators were not civil officers subject to impeachment.³²² Bingham believed that Congress could not attempt to punish its ex-members but was less limited in its ability to pursue late impeachment of civil officers.

4. Delahay

Judge Mark Delahay was impeached in 1873, when the House adopted a resolution of impeachment proposed by the Judiciary Committee.³²³ Delahay was alleged to have funneled \$32,000 from a confiscation case to a relative, but the impeachment rested solely on “the most grievous charge, and that which was beyond all question[:] that his personal habits unfitted him for the judicial office, that he was intoxicated on the bench as well as off.”³²⁴

representative of the people); *see also* 2 HINDS, *supra* note 279, at 796 (describing condemnation of Deweese as censure); *id.* at 830 (same as to Whittemore).

317. *See id.* at 1544 (Whittemore case); *id.* at 1617 (Deweese case).

318. *See id.* at 1547 (vote on Whittemore); *id.* at 1617 (vote on Deweese).

319. *See id.* at 1617 (statement of Representative Logan) (raising question of investigating committee’s jurisdiction).

320. *See id.* at 1617-22 (recording debate on jurisdiction of investigating committee, including indecisive voting on motions).

321. *Id.* at 1618.

322. *Id.*

323. CONG. GLOBE, 42d Cong., 3d Sess. 1900 (1873).

324. *Id.*

Regardless of whether being a drunk is a high crime or misdemeanor, as alleged by the resolution,³²⁵ the important fact is that Delahay resigned before the House could draft specific articles of impeachment and bring the case to the Senate.³²⁶ The House let the matter drop without any discussion on the record. If anyone took this to mean that the House did not think that it could pursue a late impeachment, however, he was proven wrong three years later.

5. Belknap

The 1876 case of Secretary of War William Belknap is the single most important precedent in the realm of late impeachment. The House impeached Belknap a few hours after he resigned, and the Senate tried him. The House unanimously voted, and the Senate ruled specifically, that resignation could not terminate the congressional impeachment process. Unfortunately for those seeking clarity, the Senate jurisdictional vote passed by a simple majority. The minority members who lost felt strongly enough about their position that most voted to acquit Belknap on this issue alone. Enough did so to prevent the Senate from obtaining the two-thirds vote necessary for conviction. Still, there was enough support for late impeachment that the five-month-long trial went forward on the merits. Moreover, the final vote was very close, suggesting that a more egregious case might have yielded a conviction.

Belknap was connected to a kickback scheme involving western trading posts. The Secretary of War granted post traderships, and they were lucrative positions. In 1870, Belknap appointed Caleb Marsh to the tradership at Fort Sill, Oklahoma but asked him to make an arrangement with the old post trader, John Evans, to protect the latter's property rights in the existing buildings and stocks at the fort.³²⁷ Marsh arranged to allow Evans to continue operating the post in exchange for \$12,000 a year in cash—half of which Marsh paid to Belknap's wife.³²⁸ The

325. *Id.* at 1899. Although labeled as high crimes and misdemeanors, many of the offenses for which federal judges have been impeached and convicted better fit the broader term of "misbehavior" specified in Article III, § 1. *See supra* note 198.

326. *See* VAN TASSEL & FINKELMAN, *supra* note 1, at 119.

327. BUSHNELL, *supra* note 16, at 166 (summarizing facts in Belknap case).

328. *Id.*

Belknaps eventually received over \$20,000 from the agreement.³²⁹

The House Committee on Expenditures discovered the entire arrangement six years later.³³⁰ Belknap learned that he was about to be impeached and realized that there was one thing he might do to prevent it. After a discussion with House leader Hiester Clymer, Belknap apparently concluded that if he resigned he might avoid the unpleasant experience of a national inquest, additional publicity about his embarrassing conduct, and disqualification from office.³³¹ Belknap hurried to President Grant's office and tendered his resignation at 10:20 A.M. on March 2, telling the overly credulous Grant that he was resigning to protect Mrs. Belknap.³³²

Later that day, the House faced the question of how to punish Belknap. House members knew that Belknap had resigned and briefly debated their jurisdiction over former officers. A member of the committee argued that the Senate could still disqualify Belknap and pointed to the Hastings precedent.³³³ Representative Blackburn offered a fiery defense of late impeachment.³³⁴ Others disagreed or asked for more time.³³⁵ At about noon, though, the House approved the impeachment unanimously, thus endorsing late impeachability—or, at least, deciding that the Senate could sort out the issue.³³⁶ The House then drafted specific articles of impeachment, approved them, and forwarded the case to the Senate on April 4.³³⁷

Unfortunately for Belknap, 1876 was an election year. The Democrats—who had taken over the House in 1874 due in part to outrage over the Grant administration's scandalous

329. *Id.*

330. *Id.* at 167 (summarizing facts in Belknap case).

331. *See id.* at 167, 171; *see also* BELKNAP TRIAL, *supra* note 18, at 9.

332. BELKNAP TRIAL, *supra* note 18, at iii (discussing timing of the resignation); BUSHNELL, *supra* note 16, at 167 (describing Belknap's actions).

333. 4 CONG. REC. 1430 (1876) (statement of Rep. Robbins of North Carolina).

334. *See id.* at 1431-32 (statement of Rep. Blackburn).

335. *Id.* at 1429, 1432-33 (statement of Rep. Kasson) (urging that more time be taken to resolve the issue and citing Justice Story against late impeachment). An eventual impeachment manager, Representative Hoar, cited Justice Story's statements against late impeachment, *see infra* text accompanying notes 496-501, and argued that the House should take its time. 4 CONG. REC. 1431 (1876) (statement of Rep. Hoar).

336. 4 CONG. REC. 1433 (1876) (unanimous approval of resolution of impeachment); *id.* at 1431 (statement of Rep. Bass) (arguing that it was for the Senate to decide jurisdiction).

337. BELKNAP TRIAL, *supra* note 18, at iv; BUSHNELL, *supra* note 16, at 169-70.

corruption—were anxious to exploit that corruption again in the 1876 campaign. The Republicans felt pressured to come out strongly against executive corruption as well.³³⁸ This explains the lack of even political opposition to late impeachment in the House. Once the case reached the Republican-controlled Senate, however, the motives changed. The vote in the House had been a quick affair, a cost-free way for members of both parties to condemn Belknap and pass the unpleasant constitutional issues to the Senate. But the Senate actually had to try the case. Facing the prospect of a lengthy trial that might dominate the campaign, the Senate first had to decide whether to postpone the case until after the election.³³⁹ No Democrat wanted to postpone the case, and most Republicans evidently just wanted to get the case over with; the motion to postpone the case was rejected unanimously.³⁴⁰

At this point, Belknap's lawyers moved to dismiss the case for lack of jurisdiction; before reaching the merits, they wanted to litigate the late impeachment issue.³⁴¹ The House managers argued that the impeachment was not late because it occurred on the same day as Belknap's resignation (fractions of a day being disregarded at common law, by their argument), but this theory was never taken very seriously.³⁴² In any case, the House from the first had styled the impeachment as being against the "late Secretary of War," for offenses committed "while he was in office."³⁴³

More than two weeks of wide-ranging arguments on the question of late impeachment ensued, followed by two weeks of senators' reciting their own conclusions.³⁴⁴ The debate covered virtually every point raised in this Article. Whatever political motivations underlay the final vote, no senator could have

338. See BELKNAP TRIAL, *supra* note 18, at 14-15; BUSHNELL, *supra* note 16, at 168 (describing political climate in Congress in 1876).

339. See BELKNAP TRIAL, *supra* note 18, at 11.

340. *Id.* at 15.

341. BELKNAP TRIAL, *supra* note 18, at 6; BUSHNELL, *supra* note 16, at 170-71.

342. See BELKNAP TRIAL, *supra* note 18, at 6 (raising argument); *id.* at 358-60 (opinion of Senator Norwood) (rejecting it while voting to convict).

343. *Id.* at iii, 2.

344. *Id.* at 15 (beginning of jurisdictional arguments on April 28); *id.* at 72 (end on May 14); *id.* at 77 (beginning of recitation of opinions on May 15); *id.* at 158 (end on May 29).

complained that he had not heard a well-briefed and well-grounded constitutional argument.³⁴⁵

In the end, on May 29, the Senate voted thirty-seven to twenty-nine that it had jurisdiction over the late impeachment.³⁴⁶ The majority Republicans—Belknap’s party—voted twenty-six to thirteen against, while the Democrats were twenty-four to two in favor.³⁴⁷ Some might take this unanimity among Democrats, coupled with significant support among Republicans, as a sign of the case’s strength as a precedent in favor of jurisdiction. On the other hand, it might just reflect Democratic partisanship and the pressure some Republicans felt to denounce Belknap.³⁴⁸

The Blount case is now regarded as settling the issue that only civil officers are susceptible to impeachment.³⁴⁹ The House managers and several senators voting in favor of jurisdiction in Belknap’s case, however, subscribed to a limited view of Article II, Section 4 and concluded that the only limits inherent in impeachment were those contained in the common-law term “impeachment” itself.³⁵⁰ To the extent that proponents conceded that Article II, Section 4 does limit impeachment to “officers,” they argued that this was a limit on who could commit impeachable offenses and not on when offenders could be tried.³⁵¹

345. *Cf. id.* at 137 (opinion of Senator Jones of Florida) (“[L]et us leave to those who shall succeed us the full benefit of every argument which has contributed to the conclusion at which we have arrived.”).

At least one partisan observer disagreed in mid-May that the debate was balanced. The Republican *New York Tribune* reported: “It seems to be generally conceded that the managers are no match for the brilliant array of counsel employed by the deposed secretary, and the general expectation is that the senate will decide it has no jurisdiction.” *The Belknap Impeachment Trial*, 3 CENT. L.J. 300, 301 (1876).

346. BELKNAP TRIAL, *supra* note 18, at 76; BUSHNELL, *supra* note 16, at 176.

347. BUSHNELL, *supra* note 16, at 176 (breaking down vote by party lines). A quasi-Republican, Anti-Monopolist Newton Booth, also voted against jurisdiction. *Id.*

348. *See* BELKNAP TRIAL, *supra* note 18, at 124 (opinion of Senator Ingalls) (Republican opponent of late impeachment commenting that political parties “always embrace among their adherents large numbers of that invaluable class of supporters who invariably study how they can differ with their associates, and never believe they are truly independent unless they act with their adversaries”).

349. *See supra* note 300.

350. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 34, 49-50 (argument of House managers); *id.* at 80 (opinion of Senator Wallace); *id.* at 86 (opinion of Senator Sherman); *id.* at 88 (opinion of Senator Edmunds); *id.* at 136 (opinion of Senator Saulsbury); *see also* note 167 and accompanying text.

351. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 34 (argument of House managers), *id.* at 79 (opinion of Senator Thurman).

Structural concern about giving the impeachment defendant or the President full power over congressional jurisdiction was another popular argument used in favor of jurisdiction. As one senator incredulously stated the counter-argument:

[I]t is gravely insisted that . . . it matters not whether the office be vacated by self-amotion, or by judgment of this court, or by executive order The offender is removed, out of office, and cannot be disqualified, cannot be impeached, even though as President of the United States he had committed treason!³⁵²

Still others focused on the deterrent effect that late impeachment could have on other officials.³⁵³

Among those voting against jurisdiction, the most popular argument was that a reading of Article II, Section 4 implied a restriction on the timing of trials in its use of the term “officers”³⁵⁴ and the prominent role of removal.³⁵⁵ Given the majority’s limited reading of this article and section, some opponents also raised the concern that if impeachment were not limited to current civil officers, any private citizen could be subjected to impeachment.³⁵⁶ Proponents of late impeachment

352. *Id.* at 359 (opinion of Senator Norwood); *see also id.* at 78 (opinion of Senator McDonald); *id.* at 79 (opinion of Senator Thurman); *id.* at 81 (opinion of Senator Wallace); *id.* at 90 (opinion of Senator Edmunds); *see also supra* Part V.D.

353. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 87 (opinion of Senator Sargent) (“A sentence to disqualification . . . operates for the public safety not only by the exclusion of the criminal from office but as a warning and example to all public officers, tending to purity in office.”); *id.* at 93 (opinion of Senator Maxey) (stating that disqualification is inflicted “chiefly, by fearful example, to teach all men that American institutions and the perpetuation of free government, of the people, by the people, and for the people, demand purity in office”); *see also supra* Part V.A (discussing deterrence).

354. *See, e.g.*, BELKNAP TRIAL, *supra* note 18, at 29 (argument of defense counsel); *id.* at 82 (opinion of Senator Morton); *id.* at 115 (opinion of Senator Eaton); *id.* at 126 (opinion of Senator Ingalls); *id.* at 132 (opinion of Senator Boutwell). *See also supra* Part IV.B.2 (discussing textual interpretations of constitutional impeachment clauses raising this argument).

355. *See, e.g.*, BELKNAP TRIAL, *supra* note 18, at 82 (opinion of Senator Morton); *id.* at 85 (opinion of Senator Frelinghuysen); *id.* at 115 (opinion of Senator Eaton); *id.* at 124 (opinion of Senator McMillan). *See also supra* Part VI.B.2 (discussing textual interpretations of constitutional impeachment clauses raising this argument).

356. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 26 (argument of defense counsel); *id.* at 127 (opinion of Senator Cameron) (“If the Senate has jurisdiction to try one private citizen upon impeachment it has a right to try any private citizen by the same process.”); *id.* at 100 (opinion of Senator Howe) (“If the first article gives to the House the dangerous power to impeach a man because he has once been in office, it gives it the power to impeach him also because he is in danger of getting into office.”); *id.* at 115 (opinion of Senator Eaton); *see also supra* note 23 and accompanying text.

naturally disagreed that their view necessitated this implication.³⁵⁷

The two sides also tussled over precedents and authorities. Both sides used the records of the Constitutional Convention³⁵⁸ and the state ratification debates.³⁵⁹ Both sides used the Blount case as well. Opponents of late impeachment in the Belknap case argued that the Blount case provided a clear precedent against late impeachment.³⁶⁰ Proponents retorted that Blount's case stood against only the impeachability of senators and noted that Blount's defense had conceded that resignation could not stop impeachment.³⁶¹ Opponents shot back that such concessions were dicta set forth by counsel who had nothing to lose by narrowing their argument as much as possible.³⁶²

Justice Joseph Story's commentary provided another prominent source of disagreement.³⁶³ In his writings, Story had made some statements against late impeachment, which opponents latched onto almost gleefully;³⁶⁴ this spurred proponents to cite Story's mitigation of his own comments,³⁶⁵ as well as pro-late impeachment comments from others such as William Rawle³⁶⁶ and John Quincy Adams.³⁶⁷

357. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 34 (argument of House managers).

358. *E.g.*, *id.* at 38-39 (argument of defense counsel); *id.* at 53, 57-58 (argument of House managers); *id.* at 98-99 (opinion of Senator Howe); *id.* at 118-20 (opinion of Senator Allison); *id.* at 156 (opinion of Senator Cragin). *But see id.* at 145 (opinion of Senator Booth) (making anti-originalism argument). The convention is discussed in Part III.C.1, *supra*.

359. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 120-21 (opinion of Senator Allison); *id.* at 150 (opinion of Senator Dawes). The ratification debates are discussed in the text accompanying notes 151-58, *supra*.

360. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 28 (argument of defense counsel).

361. *E.g.*, *id.* at 36-37 (argument of House managers); *see also supra* text accompanying notes 294-95 (quoting concessions at issue) and 299-300 (discussing actual meaning of Blount precedent).

362. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 42 (argument of defense counsel); *see also supra* text accompanying notes 294-95 (quoting arguments at issue).

363. *See infra* Part VII.A.

364. *See, e.g.*, BELKNAP TRIAL, *supra* note 18, at 30, 40, 42 (argument of defense counsel); *see also supra* text accompanying notes 496-501 (quoting Story's statements).

365. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 152 (opinion of Senator Dawes); *see also* note 503 and accompanying text (quoting Story's caveats and other commentary on Story).

366. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 111 (opinion of Senator Mitchell). Rawle is quoted *infra* in Part VII.A.

367. *E.g.*, BELKNAP TRIAL, *supra* note 18, at 112 (opinion of Senator Mitchell). Adams is quoted and discussed, *supra*, in the text accompanying notes 310-13. Adams was not a unanimously respected authority. As defense counsel for Belknap, dismissing Adams's comments on late impeachment, put it:

With the jurisdictional question out of the way, the trial proceeded for two more months before the final voting began on August 1.³⁶⁸ Belknap continued to push the jurisdictional argument,³⁶⁹ though, and despite the lengthy and detailed testimony compiled about Belknap's activities, the final decision on the merits reflected the initial decision on jurisdiction. Belknap was acquitted by a thirty-seven to twenty-five vote on the closest charge, five votes away from the forty-two to twenty vote needed for a conviction. Of the twenty-five senators voting to acquit, twenty-two (one Democrat and twenty-one Republicans) indicated that they did so because Belknap had already left office.³⁷⁰ Only three senators (all Republicans) indicated that they had gotten to the merits and actually believed Belknap was not guilty of an impeachable offense.³⁷¹ Thus, taking these senators at their word, it seems that Belknap was acquitted only because he was being impeached after he left office.

In sum, the Belknap case provides a precedent that federal officials can be impeached and tried after they have left office. Nevertheless, this precedent is binding only to the extent that the Senate wishes to be bound.³⁷² Critics of the Belknap precedent note, correctly, that the minority voting against jurisdiction did not feel bound by the majority, and Belknap's acquittal was necessarily based on the fact that his was a late impeachment.³⁷³ On the other hand, after the vote on jurisdiction, the minority failed in an attempt to stop the trial on grounds that a two-thirds vote to convict could not possibly

Mr. Adams of course opposed what everybody else believed to be true. Nothing indeed would have given him greater pleasure than to be impeached. It would have given him an opportunity to come over here and lay about him right and left. His organ of combativeness was always in a state of chronic inflammation.

BELKNAP TRIAL, *supra* note 18, at 69.

368. See BELKNAP TRIAL, *supra* note 18, at 342 (mentioning the beginning of voting)

369. *Id.* at 170 (Belknap's Answer after defeat on jurisdictional issue).

370. BUSHNELL, *supra* note 16, at 186 (describing and tallying vote); VAN TASSEL & FINKELMAN, *supra* note 1, at 193 (same).

371. BUSHNELL, *supra* note 16, at 186 (describing and tallying vote); VAN TASSEL & FINKELMAN, *supra* note 1, at 193 (same).

372. See 2 *Archbald Trial*, *supra* note 269, at 1653 (senator voting in favor of late impeachment on basis of Belknap precedent); GERHARDI, *supra* note 12, at 49 (discussing congressional prerogative to revisit constitutional precedents); cf. Neal Kumar Katyal, *Impeachment as Congressional Constitutional Interpretation*, 63 LAW & CONTEMP. PROBS. 169, 183-88 (2000) (arguing that rationales for *stare decisis* are not compelling in legislative context).

373. See, e.g., BUSHNELL, *supra* note 16, at 186-88 (describing importance of jurisdictional question to senators voting to acquit Belknap).

result.³⁷⁴ In any event, four senators who had voted against jurisdiction nevertheless considered themselves bound by the majority decision—three of them voted to convict.³⁷⁵

Furthermore, there is necessarily a difference between an acquittal and a dismissal. The experience of a five-month trial surely had more than just nominal significance to Belknap.³⁷⁶ His guilt was established, even if he was not subjected to punishment. By deciding only after a full trial to acquit Belknap, the Senate essentially decided that he should not be convicted, not that he could not be. Jurisdiction and conviction are separate questions. The Constitution bars “conviction” with less than a super-majority, but does not similarly bar “trials,” and so a simple majority properly decides preliminary matters like procedural rules, jurisdiction, and dismissal.³⁷⁷

For his part, Chairman of the House managers Scott Lord felt that despite Belknap’s acquittal, “great good [would] accrue from the impeachment.”³⁷⁸ Specifically, Lord felt that “it ha[d] been clearly settled . . . that persons who have held civil office under the United States are impeachable” and that the case had given “the public mind clearer views of official accountability.”³⁷⁹ Manager Hoar agreed and contended that the Belknap impeachment would ensure that no one in Belknap’s position would repeat his offenses.³⁸⁰ House Judiciary Committee Chairman J. Proctor Knott perhaps put it best when he said:

Was the only purpose of this disqualification simply to preserve the Government from the danger to be apprehended from the single convicted criminal? Very far from it, sir! . . .

374. See BELKNAP TRIAL, *supra* note 18, at 105-06 (remarks of Senator Christiancy); *id.* at 76 (vote).

375. *Id.* at 343 (statement of Senator Booth); *id.* at 344 (statement of Senator Harvey); *id.* at 345 (statement of Senator Oglesby); *id.* at 356 (statement of Senator Morton). In one state late impeachment case, all of the minority of senators who had voted against jurisdiction reached the merits and voted to convict. See *infra* text accompanying note 483. The state’s supreme court eventually reversed the entire proceeding by a narrow vote. See *infra* Part VI.B.2.d.

376. Cf. DAVIES, *supra* note 54, at 415 (describing ruinous effect of impeachment trial on Warren Hastings).

377. See U.S. CONST. art. I, § 3, cl. 6; GERHARDT, *supra* note 12, at 35 (discussing majority requirement for revising rules). The Senate agreed in the impeachment trial of President Clinton that a majority vote (not just one-third plus one) would be required to dismiss the case. S. Res. 16, 106th Cong. (1999).

378. BUSHNELL, *supra* note 16, at 188 (quoting Lord’s statement in House committee report).

379. *Id.* (quoting Lord’s statement in House committee report).

380. 4 CONG. REC. 5083 (1876) (statement of Rep. Hoar).

The great object, after all, was that his infamy might be rendered conspicuous, historical, eternal, in order to prevent the occurrence of like offenses in the future. The purpose was . . . to teach [other officials] that if they should fall under like temptations they will fall, like Lucifer, never to rise again.³⁸¹

As a practical matter, if Belknap had presented more of a danger to the Republic—say, if his crime had been more treasonous than venal or if he threatened to serve in the federal government again—the twenty-five senators voting against jurisdiction and conviction might not have stood their ground. Only two needed to change their votes for Belknap to have been convicted, assuming that everyone reaching the merits would have voted to convict in such a case. It also appears that some senators were swayed by the fact that Belknap faced criminal liability that might result in a sentence of disqualification.³⁸² It is impossible to know for sure, but if 1876 were not an election year, if the partisan balance in the Senate had been different, if resignation had come after impeachment rather than hours before, or if other facts that lack constitutional significance had been changed, the Senate easily could have reached a different result.³⁸³ More to the point of this Article, even if the weakness of the majority in favor of late impeachment in the Belknap case prevented Belknap's conviction, it did not prevent his impeachment and trial, and it certainly does not legally bar future late impeachments.

6. Archbald

Judge Robert Archbald was impeached and convicted in 1912 for corruption.³⁸⁴ At the time of the impeachment, Archbald sat on the United States Commerce Court as a circuit judge, but six of the twelve specific articles of impeachment covered conduct

381. Turley, *supra* note 165, at 54-55 (quoting Belknap proceedings). Deterrence is discussed in Part V.A, *supra*.

382. *See, e.g.*, BELKNAP TRIAL, *supra* note 18, at 158 (opinion of Senator Cragin).

383. *Cf.* VAN TASSEL & FINKELMAN, *supra* note 1, at 12 (“As a practical matter, the fact that the Senate did not convict Belknap, suggests that except in extraordinary circumstances, resignation will bring the impeachment process to a close.”). Practical considerations underlying late impeachment (“should” as opposed to “could”) are discussed in Part VIII, *infra*.

384. VAN TASSEL & FINKELMAN, *supra* note 1, at 132-44 (describing Archbald case and listing articles of impeachment).

he had committed as a district judge.³⁸⁵ Thus, Archbald's case squarely presents the issue of whether a sitting officer can be impeached for acts perpetrated while holding a former office.³⁸⁶ If late impeachment is acceptable, then this sort of impeachment should be also. If this sort of impeachment is barred, then so too is late impeachment.³⁸⁷

Unfortunately, the Archbald case does not provide a definitive precedent. To be sure, the House debated this version of the late impeachment issue. Though Archbald's Answer did not raise it,³⁸⁸ both sides briefed it cursorily³⁸⁹ and argued somewhat more thoroughly at closing, essentially summarizing and recycling the arguments from the Belknap case.³⁹⁰

Ultimately, Archbald was acquitted on all of the articles of impeachment that related to conduct in his former office, as well as two of the articles concerning his current post.³⁹¹ The closest vote among the district court articles was thirty-six to twenty-nine against.³⁹² Several senators filed written opinions, and many addressed the timing issue.³⁹³ Three senators entertained some doubts about late impeachment and voted to acquit rather than set a precedent that they did not wish to set.³⁹⁴ Six others opposed late impeachment outright.³⁹⁵ Five were

385. BUSHNELL, *supra* note 16, at 219.

386. This issue is covered in more detail in Part V.E. *supra*.

387. This does not mean, conversely, that if Archbald was impeachable for these offenses, then all late impeachments would be acceptable; the fact that Archbald was a sitting officer might have been determinative. *See supra* Part V.E (describing "Whitewater" view that allows impeachment for old offenses, but only for sitting officers).

388. *See* 1 *Archbald Trial*, *supra* note 269, at 44-59.

389. *See* 1 *id.* at 1062-64 (managers' brief) (arguing that jobs were continuous); *id.* at 1101-04 (defense brief) (surveying some history of late impeachment and arguing against "absurd results" it would entail).

390. *See* 2 *id.* at 1412-13, 1424-25, 1470-71 (managers' arguments); 2 *id.* at 1508-10, 1545-47 (defense arguments); *see also* BUSHNELL, *supra* note 16, at 234 (mentioning timing argument by Archbald's counsel).

391. 2 *Archbald Trial*, *supra* note 269, at 1622-46 (chronicling voting on all articles).

392. *Id.* at 1634.

393. *Id.* at 1650-78 (opinions). Some cursory opinions were offered during the voting. *E.g.*, *id.* at 1634-36, 1647-48; *see also* BUSHNELL, *supra* note 16, at 238 (surveying opinions on impeachment after leaving office); Dougherty, *supra* note 32, at 72-73 (noting opposition to and support for late impeachability in Archbald case).

394. 2 *Archbald Trial*, *supra* note 269, at 1634-35 (opinion of Senator Borah); 2 *id.* at 1647 (opinion of Senator du Pont); 2 *id.* at 1675 (opinion of Senator Simmons).

395. 2 *id.* at 1635 (opinion of Senator Bryan); 2 *id.* at 1635-36, 1651 (opinions of Senator Works) (relying on "good behavior" language rather than impeachment clauses); 2 *id.* at 1638 (opinion of Senator Brandegee); 2 *id.* at 1655-56 (opinion of

undecided about late impeachment and abstained as a result.³⁹⁶ Most significantly, though, seven senators found this particular form of late impeachment appropriate, although three of them voted to acquit on the merits.³⁹⁷ Assuming (as we reasonably can) that at least one other senator voting to acquit saw no problem with late impeachment and voted solely on the merits,³⁹⁸ a majority of the senators voting saw no problem with late impeachment. At the *very* least, though, given that Archbald had already been convicted for other, more recent conduct, this issue “had no real bearing” on the case, as even an opponent of late impeachment has concluded.³⁹⁹

7. English

Judge George W. English was impeached in 1926 for tyrannical, corrupt, partial, and abusive conduct on the bench.⁴⁰⁰ He resigned six days before his trial was to begin in the Senate.⁴⁰¹ The House resolved that, in light of the resignation, it “[d]id not desire further to urge the articles of impeachment.”⁴⁰² The House managers informed the Senate that although they were recommending termination of the proceedings, they were of the opinion that “the resignation of Judge English in no way affects the right of the Senate, sitting as a court of impeachment, to hear and determine” such charges.⁴⁰³ Indeed, three senators

Senator Crawford); 2 *id.* at 1660 (opinion of Senator McCumber); 2 *id.* at 1661 (opinion of Senator Catron).

396. 2 *id.* at 1621 (statement of Senator Clarke); 2 *id.* at 1632 (statements of Senators Stone and Swanson); 2 *id.* at 1634 (statement of Senator Smith of Georgia); 2 *id.* at 1636 (statements of Senators Newlands and Foster). Stone expressed “grave doubt” about late impeachability, given the “grave abuses” it could spur. 2 *id.* at 1652.

397. 2 *id.* at 1647 (opinion of Senator Owen) (affirming late impeachability, at least with regard to sitting officers); 2 *id.* at 1648 (opinion of Senator Poindexter); 2 *id.* at 1650 (opinions of Senators Root and Lodge) (affirming late impeachability but voting to acquit on merits); 2 *id.* at 1653 (opinion of Senator Gronna); 2 *id.* at 1663 (opinion of Senator Cullom) (affirming late impeachability but voting to acquit on merits); 2 *id.* (opinion of Senator Cummins).

398. *See, e.g.*, 2 *id.* at 1658 (opinion of Senator Oliver, voting apparently solely on the merits).

399. BUSHNELL, *supra* note 16, at 238-39.

400. *Proceedings of the United States Senate in the Trial of Impeachment of George W. English, District Judge of the United States for the Eastern District of Illinois*, S. DOC. NO. 69-177, at 3-15 (1926) [hereinafter *English Trial*] (recording the articles of impeachment).

401. *Id.* at 76 (mentioning that English’s impeachment trial was to begin on November 10, 1926); *id.* at 78 (recording English’s resignation on November 4, 1926).

402. *Id.* at 80-81.

403. STAFF OF HOUSE COMM. ON THE JUDICIARY, 93D CONG., IMPEACHMENT SELECTED MATERIALS ON PROCEDURE 891 (Comm. Print 1974) [hereinafter IMPEACHMENT].

argued that the resignation should not prevent the Senate from passing judgment on English's conduct and punishing him as appropriate.⁴⁰⁴ Eight others responded that while they agreed that the Senate retained its jurisdiction, they wanted to respect the managers' role as prosecutors and drop the case if the House no longer wanted to pursue it.⁴⁰⁵ As one such senator put it:

The Federal Constitution says that in cases of this kind the House of Representatives shall have the sole power of impeachment In view of that language, it seems to me that in this case no choice is left to us. . . . but, at the same time, I am sure that I will be allowed the privilege of saying that I deeply regret the conclusion that the House of Representatives has reached.⁴⁰⁶

No senator suggested that it would have been impossible or unconstitutional to proceed if the House had not "desired" to do otherwise.⁴⁰⁷ Indeed, one senator noted, without contradiction, that he wanted it "distinctly understood" that the case should not provide a precedent that a resignation would necessarily terminate impeachment proceedings.⁴⁰⁸ English was old and unlikely ever to serve in federal office again,⁴⁰⁹ and there was little appetite for pursuing what were, after all, mild offenses relative to the effort and resources required to pursue them. The motion to dismiss the case passed seventy to nine.⁴¹⁰

This case provides another vaguely positive precedent on late impeachability. Clearly, the House and the Senate felt that they *could* have proceeded with the case. Had the House believed that it had no authority to proceed or that the Senate might reach that conclusion, it would not have passed the carefully worded resolution that it did. If the Senate had so concluded, its debate would have taken on a much different tone.

404. *English Trial*, *supra* note 400, at 81-85 (speeches of Senators Blease and Dill); *id.* at 89-90 (speech of Senator Wheeler).

405. *Id.* at 85-89, 90-92 (speeches of Senators Norris, Reed of Pennsylvania, Reed of Missouri, Bruce, Copeland, King, Fletcher, Borah).

406. *Id.* at 88 (speech of Senator Bruce). *But see id.* at 89-90 (speech of Senator Wheeler, arguing that trial could and should continue regardless of the House's decision).

407. *But see id.* at 91 (speech of Senator King) (alluding to Delahay case and suggesting that resignation was treated there as "ipso facto terminating the case").

408. *Id.* at 91-92 (speech of Senator Fletcher).

409. *See id.* at 92 (speech of Senator Borah).

410. *Id.* at 92-93 (recording the roll call vote on order of dismissal).

8. Aborted Cases

On numerous occasions, the target of an impeachment inquiry resigned before the House could take a vote.¹¹¹ In every one of these cases (except, of course, that of Belknap), the House opted not to proceed. The most famous example of this, of course, is the aborted impeachment of President Nixon. The others, less famous, either concern judges not worth pursuing or more prominent figures against whom the cases were not particularly impressive.¹¹²

None of these cases contains evidence of a congressional understanding that late impeachment is impossible, but several of the cases spurred debate on the question. For example, Judge Edward Durrell resigned in January 1875 after the House Judiciary Committee passed an impeachment resolution against him.¹¹³ The House discontinued the proceedings by a 128-69 vote after a discussion on whether the House had any power to proceed.¹¹⁴ Representative Benjamin Butler, who favored impeachment, argued after the resignation that impeachment could proceed but should not, given Durrell's advanced age.¹¹⁵ Representative Luke Poland opposed impeachment on the merits but did not believe that resignation presented any sort of obstacle to the House proceeding, if it so chose.¹¹⁶ Representative Lyman Tremain, who also opposed impeachment on the merits, expressed "serious doubt" as to the House's power to proceed.¹¹⁷ Given that the only people who spoke in favor of the power of late impeachment opposed it on the merits in Durrell's case, the House's vote here does not represent any sort of statement against the constitutional power of late impeachment. Similar statements were made in favor of

411. BUSHNELL, *supra* note 16, at 39 ("More than fifty federal judges have resigned while under investigation or after their impeachment had been recommended to the House of Representatives, and further action was not pursued against them.").

412. See IMPEACHMENT, *supra* note 403, at 691-92 (Judge Stephens); *id.* at 710 (Judge Irwin); *id.* at 720-22 (Judge Durrell); *id.* at 726-28 (Judge Busteed); *id.* at 853-56 (Judge Hanford); *id.* at 859-61 (Justice Wright); *id.* at 880-81 (Secretary Mellon).

413. *Id.* at 720.

414. *Id.* at 720-22; see also 3 CONG. REC. 319-24 (1875) (recording debate and vote).

415. 3 CONG. REC. 320 (1875).

416. *Id.* at 322-23.

417. *Id.* at 320-22.

the power of late impeachment in other cases in which the merits did not warrant proceeding.⁴¹⁸

It is undeniable that this series of cases indicates that late impeachment rarely will be deemed worthwhile. On the other hand, it does not indicate that Congress is powerless to proceed in such cases. By analogy, the vast majority of criminal prosecutions in this country end in guilty pleas, with no trial and with reduced sentences but at a tremendous savings of resources on the part of the prosecution and the courts. Given how time-consuming and distracting full-blown impeachment proceedings tend to be, it is no surprise that late impeachment is typically considered not worth the effort.

Just as the reality of frequent plea bargains in the mass of minor criminal cases (and the occasional big one) does not affect the prosecution's ability to go to trial if necessary, the reality of impeachment practice does not change the potential for late impeachment. Congress, moreover, does not blithely concede its jurisdiction. The biggest limitation that the Senate has allowed to its jurisdiction came in the Blount case, in which it was decided that senators were not impeachable. But the Senate's decision (notably, against the House's conclusion), while constitutionally defensible, shows a sort of self-interest that would not necessarily duplicate itself in the impeachment of a former executive or judicial officer.⁴¹⁹

B. *State Impeachment After 1787*

After 1787, the states continued to provide instructive examples both for and against late impeachment. Because the language of the federal Constitution was already set, state precedents based on dissimilar state constitutional language represent less persuasive authority. To the extent that state language did correspond to federal language, the precedents are inconclusive.

1. Post-1787 Changes to State Constitutions

In the immediate aftermath of the federal Constitution's adoption, several conventions rewrote their state constitutions,

418. *E.g.*, IMPEACHMENT, *supra* note 403, at 728 (Judge Busteed); *id.* at 855 (Judge Hanford); *id.* at 861 (Justice Wright).

419. *See supra* note 197.

including the provisions on impeachment contained therein. In some cases, states adopted specific language from the federal Constitution. Because the impeachment language in Article II, Section 4 of the federal Constitution was so poorly drafted, however, most states adjusted it.¹²⁰

In some cases, it is instructive to see how states with constitutions providing for impeachment before 1787 changed their impeachment provisions after 1787. Other examples are not instructive: Massachusetts and New Hampshire still use their pre-1787 constitutions, while North Carolina did not change its constitution until after the Civil War.

a. *Georgia*

Georgia was the first state to adopt a new constitution after 1787. Georgia's earlier constitution had not provided for impeachment at all.¹²¹ In 1789, though, the state wrote a new constitution that essentially tracked the federal Constitution, and contained the following impeachment provision: "[The House of Representatives] shall have solely the power to impeach all persons who *have been*, or may be in office."¹²² That explicit authorization for late impeachment was reaffirmed in seven subsequent constitutions¹²³ and was not removed until the most recent constitutional convention in 1983. Besides providing evidence that late impeachment was well-regarded in 1789, the Georgia provision improves on the form of the federal Constitution in two respects. First, unlike Article II, Section 4, it states directly which people are susceptible to impeachment. Second, it definitively indicates that late impeachment is allowed.

One could argue that by explicitly authorizing late impeachments, the Georgia Constitution meant to distinguish

420. *But see, e.g.*, IND. CONST. of 1816, art. III, § 24 ("The Governor, and all civil officers of the State, shall be removed from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.").

421. GA. CONST. of 1777, art. XLIX (rendering officers "liable to be called to account by the house of assembly" but not providing for impeachment).

422. GA. CONST. of 1789, art. I, § 9 (emphasis added); *see also* MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION 4 (explaining congruence between Georgia Constitution of 1789 and federal Constitution).

423. *See* GA. CONST. of 1976, art. III, § 6, ¶ 1; GA. CONST. of 1945, art. III, § 6, ¶ 3; GA. CONST. of 1877, art. III, § 6, ¶ 3; GA. CONST. of 1868, art. III, § 3, cl. 5; GA. CONST. of 1865, art. II, § 3, cl. 4; GA. CONST. of 1861, art. II, § 3, cl. 4; GA. CONST. of 1798, art. I, § 10.

itself from the federal Constitution, which, the Georgia framers believed, implicitly *disallowed* late impeachment. But if this is so, then the specification that the Georgia House has the sole power to impeach officers should be read as a restriction on the federal House's unmodified sole power to impeach, period. In other words, if the wording of the Georgia Constitution of 1789 indicates that the federal Constitution does not allow late impeachment, it also indicates that the federal Constitution allows every private citizen to be impeached. A better interpretation is that Georgia neither added to nor subtracted from the federal impeachment power but changed and/or clarified it.

Georgia removed the "have been in office" late impeachment provision in 1983 because late impeachments seemed irrelevant to the committee charged with redrafting the impeachment section.⁴²⁴ The committee's consideration of the issue, preserved in a transcript, is very illuminating as an example of commonsense (if shortsighted) intuitions about late impeachment:

DR. PYLES: May I raise another question? What about this ". . . against all persons who shall have been . . ." What's the point?

. . .

This is highly confusing if you say ". . . shall have been in office . . ." That's almost *ex post facto* or something.

MR. CLARK: How can you impeach somebody who's not in office[?]

DR. PYLES: Yeah. Or why. We've got criminal provisions, law, civil law.

MR. CLARK: Any understandable background for that, that phraseology, "shall have been"?

CHAIRMAN SWEENEY: No.

. . .

MR. TIDWELL: If you look further into what you can do, the consequences are, he cannot hold office again. That might shed some light on that.

. . .

424. See 2 STATE OF GEORGIA SELECT COMMITTEE ON CONSTITUTIONAL REVISION, TRANSCRIPT OF MEETINGS, 1977-1981, COMMITTEE TO REVISE ARTICLE III, Oct. 29, 1979, at 29-30 (stating subcommittee's understanding that leaving office "obviate[s] the need for an impeachment proceeding").

MR. HILL: . . . Now a person could leave office and two or three years later something is found out about that person that would be serious enough to warrant an impeachment trial so that he or she could never hold office again. . . . I don't think the language was happenstance, I think it was intended to cover both people in office and former officeholders.

MR. CLARK: . . . [I]mpeachment is to put that person out of office, it seems to me, and the idea if he has committed some malfeasance or violation, that there would be criminal support, this falls into court action rather than the ponderous procedure of an impeachment. I just can't see it ever coming about. . . . it clutters up again and adds questions to the Constitution that is just not necessary.

MS. RYSTROM: I agree with you.

. . .

DR. PYLES: I actually think the impeachment provision serves as a deterrent or maybe a threat against an officer, whether it will ever be carried out or not, the fact that it could be carried out is a pretty viable threat it would seem to me to an individual before he continued to persist in whatever it was that would be heinous enough to warrant impeachment.

CHAIRMAN SWEENEY: Especially if he knows that it may come up after he leaves office.

MR. CLARK: . . . I don't think it's enough—it's not important enough to quibble about. I don't think it's likely to come up again, so I would be opposed to leaving the wording in there, I don't think it serves any protective purpose at all.

CHAIRMAN SWEENEY: Well, is there a motion to drop it?

. . .

DR. PYLES: I so move.

. . .

CHAIRMAN SWEENEY: All in favor?

MS. RYSTROM: I was getting convinced on the other side as this discussion went on.

CHAIRMAN SWEENEY: Four [out of seven committee members present] in favor of dropping the language.¹²⁵

The Georgia late impeachment language, which had survived seven constitutional revisions, did not survive the eighth. The subcommittee started somewhat confusedly: How would late impeachment be “ex post facto”? Why does the availability of the criminal law preclude late impeachment but not regular

425. 1 *id.*, Oct. 1, 1979, at 25-29.

impeachment? Nonetheless, it eventually covered most of the main arguments about late impeachment. Specifically, the availability of disqualification and deterrence were raised as points in favor of late impeachment,⁴²⁶ while the practical difficulty of late impeachment and the strong connection between impeachment and removal were raised against it.⁴²⁷ But the subcommittee ignored the significant potential problem that an official could resign to avoid impeachment and/or disqualification—the situation in many actual cases of late impeachment.⁴²⁸

The Georgia experience provides an example of constitutional framers deciding as a practical matter whether late impeachment is worthwhile—something that even proponents of late impeachability admit is a hard point to defend.⁴²⁹ But this article primarily addresses whether the federal Constitution *allows* late impeachment, not whether states, writing their constitutions from scratch, *should* include it. For this reason, the most significant point about the Georgia revision is that when the 1983 framers sought to preclude late impeachment, they used language that reflects the federal language: “The House of Representatives shall have the sole power to vote impeachment charges against any executive or judicial officer of this state or any member of the General Assembly.”⁴³⁰ Thus, in Georgia, language setting forth that only officers can be impeached was meant to preclude late impeachment.⁴³¹ On the other hand, its framers’ intent was clear, and the change from the previous language was blunt and meaningful. In the absence of such factors, language like this has been held to allow late impeachment in other states.⁴³²

426. See *supra* Parts V.B (discussing disqualification) & V.A (discussing deterrence).

427. See *supra* text accompanying notes 19-22 (discussing role of removal); *infra* Part VIII (discussing practical considerations).

428. See, e.g., *supra* Part VI.A.4 (discussing the Belknap case); *infra* Part VI.B.2.c (discussing the Ferguson case); see also *supra* Parts V.B and V.D (discussing structural implications of this phenomenon).

429. My own admission of this point, and my response to it, is detailed in Part VIII, *infra*.

430. GA. CONST. art. III, § 7, ¶ 1.

431. See *supra* text accompanying note 425.

432. Examples include the Jones (*infra* text accompanying notes 448-50), Dovel (*infra* text accompanying notes 451-52), and Furches (*infra* note 464) cases.

b. *Tracking the Federal Constitution*

Other states changed their pre-1787 constitutions in ways that are significant with regard to late impeachment.

South Carolina wrote a new constitution in 1790. Its old constitution had not mentioned late impeachment. The new one did not either, but its wording matched the federal Constitution's impeachment provisions more closely:

The governor, lieutenant governor, and all the civil officers shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall not extend further than to the removal from office, and disqualification to hold any office of honor, trust, or profit, under this state. The party convicted shall nevertheless be liable to indictment, trial, judgement, and punishment, according to law.⁴³³

While they adopted wording very similar to that in the federal Constitution—and presumably sought to construct a similar impeachment regime—the South Carolina framers joined Georgia's in rejecting the confusing wording of Article II, Section 4. Instead, they specified all of the limitations on impeachment in one section and precisely listed who was “liable to impeachment.” The South Carolina Constitution provides some basis for the “late” interpretation of impeachment jurisdiction, as opposed to the “Whitewater” interpretation, in its statements that officers were “liable to impeachment” as opposed to being “liable to removal,” and that impeachable offenses had to be committed in office.⁴³⁴

Pennsylvania's constitution was the next to be ratified in 1790. While the old Pennsylvania Constitution had specifically authorized late impeachment if the officer had not left office by the natural expiration of his term, the new constitution was silent on the subject. Instead, it, too, tracked the language of the federal Constitution.⁴³⁵ In blurring the issue of late

433. S.C. CONST. of 1790, art. V, § 3.

434. The “Whitewater” and other interpretations of impeachment are discussed in Parts IV.B.2 and V.E, *supra*. The dismissal-centered language was used in New Jersey's revolutionary constitution. *See supra* text accompanying note 75. Of course, the language in the federal Constitution obscures this point. *See supra* Part IV.

435. *See* PA. CONST. of 1790, art. IV, § 3 (“The Governor, and all other civil officers, under this commonwealth, shall be liable to impeachment for any misdemeanor in office: But judgment, in such cases, shall not extend further than to removal from office, and disqualification to hold any office of honour, trust, or profit, under this

impeachment, the Pennsylvania framers might have intended to expand late impeachment to include those who had left office naturally or to rule out late impeachment altogether. As in South Carolina, though, the failure to mention removal prominently and the use of explicit language regarding the timing of the offense provide some basis for adopting the “late” interpretation of impeachment jurisdiction.

Kentucky joined the Union in 1791 and copied the South Carolina/Pennsylvania language.⁴³⁶ The next year, the framers of the new Delaware Constitution adhered even more closely to the language in the federal Constitution.⁴³⁷ Recall that Delaware’s old constitution had specified an eighteen-month statute of limitations for impeachment cases and had required that the

commonwealth: The party, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment, and punishment, according to law.”). It appears that the 1790 revision initially may not have included the first sentence specifying who could be impeached. *See* MINUTES OF THE GRAND COMMITTEE OF THE WHOLE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA 59 (Philadelphia, Zachariah Poulson 1790) (showing adoption of Article IV, § 3 without its first sentence); *id.* at 98 (reprinting entire constitution and showing Article IV, § 3 without its first sentence).

The scope of the new Pennsylvania impeachment clauses was intended to be the same as that of the federal provisions—aside from a slight difference in the definition of impeachable offenses—as demonstrated in a statement by leading Framers and Supreme Court Justice James Wilson: “The president, vice president, and all civil officers of the United States; the governor and all other civil officers under this commonwealth, are liable to impeachment; the officers of the United States, for treason, bribery, or other high crimes and misdemeanors; the officers of this commonwealth, for any misdemeanor in office.” 1 JAMES WILSON, *supra* note 43, at 426.

436. *See* KY. CONST. of 1791, art. V, § 2 (“The Governor and all civil officers shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall not extend further than to removal from office, and disqualification to hold any office of honor, trust, or profit, under this Commonwealth; but the party convicted shall nevertheless be liable and subject to indictment, trial, and punishment, according to law.”). Tennessee followed suit in 1796. *See* TENN. CONST. of 1796, art. IV, § 4 (“The governor, and all civil officers under this State, shall be liable to impeachment for any misdemeanor in office; but judgment, in such cases, shall not extend further than to removal from office, and disqualification to hold any office of honor, trust, or profit under this State. The party shall, nevertheless, in all cases be liable to indictment, trial, judgment, and punishment, according to law.”).

437. *See* DEL. CONST. of 1792, art. V, § 2 (“The Governor, and all other civil officers under this state, shall be liable to impeachment for treason, bribery, or any high crime or misdemeanor in office. Judgment in such cases shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit under this state; but the party convicted shall nevertheless be subject to indictment, trial, judgment and punishment according to law.”); DRAUGHT OF A CONSTITUTION OF GOVERNMENT (Wilmington, Peter Brynberg & Samuel Andrews 1792) (recording identical proposed language circulated to citizenry by order of the convention on December 31, 1791); *see also* PROCEEDINGS OF THE HOUSE OF ASSEMBLY OF THE DELAWARE STATE 1781-1792 AND OF THE CONSTITUTIONAL CONVENTION OF 1792, at 800 (Claudia L. Bushman et al. eds., 1988) (recording convention’s acceptance of new impeachment language found in draft cited above); *id.* at 883 (ratifying same); *id.* at 36-37 (describing resemblance between new state constitution and federal Constitution).

clock not begin for governors until they left office.⁴³⁸ Thus, Delaware had required late impeachment for governors and had permitted late impeachment for other officials who left office less than eighteen months after committing their offenses. With the new constitutional language, Delaware no longer required or explicitly authorized late impeachment. On the other hand, it did not forbid them either, and it eliminated the eighteen-month time limit. In some sense, then, Delaware *expanded* the impeachment power to include “regular” impeachment; there is no reason to conclude that this expansion was achieved only as an unstated trade for restricting the power of late impeachment.

Vermont rewrote its Constitution in 1793 upon joining the Union. It kept the same language on impeachment, however, and that language remains in the Vermont Constitution today.⁴³⁹ Thus, Vermont is currently one of only two states that explicitly and specifically authorize late impeachment.⁴⁴⁰ The other state, New Jersey, added a limited late impeachment power when it wrote its second constitution in 1844, almost as an afterthought.⁴⁴¹

Finally, Virginia, the first state to address late impeachment explicitly in its constitution, removed that specification in 1830. In doing so, it clouded the issue of late impeachment in the same manner as did Pennsylvania and Delaware. Recall that the Virginia Constitution of 1776 had required that governors could only be impeached after leaving office, but placed no time limits on impeachment of other officers.⁴⁴² Requiring late

438. See *supra* text accompanying note 76 and following discussion.

439. See VT. CONST. ch. 2, § 58. The Vermont Constitution has been substantially amended since 1793, when this provision was found at § 24.

440. *Id.* (“Every officer of State, whether judicial or executive, shall be liable to be impeached by the House of Representatives, either when in office or after resignation or removal for mal-administration.”).

441. See N.J. CONST. of 1844, art. V, § 11 (“The governor and all other officers under this State shall be liable to impeachment for misdemeanor in office, during their continuance in office, *and for two years thereafter.*”) (emphasis added); PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 600 (New Jersey Writers’ Project ed., 1942) (chronicling last-minute addition of late impeachment provision); see also N.J. CONST. art. VII, § 3, cl. 1 (“The Governor and all other State officers, while in office and for two years thereafter, shall be liable to impeachment for misdemeanor committed during their respective continuance in office.”).

Senator Eaton, an opponent of late impeachment, argued at the Belknap trial that the addition of an explicit late impeachment provision to the New Jersey Constitution presupposed that the old one—which paralleled the silence in the federal Constitution—barred late impeachment. BELKNAP TRIAL, *supra* note 18, at 116.

442. See *supra* text accompanying note 74.

impeachment of governors was a limit, and that limit was removed in 1830.⁴⁴³ Thus, the changes made in 1830 do not answer the question of whether or not late impeachment exists in Virginia.

2. State Cases

State impeachment precedents prior to 1787 can enhance an understanding of federal impeachment. These precedents are sympathetic to late impeachment on balance, but the balance is a close one. Moreover, they are decisions by courts, and thus represent a third participant in an inter-branch struggle to define the bounds of impeachment. As with federal cases, though, state cases do not provide a very large sample.⁴⁴⁴ They do not readily provide firm conclusions about the nature of late impeachment.

a. *Early Cases*

The New Hampshire case of Judge Woodbury Langdon presents an early state precedent against late impeachment. Langdon resigned from office in 1790 after he had been impeached but before his trial commenced.⁴⁴⁵ The assembly voted not to accept his resignation but had no power to compel him to serve.⁴⁴⁶ When Langdon refused to show up for the trial, the impeachment managers entered a *nolle prosequi* and the case was dismissed.⁴⁴⁷

On the other extreme is Kentucky's impeachment of Thomas Jones, a county surveyor, in 1803.⁴⁴⁸ Jones resigned during his trial, but the senate decided that this did not remove its jurisdiction over the case.⁴⁴⁹ The trial continued, and Jones was

443. See VA. CONST. of 1830, art. III, § 13 ("The governor, the judges of the court of appeals and superior courts, and all others offending against the state, either by maladministration, corruption, neglect of duty, or any other high crime or misdemeanor, shall be impeachable by the house of delegates . . .").

444. See 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 557 (1974) ("Impeachments have been a sometime thing in the states. Nine governors have been impeached, . . . and impeachment of other executive officers has been fairly rare. As with the federal impeachment clause, state clauses have had their greatest use in the impeachment of judges.").

445. HOFFER & HULL, *supra* note 1, at 126-39 (describing Langdon case).

446. *Id.* at 128.

447. *Id.*

448. See *id.* at 172 (describing Jones case).

449. *Id.*

convicted and disqualified from future office.¹⁵⁰ Similarly, South Carolina impeached Daniel Doyley, a state treasury officer.¹⁵¹ He too was tried despite voluntarily leaving office, was convicted, and was disqualified from future office.¹⁵²

b. *Hill*

One distinction between state late impeachments and federal ones is that many state cases have resulted in judicial review.¹⁵³ Unlike legislative precedents, judicial precedents carry both a clear statement of intent and understanding (that being the purpose of judicial opinions) and the full weight of *stare decisis*.

A key case in the realm of state judicial treatment of late impeachment was the Supreme Court of Nebraska's decision in *State v. Hill*.¹⁵⁴ *Hill* rejected late impeachment, against a background of other state cases that had affirmed it.¹⁵⁵ The case concerned the attempted late impeachments in April 1893 of former state officials Thomas Benton and John Hill.¹⁵⁶ Both defendants entered pleas in the state supreme court challenging their amenability to impeachment.¹⁵⁷ The state constitution provided that "all civil officers of this state shall be liable to impeachment for any misdemeanor in office."¹⁵⁸ The court viewed this provision and procedural requirements in the state constitution that related to officers as evidence that private citizens, whether ex-officers or not, were not amenable to impeachment:

[S]ection 5, already quoted, designates the persons who may be impeached as "all civil officers of this state." This language

450. *Id.*

451. *Id.* at 256-57 (describing Doyley case).

452. *Id.*

453. *See supra* note 163 and accompanying text.

454. 55 N.W. 794 (Neb. 1893). In a case decided the same day, the court dismissed another late impeachment on different grounds, while noting its argument in *Hill*. *State v. Leese*, 55 N.W. 798, 799 (Neb. 1893) (citing *Hill* and pointing out that the legislature had no power to impeach Leese because he had been out of office for two years)

455. In each of the cases affirming late impeachment, the defendant was still in office but was being impeached for offenses committed in a previous term. *See infra* note 463 and accompanying text. While this scenario is consistent with late impeachment, it is also consistent with other views of impeachment that preclude late impeachment. *See supra* Part V.E (discussing this issue with regard to alternative interpretations)

456. *Hill*, 55 N.W. at 794.

457. *Id.* at 794-95. The impeachment court in unicameral Nebraska was and is composed of state judges. NEB. CONST. art. 3, § 17; *Hill*, 55 N.W. at 795.

458. *Hill*, 55 N.W. at 795 (quoting NEB. CONST. of 1875, art. 5, § 5).

is unambiguous. It means existing officers; persons in office at the time they are impeached. Ex-officials are not civil officers within the meaning of the constitution. Jurisdiction to impeach attaches at the time the offense is committed, and continues during the time the offender remains in office, but no longer.⁴⁵⁹

The court also considered a state statute that allowed late trial of impeachment but construed it *expressio unius* to distinguish between late impeachment (forbidden) and late trial (permitted).⁴⁶⁰

In the process of stating its decision, the court also surveyed Justice Story's commentaries against late impeachment and labeled them a "generally accepted . . . correct exposition of the law."⁴⁶¹ The court rejected the British cases of Hastings and Melville as irrelevant given the broader scope of English impeachment.⁴⁶² It also considered a trio of state cases (from Nebraska, New York, and Wisconsin) in which a form of late impeachment was approved—officials who served multiple terms continuously were successfully impeached for offenses committed in prior terms.⁴⁶³ The *Hill* court distinguished these cases; it considered the current status of the officials more important than the timing of the trial vis-à-vis the offense.⁴⁶⁴ Finally, it rejected the Belknap precedent because of the weakness of the Senate's majority and also because, unlike Belknap, Benton and Hill were out of office from the natural expiration of their terms.⁴⁶⁵

459. *Id.* at 796.

460. *See supra* text accompanying notes 250-51.

461. *Hill*, 55 N.W. at 796; *see also infra* Part VII.A (quoting Justice Story's commentary on late impeachment).

462. *Hill*, 55 N.W. at 797; *see also supra* text accompanying notes 54-58.

463. *Hill*, 55 N.W. at 797. The cases described in *Hill*, concerning Governor Butler of Nebraska, Judge Barnard of New York, and Judge Hubble of Wisconsin, are described in more detail in *Newman v. Strobel*, 259 N.Y.S. 402, 406-07 (N.Y. App. Div. 1932).

464. *Hill*, 55 N.W. at 797. The court did not make clear whether the defendants' terms must be continuous for such an impeachment to occur, though it did mention continuousness in a way that suggests it thought so. *See id.* The opposite view, however, would be more logically consistent—it would focus impeachment on removal for official misconduct, period. This issue is discussed in more detail in Part V.E. *supra*.

An even starker case—in which service was continuous but the office changed—occurred after *Hill*. *See 2 Archbald Trial, supra* note 269, at 1424 (manager's argument) (discussing 1901 case of Judge Furches of North Carolina).

465. *Hill*, 55 N.W. at 797; *see also supra* Part VI.A.5 (discussing Belknap case). Recall that the first state constitution of Pennsylvania and all of the constitutions of Vermont have allowed late impeachment against officials, but only if their terms did not expire naturally. *See supra* text accompanying notes 78 and 83.

c. Ferguson

Another case, with simpler facts, occurred in Texas in 1924.⁴⁶⁶ Governor James E. Ferguson had been impeached in 1917 and disqualified from future state office. Ferguson was attempting to get his name on the ballot in 1924, alleging that he resigned the day before he had been disqualified, making the Senate's act void.⁴⁶⁷ As the court described the facts, Ferguson had participated in his trial and had lost the vote of conviction, but "before the Senate, in due course of orderly procedure, could pronounce its judgment, [Ferguson] filed his resignation with the secretary of state."⁴⁶⁸ The Court rejected Ferguson's argument that he could deprive the Senate of the jurisdiction to sentence him:

[The Senate's] power to conclude the proceedings and enter judgment was not dependent upon the will or act of the Governor. Otherwise, a solemn trial before a high tribunal would be turned into a farce. . . . [T]he resignation of Governor Ferguson in no manner impaired the power or jurisdiction of the Senate to render judgment⁴⁶⁹

To be sure, Ferguson's case was an extreme one. Nevertheless, the Texas Supreme Court recognized that impeachment is not just about removal. The court made clear that if removal were the only possible penalty—if the jurisdiction of the Senate somehow depended on its ability to remove the defendant—then Ferguson's action would have been effective.⁴⁷⁰ Because in Texas, as in the federal system, impeachment convicts can be disqualified, however, this view of jurisdiction must fail.⁴⁷¹ This was true even though the Texas Constitution, tracking its federal counterpart, referred only to impeachment of the "Governor" (as opposed to the ex-Governor) and made clear that the

466. See *Ferguson v. Maddox*, 263 S.W. 888 (Tex. 1924).

467. *Id.* at 888-89. After losing this case Ferguson simply had his wife, "Ma" Ferguson, run for governor. She won easily and became the nation's second female governor—in part by assuring voters that they would get "two governors for the price of one," because she would follow her husband's advice. See John D. Huddleston, *Ferguson, Miriam Amanda Wallace*, THE HANDBOOK OF TEXAS ONLINE, at <http://www.tsha.utexas.edu/handbook/online/articles/view/FF/ffe6.html> (last modified July 23, 2001).

468. *Ferguson*, 263 S.W. at 893.

469. See *id.*

470. *Id.*

471. *Id.*

principal practical purpose of impeachment was to remove sitting civil officers.⁴⁷²

d. *Smith*

The most recent state opinion on late impeachment is the 1981 Florida decision in *Smith v. Brantley*.⁴⁷³ In that case, the Florida Supreme Court decided four to three that late impeachment was not allowed.⁴⁷⁴

Circuit Judge Samuel Smith voluntarily suspended himself in 1977, after sixteen years on the bench, in the midst of allegations that he was involved in a scheme to traffic over 1,500 pounds of marijuana.⁴⁷⁵ On January 13, 1978, Smith attempted to resign from the bench, but Governor Reubin Askew refused to accept the resignation, in part because he did not want to prejudice any case against Smith.⁴⁷⁶ The most obvious potential prejudice was the possibility that Smith might not be impeachable if he had already resigned. As expected, on January 31, a special committee was appointed in the state House to consider impeachment, and on April 12 Smith was impeached.⁴⁷⁷

Smith tried to stop the proceedings with a lawsuit alleging that as an ex-officer he was no longer subject to impeachment.⁴⁷⁸ His lawyers argued that he was no longer an “officer,” cited numerous cases in which officials who resigned were not pursued, and argued that federal precedent was either neutral or against late impeachment.⁴⁷⁹ The House managers and several

472. *Id.* at 890 (citing constitutional provisions, including TEX. CONST. art. XV, § 2 (stating that “Governor” and other named officers can be impeached)); *id.* § 7 (allowing legislature to provide for impeachment procedures in cases involving “civil officers” not named in § 2); *id.* § 5 (providing for suspension of impeachment defendants from office during pendency of case).

473. 400 So. 2d 443 (Fla. 1981).

474. *Id.*

475. JOURNAL OF THE SENATE, STATE OF FLORIDA 196 (Court of Impeachment 1978) [hereinafter SENATE JOURNAL] (setting forth Article II of the articles of impeachment: “Conspiracy to Unlawfully Obtain and Distribute in Excess of Approximately 1500 Pounds of Marijuana”).

476. *See Smith*, 400 So. 2d at 445.

477. *Id.*

478. *Id.* at 445-46.

479. SENATE JOURNAL, *supra* note 475, at 22-23. None of the cases cited as being dropped upon resignation appear to have involved a determination that it would have been unconstitutional to proceed. On the federal precedents, Smith’s lawyer argued that Blount’s case stood against late impeachment, *see supra* Part VI.A.1, and that Belknap’s was not applicable because the majority in favor of late impeachability was short of two-thirds, *see supra* Part VI.A.5.

senators disagreed and made their own historical and structural arguments.¹⁸⁰ The Senate voted twenty-nine to six to go forward with the trial after the Chief Justice, presiding over the Senate for the occasion, advised the Senate that it did have jurisdiction over the case even if Smith had resigned.¹⁸¹ The trial court then rejected Smith's lawsuit.¹⁸² The impeachment proceeded, and Smith was unanimously convicted, removed from office (to the extent that the effectiveness of his resignation was in doubt), and disqualified from future office.¹⁸³

Reviewing the case, the supreme court disagreed with its chief justice and with the lower court.¹⁸⁴ The court concluded that the resignation could be effective despite the governor's refusal to accept it,¹⁸⁵ and that once an officer is out of office, the House has no jurisdiction to impeach him.¹⁸⁶ (Interestingly, because the court was so badly split, Smith's conviction nevertheless was affirmed.¹⁸⁷)

The court took a simple view of the question, similar to the one sketched out at the outset of this article.¹⁸⁸ First, the court looked at the state constitutional provisions that governors, judges, and other officers are liable to impeachment for misdemeanor in office, are to be suspended from performing their duties during the impeachment proceedings, and are to be

480. See SENATE JOURNAL, *supra* note 475, at 26, 31-32 (Court of Impeachment 1978) (recording House managers citing cases of Blount, *see supra* Part VI.A.1, Belknap, *see supra* Part VI.A.5, and Ferguson, *see infra* Part VI.2.c, and arguing that disqualification, *see infra* Part VIII.A, represented adequate basis to proceed against ex-officers); *id.* at 30 (recording inquiry by Senator Dunn that barring late impeachability would allow subject to resign to avoid disqualification, *see supra* Part V.B, and thereby "unilaterally thwart the will of the people").

481. SENATE JOURNAL, *supra* note 475, at 49 (Court of Impeachment 1978) (vote), *id.* at 41 (chief justice's opinion). The chief justice relied heavily on the fact that Smith would receive a pension if not impeached and convicted, which he found to be an adequate basis for proceeding. *See infra* text accompanying note 506 (similar argument in case of President Nixon); Part VIII.B (discussing practical effect of pensions on late impeachment).

482. *Smith*, 400 So. 2d at 446.

483. SENATE JOURNAL, *supra* note 475, at 185-87 (Court of Impeachment 1978) (mentioning and explaining the votes).

484. *Smith*, 400 So. 2d at 451.

485. *Id.* at 449.

486. *Id.* at 487.

487. While the court split four to three on late impeachability, one justice wanted to make prospective the ruling that resignations are effective regardless of the governor's actions, and so he affirmed the Senate's verdict along with the three dissenters. *Id.* at 153 (England, J., concurring in part and dissenting in part).

488. *See supra* Part II.

removed from office if convicted.⁴⁸⁹ The court concluded that officers are officers; ex-officers, who could not be suspended or removed from office, are not.⁴⁹⁰ The court thus was making the linguistic argument that “officer” meant “sitting officer” and the functional argument that “the primary and dominant purpose of impeachment in Florida is removal of an officeholder from office.”⁴⁹¹ Once an officer has resigned, this purpose is fulfilled, the court said, and the mere possibility of disqualification from future office does not change the fact that the main purpose of the process has been achieved.⁴⁹² The court considered Blount, Belknap, and Ferguson, but argued that in each case the resignation did not occur until impeachment proceedings had begun.⁴⁹³

Three justices dissented, asserting two functional arguments made in this article—that disqualification is significant and that the jurisdiction of an impeachment court should not depend on the whim on the defendant or the timing of his offense:

The majority holding will allow officers who secretly commit serious breaches of the public trust . . . to escape impeachment and disqualification if they resign or if their terms of office expire before their misdeeds are discovered and impeachment proceedings are begun. This surely was not intended by the framers of our constitution when they gave the Senate the authority to disqualify⁴⁹⁴

Perhaps fittingly, this closest of constitutional questions received the closest of verdicts.

489. *Smith*, 400 So. 2d at 449 (examining FLA. CONST. art. III, § 17). In the previous version of the state constitution, disqualification was a mandatory part of the sentence as well. *See id.* at 450 (discussing FLA. CONST. of 1885, art. III, § 29).

490. *Id.* at 449-50.

491. *Id.*

492. *Id.* at 450.

493. *Id.* The court was right that Blount and Ferguson left office only after they had been impeached. *See supra* text accompanying notes 281-82 (covering the Blount chronology) and 466-67 (covering the Ferguson chronology). But Belknap—who resigned before any official action was taken against him by the House but after his offenses were being considered in committee, *see BELKNAP TRIAL, supra* note 18, at 130 (opinion of Senator Bayard)—presents serious line-drawing problems that the Florida court glossed over. *See supra* text accompanying notes 330-32 (discussing the Belknap chronology).

494. *Smith*, 400 So. 2d at 455 (Alderman, J., concurring in part and dissenting in part). These structural points are discussed *supra* in Parts V.A (discussing deterrence) and V.B (discussing the significance of disqualification).

VII. THE COMMENTARY

Unsurprisingly, given the high stakes and close questions inherent in late impeachment, the issue has attracted its share of commentary from the academy. As with the rest of the evidence marshaled in this article, commentators are divided but lean toward the acceptance of late impeachment.

A. *Rawle and Story*

In his famous treatise on constitutional law, William Rawle gave a relatively terse treatment of the issue and concluded that late impeachment was constitutionally acceptable. As he put it, “[I]t is obvious, that the only persons liable to impeachment, are those who are *or have been* in public office.”⁴⁹⁵

An even more distinguished commentator, Justice Joseph Story, weighed in on the question a few years later in his *Commentaries*.⁴⁹⁶ Story disagreed with Rawle, whom he referred to as “[a] learned commentator.”⁴⁹⁷ Story focused on the prominent mention of removal in Article II, Section 4, which he considered to define who and what was impeachable:⁴⁹⁸

If, then, there must be a judgment of removal from office, it would seem to follow, that the constitution contemplated, that the party was still in office at the time of the impeachment. . . . [T]he language of the constitution may create some doubt, whether it can be pronounced without being coupled with a removal from office.⁴⁹⁹

Story denigrated disqualification as a remedy, noting that it “would be scarcely felt, as a punishment, by the profligate and the base,”⁵⁰⁰ and positing that “it might be argued with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offence, when the most

495. RAWLE, *supra* note 35, at 213 (emphasis added).

496. STORY, *supra* note 42.

497. 2 *id.* at 270.

498. *Cf. supra* note 90 (discussing Story’s concession that Article II, § 1 would fit more logically in Article I).

499. 2 STORY, *supra* note 42, at 271. Story elsewhere mentioned that “[t]here seems to be peculiar propriety, in a republican government at least, in confining the impeaching power to persons holding office.” 2 *id.* at 256. In context, however, Story was merely limiting impeachment to official as opposed to private action and not discussing the timing of the proceedings. *See 2 id.*

500. 2 *id.* at 251.

important object, for which the remedy was given, was no longer necessary, or attainable.⁵⁰¹

Although Story's arguments against late impeachment could not convince a majority of the Senate in the Belknap case, he did influence many among the minority.⁵⁰² The main reason that Story's arguments have not received more definitive support is that, with all due respect to Story, his arguments about late impeachment did not address the weakness of the textual case against late impeachment and did not engage, let alone answer, the structural concerns that militate in favor of late impeachability. Story himself seems to have recognized the limits in his presentation; he issued this strong caveat at the end of his discussion of late impeachment:

It is not intended to express any opinion in these commentaries, as to which is the true exposition of the constitution on the points above stated [including late impeachment]. They are brought before the learned reader, as matters still *sub judice*, the final decision of which may be reasonably left to the high tribunal, constituting the court of impeachment, when the occasion shall arise.⁵⁰³

Opponents of his position have used this caveat, quite rightly, to rebut those who have cited Story as an authority against late impeachment;⁵⁰⁴ Story himself realized that this was not a simple question and that the Senate would have the last word.

B. *Recent Commentary*

More recently, in the wake of Watergate and *l'affaire Lewinsky*, the argument for late impeachment has reemerged.

The political atmosphere in Watergate was somewhat charged—a President unpopular among law professors, whose conduct seemed clearly to be impeachable, who resigned rather than face impeachment, and who was pardoned by his successor. Other than the dim possibility of state criminal proceedings, the

501. 2 *id.* at 271.

502. See *supra* notes 364-65 and accompanying text.

503. 2 STORY, *supra* note 42, at 273. The hesitant nature of Story's conclusion gave one unblushing advocate a reason to question whether Story had written these comments at all. 43 CONG. REC. 324 (1875) (statement of Rep. Butler) ("The dictum of Judge Story upon this question was, I am afraid, like some other *dicta* in his voluminous works, written by some law-school student[.]").

504. *E.g.*, *supra* text accompanying note 365.

only possibility of punishing Nixon under the law was to impeach him even though he had left office. One article in the *Duke Law Journal* argued that Nixon could still be impeached,⁵⁰⁵ even as it conceded that Congress appeared unlikely to do so.⁵⁰⁶ Another article reached the same conclusion in quite strong terms⁵⁰⁷ and chided Raoul Berger for leaving the late impeachment issue completely out of his book *Impeachment: The Constitutional Problems*.⁵⁰⁸

It was assumed by some of these same commentators that an impeachment conviction would allow Congress to strip Nixon of his pension,⁵⁰⁹ but it now seems that this would have violated the constitutional limitation on judgments to removal and disqualification. In retrospect, Congress could have taken steps to allow late impeachment to strip an ex-officer of his pension, but it was probably too late to apply such a law to Nixon.⁵¹⁰

Most recently, Michael Gerhardt, perhaps the leading scholar on impeachment working today, has written that there is a “surprising consensus among commentators” that late impeachment is acceptable.⁵¹¹ (In fact the consensus, while

505. Firmage & Mangrum, *supra* note 142, at 1089-94. Firmage and Mangrum noted the Blount concession, *see supra* text accompanying notes 294-95, the Belknap case, *see supra* Part VI.A.5, and the English caveat, *see supra* text accompanying note 408. They then argued that late impeachment could be used to disqualify, to strip emoluments, *but see infra* Part VIII.A, and to set precedent. They recognized, however, that resignation would accomplish many of the goals of an impeachment and so might make it worthwhile to end the proceedings.

506. Firmage & Mangrum, *supra* note 142, at 1101.

507. *See* Bestor, *supra* note 133, at 277-81 (“[M]any members of Congress, to say nothing of the general public, assume that the liability of an official to impeachment somehow terminates the instant he leaves office Such an assumption has no substantial historical foundation and is not supported by a single authoritative and unequivocal decision of recent times.”). Bestor raised the Hastings precedent, *see supra* text accompanying notes 54-57, the Virginia and Delaware Constitutions, *see supra* text accompanying notes 74 & 76, the absence of any constitutional provision barring late impeachment, the “whilst in office” discussion at the constitutional convention, *see supra* Part III.C.1.b, the Adams quotation, *see supra* text accompanying notes 310-13, the Belknap case, *see supra* Part VI.A.5, and the functional argument that late impeachment would be less destabilizing than seeking to remove a sitting President, *see infra* text accompanying note 543.

508. *See* Bestor, *supra* note 133, at 280-81 (arguing that late impeachment is a more important problem than others considered at length by Berger).

509. Firmage & Mangrum, *supra* note 142, at 1092.

510. *See infra* Part VIII.B (discussing ability to use impeachment to strip pensions).

511. GERHARDT, *supra* note 12, at 79 & n.22 (citing as examples an earlier article by himself; Rotunda, *supra* note 190; Firmage and Mangrum, *supra* note 142; and Bestor, *supra* note 133). Others have written in favor of late impeachability. *E.g.*, Jonathan Turley, *The Executive Function Theory, the Hamilton Affair, and other Constitutional Mythologies*, 77 N.C. L. REV. 1791, 1827 (1999) (“[T]he Belknap case indicates that

surprising, is not unanimous.⁵¹²) Gerhardt agrees that the precedents of failure to use late impeachment reflect practical considerations rather than constitutional limits.⁵¹³ Gerhardt cites the Warren Hastings precedent and pre-1787 state constitutional language addressing late impeachment.⁵¹⁴ He continues with a structural argument about disqualification, evidence of original understanding, citation to John Quincy Adams, and a dismissal of Justice Story's concerns.⁵¹⁵

When President Clinton outraged many with his literally last-minute pardons, the issue emerged again. I can personally relate that I wrote an updated op-ed piece on the subject, which was rejected by all outlets to which I submitted it, including one conservative publication that said the notion of impeaching a President after he had left office was too fantastical even for them.⁵¹⁶ A few days later, Senator Arlen Specter appeared on a Sunday morning talk show and expressed his favorable opinion on late impeachability, which suddenly seemed much less fantastical, if still quite unlikely in Clinton's particular case.⁵¹⁷ Specter's comments in favor spurred commentary of its own on both sides of the issue, thus further belying the consensus that Gerhardt had found not long before.⁵¹⁸

resignation from office does not prevent trial on articles of impeachment."); C.S. Potts, *Impeachment as a Remedy*, 12 ST. LOUIS L. REV. 15, 23 (1927).

512. See *supra* note 16 (listing some of those who have written against late impeachability).

513. GERHARDT, *supra* note 12, at 79-80 ("No doubt, there are numerous reasons not to move for impeachment against an official after resignation, but none of these are constitutionally mandated."); see *infra* Part VII.

514. GERHARDT, *supra* note 12, at 79. On Hastings, see *supra* text accompanying notes 54-57. State constitutional language is discussed in Part III.B.2, *supra*.

515. GERHARDT, *supra* note 12, at 80-81. On disqualification, see Part V.B, *supra*. Original understanding is discussed in Part III.C.1, *supra*, and the "whilst in office" language that Gerhardt focuses on is discussed in Part III.C.1.b, *supra*. Adams is discussed in text accompanying notes 310-14, *supra*, and Story in Part VII.A, *supra*.

516. The piece eventually appeared on the *Jurist* web site. See Kalt (JURIST), *supra* note 8. A similar piece had run two years before—in Canada. See Kalt (NAT'L POST), *supra* note 8.

517. See *infra* text accompanying note 532.

518. See, e.g., Souss, *supra* note 16 (opposing late impeachability); Mark R. Levin, *Arlen Specter, the Constitution, & UFOs*, NATIONAL REVIEW ONLINE (Feb. 12, 2001), at <http://www.nationalreview.com/contributors/levin021201a.shtml> (opposing late impeachability); Kalt (JURIST), *supra* note 8 (favoring late impeachability); Victor Williams, *Pardongate: Another Impeachment After the Investigations Conclude?*, FINDLAW'S WRIT (Feb. 27, 2001), at http://writ.news.findlaw.com/commentary/20010227_williams.html (favoring late impeachability).

VIII. PRACTICAL CONSIDERATIONS

The foregoing has all been directed at the question of whether late impeachment is allowed. It is time to confront a more difficult question for proponents of late impeachment: What is the point?

Even though they do not prove that late impeachment is legally impossible, the nearly unbroken series of cases in which impeachment proceedings were dropped when the target resigned show that pursuing a late impeachment is generally regarded as pointless in actual cases. Whatever the abstract purposes of impeachment, it is evident that removing the target has been the primary practical purpose and that once removal has been accomplished—by whatever means—there was often little point in continuing. Then again, the sample size is fairly small, it includes the late impeachments of Blount and Belknap, and it is easy to imagine a future case in which late impeachment is worthwhile.

A. Disqualification

Disqualification is currently the only practical consequence to the target of a late impeachment. Despite the many arguments made by proponents of late impeachment that disqualification is a significant punishment,⁵¹⁹ the simple fact of the matter is that in most cases it is not. Most people who resign to avoid impeachment will carry enough disgrace that they cannot count on being re-appointed and re-confirmed anyway.⁵²⁰ Moreover, some of these people have been old enough that they were not likely to get new federal jobs even if they were proven innocent.⁵²¹ Indeed, in most impeachment cases, the Senate has not even bothered to disqualify the convict.⁵²²

Still, one can imagine a case in which disqualification is worthwhile. An official may have committed an offense so heinous that it is appropriate to declare to the nation that he is constitutionally unworthy of “honor, trust, or profit.”

519. See *supra* Part V.B.

520. Cf. *supra* note 269 and accompanying text.

521. See, e.g., *supra* text accompanying notes 408-10.

522. Of the fourteen men convicted in impeachment cases, only two, Judges West Humphreys and Robert Archbald, have been disqualified. BUSHNELL, *supra* note 16, at 6.

One can also imagine a case in which the prospect of the convicted party staging a comeback is likely enough—and undesirable enough—that disqualification is worth pursuing. While the undesirability of such a comeback is a subjective matter that would depend on the specifics of the case, there is little doubt of their likelihood. Senator Blount remained popular at home and could have staged a comeback if he had not died prematurely.⁵²³ President Andrew Johnson was elected to the Senate after he left office.⁵²⁴ Belknap had a successful Washington law practice after his impeachment.⁵²⁵ One can easily imagine a relatively young ex-President such as Bill Clinton being interested in a judicial or diplomatic post. There is, of course, a potential for abuse in such a situation, similar to Hypothetical 1 at the beginning of this article⁵²⁶—disqualification might be used as a weapon to defeat the political will of a convict's supporters. This is a problem inherent in impeachment itself, however, and not just late impeachment in particular.

A further advantage of late impeachment is that the punishment is much more flexible. Especially when high-ranking executive officials are tried, removal from office is so weighty and disruptive a penalty that it might preclude adjudication of the impeachment case “on the record.”⁵²⁷ Disqualification is a severe penalty, but it is not mandatory; it is just the maximum.⁵²⁸ A late impeachment could result in a suspension of eligibility for certain offices, or for a certain time, or it might result in no punishment at all.⁵²⁹

To be sure, if Congress were interested in expressing its disapproval of an ex-officer without actually leveling

523. See *id.* at 37.

524. See BUSHNELL, *supra* note 16, at 160 (describing Johnson's post-presidential career); Lawrence Kestenbaum, *Johnson, Andrew (1808-1875)*, in THE POLITICAL GRAVEYARD, at <http://www.politicalgraveyard.com/bio/johnson1.html> (last modified May 13, 2001).

525. See BUSHNELL, *supra* note 16, at 189.

526. See *supra* text accompanying note 1; see also *supra* note 396 (discussing argument of Senator Stone).

527. See *infra* text accompanying note 543.

528. While precedent establishes otherwise, some believe that disqualification is mandatory. See *supra* note 165.

529. See BELKNAP TRIAL, *supra* note 18, at 48 (argument of House managers in late impeachment trial).

punishment, it could simply censure him.⁵³⁰ But this provides a perfect example of the special essence of impeachment. Censure reflects the desire of a bare majority of Congress to make a relatively costless—and weightless—political statement. Impeachment, by contrast, requires a two-thirds majority in the Senate, which essentially requires bipartisan agreement. The very difficulty of obtaining an impeachment conviction casts it as a sober and momentous judgment rather than just a cynical political one. If the Senate determines that punishment is not worthwhile in the case at hand, this reflects its nuanced judgment rather than the inevitable limits of the mechanism itself. Moreover, because of its inherent weight, impeachment represents a determination that similar conduct by others in the future is liable to be held impeachable and, if the target is in office, basis for mandatory removal. An impeachment of one person thus represents a precedent for others, promoting accountability and providing deterrent. By comparison, censure is just congressional froth, as significant as a joint resolution commemorating National Toothpick Week.⁵³¹

In any case, just as disqualification is available as a remedy even though it is rarely necessary, so too is late impeachment available regardless of how infrequently it proves worthwhile.

B. *Punishment Beyond Disqualification*

A practical reason to pursue late impeachment is that disqualification may *not* be the only punishment facing the officer in question. When Senator Arlen Specter suggested in February, 2001 that former President Clinton could still be

530. The constitutionality of censure is a matter of some disagreement, most recently during the Clinton impeachment. See Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 649-50 & nn.73-74 (1999) (citing differing opinions on censure during Clinton impeachment). The argument in favor of the constitutionality of censure is more persuasive. See, e.g., Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33 (1999) (presenting basic argument in favor of constitutionality of censure).

531. As an example, President Jackson's censure by the Senate in 1834 was expunged three years later when his party took control of the Senate. 13 CONG. D.F.B. 504 (1837) (resolution expunging Jackson's censure); Jack Chaney, *The Constitutionality of Censuring the President*, 61 OHIO ST. L.J. 979, 981-82 (2000) (describing episode). If censure actually carried any weight, it would be more likely to be unconstitutional pursuant to the constitutional prohibition against bills of attainder. Compare James C. Ho, *Misunderstood Precedent: Andrew Jackson and the Real Case Against Censure*, 24 HARV. J.L. & PUB. POL'Y 283, 290 (2000) (arguing that censure violates prohibition on attainder), with Gerhardt, *supra* note 530, at 34 (arguing that Congress has the authority to "pass a non-binding resolution expressing an opinion" such as censure).

impeached, he did not even mention the possibility of disqualifying Clinton from future office. Instead, Specter indicated that if convicted, the ex-President would lose his perquisites:

President Clinton technically could still be impeached. And you say how can that happen, he's out of office? Because a president may be impeached for the emoluments of office, such as the substantial sums being spent on the library, such as the bodyguards, such as his pension.⁵³²

Although Specter was correct (if lonely) in asserting that Clinton could still be impeached, he was wrong to state that Clinton's punishment upon conviction could include stripping him of his "emoluments." Federal law currently provides that a President who is impeached does lose his pension and other benefits, but only if he is impeached while in office.⁵³³ Therefore, impeaching Clinton would not affect his emoluments.⁵³⁴

All of this means that if a malfeasing President is interested in keeping his pension, he need only wait until the end of his term to commit his impeachable offenses. To avoid this sort of misincentive,⁵³⁵ Congress should change the law to make clear—prospectively—that an impeached and convicted President (or other official) does not deserve to reap millions in federal benefits, regardless of when the offenses and impeachment occur. This would add teeth to late impeachment and make it much more likely to be a worthwhile exercise of congressional resources. It would also prevent the awkward situation of Congress using a pension as an improper bargaining chip to induce resignation.⁵³⁶

532. *Fox News Sunday* (Fox News Channel television broadcast, Feb. 11, 2001) (transcript available at 2001 WL 7790809); *see also* text accompanying note 509 (expressing similar belief by Watergate-era commentators).

533. 3 U.S.C. § 102 (1994) ("As used in this section, the term 'former President' means a person . . . whose service in such office shall have terminated other than by removal pursuant to section 4 of article II of the Constitution of the United States of America[.]").

534. Changing the law just to reach Clinton might have constituted an unconstitutional bill of attainder. If it would *not* have been an attainder, Congress could have passed a law stripping Clinton of his benefits without bothering to go through the cumbersome impeachment process.

535. *See infra* Part VIII.D.

536. Congress apparently continued the impeachment proceedings against Judge Warren Davis even after he had resigned from office, until he agreed to give up his pension. *See* Turley, *supra* note 165, at 75 n.359.

One could argue that making the punishment on conviction include such a severe financial penalty would violate the constitutional provision that “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.”⁵³⁷ If this is true, however, it makes the current presidential benefits law unconstitutional as well. More to the point, the law defining the benefits of ex-Presidents operates independently of the impeachment process—it is a law approved by both houses and the President, and losing the pension would be based on the operation of the pension law, not on the “judgment” of the Senate in the impeachment case.⁵³⁸

C. Precedent

As in the rest of our common-law system, impeachment cases not only affect the principals of the immediate controversy, but also establish the principles that future cases will follow. An impeachment case may present issues on which Congress wishes to establish precedents, and late impeachment may be the only way to do this successfully.

Hypothetical 3 presents an example of a potential case in this vein.⁵³⁹ If the issue is whether a certain type of conduct is impeachable, regardless of its criminal nature, there is no substitute for impeachment to develop the precedent. Impeachment convictions and acquittals are rare, but they do serve to telegraph to other officials which conduct will, or will not, be tolerated. If Congress feels the need to resolve an issue by setting such a precedent, it might wish to proceed even if the target is no longer in office.

D. Timing

Another reason that a late impeachment would be appropriate is timing. Ideally, holding all other things equal, an offense committed near the end of an officer’s tenure would be

537. U.S. CONST. art. I, § 3, cl. 7.

538. One could respond that the lucrative post of ex-President is, in a sense, an “office” of “profit,” from which removal and disqualification is acceptable, but this seems too cute. *Cf.* Kalt, *supra* note 13, at 797 (using disqualification language in discussing congressional power to provide for ex-Presidents).

539. *See supra* text accompanying note 3.

treated the same as one occurring at the beginning. At the beginning of a presidential term, if the President or a cabinet member commits an impeachable offense, he can be impeached, removed, disqualified, and prosecuted. At the end of the term, given the cumbersome nature of the impeachment process, he can only be prosecuted.

To be sure, this difference may just boil down to the value of disqualification, and as argued above disqualification often will not be enough to warrant proceeding with a late impeachment.⁵⁴⁰ On the other hand, the fact that disqualification usually will not matter does not justify taking it off the table for the cases in which it *would* matter. And if stripping the President of millions of dollars worth of benefits is added to the mix,⁵⁴¹ the incentive effect would easily be significant enough. Moreover, criminal prosecution is rarely if ever certain in the sorts of cases that lead to impeachments.⁵⁴²

One might also argue that, for Presidents anyway, late impeachment is preferable to “regular” impeachment precisely because it does not involve removal. Thus, it is the “least disruptive way” to adjudicate presidential misconduct, and it ensures that external factors will not unduly sway the sober judgment of the Senate.⁵⁴³

Without late impeachability, then, lame-duck officials are situated in a way that allows them to perpetrate offenses against the United States with relative impunity. Any disincentives to such conduct that can be erected would improve this situation, and late impeachment is an obvious way to do just that.

E. *Congress Defends Its Turf*

The structural problems that late impeachment helps to avoid have already been described.⁵⁴⁴ Congress might find itself in a case where an executive or judicial official is thumbing his nose

540. See *supra* Part VIII.A.

541. See *supra* Part VIII.B.

542. See *supra* note 235.

543. See Bestor, *supra* note 133, at 281 (“The removal of the actual head of state, however, is potentially so threatening to the stability of government itself, that public opinion is usually prepared to allow precedents of executive usurpation to accumulate rather than run the risks involved in impeachment. Such risks, however, disappear if a President is made to answer for willful violations of the supreme law after he has ceased to be in office.”).

544. See *supra* Part V.

at his would-be impeachers. If Congress is interested in preserving its role in government oversight, it would have to take action through late impeachment. If an official's resignation amounts to something of a guilty plea and achieves removal without the expense and distraction of an impeachment trial, Congress would have no reason to proceed just to protect its turf. If, by contrast, the resignation is calculated to avoid disqualification, maintain a pension, or preempt public inquiry,⁵⁴⁵ then Congress will want to assert itself. Thumbing one's nose at Congress (as the President does in Hypothetical 4⁵⁴⁶) would be—and should be—a surefire way to spur Congress to pursue a late impeachment.⁵⁴⁷

F. *Quick and Easy*

One objection to late impeachment is actually a reason in its favor. Given how cumbersome the impeachment process is, critics ask, why bother impeaching an ex-officer when the criminal justice system will probably handle the case itself? If an official is in office, impeachment is necessary to remove him even if he is convicted of a crime.⁵⁴⁸ Once he is out of office, though, removal is irrelevant, and the punishments that a judicial court can dole out may represent adequate punishment. Indeed, the punishment for violating the federal bribery statute can include disqualification (though this provision would seem to be of dubious constitutionality).⁵⁴⁹

545. Congress can still hold hearings and launch investigations without holding full-blown impeachment proceedings. However, the impeachment process can be started by anyone. Regular hearings, by contrast, require as a practical matter that a committee chairman be interested in pursuing the matter. Depending on the party and power alignments in Congress, impeachment may be the only way to bring the case to the forefront. *See supra* Part V.D (discussing role of impeachment in light of congressional power to launch lesser investigations).

546. *See supra* text accompanying note 4.

547. *Cf.* BELKNAP TRIAL, *supra* note 18, at 87 (opinion of Senator Sherman) ("It is not likely that the power to impeach persons not in office, for official misconduct when in office, will often be invoked, and only in extreme cases and when the offender flees from justice by resignation.").

548. A striking example of this fact occurred in 1986, when Judge Harry Claiborne was convicted of tax evasion. Claiborne was sentenced to prison, where he sat receiving his judicial salary, apparently intending to retake his seat on the bench when his sentence expired. BUSHNELL, *supra* note 16, at 289. This moved the House to impeach him. *Id.* at 293. This spectacle recurred three years later in the case of Judge Walter Nixon, who refused to resign despite being imprisoned. *Nixon v. United States*, 506 U.S. 224, 227 (1993).

549. *E.g.*, 18 U.S.C. § 201(b) (1994) (specifying that person convicted under bribery provision "may be disqualified from holding any office of honor, trust, or profit under

On the other hand, if a person is out of office and is being pursued by the criminal justice apparatus, there is much less reason *not* to impeach him—after the criminal process has run its course. Because the impeachment is “late” already, there would be little pressure to conclude the impeachment quickly. Congress can simply wait for the criminal case to conclude and, if guilt is obvious, use the record developed by the court to perform an expedited impeachment and trial.⁵⁵⁰ For this reason, if the pragmatic decision on whether or not to launch a late impeachment is based on a cost-benefit analysis, the “cost” may be much less than that of a regular impeachment.

G. Potential Abuse

As a final note, one might argue that giving Congress the ability to impeach ex-officers introduces a dangerous potential for abuse. The impeachment power is one of the few held by Congress that carries with it no inter-branch check or balance. From its early near-abuse by Jeffersonians in the early 1800s to its highly politicized use against Presidents Johnson and Clinton, this dangerous potential of impeachment has often been at the forefront of debate.

While as a practical matter, late impeachment may be susceptible to abuse, it is, however, subject to the same safeguard that has prevented abuse of regular impeachment—the fact that

the United States”); *id.* § 1901 (covering disbursing officers trading in public property). Similar provisions date back to the First Congress. *See* Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 112, 117 (“Act for the Punishment of [C]ertain Crimes [A]gainst the United States.”).

Notwithstanding this fact, the constitutionality of such laws is questionable. “[T]he Bribery Act of 1790 was never enforced, in part because of concerns about its constitutionality.” GERHARDT, *supra* note 12, at 20. The Constitution would seem to allow the President to appoint and remove whomever he likes, subject only to Senate confirmation in certain cases. Admittedly, though, the courts would probably reject this argument if push came to shove. *See* *United States v. Espy*, 145 F.3d 1369, 1372 (D.C. Cir. 1998) (“[W]e have little doubt that Congress could legitimately restrict Agriculture Department officers to those not convicted under the Meat Inspection Act.”); *see also* *Myers v. United States*, 272 U.S. 52, 128 (1926) (arguing that Congress can prescribe qualifications for offices, so long as “the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation”).

550. Congress proceeded quickly, if not as quickly as it could have, in the cases of Judges Walter Nixon and Harry Claiborne, both of whom had already been convicted of crimes when they were impeached. *See* *Nixon*, 506 U.S. at 227-28 (describing Nixon trial, which entailed four days of hearings and three hours of floor debate); BUSHNELL, *supra* note 16, at 293-301 (describing Claiborne trial, which entailed seven days of hearings and three days of Senate deliberation); *cf.* GERHARDT, *supra* note 12, at 45 (noting that despite “ample discovery” in criminal trials, Nixon case entailed substantial pretrial workload).

conviction is designed to be difficult to achieve.⁵⁵¹ Indeed, the Jeffersonian Republicans failed to convict Justice Chase and the rest of *The Federalist* judiciary; the Radical Republicans failed to convict President Johnson; and the latter-day Republicans failed to convict President Clinton. The reasons are many, but most can be tied back to the original design of impeachment. Trial is placed in the Senate because it is designed to be a deliberative and relatively careful body.⁵⁵² A two-thirds majority is required for conviction in order to require that an impeachment conviction cannot occur without bipartisan support or, in the unusual event that one party has a two-thirds majority in the Senate, without unusual party unity. In any case, the impeachers and triers are accountable to the voters. These structural safeguards are adequate for regular impeachment, and they are just as adequate for late impeachment.

H. Conclusion

While late impeachment is usually not worth pursuing, this Part of the Article has sketched out some reasons why it may be in future cases. The punishments available—disqualification and possibly others—may prove compelling. The case may present a unique opportunity to set a precedent or a good way to make an example of a lame duck offender. If the officer's affront to congressional power is too great, late impeachment provides a structured and restrained method of defending Congress's honor. Finally, the costs would be lower and the potential for abuse no higher than with regular impeachment.

IX. CONCLUSION

Late impeachment provides a difficult problem of constitutional interpretation. It confronts an ambiguous portion of the text, which renders unclear whether the political focus of impeachment limits just the offenses and offenders who can be pursued or whether it also restricts the timing of the proceedings as well. But if the text is unclear, the history underlying it is not. Late impeachment was practiced in England and, unlike other aspects of English impeachment, was never

551. See *BELKNAP TRIAL*, *supra* note 18, at 94 (opinion of Senator Wright) (making similar structural point about abuse); *id.* at 112 (opinion of Senator Mitchell) (same).

552. *THE FEDERALIST* NO. 65, at 397-98 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

explicitly ruled out in America, either in pre-1787 state constitutions or in the federal one. Indeed, some state constitutions made late impeachability explicit or even required.

Constitutional structure is also consistent with late impeachability. If the only purpose for impeachment were removal, then there would be no reason to conduct a late impeachment. But removal is not the only purpose of impeachment. Impeachment is designed as a deterrent to prevent offenses from occurring in the first place, and this deterrent effect would be severely undermined if it faded away near the end of a term. Moreover, convicted impeachees can be disqualified from future federal office, an important punishment that the offender himself should not be able to moot. Nor should the President be able to preempt a full investigation or full punishment; the Constitution forbids the President from using his pardon power to achieve these ends, and late impeachment is the only way to prevent an end run around this clear structural imperative. Although some opponents of late impeachment make allowances for these extreme cases by allowing *some* late impeachments, in reality, no constitutional basis exists for distinguishing between them.

Finally, precedent favors late impeachability. Admittedly, there is no wholly clear and binding authority. States construing similar provisions have come to mixed results. But the Senate, which, in the end, is the final arbiter of this question, has approved late impeachment. Senate opponents of late impeachment may have prevented convictions, but they have not prevented late trials, and they cannot alter the formal declaration of a majority of the Senate that officers can be impeached after they have left office.

In practice, late impeachment may rarely if ever prove worthwhile to pursue. Then again, one can imagine several scenarios in which it might. Even if no occasion ever arises in which late impeachment is worthwhile to pursue, this would place late impeachment in the same class as regular impeachment—more important to have available than to actually use. No federal executive official has ever been impeached and convicted, either while in office or after leaving it, but every federal officer is appropriately constrained by the possibility of impeachment, and it is only with late impeachment that this constraint can be properly whole.

