Maryland Law Review

Volume 52 | Issue 2 Article 8

Federal Impeachment and Criminal Procedure: the Framers' Intent

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FEDERAL IMPEACHMENT AND CRIMINAL PROCEDURE: THE FRAMERS' INTENT

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On April 17, 1936, the United States Senate voted on whether to convict federal district judge Halsted L. Ritter on seven articles of impeachment.[1] The first six articles alleged a variety of offenses ranging from bribery to champerty.[2] The seventh, an omnibus article, contained no new factual material.[3] It charged that Ritter, by his actions alleged in the first six articles, had brought himself, his court, and the federal judiciary into disrepute, and that the Senate should thus remove him from the bench.[4]

Although the Senate acquitted Ritter on articles one through six, it convicted him on the omnibus article by a bare two-thirds majority—the constitutional requirement for his removal.[5] Ritter had earlier objected to the seventh article on the grounds that it merely repeated the preceding allegations.[6] Now he had further grounds for objection; the Senate had acquitted him on the first six articles, and then proceeded to convict him of an offense based on the same factual allegations. Ritter filed suit, alleging, *inter alia*, that the Senate had violated the Fifth Amendment prohibition on double jeopardy.[7]

Ritter's lawsuit inaugurated a new era in the history of federal impeachment. Never before had the subject of a federal impeach-

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1. Impeachment of Halsted L. Ritter, 80 CONG. REC. 5602-08 (1936) [hereinafter *Ritter Proceedings*]. *See also Proceedings of U.S. Senate in Trial of Impeachment of Halsted L. Ritter*, S. Doc. No. 200, 74th Cong., 2d Sess. 627-39 (1936), *reported in* U.S. Congressional Serial Set, No. 10006, at 627-68 (1936).

2. *Ritter Proceedings*, 80 CONG. REC. at 5602-08.

3. *Id.* at 5606.

4. *Id.*

5. The vote was 56-28, with 12 senators absent or excused. *Id. See* U.S. CONST. art. I, § 3, cl. 6 ("[N]o Person shall be convicted without the Concurrence of two thirds of the Members present.").

6. *See* Ritter v. United States, 84 Ct. Cl. 293, 294 (1936), *cert. denied*, 300 U.S. 668 (1937).

7. Petition at 63, *Ritter* (No. 43333). The Fifth Amendment states, in pertinent part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

ment sought judicial review of the process.[8] Since Ritter's case, however, impeachment defendants consistently have attempted judicial redress at some point during or after the impeachment proceedings.[9] Although these individuals have sought different remedies and challenged the Senate on a variety of grounds, one common element clearly runs through all of the cases. Every impeachment defendant has either expressly or impliedly asserted that he was entitled to due process or other criminal procedural rights, and that Senate actions denied him those rights.[10] Still, however, the debate continues, for no court has authoritatively stated the degree to which Bill of Rights criminal procedural guarantees apply to impeachment.[11]

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8. *See Ritter*, 84 Ct. Cl. at 297 (noting that "the question now being considered has never been presented to a Federal Court in relation to the impeachment of a Federal officer").

9. *See, e.g.*, Nixon v. United States, 113 S. Ct. 732 (1993); Hastings v. United States Senate, 887 F.2d 332 (D.C. Cir. 1989) (unpublished disposition).

10. *See, e.g.*, Plaintiff's Reply Memorandum and Opposition to Defendant's Motion for Judgment on the Pleadings or for Summary Judgment at 7-8, Nixon v. United States, 744 F. Supp. 9 (D.D.C. 1990) (No. 89-3154-LFO) (appealing to notions of fairness), *aff'd*, 938 F.2d 239 (D.C. Cir. 1991), *aff'd*, 113 S. Ct. 732 (1993); Complaint for Declaratory and Injunctive Relief at 34-36, Hastings v. United States Senate, 716 F. Supp. 38 (D.D.C.) (No. 89-1602) (challenging Senate action on fundamental fairness and due process grounds, and arguing that an impeachment defendant is entitled to sufficient funding to obtain the effective assistance of counsel), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989), *reprinted in Proceedings of U.S. Senate in Impeachment Trial of Alcee L. Hastings*, S. Doc. No. 18, 101st Cong., 1st Sess. 868-70 (1989), *reported in* U.S. Congressional Serial Set, No. 13916, at 868-70 (1991) [hereinafter *Hastings Proceedings*]; Brief of Appellant at 45-48, Hastings v. United States Senate, 887 F.2d 332 (D.C. Cir. 1989) (No. 89-5188) (maintaining that the double jeopardy prohibition barred his impeachment trial, and that the lengthy delay before the presentation of articles of impeachment violated the Fifth Amendment Due Process Clause), *reprinted in Hastings Proceedings*, *supra*, at 1026-29; Reply Brief of Appellant at 14, Nixon v. United States Senate, 887 F.2d 332 (D.C. Cir. 1989) (No. 89-5191) (seeking not to enforce every requirement of modern criminal due process, but rather "only . . . the constitutional requirement that the decision-makers in the impeachment case actually hear and see the witnesses"), *reprinted in Hastings Proceedings*, *supra*, at 1236; Complaint for Declaratory and Injunctive Relief at 7-8, Claiborne v. United States Senate, No. 86-2780 (D.D.C. Oct. 8, 1986) (arguing that the Senate's action constituted a due process violation, a deprivation of the effective assistance of counsel guaranteed by the Sixth Amendment, and a denial of the right to confront one's accusers), *reprinted in Proceedings of U.S. Senate in Impeachment Trial of Harry E. Claiborne*, S. Doc. No. 48, 99th Cong., 2d Sess. (1986), *microformed on* Sup. Docs. No. Y 1.1/3:99-48, at 170-71 (U.S. Gov't Printing Office) [hereinafter *Claiborne Proceedings*].

11. *See, e.g.*, *Hastings*, 716 F. Supp. at 41 ("While *some* process is clearly due [the impeachment defendant], rights are not *necessarily* compromised by varying from the rights and process accorded defendants in criminal proceedings." (emphasis added)). *See also* Hastings v. United States, 802 F. Supp. 490, 504 (D.D.C. 1992) ("There is no reason to believe that the full panoply of due process protections that apply to a trial by an Article III court necessarily apply to every [impeachment] proceeding . . . . However,

The central issue involved in these debates—whether impeachment is a criminal process—is actually an old one. Throughout impeachment's history—both in England and the United States—lawyers, politicians, and scholars have debated this question.[12] Generally the debate has focused on whether the process will lie for nonindictable offenses, or indictable crimes only.[13] Related questions deal with the nature of the penalty that the convicted defendant receives.[14] The applicability of the criminal protections of the

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they must be conducted in keeping with the basic principles of due process that have been enunciated by the courts and, ironically, by the Congress itself.").

Although no court has authoritatively stated the extent to which these protections apply to impeachment, the Supreme Court has determined that Senate impeachment proceedings ordinarily are not subject to judicial review. In Nixon v. United States, 113 S. Ct. 732 (1993), the Court ruled that whether the Senate properly tried an impeachment was a nonjusticiable political question. *Id.* at 740. Implicit in this ruling is the Court's belief that criminal procedural guarantees do not apply to impeachment. *See* discussion *infra* note 117.

12. For a sampling of scholarly discussion of the criminal process issue, see RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 78-85 (1973); 4 WILLIAM BLACKSTONE, COMMENTARIES 258-61 (1783); PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635-1805 (1984); COLIN G.C. TITE, IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND 1 (1974); Wrisley Brown, *The Impeachment of the Federal Judiciary*, 26 HARV. L. REV. 684 (1913); Theodore W. Dwight, *Trial by Impeachment*, 6 AM. L. REG. (N.S.) 257 (1867) (may also be cited as 15 AM. L. REG. 257 (1867)); George H. Ethridge, *The Law of Impeachment*, 8 MISS. L.J. 283 (1936); Edwin B. Firmage, *The Law of Presidential Impeachment*, 1973 UTAH L. REV. 681, 684-87; Philip B. Kurland, *Watergate, Impeachment, and the Constitution*, 45 MISS. L.J. 531 (1974); William Lawrence, *The Law of Impeachment*, 6 AM. L. REG. (N.S.) 641 (1867) (may also be cited as 15 AM. L. REG. 641 (1867)); Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 YALE L.J. 1419 (1975); E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1028, 1040 (1975).

13. *See* 4 BLACKSTONE, *supra* note 12, at 259-60 ("[A]n impeachment . . . is a prosecution of the already known and established law . . . . [A] peer may be impeached for any crime."). Though BERGER, *supra* note 12, at 7-52, suggests that impeachment in Stuart England was not limited to indictable offenses, other commentators have vigorously disagreed. *See* Roberts, *supra* note 12, at 1439; Dwight, *supra* note 12, at 269 ("[U]nless the crime is specifically named in the constitution, impeachments like indictments can only be instituted for crimes committed against the statutory law of the United States."). *But see* Lawrence, *supra* note 12, at 658-65 (arguing that impeachment is not confined to indictable offenses); Kurland, *supra* note 12, at 535-59 (rejecting the view that impeachment should be treated as a mere trial for criminal conduct); Brown, *supra* note 12, at 689-92 (concluding that impeachment may be had not only for violation of criminal laws, but also for "an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in it natural consequences, tends to bring an office into contempt and disrepute").

14. *See* Kurland, *supra* note 12, at 565-81 (discussing the nature of the sanctions available in a criminal proceeding); Firmage, *supra* note 12, at 698-704 (concluding that impeachment is a political rather than criminal process, concerned more with protecting government than with punishment and retribution); Lawrence, *supra* note 12, at 655

Bill of Rights is yet another dimension of this debate,[15] one that parties have focused upon during their struggles in federal courts.[16]

Recent litigants have gone to great lengths to justify their respective positions on this issue, examining the text of the Constitution and the Framers' intent. Likewise, a number of judicial opinions have included discussions of original intent in an attempt to define the full scope of the Senate's powers and its limitations.[17] One judge, for instance, remarked in a 1986 case that the Framers meant to separate impeachment from both civil and criminal processes.[18] He then, however, acknowledged that "[s]cholars have said that the Due Process Clause applies even to the impeachment power."[19]

Despite judges' increasing tendency to apply at least some degree of due process to impeachment proceedings—and despite their efforts to discern the Framers' intent—they have failed to recognize accounts of an early episode of crucial importance to this continuing controversy. Almost completely forgotten today is an extended debate that took place on the floor of the United States Senate in February 1798. In this debate, the Senate authoritatively decided the very issue that has plagued Congress, the courts, and impeachment defendants since 1936.

The debate took place in the Fifth Congress during the impeachment of Senator William Blount—the first impeachment to take place under the new Constitution.[20] Several members of the Constitutional Convention were directly involved, both as senators

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(suggesting that "[t]he purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law").

15. *See, e.g.*, BERGER, *supra* note 12, at 81-84 (discussing the right of trial by jury in the impeachment of William Blount); Ethridge, *supra* note 12, at 294 (suggesting that the rule against double jeopardy applies to impeachment).

16. *See, e.g.*, Hastings v. United States, 802 F. Supp. 490, 500, 504-05 (D.D.C. 1992) (discussing the applicability of the Sixth Amendment criminal protections and Fifth Amendment Due Process procedures to impeachment proceedings); Hastings v. United States Senate, 716 F. Supp. 38, 41 (D.D.C.) (holding that double jeopardy did not bar impeachment), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989).

17. *See, e.g.*, *Hastings*, 802 F. Supp. at 503 (discussing the scope of the Senate's power); Nixon v. United States, 938 F.2d 239, 242-46 (D.C. Cir. 1991) (discussing the Framers' intent and the Senate's power), *aff'd*, 113 S. Ct. 732 (1993).

18. *See Claiborne Proceedings*, *supra* note 10, at 192 (incorporating the trial court transcript).

19. *Id.* at 192-93 (quoting from the trial court transcript). *See also* Hastings v. United States Senate, 716 F. Supp. 38, 41 (D.D.C. 1989), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989); Nixon v. United States, 744 F. Supp. 9, 12-13 (D.D.C. 1990), *aff'd*, 938 F.2d 239 (D.C. Cir. 1991), *aff'd*, 113 S. Ct. 732 (1993).

20. *See* UNIVERSAL GAZETTE, Mar. 29, 1798, at 4, col. 4. *See generally* WILLIAM H. MASTERSON, WILLIAM BLOUNT (1954); HOFFER & HILL *supra* note 12, at 151-63.

and commentators.[21] Other participants included senators who had served in the First Congress, which approved the Bill of Rights in its final form.[22] Thus, this debate provides an accurate account of the Framers' original intent regarding the role of the Bill of Rights's criminal procedural guarantees in the impeachment process.

I. HISTORICAL BACKGROUND TO THE IMPEACHMENT OF WILLIAM BLOUNT

The last decade of the Eighteenth Century was an eventful period in American history. The infant national government was beginning to develop as the country became accustomed to its new Constitution. By the late 1790s, the politically dominant Federalist Party had done much to transform this relatively new document into a working system of government, spawning major debates as theoretical constitutional issues became concrete political problems.[23]

Generally, the Federalist Party was broad constructionist in outlook, working constantly to increase the vitality of the new government.[24] In matters of foreign policy, the Federalists were sympathetic toward Great Britain in that country's struggle against revolutionary France.[25] The party drew most of its support from the eastern seaboard; farther inland lay the stronghold of the Republican Party.[26]

The Republicans of the 1790s tended to be strict constructionists, distrusting the power of the central government because,

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21. *Compare* DAVID G. SMITH, THE CONVENTION AND THE CONSTITUTION 93-94 (1987) (listing the delegates at the Constitutional Convention) *with* 7 ANNALS OF CONG. 508 (1798) (listing the senators who were involved in the Blount debate).

22. *Compare* KENNETH C. MARTIS, THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS 1789-1989, at 70 (1989) (listing the members of The First Congress) *with* 7 ANNALS OF CONG. 508 (1798) (listing the senators involved in the Blount debate).

23. *See* JOHN C. MILLER, THE FEDERALIST ERA 1789-1801, at 56-57 (1960) (discussing the constitutional controversy surrounding the Bank of the United States, and the positions of Andrew Hamilton, a leading Federalist, and James Madison, a leading Republican); *id.* at 65-67 (discussing the Tariff Act of May 1792, which provided government aid to manufacturers); *id.* at 231-34 (discussing the Sedition Act of 1798).

24. *See id.* at 109-10.

25. *See generally* REGINALD HORSMAN, THE DIPLOMACY OF THE NEW REPUBLIC, 1776-1815, at 42-78 (1985) (discussing the disagreement among American leaders regarding foreign policy objectives in 1789); MILLER, *supra* note 23, at 142-43.

26. *See* MILLER, *supra* note 23, at 100 ("In general, Federalism was weakest in the West, strongest in the cities, . . . and firmly established among the prosperous farmers and planters of the eastern seaboard." (citation omitted)); *see also* MARTIS, *supra* note 22, at 70-75 (containing maps illustrating the party affiliations of congressional representatives by district).

among other things, their political enemies controlled it.[27] Opposed to the monopolizing spirit of commerce, Republicans "spoke in the name of American agriculture."[28] Republicans also differed with Federalists in foreign matters, favoring France over England.[29]

This partisan difference in foreign policy outlook was no mere theoretical contest. While large-scale American involvement overseas still lay generations in the future, the great powers of Europe were heavily involved in the New World.[30] Among other places where one might encounter the forces of Britain, France, or France's ally Spain, was the American frontier.[31] And in the 1790s the United States reached inland only as far as the Mississippi River.[32] Across the Mississippi, sweeping from the Gulf of Mexico northwestward to the Rocky Mountains, lay the Spanish territory of Louisiana.[33]

This Spanish presence—and the accompanying and constant threat of a French acquisition of the territory—worried many Americans.[34] With the advent of war between Britain and Spain in October of 1796, many feared that France would demand Louisiana from Spain in return for its alliance.[35] Especially concerned were the frontiersmen and land speculators of the West who depended upon the Mississippi for transportation and land sales to settlers for income.[36] The prospect of powerful France exerting control over the Louisiana Territory and the Mississippi River would surely diminish the value of the speculators' investments.[37]

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27. *See* MILLER, *supra* note 23, at 102-04. A classic illustration of the Republican strict-constructionist position is Jefferson's debate with Hamilton on the Bank of the United States. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 78-80 (12th ed. 1991); *see generally* Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. 167 (3d Series 1974).

28. MILLER, *supra* note 23, at 105.

29. *See id.* at 126-27, 142-43.

30. *See* HORSMAN, *supra* note 25, at 41; MILLER, *supra* note 23, at 185.

31. *See* MILLER, *supra* note 23, at 185.

32. *Id.*

33. *See* HORSMAN, *supra* note 25, at 86-87.

34. *See id.* at 88-89.

35. MASTERSON, *supra* note 20, at 301-02.

36. HORSMAN, *supra* note 25, at 88-89.

37. MILLER, *supra* note 23, at 190. *See also* Letter from Nicholas Romayne to William Blount (Mar. 17, 1797), *in* FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES 214 (Burt Franklin 1970) (1849) ("I readily see that, as the French are a military and not a commercial people, that if they do get possession, they will oblige the western people to come into all their measures and caprices, or they will shut up the navigation—they will sow discord among the people, and the value of lands and all property will be greatly reduced."); 8 ANNALS OF CONG. 2346 (1798) (reprinting the same letter but missing the first 14 words of the above-quoted sentence).

One concerned individual was a Tennessean named William Blount.[38] Blount first came to national prominence while serving in the Continental Congress, and later in the Constitutional Convention.[39] Through his connections, this leading southern land speculator won an appointment as Governor of the Southwest Territory in 1790.[40] A Federalist at first, Blount eventually came to reflect the dominant political outlook of his region, joining the Republicans by the mid-1790s.[41]

By 1796, Blount and others believed that Tennessee, which comprised a large part of the Southwest Territory, was ready for statehood,[42] and Congress agreed.[43] Blount, arguably the leading political figure in the region, became one of the first two United States senators from the new state.[44]

Economic conditions on the frontier and Blount's own finances, however, were to be the new Senator's downfall. Blount had invested every personal resource to purchase large tracts of land in the western United States with the hope that he could realize significant income from its sale to settlers.[45] Financially overextended, Blount could not afford to see his investments fail. Therefore, in an effort to end the foreign threat to the West—and to his land holdings—the Senator decided to raise an army of frontiersmen to liberate Spanish-controlled Louisiana.[46] To this end, Blount, in great secrecy and through intermediaries, approached the English authorities and requested both money and material assistance.[47] Blount hoped that as a result of his plan, England would win New World territory,[48] frontiersmen would gain assurance of free trade and ac-

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38. *See* MILLER, *supra* note 23, at 190. Blount was described as ". . . an original. An early version of the wheeling and dealing, land speculating, sharp-nosed manipulator, politician, and financier, he knew how to get what he wanted—and usually by the shortest route." ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE, 1767-1821, at 51 (1977).

39. *See* MASTERSON, *supra* note 20, at 110-33.

40. *See id.* at 174-79.

41. *See id.* at 297-98.

42. *See id.* at 282-84.

43. Tennessee was admitted into the Union on June 1, 1796. *See* ch. 47, 1 Stat. 491 (1796).

44. MASTERSON, *supra* note 20, at 292-96.

45. *Id.* at 298-99. Blount was "utterly and irretrievably committed to a realization on his land interests with no alternative save absolute ruin." *Id.* at 299.

46. *Id.* at 303-08; MILLER, *supra* note 23, at 190.

47. *See* MASTERSON, *supra* note 20, at 307-10; MILLER, *supra* note 23, at 190.

48. MASTERSON, *supra* note 20, at 307. In exchange for England's assistance, Blount planned to let it take control of Louisiana, and to grant it access to the Mississippi. *Id.*

cess to the interior,[49] and Blount himself would secure new settlers and purchasers for his vast tracts of realty.[50]

Blount's nebulous dream turned to ashes, however, when an incriminating letter from him to one of his compatriots fell into government hands in April 1797.[51] Walking into the Senate chamber on July third, Blount had the shock of hearing the clerk read the letter aloud.[52] The senators, outraged that one of their colleagues would plan such foreign exploits, expelled him within a week.[53] The House of Representatives, whose members were equally incensed, impeached Blount even before his expulsion.[54] Thus, the first federal impeachment came to fruition.

The Blount impeachment continued for eighteen months before its final resolution.[55] Like many other issues of the day, the impeachment was an occasion for intense discussion about the concrete application of new, untried constitutional provisions. The debate that took place in February 1798 was just one of many, but in light of recent developments in late twentieth-century impeachment jurisprudence, it was a debate of particular importance.

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49. *See supra* note 37.

50. *See* MASTERSON, *supra* note 20, at 304-05.

51. *See id.* at 315-17.

52. *Id.* at 316. *See also* Letter from William Blount to James Carey (Apr. 21, 1797), *in* WHARTON, *supra* note 37, at 216-17. Blount must have been very surprised, considering that he had instructed the letter's recipient, James Carey, to "read this letter over three times, [and] then burn it." *Id.* at 217. *See also* 8 ANNALS OF CONG. 2349-50 (1798) (reprinting the same letter).

53. MASTERSON, *supra* note 20, at 321-22; HOFFER & HULL, *supra* note 12, at 151 ("His grandiose plotting, encompassing a cabal of adventurers, a small private army, two Indian tribes, Spain, and Great Britain, was so distasteful to his fellow senators that they expelled him after a mere two days' debate."). Both the House of Representatives and the Senate have the power to expel their respective members. *See* U.S. CONST. art. I, § 5, cl. 2.

54. *See* MASTERSON, *supra* note 20, at 321. By impeaching the Senator, the House obviously wished Blount to suffer the additional penalty of disqualification from holding any future federal office if the Senate proceeded to convict him. *See* HOFFER & HULL, *supra* note 12, at 151, 156-57, 162.

It was not until January 1798, eight months after Blount's impeachment by the House, that the House approved actual articles of impeachment. *See* 7 ANNALS OF CONG. 948-51 (1798). This seemingly backwards process further supports my argument that the Framers favored procedural laxity in the impeachment context.

55. Impeachment charges were entered against Blount on July 7, 1797, *see* MASTERSON, *supra* note 20, at 321, and on January 11, 1799, the Senate dismissed the impeachment for want of jurisdiction. *Id.* at 342. *See* 8 ANNALS OF CONG. 2318-19 (1799).

II. THE DEBATE

In early 1798, some members of Congress had been mentioning, informally, the possibility that the Sixth Amendment requirement of a jury trial in criminal prosecutions extended to impeachment trials.[56] One such member was Senator Henry Tazewell, a celebrated attorney, former judge, and probably the most popular Virginian of his time.[57] A staunch Republican, Tazewell was a firm believer in strict construction and an opponent of strong central government.[58] Previously one of the foremost judicial officers in Virginia, he was very familiar with his state's constitution, in which impeachment had a decidedly judicial character, requiring the use of juries.[59]

Tazewell enjoyed the friendship and high regard of Vice President Thomas Jefferson, the nation's leading Republican.[60] Jefferson, as presiding officer of the Senate, was hesitant to become involved openly in the Blount impeachment.[61] He did, however, on at least one occasion confidentially volunteer the results of his own private impeachment research to Tazewell.[62] The great English commentators William Blackstone and Richard Wooddeson, Jefferson told his fellow Virginian, held impeachment to be a criminal prosecution.[63] This fact, together with the Constitution's phrase

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56. Vice President Thomas Jefferson had mentioned the issue as early as late January in a private letter to James Madison in which he even ventured to give Madison an estimate of Senate support for the use of juries. *See* Letter from Thomas Jefferson to James Madison (Jan. 25, 1798), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 192-93 (Paul L. Ford ed., 1896) [hereinafter JEFFERSON WRITINGS]. The Sixth Amendment states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI. A full reading of the Amendment reveals the fundamental problem of determining the geographical parameters of an impeachment jury pool.

57. *See* 18 DICTIONARY OF AMERICAN BIOGRAPHY 354 (Dumas Malone ed. 1964).

58. 18 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 57, at 354.

59. Tazewell served on the committee that framed Virginia's state constitution. *Id.* *See* HOFFER & HULL, *supra* note 12, at 70-75 (outlining Virginia's original impeachment process); *infra* text accompanying note 97.

60. 18 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 57, at 354.

61. *See* Letter from Thomas Jefferson to Henry Tazewell (Jan. 27, 1798) *in* 7 JEFFERSON WRITINGS, *supra* note 56, at 195.

62. *See id.* at 194-95. Jefferson cautioned: "[d]o not let the inclosed paper be seen in my handwriting." *Id.* at 195. The enclosed paper contained Jefferson's research results regarding the impeachment issue, including a long list of legal authority. *See* JEFFERSON'S PARLIAMENTARY WRITINGS: "PARLIAMENTARY POCKET-BOOK" AND A MANUAL OF PARLIAMENTARY PRACTICE 11-12 (Wilbur S. Howell ed., 1988) [hereinafter JEFFERSON'S PARLIAMENTARY WRITINGS].

63. Letter from Jefferson to Tazewell, *supra* note 61, at 194.

"high Crimes and Misdemeanors," was more than enough to convince the Vice President that the Constitution required a jury in the Blount impeachment.[64] It was probably a combination of Jefferson's research results and Tazewell's familiarity with Virginia impeachment process that led Tazewell to introduce a surprising resolution before the Senate on February 14, 1798.

On that day, while the Senate discussed a pending bill regarding proper impeachment trial procedures, the Virginia Senator moved that the chamber call a jury to hear the case.[65] The motion produced a combination of amazement and contempt. Jacob Read, an outspoken Federalist senator, demanded that Tazewell elaborate upon his "extraordinary proposition."[66] Read sarcastically insisted that he wished to hear all that Tazewell could say to prove that "such a monster" as a jury of twelve and a court of thirty-two (the senators) belonged within the Senate's walls. Republican Timothy Bloodworth sprang to Tazewell's defense, replying that not everyone was as anxious as Read to dismiss the issue without mature deliberation.[67] Senator Elijah Paine, however, reiterated Read's comments, challenging Tazewell to prove the need for a jury.[68] After this posturing, the Senate decided to delay debate on the motion. On February 16, Tazewell again brought up his proposal,[69] and the Senate addressed for the first time an issue that has undergone debate in scholarly circles ever since—whether impeachment is a criminal process.

Tazewell was the first of several men to speak on that day, and he was well-equipped for battle. At the outset, he acknowledged that some senators would be prejudiced against him based on their own state constitutions or his resort to English precedent, which was necessary to prove his case. He then decried the passions that drove men—by whom he meant the Federalists—to increase, rather than restrain, their power. Having made those preliminary observations, Tazewell proceeded to deliver a lengthy argument that marked him

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64. *See id*; *see also* JEFFERSON'S PARLIAMENTARY WRITINGS, *supra* note 62, at 12 (referencing a letter from Jefferson to Federalist Senator Samuel Livermore, a member of the impeachment committee, suggesting that the committee use his notes for guidance). *See generally* U.S. CONST. art. II, § 4.

65. The substance of the debate on this aspect of the Blount impeachment can be found in a series of newspaper articles. *See* AURORA, Feb. 16, 20, & 28, 1798; UNIVERSAL GAZETTE, Mar. 1 & 29, 1798.

66. AURORA, Feb. 16, 1798, at 2, col. 3.

67. *Id.*

68. *Id.*

69. UNIVERSAL GAZETTE, Mar. 1, 1798, at 4, col. 1.

as perhaps the most innovative and logical rhetorician involved in the Blount case.

The original Constitution, Tazewell observed, contained two pertinent phrases. The first was the provision that granted the Senate the sole power to try all impeachments.[70] The second was a passage in Article III, Section 2 requiring a jury in the trials of all crimes, with the exception of impeachment cases.[71] Under the unamended Constitution, Tazewell conceded, the impeachment process did not require the use of juries. The Sixth Amendment, however, stipulated that *all* criminal trials involve juries, making no express exception for impeachment as had Article III. Therefore, the entire issue rested on two questions: (1) was impeachment a criminal prosecution, and (2) if so, did the Sixth Amendment abrogate the Article III provision? If the answer to both of these questions was "yes," then the Constitution—specifically, the Sixth Amendment—required that the Senate summon a jury. If the answer to either question was "no," a jury would not be necessary.

Tazewell turned first to the question of impeachment's criminal nature, reciting argument after argument to prove that impeachment was a criminal prosecution. Appealing to constitutional terminology, the Senator stressed phrases such as "high Crimes and Misdemeanors," the constitutional standard for impeachable offenses, and the express exception of impeachments from the Article III provision requiring a jury in all criminal trials. This exception, he stated forcefully, revealed that the Framers considered impeachment to be criminal, for otherwise an exception would have been unnecessary.[72] Appealing to English law, he reeled off a string of citations from Blackstone and Wooddeson that must have made Jefferson smile with satisfaction. Then Tazewell resorted to analogy, attempting to show that impeachment bore a number of similarities to indictment. Each process, Tazewell maintained, had as its object the punishment of a defendant; often both processes would reach the same sorts of offenses. He explained that an impeachment tried before a regular court would possess every essential element of an indictment. Because impeachments and indictments were proce-

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70. *Id.* *See* U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

71. UNIVERSAL GAZETTE, Mar. 1, 1798, at 4, col. 1. *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

72. UNIVERSAL GAZETTE, Mar. 1, 1798, at 4, col. 1.

durally indistinguishable, the Senator concluded that the former must be criminal in nature, for the place of trial had no effect upon that nature. Finally Tazewell discounted the possibility that impeachment was *sui generis*, a unique procedure, arguing that only two types of process existed, namely, the civil and the criminal. Impeachment was clearly not civil, and if it were *sui generis*, he continued, then it was a dangerous device, not subject to any legal control.[73] He expressed a strong hope that the Senate "would this day not create such a monster, but confine impeachments to that class of prosecutions which alone could restain [sic] its ferocity."[74]

Having concluded that impeachments were criminal prosecutions, Tazewell endeavored to show that the Sixth Amendment clause modified the original Constitution, extending the jury trial requirement to all criminal prosecutions, including impeachment. Tazewell's primary attack consisted of an analysis of both the Constitution's language and the Framers' intent. He began this attack by observing that the Sixth Amendment contained no impeachment exception. This alone would seem to overrule the original Article III provision, but Tazewell went further. He argued that other than the impeachment exception, no difference existed between the two clauses. A fundamental maxim of legal interpretation, Tazewell informed his audience, was that no clause of a document should be considered meaningless; and yet if the Sixth Amendment was construed such that it did not modify the original clause and extend juries to impeachments, the amendment served no purpose at all.[75]

Turning to the drafters' intent, Tazewell noted that the Sixth Amendment provision, as first proposed by James Madison, did contain the impeachment exception, but that a Senate committee had subsequently removed it. Ignoring the inconsistency between this argument and the immediately preceding one, Tazewell urged that this deletion of an express exception constituted a denial of an exception, and that impeachments therefore required juries. Tazewell then reminded the Senate of the case of Jay's Treaty, in which the House of Representatives, attempting to involve itself in treaty concerns with Great Britain, sought papers on Secretary of State John Jay's negotiations from President Washington's administration.[76]

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73. *Id.* This sentiment lay at the heart of Republican objections to the Federalist goal of a broad impeachment power. *See infra* notes 113-115 and accompanying text.

74. UNIVERSAL GAZETTE, Mar. 1, 1798, at 4, col. 2 (clearly meaning "restrain").

75. *Id.*

76. *Id.* For a discussion of the events surrounding Jay's Treaty, see MILLER, *supra* note 23, at 164-79.

Some senators now opposing Tazewell's motion had opposed the House on that occasion, Tazewell reminded his fellow congressmen. In that instance, Washington had noted that the Framers in 1787 first approved, and then deleted, a constitutional clause that would have given the House the power to obtain Jay's papers. Washington interpreted this to mean that the House did not have the power, and he thus refused to comply with the representatives' request. Tazewell's message was obvious: The Federalist senators who approved Washington's actions in 1796 should now be consistent and adhere to the rule of construction that Washington had then invoked.[77]

The Virginia Senator then moved on to argue from more general principles, such as the need to guarantee impartiality. A jury, he proclaimed, was "the best shield against judicial oppression," and an impeachment defendant, with his reputation and office at stake, should have the benefit of such protection.[78]

Lastly, Tazewell confronted two arguments that were circulating within the Senate. First, some had suggested that state practice did not support the use of juries because certain states with constitutional language similar to the original Article III provision failed to use juries in impeachments. Tazewell replied that this argument ignored the effect of the Sixth Amendment, and further, that the Senate should afford equal consideration to those states that did use juries in impeachments. Second, he dismissed as insufficient the suggestion that the use of a jury would prove inconvenient.[79] Ruling authorities, he said, would always find it inconvenient to share their power with other groups.[80] Inconvenience, he declared, could not bar the exercise of a constitutional right.

As Tazewell concluded his discourse, a number of Republicans immediately requested a postponement in order to consider the Senator's arguments. This motion itself blossomed into a major issue. All Republicans who spoke, together with Federalist Humphrey Marshall (a strict-constructionist), either sought a postponement, or demanded a Federalist answer to Tazewell's speech, or both.[81] The Federalists were torn. Though all who spoke claimed to have made up their minds, some wished to have an op-

77. *See* UNIVERSAL GAZETTE, Mar. 1, 1798, at 4, col. 2; *see also* MILLER, *supra* note 23, at 171-74 (discussing Washington's method of constitutional interpretation in the case of Jay's Treaty).

78. UNIVERSAL GAZETTE, Mar. 1, 1798, at 4, col. 3.

79. *Id.* (declaring that Tazewell "could not believe that a constitutional right ought to be taken away on account of the inconveniencies which might attend its existence").

80. *Id.*

81. *Id.* at 4, cols. 3-4.

portunity to respond. Jacob Read was not one of the latter. He belligerently remarked that when Tazewell first brought up the jury issue, Read had "really tho't it was for merriment."[82] When he had realized that Tazewell was sincere, he listened, but heard nothing to change his mind.

Despite Read's outburst, those senators who desired to allow time for a rebuttal prevailed. For these men the need for a reply seemed a matter of honor. At least two of them denied Republican charges that the Federalists had already secretly agreed to defeat Tazewell's motion.[83] After the debate on postponement had run for some time, James Ross, followed by Richard Stockton, rose to reply to Tazewell.[84] The fact that either of these broad-constructionists could prepare an answer so quickly is suspicious. Each speech, moreover, seems curiously well thought out. The Federalists, their denials notwithstanding, probably did decide beforehand to prepare answers to Tazewell's argument.

In his argument, James Ross did almost exactly what Tazewell had counseled the Senate to avoid. He distinguished impeachment from regular civil and criminal processes, declaring it to be a unique instrument.[85] Ross delineated various types of Anglo-American legal proceeding, mentioning trials at common law, trials in chancery, and trials in admiralty. He added to this list trials by impeachment. All of these, he stated, were substantively and procedurally different from each other. Impeachment, then, was by no means the only example of a process other than a civil or criminal common law proceeding. Ross concluded that impeachment was not a criminal prosecution, but instead a trial of a government officer for breach of duty.[86]

Ross then asked the Senate to consider the result if an impeachment jury acquitted a defendant but two-thirds of the Senate voted to convict.[87] Not pausing to dwell on this point, he noted that impeachment defendants were liable to criminal prosecution in the

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82. *Id.* at 4, col. 3.

83. *Id.* at 4, col. 3 (explaining how one Federalist insisted that "[h]e knew of nothing to warrant the insinuation that a decision on this question had been made out of doors").

84. *See* AURORA, Feb. 20, 1798, at 3, col. 1.

85. *See* AURORA, Feb. 28, 1798, at 2, col. 2.

86. *Id.*

87. *Id.* (questioning, "[I]f two thirds of the Senate agreed to the guilt of the accused, were they to pass sentence tho' the jury had returned a verdict of not guilty; were they to be deprived by the jury of the exclusive power given them by the constitution to try impeachment?").

regular courts, in addition to undergoing the impeachment process.[88] Ross believed that this fact alone indicated that impeachment was something other than a criminal action.[89] Tazewell's motion, Ross concluded, would also violate the Senate's authority under the Sole Power Clause.[90]

Richard Stockton's argument rested on different grounds. The Sixth Amendment, he maintained, applied only to judicial matters.[91] Referring to the amendment's history in the First Congress, Stockton explained that it was adopted "merely as an explanatory amendment to quiet the minds of the people respecting the trial by jury. It was only a kind of amplification on the ordinary judicial power provided by the original constitution."[92] Stockton, however, viewed impeachment as a legislative matter. Thus, the jury trial provision in no way affected the Senate's sole power to try impeachments. Stockton explained that any contrary understanding would permit an implied interpretation of the Sixth Amendment to override an express constitutional grant of power to the Senate.[93]

Now that Tazewell had heard his arguments answered, he wished to make a reply. Once again he asked for a postponement in order to compose a rebuttal.[94] Read, impatient and still bellicose, announced that he was prepared to stay in the chamber until midnight if it meant that the Senate could finish the business that day.[95] Notwithstanding the South Carolinian's attitude, the Republicans managed to win a postponement until Monday, the nineteenth of February.

On Monday, the first man to speak in the next long round of discussion was Elijah Paine, a Federalist from Vermont.[96] He, like his two colleagues before him, emphasized the Senate's sole jurisdiction in impeachment trials, and categorized impeachments as a political rather than a criminal process. He then examined the im-

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88. *See* U.S. CONST. art. I, § 3, cl. 7 ("[T]he Party convicted [by impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.").

89. AURORA, Feb. 28, 1798, at 2, col. 2. Ross inferred that "the trial by impeachment was an extraordinary proceeding, not according to the ordinary courts of law, nor to punish a transgression of the law; but to effect the removal of the offender from office." *Id.*

90. *See supra* note 70.

91. AURORA, Feb. 28, 1798, at 2, col. 3.

92. *Id.*

93. *Id.*

94. *Id.* at 2, col. 4.

95. *Id.*

96. *See* UNIVERSAL GAZETTE, Mar. 29, 1798, at 4, col. 1.

peachment provisions of half a dozen state constitutions to show how the citizens of these states viewed impeachments. Paine declared that only in Virginia, Tazewell's home state, did the state constitution expressly vest impeachment jurisdiction in the regular court system, as a judicial process. Nowhere else in state practice, he claimed, had juries ever found their way into impeachment trials.[97]

Then Read rose yet again, but confined his comments to restatements of the anti-jury position and further observations about the disgraceful nature of the entire issue.[98] When Read had finished, Tazewell began a lengthy rebuttal. First he attacked Ross's conclusion that impeachment must not be criminal because of regular courts' concurrent jurisdiction.[99] Tazewell drew exactly the opposite conclusion from the clause in question; because a civil action could never bar a subsequent criminal proceeding, the Framers would have had no need to approve concurrent jurisdiction expressly in Article I, Section 3 unless they held impeachment to be criminal. Having thus endeavored once again to demonstrate impeachment's criminal nature, Tazewell returned to the second question of whether the Sixth Amendment modified the original jury trial provision.

The Virginia Senator made reference to an earlier episode, in which Ross and other broad constructionists had argued that the Senate had an implied power to prescribe, by resolution, an oath for itself to take before hearing the merits in an impeachment trial. Strict constructionists had argued that the enactment of such an oath was an exercise of legislative power, and therefore the approval of both houses of Congress was required.[100] In that instance, Tazewell said accusingly, the Federalists had not objected to overriding the Congress's express power of legislation with an implied reading of the Sole Power Clause that would let the Senate act unilaterally. And yet, Tazewell continued, these same senators now denied that the Sixth Amendment could likewise implicitly overrule the express provision of Article III. The rule, Tazewell commented sarcastically, appeared to be that implied readings were acceptable only

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97. *Id.*

98. *Id.* at 4, col. 2.

99. *Id. See supra* note 88.

100. *See* 7 ANNALS OF CONG. 503 (1798); AURORA, Feb. 10, 1798, at 2, cols. 2-3 (mistakenly describing a Senate debate of February 8 as having taken place on February 1); AURORA, Feb. 11, 1798, at 2, cols. 3-5.

where they served to increase the Senate's power.[101]

Regardless, he continued, implied constructions were unnecessary because the Sixth Amendment explicitly required the use of juries in all criminal prosecutions, and surely impeachment was such a process. Answering Stockton's assertions, Tazewell even reconciled the Sixth Amendment with the Sole Power Clause. The latter was a grant of jurisdiction, he explained, and just as a chancery court may have exclusive jurisdiction in equity cases, and admiralty courts in admiralty cases, the Senate has exclusive jurisdiction in impeachment. Thus, Tazewell observed, whether or not a chancery or admiralty court used a jury did not alter its grant of exclusive jurisdiction.[102] The same was true of the Senate's jurisdiction over impeachments. Under this reading the two clauses did not conflict at all. The Sole Power Clause was merely a grant of jurisdiction rather than a *carte blanche* to the Senate over procedural matters that other constitutional provisions covered.

Tazewell then proceeded to answer additional objections that Ross, Paine, and Stockton had raised. First, he challenged Stockton's interpretation of the debates in the First Congress, stating that he would not object to the extension of other Bill of Rights guarantees to impeachment as well.[103] Second, he attacked Paine's citation of precedent from several states. Finally, he addressed the danger of a conflict between juries and senators, of which Ross had warned earlier. A jury vote of conviction, Tazewell argued, was alone never sufficient to convict a defendant unless the court agreed. Hence the use of a jury would not abrogate the clause requiring a vote of two-thirds of the Senate in order to punish the party on trial.[104]

At long last, Tazewell concluded by saying that he had simply attempted to show his fellow senators why he thought a jury would be necessary in the Blount impeachment, and that the Senate was the body to decide whether he had done so effectively. In fact his analysis was brilliant. His arguments, moreover, had elicited Federalist responses that were no less impressive. What the Senate was about to decide upon was not just the jury issue but the broad question of whether constitutional criminal procedure should be applied to the impeachment process.

The chamber soundly defeated Tazewell's motion.[105] The de-

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101. UNIVERSAL GAZETTE, Mar. 29, 1798, at 4, col. 3.
102. *Id.* at 4, col. 4.
103. *Id.*
104. *See* UNIVERSAL GAZETTE, Mar. 29, 1798, at 4, col. 5.
105. 7 ANNALS OF CONG. 508 (1798).

feat, moreover, was accomplished by no mere partisan vote, for Tazewell all along had been almost the only voice to speak in support of the jury concept. Even when his fellow Republicans had defended him, they were defending not so much his position as his right to speak. Of the twenty-nine senators in the chamber, only three voted to support the motion.[106] Two of these—Tazewell and Stevens T. Mason—were the senators from Virginia, where state impeachment was clearly more judicial in character.[107] The third man was Blount's good friend and protégé, Andrew Jackson.[108]

CONCLUSION

The Senate vote against the use of juries in impeachments could have rested on a failure of either of Tazewell's two arguments. Either the senators believed that impeachment was not a criminal process, or that it was a criminal process but that the Sixth Amendment provision did not nullify the Article III clause. If the vote rested on the latter grounds, then it said nothing about other criminal provisions in the Bill of Rights. If, however, it rested on the former reason, then the vote had far broader ramifications, logically applying to the other criminal guarantees as well.[109] The Senate expressed no formal reason, of course, for its decision. The majority of arguments presented by Tazewell's opponents, however, addressed the broader issue of impeachment's nature. This fact suggests that the former issue, rather than a more routine rule of construction, was the Senate's true concern.

The question of impeachment's criminal nature, additionally, was a much more basic and complex issue in both theoretical and practical terms than the second concern. The Sixth Amendment's meaning was a relatively simple matter, a straightforward exercise in construction. The wording of the amendment was absolute. By a plain reading of its jury trial provision, a jury from the district where the offense took place would unquestionably be necessary in im-

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106. *Id.*

107. *Id.* *See supra* note 59.

108. 7 ANNALS OF CONG. 508 (1798). By 1792, Blount considered Jackson to be one of his strongest supporters, "someone he could trust and rely on." REMINI, *supra* note 38, at 54. In turn, Blount worked actively to further Jackson's career. *Id.* Moreover, Jackson was committed to Blount's entire conspiratorial design against the Spanish, and he "stoutly defended his political mentor at every opportunity" throughout the course of the impeachment. *Id.* at 105.

109. *See* U.S. CONST. amends. IV, V, & VI.

peachment trials[110]—if impeachment were a criminal process. Surely the outpouring of strong feelings came about because of a dispute deeper than a mere conflict in generally accepted theories of interpretation, for Tazewell introduced no radically new maxims of construction. Both the senators' comments, and their clearly expressed attitudes, indicate that the defeat of Tazewell's motion constituted a decision that impeachment was not a criminal process.

The day after Tazewell had submitted his jury proposal, Jefferson gloomily observed that the two-to-one Federalist majority in the Senate would make short work of the measure.[111] In fact the Vice President overestimated his party's support for the motion, as the final vote revealed.[112] The heavy preponderance of opinion against the use of a jury no doubt bothered Jefferson, who saw unchecked impeachments as instruments "more of passion than justice."[113] Jefferson warned that impeachment would be a "formidable weapon" in the hands of the Federalists, a "most effectual [method] for getting rid of any man whom they consider as dangerous to their views . . . ."[114] Shortly after the final vote, Jefferson wrote to James

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110. *See* U.S. CONST. amend. VI (providing criminal defendants with the right to "an impartial jury of the State and district wherein the crime shall have been committed").

111. *See* Letter from Thomas Jefferson to James Madison (Feb. 15, 1798), *in* 7 JEFFERSON WRITINGS, *supra* note 56, at 202.

112. Jefferson had predicted a vote of 22 to 10, *id.*, but the final vote was 26 to 3. 7 ANNALS OF CONG. 508 (1798).

113. Letter from Jefferson to Madison, *supra* note 111, at 203.

114. *Id.* at 202. Within a few months, Jefferson's fears would come to fruition in a different form. The Sedition Act, ch. 74, 1 Stat. 596 (1798), which Congress adopted in July of 1798, prescribed heavy fines and imprisonment for those judged guilty of writing, publishing or speaking anything of a false, scandalous, and malicious nature against the Federalist government. *See* MILLER, *supra* note 23, at 229-32. Shortly after the bill's passage, Matthew Lyon, a Republican Congressman from Vermont, was indicted on the charge of making libelous statements against President John Adams. *Id.* at 235-36. Though Lyon was convicted, the charges only served to make him a Republican martyr: he ran for re-election and won during his four-month term in prison. *Id.* at 236. *See also* HOFFER & HULL, *supra* note 12, at 151 (noting the tension created by the co-existence of the Sedition Act and the possibility that federal officers belonging to minority parties may be impeached); *id.* at 156-57 (noting a Federalist theory that even *private* citizens may be impeached).

Jefferson's concern over the use of impeachment as a political weapon has recently resurfaced. In Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1992), federal district court judge Stanley Sporkin explained that if impeachments were completely unreviewable, "a political party which gained a majority of seats in the House and two-thirds of the seats in the Senate could without any legitimate basis purge from the federal bench those whose views were contrary to theirs. Insisting as they did on life tenure for the judiciary, the founding fathers could not have shared these views." *Id.* at 495 n.5.

Jefferson's concern about an unchecked impeachment power is reflected in the views of Justices White, Blackmun, and Souter of the present-day Supreme Court. In Nixon v. United States, 113 S. Ct. 732 (1993), a majority of the Supreme Court deter-

Madison to tell him of the outcome.[115] Jefferson was probably surprised when Madison, the original author of the Sixth Amendment, answered that Tazewell's jury arguments had left him unconvinced.[116]

Madison's statement was a final blow to the theory that criminal provisions of the Bill of Rights necessarily applied to impeachment. In fact, very few members of the Framers' generation were in favor of the jury trial measure; most went on record as solidly against it. The debate and decision upon this issue—a full discussion followed by a lopsided, overwhelming vote against Tazewell's motion—should destroy any intent-based argument that impeachment is a criminal process. The Framers' original intent, furthermore, contradicts the lower federal courts' recent tendency to apply some degree of due process and other Bill of Rights guarantees to impeachment.[117] Members of the 1787 Convention, members of the Con-

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mined that Senate impeachment trial procedures are not subject to judicial review. *Id.* at 740. Whereas Jefferson was concerned with the lack of a jury check on the impeachment power, Justices White and Souter wrote separately in *Nixon* to express their concern over the lack of any judicial safeguard. Justice White, joined by Justice Blackmun, warned that an unreviewable discretion would allow the Senate to convict an impeachment defendant "without any procedure whatsoever." *Id.* at 741 (White, J., concurring). Likewise, Justice Souter envisioned situations justifying judicial interference. For instance, he believed interference might be appropriate "[i]f the Senate were to act in a manner seriously threatening the integrity of its results, [such as] convicting . . . upon a coin toss . . . ." *Id.* at 748 (Souter, J., concurring). For further discussion of the *Nixon* case, see *infra* note 117.

115. Letter from Thomas Jefferson to James Madison (Feb. 22, 1798), *in* 7 JEFFERSON WRITINGS, *supra* note 56, at 207.

116. Letter from James Madison to Thomas Jefferson (Mar. 4, 1798), *in* 17 THE PAPERS OF JAMES MADISON 88 (David B. Mattern et al. eds., 1991). Madison observed that "[m]y impression has always been that impeachments were somewhat sui generis, and excluded the use of Juries." *Id.*

117. This recent trend suffered a major reversal in Nixon v. United States, 113 S. Ct. 732 (1993). In *Nixon*, the Supreme Court ruled that courts lack the power to review the manner in which the Senate may "try" an impeachment proceeding. *Id.* at 740. The Court believed that allowing the Senate final authority to determine impeachment trial procedures would in no way transgress "identifiable textual limits" in the Constitution. *See id.* Therefore, impeachment presented a political, nonjusticiable question to the Court, precluding it from reviewing the propriety of the Senate's decision to "try" an impeachment by appointing a committee of senators to hear evidence and report it to the full Senate. *See id.* at 734.

Writing for the majority, Chief Justice Rehnquist explained that the word "try" "lacks sufficient precision to afford any judicially manageable standards of review . . . ." *Id.* at 736. According to the Court, the Constitution places three "very specific" restrictions on the Senate's impeachment power—the senators must be under oath, a two-thirds vote is necessary to convict, and the Chief Justice must preside at the impeachment trial of a President. *Id.* Chief Justice Rehnquist stated that "these limitations are quite precise, and their nature suggests that *the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word 'try'* . . . ." *Id.* (emphasis

gress that framed the Bill of Rights, and the author of the original amendments opposed without qualification the idea that impeachment was a criminal process subject to constitutional criminal provisions.

The Senate, however, is free to decide that such provisions should apply to impeachment, for each house of Congress determines its rules of proceedings.[118] Senators could thus voluntarily extend such rights to an impeachment defendant if they wished. But this decision must be that of the Senate alone. Any judicial effort to overrule the Senate's decision on this point would go against a compelling decision of the authors and ratifiers of the Constitution and the Bill of Rights.

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added). Implicit in this reasoning is the Court's decision that Bill of Rights criminal procedural guarantees provide no additional limitations on the impeachment power.

The *Nixon* result is in full accordance with the defeat of Tazewell's jury trial measure in the Blount impeachment. The *Nixon* court, however, missed an opportunity to use the 1798 debate to support its conclusion.

118. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").