

New Evidence on the Constitution's Impeachment Standard: “high . . . Misdemeanors” Means Serious Crimes

By Robert G. Natelson¹

I. THE PROBLEM

The Constitution permits impeachment and removal of federal officers for “Treason, Bribery, or other high Crimes and Misdemeanors.”² Records from the Founding tell us that the adjective “high” modifies both “Crimes” and “Misdemeanors.”³ Thus, the Impeachment Clause may be read as permitting removal if an official has committed (1) treason, (2) bribery, (3) another high crime, or (4) a high misdemeanor.

But what is a high misdemeanor? As I pointed out in a prior article in *Federalist Society Review*,⁴ commentators and scholars have agitated this question for many years. Exemplifying the disagreement was the testimony of the four constitutional scholars called to testify before the U.S. House Judiciary Committee during the impeachment proceedings against President Trump.

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²U.S. CONST. art. II, § 4.

³The records of the 1787 Constitutional Convention contain several uses of the phrase “high misdemeanors.” *E.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION 174 (Max Farrand ed., 1937) [hereinafter FARRAND] records of the committee of detail); *id.* at 187 (committee of detail draft) (James Madison) (Aug. 6, 1787); *id.* at 348 (using the phrase when drafting the Treason Clause) (James Madison) Aug. 20, 1787).

⁴Robert G. Natelson, *Impeachment: The Constitution's Fiduciary Meaning of “High . . . Misdemeanors,”* 19 FED. SOC. REV. 68 (2018).

Each interpreted the impeachment standards somewhat differently. Professor Jonathan Turley advocated the most exacting one. He argued that high misdemeanors are acts that “reach a similar level of gravity and seriousness” as criminal activity.⁵ Professor Noah Feldman defined high crimes and misdemeanors as comprising “abuses of power and public trust connected to the office of the presidency.”⁶ Professor Michael Gerhardt contended that high crimes and misdemeanors encompassed, among other infractions, political crimes, abuse of power, breaches of the public trust and “serious injuries to the Republic.”⁷ Professor Pamela S. Karlan argued that subverting an election and disregarding the public interest were both impeachable offenses.⁸

My prior article suggested yet another standard: that a high misdemeanor is what modern lawyers call breach of fiduciary duty and Founding-Era lawyers called breach of trust.⁹ As explained below, I now acknowledge I was mistaken, but my position did have several advantages to commend it. First, the fiduciary standard squared most closely with the kind of evidence impeachment scholars commonly consult.¹⁰ Second, it was consistent with the Founders’ concept of republican government as a fiduciary enterprise—a public trust.¹¹ Third, it accommodated the

⁵Jonathan Turley, *Testimony*, House Judiciary Committee, Dec. 4, 2019, at 11, <https://i2i.org/wp-content/uploads/Turley-Testimony.pdf>.

⁶Noah Feldman, *Testimony*, House Judiciary Committee, Dec. 4, 2019, at 1, <https://i2i.org/wp-content/uploads/Feldman-Testimony.pdf>.

⁷Michael Gerhardt, *Testimony*, House Judiciary Committee, Dec. 4, 2019, at 5, <https://i2i.org/wp-content/uploads/Gerhardt-Testimony.pdf>.

⁸Pamela S. Karlan, *Testimony*, House Judiciary Committee, Dec. 4, 2019, at 3 & 4, <https://i2i.org/wp-content/uploads/Karlan-Testimony.pdf>.

⁹*Natelson*, *supra* note ____.

¹⁰*Infra* note ____ and accompanying text.

¹¹Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004).

prevailing view that an action need not be a crime to be impeachable.¹² Fourth, because fiduciary law was fairly well developed in the Founding Era,¹³ the “breach of trust” formulation is more precise than phrases such as “abuse of power” and “disregarding the public interest.” Of course, a certain amount of precision is desirable to protect the constitutional independence of the president from congressional whim.

Why has there been so much conflict on this subject? One reason, no doubt, is that political agendas unduly influence constitutional scholarship: Conclusions often are fixed before the research begins.¹⁴ Certainly it not coincidental that the three witnesses advocating the more lenient grounds for impeaching President Trump are all outspoken critics of the president, and they were called by the Democratic majority. Professor Turley, who advocated the strictest standard, while not exactly a Trump supporter, was called by the Republicans.

¹²Michael Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 83 (1989) (“But attempts to limit the scope of impeachable offenses have rarely proposed limiting impeachable offenses only to indictable offenses. Rather, the major disagreement among commentators has been over the range of nonindictable offenses for which someone may be impeached”); see also *id.* at 85 (concluding that impeachment is not limited to indictable offenses).

¹³Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. J. L. & POL. 239 (2007).

¹⁴Henry P. Monaghan, “*Our Perfect Constitution*,” 56 NYU L. REV. 353, 377-78 (1981) (pointing out that this has been especially true since law professors started to dominate constitutional scholarship).

But in this case there is another reason for the variation in professorial opinion: The evidence consulted thus far when viewed in isolation is simply not determinative. This lack of determinability has led some scholars to conclude that ascertaining the precise meaning of high misdemeanors is not practical, the process is inherently political, that the grounds for impeachment should be worked out on case by case basis.¹⁵

As the House Judiciary Committee testimony demonstrates, the evidence consulted thus far consists principally of the Constitutional Convention debates, a relatively small sample from the large corpus of ratification-era writings (primarily *The Federalist*), some English and American impeachment history, and Joseph Story's monumental, but unreliable,¹⁶ *Commentaries on the Constitution*. Rarely consulted is the contemporaneous Anglo-American jurisprudence, with the occasional exception of Blackstone's *Commentaries*. Of course, Blackstone is an excellent source, but he is occasionally mistaken, more often unclear, and (because his work is a mere summary of the law) necessarily incomplete. Moreover, Blackstone's *Commentaries* is only one of the hundreds of readily available Founding Era law books.¹⁷

As the result, sources such as Madison's convention notes are read in isolation from the wider legal background, without underlying legal terminology and concepts to clarify them. Yet they *must* be read against the contemporaneous

¹⁵*Gerhardt, supra* note ____, at 87.

¹⁶JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) was published more than four decades after the ratification when most of the Founders were dead, but without the compensating benefit of important historical documents, including Madison's convention notes and most of the ratification records.

¹⁷John Worrall's 1788 bibliography of English law books consumed over 250 pages. Many of its entries are available today at databases such as *Eighteenth Century Collections Online*. JOHN WORRALL, BIBLIOTHECA LEGUM ANGLIAE (1788), https://i2i.org/wp-content/uploads/2015/01/Constitution_Worrall-ocr.pdf.

legal background to be fully understood.

The Constitution is a legal document, the “supreme Law of the Land.”¹⁸ The majority of its framers were lawyers, as were most of those who explained the document in the ratifying conventions and to the American public—a public quite legally sophisticated by today’s standards. The document itself is laden with legal terms of art. These include not only obvious legal phrases like habeas corpus and trial by jury, but phrases that, while common in the eighteenth century, are not widely used in modern law. Examples are “Privileges and Immunities,” “necessary and proper,” and “regulate . . . Commerce”—phrases with specific legal meanings during the Founding Era.¹⁹ That one must read the Constitution in the context of eighteenth century jurisprudence should be obvious, particularly to lawyers and law professors. But apparently it is not.

One of the few scholars who have ventured beyond Blackstone was Raoul Berger. Berger was not a legal scholar but a Harvard political scientist who authored a leading book on impeachment.²⁰ Perhaps because he wrote before electronic search methods were available, however, Berger’s investigation into contemporaneous law was cursory. His conclusion was that “high misdemeanors” were “words of art confined to impeachments, without roots in the ordinary criminal law.”²¹ As this Article demonstrates, this conclusion could not have been more wrong.

¹⁸U.S. CONST. art. VI.

¹⁹Co-authors and I have examined the meaning of these phrases in a series of articles, including *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117 (2009); *The Legal Meaning of “Commerce” In the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006); GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010).

²⁰RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973).

²¹*Id.* at 66 (1973).

In fact, Founding Era legal materials reveal shows that “high misdemeanor” was a frequently-used legal term of art with a fixed and specific meaning. The phrase was so prominent that the Founders who utilized it almost certainly understood its meaning. By adopting it, the Founders raised the bar for impeachment well above the House of Commons’ standard in the then-current Warren Hastings case and well above the standards codified in most state constitutions.

II. WHAT THE LEGAL SOURCES TELL US

The Founders came of age and received their legal educations while colonists in the British Empire. Their law and their law books were overwhelmingly English. Accordingly, this Part II.A examines their English legal sources. Part II.B examines Founding-Era American sources confirming the English materials.

A. *English legal sources.*

During the 18th century, offenses against the British Crown were interchangeably labeled misdemeanors, offenses, contempts, and crimes. All misdemeanors were crimes and all crimes were misdemeanors. However, in common speech, as in common speech today, people often called more serious offenses “crimes” and lesser offenses “misdemeanors.”²² Exemplifying how the

²²GILES JACOB, A NEW LAW-DICTIONARY (10th ed. 1782) (unpaginated) (defining misdemeanor) (“This word in the laws of *England*, signifies a *crime*.—Every crime is a misdemeanor, yet the law hath made a distinction between crimes of a higher and a lower nature, the latter being denominated *misdemeanors*, the former *felonies*, &c.) (Italics in original); cf. 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY (1792) (unpaginated) (defining “misdemeanor”) (“MISDEMEANOR, in its usual acceptation, is applied to all those crimes and offenses for which the law hath not provided a particular name; and it may be punished, according to the degree of the offense, by fine, or imprisonment, or both.”)

See also JAMES BUCHANAN, A NEW ENGLISH DICTIONARY (1769) (unpaginated) (defining “Misdemeanour” as “A crime”).

terminology operated is the entry for “misdemeanour” in the 1778 edition of the *Encyclopaedia Britannica*:

MISDEMEANOUR, in law, signifies a crime. Every crime is a misdemeanor; yet the law has made a distinction between crimes of a higher and a lower nature; the latter being denominated *misdemeanours*, the former *felonies*, &c.²³

The traditional distinction between felonies and other crimes was that felonies were punishable by death. The most serious felony was high treason (against the Crown),²⁴ followed by petit treason. The latter was “where one, out of malice, takes away the life of a subject, to whom he owes special obedience.”²⁵ Lesser felonies derived either from the common law or from parliamentary enactment. The common law felonies included, but were not limited to, murder, burglary, robbery, larceny, rape, and arson.²⁶

High treason was punishable by drawing-and-quartering and forfeiture of all property.²⁷ Petit treason was punishable by forfeiture plus drawing and hanging for men and drawing and burning for women.²⁸ Other felonies resulted in death by hanging and, depending on the felony, forfeiture of all property or of goods only.²⁹

²³7 ENCYCLOPEDIA BRITANNICA 5138 (2d ed., 1778) (defining “misdemeanour”) (italics in original). The abbreviation “&c.” means et cetera.

²⁴JACOB, *supra* note ___ (defining felony) (“*Felony* is included in high treason”—meaning that high treason is a species of felony). (Italics in original.)

²⁵*Id.* (defining petit treason).

²⁶*Id.* (defining felony) (“at this day *felony* includes petit treason, murder, homicide, sodomy, rape, burning of houses, burglary, robbery, breach of prison (where the prisoner is chargeable with a felony), rescue and escape, after one is imprisoned or arrested for *felony*”) (Italics in original).

²⁷The gory details are in 4 WILLIAM BLACKSTONE, COMMENTARIES *92.

²⁸*Id.* at *204.

²⁹JACOB, *supra* note ___ (defining felony).

The system was cruel, but by the eighteenth century it was not quite as cruel as it first appears. Courts often avoided the death penalty through devices such as “benefit of clergy” for first offenders³⁰ and “transportation” to distant colonies. Moreover, petty larceny, while still accounted a felony, no longer carried the death penalty.³¹

³⁰When a statute did not specifically deny benefit of clergy, an first-time offender would be branded in the hand (to indicate the first offense) and then released. *Id.* (defining “clergy”).

³¹*Id.* (defining felony).

Felonies formed a subset in a set of crimes called *high misdemeanors*—also called great misdemeanors, high offenses,³² and misprisions. Originally, a misprision was merely an act of neglect. Eighteenth century commentators called this its negative meaning.³³ But by the eighteenth century misprision also served as an exact synonym for high misdemeanor.³⁴ This was called its positive meaning.³⁵

³²*E.g.*, 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 266 (6th ed., 1787) (“very high offense”) & table (“very high misdemeanor”).

³³Some lay sources report only the negative meaning, e.g., JAMES BUCHANAN, A NEW ENGLISH DICTIONARY (1769) (unpaginated) (defining “Misprision” as “Oversight or neglect”).

³⁴JACOB, *supra* note ___ (defining misprision):

Misprision: neglect or oversight . . . In a larger sense, *misprision* is taken for many great offenses, which are neither treason nor felony, or capital, but very near them; and every great misdemeanor, which hath no certain name appointed by the law, is sometimes called *misprision* . . . And *misprision* being included in every treason or felony, the King may cause him to be indicted and arraigned of *misprision* only, if he please.

See also 7 ENCYCLOPEDIA BRITANNICA 5138-39 (2d ed, 1778):

MISPRISIONS . . . are, in the acceptation of our law, generally understood to be all such high offenses as are under the degree of capital, but nearly bordering thereon; and it is said, that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only. And upon the same principle, while the jurisdiction of the star-chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemeanour

³⁵4 WILLIAM BLACKSTONE, COMMENTARIES *121 (“MISPRISIONS, which are merely positive, are generally denominated contempts or high misdemeanors”); 7 ENCYCLOPAEDIA BRITANNICA, *supra* note ___, at 5139 (similar language).

Although treason and other felonies were technically high misdemeanors/misprisions,³⁶ in common speech “high misdemeanor” and “misprision” denoted serious crimes other than felonies—that is, “under the degree of capital, but nearly bordering thereon.”³⁷ If a statute created a crime but was unclear about whether that crime was to be a felony, then the offense was treated as a high misdemeanor.³⁸ Punishments for high misdemeanor included long imprisonment, stiff fines, forfeiture, and sometimes the pillory.³⁹

Founding-Era sources frequently emphasize the serious and criminal nature of high misdemeanors. One lay dictionary, for example, defined “misdemeanor” merely as “a behaving one’s self ill; an offense or fault.” However, it characterized “high misdemeanour” as “a crime of a heinous nature, next to High Treason.”⁴⁰

³⁶2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY (1792) (unpaginated) (defining “misprision” and explaining that “a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only”); 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW (5th ed. 1786) (unpaginated, but under the subject of “Rescue”) (a rescuer of one committed for high treason may be guilty of high treason, but “he may be immediately proceeded against for a Misprision only, if the King please”).

³⁷2 RICHARD BURN & JOHN BURN, *supra* note ___ (defining “misprison”)

³⁸1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER xxvi-xxvii (15 ed., 1785) (“But an offense shall never be made felony by the construction of any doubtful or ambiguous words of a statute; and therefore . . . it shall amount unto no more than a high misdemeanor, punishable by imprisonment or the like.”).

³⁹*E.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *91 (detracting from the established royal line was at one time “a high misdemeanor, punishable with forfeiture of goods and chattels”); *id.* at *211 (firing one’s own house in a town “is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour”); T.W. WILLIAMS, A COMPENDIOUS DIGEST OF THE STATUTE LAW 117 (1787) (“Subjects going to the *East Indies* (except lawfully authorized) may be seized, brought home and prosecuted for high crimes and misdemeanors, and are liable to conviction, to corporal punishment, fine, and imprisonment.”); 2 ANONYMOUS, A GENERAL TREATISE OF NAVAL TRADE AND COMMERCE 127 (1753) (same).

⁴⁰NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1783)

Similarly, a 1778 encyclopedia stated that “*High crimes and misdemeanours* denote offenses of a heinous nature, next to high treason.”⁴¹ Some examples of high misdemeanors are as follows:

- * attempted murder,⁴²
- * receiving stolen goods,⁴³
- * otherwise treasonous words not accompanied by an overt act,⁴⁴

(unpaginated) (defining “misdemeanour”).

⁴¹3 NICHOLAS CHAMBERS, *CYCLOPAEDIA: OR, AN UNIVERSAL DICTIONARY OF ARTS AND SCIENCES* (1778) (unpaginated) (defining “misdemeanour”). This work also paraphrased Blackstone to the effect that, technically, crime and misdemeanor were synonymous. *Id.* Of one trying a case without a commission to do so, Blackstone wrote, “it being a high misdemeanor in the judges so proceeding, and little (if any thing) short of murder in them all, in case the person so attainted be executed and suffer death.” 4 WILLIAM BLACKSTONE, *COMMENTARIES* *384.

⁴²Case of William Nicholas [K.B. 1748] *Fost.* 85, 168 Eng. Rep. 32, 33 (stating that attempted murder by poison was a high misdemeanor).

⁴³4 WILLIAM BLACKSTONE, *COMMENTARIES* *132 (“RECEIVING of stolen goods, knowing them to be stolen, is also a high misdemeanor”).

⁴⁴3 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* *14 (1644) (“But words without an overt deed are to be punished in another degree, as an high misprision.”); 1 RICHARD BURN, *supra* note ___, at 327: (“by the common law and the statute of *Ed.* 3 words spoken amount only to a high misdemeanor, and no treason”); 4 WILLIAM BLACKSTONE, *COMMENTARIES* *80 (“it seems clearly to be agreed, that, by the common law and the statute of Edward III, words spoken amount only to a high misdemeanor, and no treason.”)

- * assault not resulting in death,⁴⁵
- * judicial bribery,⁴⁶
- * jail-break by a prisoner not accused or convicted of felony,⁴⁷
- * permitting an accused or convicted felon to escape without active assistance,⁴⁸
- * challenging to, or assisting at, a duel,⁴⁹
- * criminal libel,⁵⁰

⁴⁵King v. Williams [K.B.1790] 1 Leach 529, 168 Eng. Rep. 366 (headnote) (stating that assault not qualifying as a felony is a high misdemeanor).

⁴⁶William Hawkins, A Treatise of the Pleas of the Crown (6th ed. 1787) (table) (“Bribery in a judge formerly punished as high treason. 314 f. 6 . . . It is now a very high misdemeanor.”); *cf.* 3 Coke 145 (stating that if a judge receives bribes he is guilty of a “great misprison”).

⁴⁷2 BACON ABRIDGMENT, *supra* note ___ (unpaginated, but under the topic “Gaol and Gaoler”) (jail-breaks are not a felonies if the prisoner is not a felon, but are “still punishable as High Misprisions by Fine and Impeachment.”).

⁴⁸2 HAWKINS, *supra* note ___, at 189:

But if a person, knowing another to have been guilty of such a crime [felony], barely receive him, and permit him to escape, without giving him any manner of advice, assistance, or encouragement in it, as. by directing him how to do it in the safest manner, or furnishing him with money, provisions, or other necessaries, it seems he is guilty of a high misdemeanor only, but no capital offence.

See also 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (3d ed., 1783) (unpaginated) (defining “Receiver”):

And the receiving a felon, and concealing him and his offence, makes a person accessory to the felony. . . [but] if a person knowing of one to have been guilty of felony, barely receive him, and permit him to escape, without giving him any advice, assistance, or encouragement, it is a high misdemeanor, but no capital offence.

⁴⁹1 HAWKINS, *supra* note ___, “Table” (“And barely to challenge to a duel, by letters, words, or provoking language or to be the messenger thereof, is a very high misdemeanor.”).

* burning one's own house in a town, thereby gravely endangering others,⁵¹
and

⁵⁰ANONYMOUS, A DIGEST OF THE LAW OF LIBELS 52 (1770) (stating that crime of libel is a high misdemeanor).

⁵¹1 JOSEPH SHAW, THE PRACTICAL JUSTICE OF THE PEACE 75 (5th ed. 1751) ("Tis high Treason in such as agree to arm themselves, and from House to House to get Assistance to pull down Inclosures & c. but if such Persons have an Interest [in the property], it amounts but to an High Misdemeanor."); 4 WILLIAM BLACKSTONE, COMMENTARIES *221 ("However such wilful firing one's own house, in a town, is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour.").

* a jailor's coercion of a prisoner to obtain a conviction against an innocent person.⁵²

Moreover, in England, medical malpractice was a high misdemeanor because of the danger it posed to human life.⁵³ Parliament also created high misdemeanors, such as unauthorized travel to the East Indies.⁵⁴

B. American Legal Sources

American sources utilizing the term “high misdemeanor” employed it the same way English writers did. Two illustrations appear in what was perhaps the earliest law book published in America: George Webb’s *The Office and Authority of a Justice of the Peace*, printed in Williamsburg, Virginia in 1733.⁵⁵ Webb stated that “Uttering false money, knowing it to be so, is not High Treason, but a great Misdemeanor, and Finable.”⁵⁶ He further wrote that, “It hath been held a great Misdemeanor in a Justice of the Peace, to entice an Infant [then a person under age 21] to enter into a Recognisance, knowing him to be an Infant. One *Hickes* was fined 100 *l* [pounds] and committed for his Offence.”⁵⁷ Both these passages reflect an understanding that a high (or great) misdemeanor was a criminal offense meriting severe punishment.

Jeremy Belknap’s 1784 history of New Hampshire was not a law book but it

⁵²3 COKE, *supra* note ___, at 91. Under the common law, if the victim was hanged, the jailor was guilty of felony; if he was acquitted, the jailor was guilty of a “great misprision.” As Coke reports, Parliament changed the latter to felony by statute. *Id.*

⁵³3 WILLIAM BLACKSTONE, COMMENTARIES *122.

⁵⁴2 NAVAL TRADE, *supra* note ___, at 127.

⁵⁵GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE (Williamsburg, 1733).

⁵⁶*Id.* at 84.

⁵⁷*Id.* at 274.

did record a legal transaction: the case of one Abraham Corbett, who was fined severely for issuing warrants on several occasions in the king's name but without authority. The court deemed Corbett's conduct a great misdemeanor.⁵⁸

⁵⁸JEREMY BELKNAP, THE HISTORY OF NEW-HAMPSHIRE 107-08 (Phila., 1784).

Article IV of the Articles of Confederation provided for interstate extradition of fugitives “charged with, treason, felony, or other high misdemeanor in any State.”⁵⁹ The reader can see how the language reflects the criminal law’s nesting-doll categories: treason, felony, and *other* high misdemeanor. Moreover, the maxims *noscitur a sociis* and *eiusdem generis* strongly suggest because treason and felony are serious crimes, “other high misdemeanor” refers to serious crimes as well. In a September 28, 1787 letter to Congress, Foreign Secretary John Jay alluded to this portion of the Articles. His letter discussed the case of an irresponsible sea captain who abused his passengers so severely that some of them died—and then abandoned others on a deserted coast of Maine (then part of Massachusetts). Jay wrote:

“[H]e has committed Felony, if not Murder, on the high Seas . . . The Captain’s Conduct as affecting Massachusetts may also be by their Laws a high Misdemeanour; but if that be the case, they have by the 4th Article of the Confederation a Right to demand the Offender from any of the States in which he may be found.”⁶⁰

The Constitutional Convention had adjourned only a few days before Jay’s letter. The convention records show that the delegates employed the term “high misdemeanor” on several occasions. The Constitution’s first draft, reported to the convention by the Committee of Detail on August 6, 1787, included the following extradition clause:

Any person charged with treason, felony or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of

⁵⁹ARTS. OF CONFED., art. IV.

⁶⁰Letter from John Jay to Congress, Sept. 28, 1787, 33 J. CONT. CONG. 553, 544 (Sept. 28, 1787).

the offense.”⁶¹

Of course, if a high misdemeanor had not been criminal, there would have been no need for extradition. Madison later moved successfully to substitute “other crime” so as to “comprehend all proper cases: it being doubtful whether ‘high misdemeanor’ had not a technical meaning too limited.”⁶² As his amendment indicates, Madison recognized that “high misdemeanor” was a technical term. Presumably he did not want the provision to exclude misdemeanors that were not “high” but still merited extradition.

When discussing limits on the Constitution’s Treason Clause, Rufus King noted that if the Constitution barred prosecutions for treason against individual states, those states could still “punish offenses as high misdemeanors.”⁶³ Thus King drew an equivalency between treason and high misdemeanor.

⁶¹2 FARRAND, *supra* note ___, at 187-88, 8/6 (James Madison).

⁶²*Id.* at 443 (Aug. 28, 1787) (James Madison).

⁶³*Id.* at 348 (Aug. 20, 1787) (James Madison).

The new federal Congress also employed the term “high misdemeanors” in the same way. The 1789 statute establishing the Treasury Department banned certain conflicts of interest, and defined each violation as “a high misdemeanor,” punishable by removal from office, incapacity, and a \$3000 fine.⁶⁴ During the 1790s,⁶⁵ Congress passed several laws prohibiting activities that interfered with United States foreign policy and the enforcement of federal laws. Those offenses with penalties that included incarceration for more than a year were designated “high misdemeanors.”⁶⁶ One with lesser punishments was designated merely as a “misdemeanor.”⁶⁷

The same understanding continued in American courts during the 1790s. At least six cases including the phrase “high misdemeanor” were decided during that decade. Two merely applied federal statutes designating crimes as high misdemeanors.⁶⁸ However, the other four specifically identified crimes of the sort considered high misdemeanors in English law to be such under American law.

⁶⁴An Act to establish the Treasury Department, 2 ANNALS OF CONGRESS, Appendix, 2231, 1 Stat., c. 12 (Sept. 2, 1789).

⁶⁵Rhode Island was the thirteenth state to ratify, doing so on May 29, 1790. As a rule I do not consider records arising after that date to be very probative of the meaning of the unamended Constitution. In this case, however, the material is merely corroborative of extensive evidence arising earlier.

⁶⁶THOMAS HERTY, A DIGEST OF THE LAWS OF THE UNITED STATES OF AMERICA 71-74 (1800) (accepting a commission in foreign military forces; enlisting in a foreign army; outfitting a warship for a foreign government; warring against a nation with which America is at peace; conspiring to impede the operation of law). The statutes are at 3 Stat., c. 50 (Jun., 5, 1794) and 5 Stat., c. 74 (Jul. 14, 1798).

⁶⁷HERTY, *supra* note ____, at 73 (“augmenting” a foreign warship), 3 Stat., c. 50 (Jun., 5, 1794).

⁶⁸United States v. Owners of the Unicorn, 3 Am. Law. J. 188 (D. Md. 1796) (construing 1 Stat. 381, outfitting ship to war on nations with which the U.S. is at peace); United States v. Guinet, 2 U.S. 321 (1795) (convicting one accused under that statute).

Thus, in *State v. Wilson*,⁶⁹ a Connecticut court held that stabbing a victim and threatening to murder him constituted high misdemeanors justifying incarceration. In *Bradley's Lessee v. Bradley*⁷⁰ the Supreme Court suggested that by accepting a bribe a juror was guilty of a high misdemeanor—a comment consistent with the established rule that a judge accepting a bribe was guilty of a high misdemeanor.⁷¹ In *Lessee of Culbertson v. Martin*,⁷² the Pennsylvania Supreme Court held that another kind of jury tampering—influencing the sheriff's staffing of a jury—was also a high misdemeanor. Finally, in arguing before a South Carolina appeals court, a prosecutor claimed, without contradiction, that an unauthorized return from banishment for treason was a high misdemeanor.⁷³

III. CONCLUSION

⁶⁹2 Root 63 (Conn. Super. 1793).

⁷⁰4 U.S. 112, 114 (1792).

⁷¹*Supra* notes ___ and accompanying text.

⁷²2 Yeates 433 (Pa. 1799).

⁷³*State v. Fraser*, 2 Bay 96 (S.C. Const. Ct. App. 1797) (reporting the prosecution's uncontradicted argument that returning from banishment for treason was a high misdemeanor).

The constitutional phrase “high misdemeanors” means non-capital, but serious, crimes. It is a higher standard than abuse of power, violation of the public trust, or disregard of the national interest—even though, of course, criminal behavior may breach those standards as well. This conclusion follows from the legal sources, and is confirmed by how it clarifies two uncertainties that otherwise would go unanswered.

The first uncertainty is the significance of a colloquy occurring near the end of the 1787 convention. Under consideration was a draft constitution that limited impeachment to treason and bribery. According to Madison, the colloquy proceeded as follows:

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.

Col. Mason withdrew "maladministration" & substitutes "other high crimes & misdemeanors" <agst. the State">

On the question thus altered

N. H.-- ay. Mas. ay-- Ct. ay. <N. J. no> Pa no. Del. no. Md ay. Va. ay. N.

C. ay. S. C. ay.* Geo. ay. [Ayes -- 8; noes -- 3.]⁷⁴

George Mason seems to have suggested “maladministration” to lower the Constitution’s standard for impeachment to the level applied by the House of Commons in the Hastings impeachment.⁷⁵

Mason’s proposed standard also had the virtue of being more consistent with the lax impeachment standards in several state constitutions. Those documents generally prescribed a strong legislature with a dependent executive, and the bar for impeachment was accordingly low. Indeed, the state with the highest standard was Mason’s Virginia: “offending against the State, either by mal-administration, corruption, or other means, by which the safety of the State may be endangered.”⁷⁶ Delaware followed a similar a formula,⁷⁷ but standards in other states were even

⁷⁴2 FARRAND, *supra* note ___ at 550 (Sept. 8, 1787) (James Madison).

⁷⁵The Articles of impeachment against Hastings charged him with “high crimes and misdemeanors,” but some of those charges really amounted to mal-administration. Perhaps a reason is that at one point Blackstone can be read as equating high misdemeanors in office with mal-administration, 4 WILLIAM BLACKSTONE, COMMENTARIES *121 (“MISPRISIONS, which are merely positive, are generally denominated contempts or high misdemeanors; of which 1. THE first and principal is the mal-administration of such high officers, as are in public trust and employment.”). However, Blackstone could be stating only that committing a high misdemeanor in office is necessarily a form of mal-administration—an inference strengthened by the fact that he otherwise uses “high misdemeanor” in the normal sense of “a serious, but not capital, crime.”

Ultimately, the Lords disagreed with the Commons and acquitted Hastings. P.J. Marshall, *Warren Hastings: Colonial Administrator*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Warren-Hastings/War-in-India> (“It is difficult not to regard this long-drawn-out ordeal as a serious injustice.”)

⁷⁶VA. CONST. OF 1776 (unsectioned).

⁷⁷DEL. CONST. OF 1776, art. 23 (“maladministration, corruption, or other means, by which the safety of the Commonwealth may be endangered”).

lower.⁷⁸ Pennsylvania authorized impeachment but prescribed no grounds at all.⁷⁹

The essential problem with Mason's proposal is that it was at odds with the convention's plan for a strong, independent executive; hence the opposition from Madison. In the face of resistance, Mason compromised by offering the phrase "other high crimes & misdemeanors," which the convention accepted. This higher standard was more appropriate for a federal executive that was to be stronger and more independent than the executive of any state.

Thus, Mason claimed the grounds for impeachment in the draft were too narrow and offered to widen them greatly. Madison objected. The parties compromised with language somewhere in the middle.

Equating high misdemeanors with serious crimes also resolves an uncertainty that had long bothered me: In this elegantly-written Constitution, why does the Impeachment Clause seem so clumsy?

If we interpret "high misdemeanors" to mean non-criminal conduct, then "Treason, Bribery, or other high Crimes and Misdemeanors" communicates "very serious crimes—and some legal conduct, too." This is both inelegant and violates the *ejusdem generis* maxim. On the other hand, if we apply the correct meaning of high misdemeanors, then "Treason, Bribery, or other high Crimes and Misdemeanors" provides (1) one example of a high crime (treason), (2) one example of a high

⁷⁸MD. CONST. OF 1780, art. VIII ("misconduct and maladministration"); N.C. CONST. OF 1776, art. XXII ("violating any part of this Constitution, mal-administration, or corruption"); N.H. CONST. OF 1784 (unsectioned) ("mal-conduct"); N.J. CONST. OF 1776, art. XII ("misbehaviour"); N.Y. CONST. OF 1777, § 33 ("mal and corrupt conduct"); S.C. CONST. OF 1776, § 22 ("mal and corrupt conduct"); VT. CONST. OF 1786, § XXI ("mal-administration").

The Georgia constitution did not provide for impeachment and Connecticut and Rhode Island were governed by modified versions of their colonial charters.

⁷⁹PA. CONST. OF 1776, § 23 ("Every officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly").

misdemeanor (bribery), (3) a general clause covering other high crimes, and (4) a general clause covering other high misdemeanors.

It appears, therefore, that the endless debate on the meaning of “high misdemeanors” has really been unnecessary: The answer has been right beside us all along.

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