

Impeachment and Censure

The Constitution provides for the removal of the highest officials of the land, including the president.¹ Thomas Jefferson proclaimed, “a party of revolution against the royal prerogatives—the divine right of kings and the corruptions of empire associated with an essentially unfettered monarch.”² We would be a nation of laws, not men. Nixon’s statement, “When the president does it, that means that it is not illegal,” captures the rule-of-man over rule-of-law attitude and Locke’s prerogative of the crown.³ But presidents have arrogated to themselves extraconstitutional powers reminiscent of the era of divine right monarchy. They have shown contempt for the people’s branch and contempt for the Constitution. And these are exactly the fears that prompted the Framers to include impeachment in the Constitution. Responding to Nixon’s excesses, “rule-of-law Republicans” moved toward impeachment, saying, “The power of impeachment is the Constitution’s paramount power of self-preservation.”⁴

Our impeachment process is borrowed from the British. It is an integral part of the development of the rule of law over the rule of man, as parliamentary democracy slowly supplanted divine right monarchy.⁵ The first impeachment was in 1376 when the first speaker of the House of Commons impeached two noblemen for raiding the public treasury. The next impeachment was in 1386 and introduced the catch-all phrase of *high crimes and misdemeanors*, while charging officials with “squandering away the public treasury” and “procuring offices for persons who were unfit, and unworthy of them.”

Another phrase was introduced early in the evolution of divided government: Parliament’s *power of the purse*. King Charles was in the habit of employing public resources in support of his royal relatives waging wars on the European continent. In 1620, Parliament limited grants of public funds for those wars. When so challenged, Charles repeatedly dissolved Parliament, acts which led to what became known as the Eleven Year Tyranny under claims of divine right monarchy. To the category of high misdemeanor was added “attempting to subvert the fundamental laws of the kingdom.” Charles was eventually overthrown and executed.

As the distribution of power between government branches grew clearer, impeachment was called many things, the “primary instrument of parliamentary resistance to the crown,” “the chief institution for the preservation of government,” the tool through which we have “broken the grip of monarchy and embraced the rule of law,” and the “key weapon in the long struggle of parliament against the abuse of executive power.”⁶ Impeachment was well known to the founding fathers.

During the American constitutional convention, impeachable offenses included terms both broad and narrow. They included “treachery, corrupting electors, and incapacity,” “malpractice and neglect of duty,” “treason and bribery,” “attempts to subvert the Constitution,” and “maladministration.”⁷ In the final document, the wording was reduced to “Treason, Bribery, or other high Crimes and Misdemeanors.” We would not elect an unfettered king for four years.

Article 1, § 2. The House of Representatives ... shall have the sole Power of Impeachment.

Article 1, § 3: The Senate shall have the sole Power to try all Impeachments. ... When the President of the United States is tried, the Chief Justice shall preside: ... And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Article 2, § 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

¹ John Nichols, *The Genius of Impeachment: The Founders’ Cure for Royalism* (New York: The New Press, 2006).

² Nichols, *Genius of Impeachment*, 7.

³ Cited in Schlesinger, *Imperial Presidency*, xvi.

⁴ Representative Robert McClory (R-Ill), quoted in Nichols, *Genius of Impeachment*, 97.

⁵ Nichols, *Genius of Impeachment*, 23-44.

⁶ Nichols, *Genius of Impeachment*, 30, 36, 42.

⁷ Nichols, *Genius of Impeachment*, 31-32.

Article 2, § 2. The President ... shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article 2, § 1. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

A Manual for Parliamentary Practice, written by Vice President Thomas Jefferson in 1801, is still in use by the House of Representatives. It provides a list of ways that impeachment may be initiated.⁸

- by charges made on the floor on the responsibility of a member or Delegate;
- by charges preferred by a memorial, which is usually referred to a committee for examination;
- by a resolution dropped in the hopper by a Member and referred to a committee;
- by a message from the President;
- by charges transmitted from the legislature of a State or territory or from a grand jury; or from facts developed and reported by an investigating committee of the House.

As a matter of current practice, the House Judiciary Committee deliberates whether to initiate an impeachment inquiry and, if so decided, adopts a resolution seeking authority from the assembled House to conduct the inquiry. If the full House, by simple majority, authorizes the inquiry, the Judiciary Committee conducts the inquiry and, if warranted, prepares articles of impeachment enumerating the charges. The articles of impeachment are returned to the full House where each article is voted on. A simple majority constitutes impeachment.⁹

To impeach means to subject the accused to trial by the Senate. When the president is tried, the chief justice of the Supreme Court acts as judge, and the Senate acts as jury during the trial when the articles of impeachment are considered. A two-thirds majority is required in the Senate. If found guilty, the officer is removed and denied further high office. The guilty may also be subject to legal action beyond removal.

Articles of impeachment brought against modern-day presidents are diverse but resonant with the charges of earlier centuries. The second article brought against Nixon was for abusing the power of office to attack his critics.¹⁰ Articles brought against Reagan concerned the shipment of arms from Israel to Iran, funding the Nicaraguan Contras, failing to notify Congress, and "his disregard for the laws of the United States and pattern of assault and irresponsible decisionmaking." The fourth article brought against the elder Bush concerned "committing the United States to acts of war without congressional consent and contrary to the UN Charter and international law."¹¹

Unlike impeachment, censure is not specified in the Constitution, but it is an established part of congressional traditions since Andrew Jackson was censured by the Senate in 1834 for assuming for himself unconstitutional powers by defunding the Bank of the United States. The House censured John Tyler in 1842 for a veto and the tone of his veto message. James Polk provoked "an armed skirmish between American and Mexican forces" and then asked Congress for a declaration of war. Congress granted the declaration in 1848, but first it voted to censure Polk for instigating an unconstitutional and unnecessary war. Either house may initiate censure. Censure provides a formal method short of impeachment for publicly holding the president accountable.

⁸ Nichols, *Genius of Impeachment*, 168-169.

⁹ <http://www.law.cornell.edu/background/impeach> contains background information on censure and impeachment collected during the Clinton impeachment.

¹⁰ Nichols, *Genius of Impeachment*, 144.

¹¹ Schlesinger, *Imperial Presidency*, xviii.