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## Can a Sitting President Be Federally Prosecuted? The Founders' Answer

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# Can a Sitting President Be Federally Prosecuted? The Founders’ Answer

W. BURLETTE CARTER\*

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ABSTRACT

This article uses the rich history of British common law, Parliamentary action, and colonial prosecutions to explore how the Founders would have answered this question: Can a sitting president can be prosecuted for *crimes* in courts of law or must he be first removed from office? In so doing, it takes a slightly different approach to impeachment than other scholars have taken. It proposes that the Founders would have considered this matter as raising a *jurisdictional* question involving the power of *courts of law*, on the one hand, and the power of Congress, acting as the national grand jury and as a *court of impeachment*, on the other. They also would not have provided us with a firm “yes” or “no” answer. Instead, they would have begun by stating that they gave the power of *removal* of a sitting President solely to Congress and that the power to modify his powers rests with the People, writ large. And so, they would have asked whether the proposed prosecution risks removal of a President from office, either in fact (e.g., by incarceration) or de facto (e.g., by substantially interfering with or modifying his exercise of his Constitutional duties or the discretion given to him under that document). I propose that the Founders would say that in any case in which a potential result of prosecutorial action is incarceration or restraint in the freedom to exercise *presidential* duties that do not merely ministerial supervision, courts of law cannot enforce the prosecution until he is removed from office by impeachment or otherwise. But that leaves a few cases in which the invasion may not be as severe.

I use history to defend the characterization of this impeachment question as jurisdictional. The Founders would have known that

courts of common law and Parliament shared jurisdiction over prosecuting crimes. They knew that the grand juries of the American colonies also theoretically had the power to prosecute royally-appointed chief-executives. But they also knew that colonial grand jury power was an empty right, because royal authorities regularly thwarted it. They also would have known that the colonies lacked the power to *impeach* (and thus, to remove) royally-appointed colonial leaders. Moreover, the Founders certainly knew that, after the Declaration of Independence, several state constitutions allowed the prosecution of a sitting Chief Magistrate and either gave prosecutorial authority to legislatures or split jurisdiction over crimes by high officials between legislatures and courts of law. Thus, they would have been familiar with the *theoretical* possibility of prosecuting a President and would certainly have assumed it possible. However, given the impracticability of such a prosecution, they would have deemed impeachment a particularly important right to secure in their written Constitution. The Founders understood impeachment as a criminal proceeding. A long history of denials of due process raised their concerns about fairness in that context. They also understood that impeachment had political implications. They knew it had been used for political retribution in England. These problems vexed their consideration of impeachment.

Their solution was jurisdictional. They split responsibility for enforcing compliance and assessing the punishment for an errant President. Under their scheme, Congress has the power to investigate and remove if necessary. On the other hand, courts of law have jurisdiction to enforce prosecutorial actions that do not pose a risk of removal and also, prosecutions after Congress has removed a convicted person from office. And in order to avoid double jeopardy, they also provided that the Senate acting as the High Court of Impeachment, could only deliver punishments that did not involve risks to life and limb.

The Founders would tell us that, under the model they crafted, prosecutors with statutory authority still can investigate crimes alleged to have been committed by a sitting president. Indeed, they must, in order to determine the nature and extent of alleged presidential involvement. However, they lack the ability to compel presidential cooperation if a President is unwilling. They cannot jail a President for contempt. Such actions would effect a removal, a responsibility that, the Founders intended to place solely within the province of Congress.

Moreover, they would say that the President can fire prosecutors without violating statutory rules for obstruction of justice. Even if the

President uses constitutionally-delegated powers with the sole motive of foiling a prosecution, the response is impeachment proceedings to deprive him of these powers and to protect the nation's interest in the presidency. The Founders would also say that a prosecutor has a duty to exercise prosecutorial discretion in deciding whether to proceed against a sitting President through a court of law.

The Founders would have noted that, because courts of impeachment have superior jurisdiction over matters within their concern, articles of impeachment issued by the House of Representatives are an assertion of jurisdiction over the case. Properly issued, they will automatically stay any other pending federal criminal proceeding regarding the same person and conduct, including the work of a federal grand jury.

The Founders would tell us that if a President is convicted by a court of impeachment, he cannot be subsequently prosecuted for obstruction of justice with respect to acts that were, at the time they were undertaken, delegated to him under the Constitution, even if that behavior technically meets the language of a criminal obstruction of justice statute. The penalty for the misuse of an otherwise legitimate power in order to prevent a prosecution, is removal from office. However, the President can be prosecuted for the underlying crime, the investigation of which he was attempting to obstruct. And his obstruction could be the basis of conspiracy charges, if done intentionally to facilitate the misconduct of others.

Finally, the Founders would tell us that, because federal courts have concurrent jurisdiction with Congress over the potential subjects of impeachment, a federal court has the power to consider peripheral questions regarding enforcement of prosecutorial action. It has the power to stay or delay a prosecution in a court of law for good cause shown. (It could not delay a constitutionally-conducted impeachment.) This article does not delve into what "good cause," might mean, but without doubt such a case would be presented by a reasonable threat that the prosecution would interfere with Presidential duties so as to constitute a constructive partial or full removal. A federal court also has the power to condition a request for the delay of a proceeding upon the waiver of any affirmative defenses that would otherwise bar a later prosecution and to take action that is not compulsive of the President to preserve documentary evidence. However, if a President still refuses to heed a court order requiring him to act or

refrain from acting, once again, the power to enforce that order falls to Congress through impeachment proceedings.

## INTRODUCTION

Special Counsel Robert Mueller has just completed his investigation into extraordinary allegations that officials or agents of Russia meddled in the 2016 U.S. presidential elections and that Americans, including members of the 2016 presidential campaign of President Donald J. Trump, may have conspired with them (the “Mueller Investigation”).<sup>1</sup> In his final report to Attorney General William P. Barr, the Special Counsel unequivocally cleared President Trump and other Americans of any wrongdoing on the claim of conspiracy. He chose to draw no conclusion on the question of whether the President obstructed justice by interfering with the investigation, and instead, presented the available evidence for both sides of the question. The Attorney General, in consultation with the Deputy Attorney General Rod Rosenstein, then concluded that the evidence was “not sufficient to establish that the President committed an obstruction-of-justice offense.”<sup>2</sup> The Mueller investigation, like past investigations related to Presidents, raises numerous questions about the *constitutional* vulnerability of a sitting American President to indictment and prosecution for alleged criminal behavior.<sup>3</sup> While the Constitution allows a prose-

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1. At press time, the Special Counsel’s report had not yet been made available to the public, however, Attorney General Barr provided notice of its principal conclusions in a letter to the majority and minority leaders of the House and Senate Judiciary Committees. Letter from Attorney General William P. Barr to Senator Lindsey Graham, Chairman, Senate Comm. on the Judiciary, et al. (Mar. 4, 2019) (on file with author) (“Barr Letter”). The Barr Letter further noted that Justice Department regulations allow the Attorney General to waive all or part of that confidentially if waiver is in the public interest. Barr stated that his “goal and intent is to release as much of the Special Counsel’s report as I can consistent with applicable law, regulations, and Departmental policies.” *Id.* at 4. See also e.g., Rebecca R. Ruiz & Marc Landler, *Robert Mueller, Former F.B.I. Director, is Named Special Counsel for Russia Investigation*, N.Y. TIMES, May 17, 2017, <https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html> (last visited Feb. 10, 2019). DOJ appointed Mueller pursuant to regulations allowing the appointment of a Special Counsel to avoid a conflict of interest or when such an appointment would be in the public interest. See 28 C.F.R. 600.1 et seq.

2. See Barr Letter, *supra*, at 2, 3. The Special Counsel *did* press criminal charges against a number of Russian nationals and entities. *Id.* at 2.

3. In the modern era, investigations of two other presidents have raised similar questions of presidential vulnerability to prosecution. One is the investigation of President William J. Clinton, led by Independent Counsel Kenneth Starr. *Timeline*, WASH. POST, <https://www.washingtonpost.com/wp-srv/politics/special/whitewater/timeline.htm> (last visited Nov. 11, 2018). Starr recommended impeachment of Clinton for lying to a grand jury about and engaging in other coverup with respect to a consensual extramarital affair with a 21-year-old a White House intern. Clinton was acquitted. Alison Mitchell, *The President’s Acquittal: The Overview; Clinton Acquitted Decisively: No Majority on Either Charge*, N.Y. TIMES (Feb. 13, 1999), <https://www.nytimes.com>

cution of a former President *after* an impeachment conviction,<sup>4</sup> whether it allows a *sitting* President to be indicted, subpoenaed, or prosecuted *before* an impeachment is less clear.

The Constitution's text is silent (or at best, ambiguous), on whether a sitting President can be indicted and prosecuted. The only provision mentioning an "arrest" or hinting at prosecution of a sitting officer is found in Article I, § 6. The Speech or Debate Clause states in part, "for any Speech or Debate in either House, they shall not be questioned in any other place."<sup>5</sup>

Noting this silence (or ambiguity) in the text, scholars and other knowledgeable commentators have expressed divergent opinions. Some have argued that a sitting President *can* be prosecuted.<sup>6</sup> Others,

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com/1999/02/13/us/president-s-acquittal-overview-clinton-acquitted-decisively-no-majority-for.html (last visited Feb. 10, 2019).

The other criminal investigation of a sitting President involved President Richard M. Nixon. Nixon was accused of involvement in a break-in into the Democratic National Committee headquarters, then at the Watergate Hotel. The investigation was led by Special Prosecutor Leon Jaworski. Like Starr, Jaworski made his report to Congress. The matter ended when, facing impeachment and possible conviction, President Nixon resigned from office. *See, e.g.,* Carroll Kilpatrick, *Nixon Resigns*, WASH. POST (Aug. 9, 1974), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm> (last visited Feb. 10, 2019).

4. U.S. CONST. art. I, § 3 (emphasis added) ("the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law").

5. U.S. CONST. art. I, § 6, cl. 1. The language was likely patterned on language in some state constitutions and the following language from the English Bill of Rights: "[T]he freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." *See Chapter 2, Freedom of Speech and Article 9 of the Bill of Rights (Article 9 of the Bill of Rights 1689)*. *See also e.g.,* MA. CONST., 1780, ch. 1, § 3, art x ("no member of the house of representatives shall be arrested or held to bail on mense process, during his going unto, returning from, or his attending the general assembly." Parliament.uk, <https://publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4306.htm> (last visited Feb. 10, 2019). *See also* MD. CONST., *Decl. of Rights* art. VIII (providing freedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other court or judicature).

6. *E.g.,* Laurence Tribe, *The Constitution Rules Out Immunity for Sitting Presidents*, BOSTON GLOBE (Dec. 10, 2018), <https://www.bostonglobe.com/opinion/2018/12/10/constitution-rules-out-sitting-president-immunity-from-criminal-prosecution/6Byq7Qw6TeJIPVUhgABPM/story.html> (last visited Feb. 10, 2019); Walter Dellinger, *Yes, You Can Indict the President*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/opinion/indict-president-trial.html>; Michael Avenatti, *The Case for Indicting Trump*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/opinion/michael-avenatti-trump-indictment-stormy-daniels.html> (last visited Feb. 10, 2019); BARRY H. BERKE, NOAH BOOKBINDER, & NORMAN EISEN, PRESIDENTIAL OBSTRUCTION OF JUSTICE: THE CASE OF DONALD J. TRUMP, 151–61 (2018) (rejecting claims that President cannot be indicted); Ronald D. Rotunda, *Can Trump Be Indicted? Are Sitting Presidents Immune from Prosecution?*, NEWSWEEK (Aug. 15, 2017, 06:50 AM), <http://www.newsweek.com/can-trump-be-indicted-are-sitting-presidents-immune-prosecution-650484> (last visited Feb. 10, 2019); Garrett Epps, *The Only Way to Find Out if the President Can Be Indicted*, THE ATLANTIC (May 23, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/presidential-indictment/560957/> (discussing various views); Susan Bloch, *Can We Indict a Sitting President?* 2 NEXUS 7 (1997) (discussing views of Professors A. Amar; J. Bybee; E. Chemerinsky; T. Eastland; E. Freedman; S. Howe; B. Kalt and others; Eric M. Freedman, *Achieving Political Adulthood*, 2 NEXUS 67, 84 (1997); Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from*

however, say he cannot be. Some of those argue that he is absolutely immune, either by the Constitution directly or indirectly because an indictment and trial would so interfere with presidential obligations, that it should be barred while the President is in office.<sup>7</sup> Another has argued that if performing duties delegated to him under the Constitution, the President is immune, regardless of motive.<sup>8</sup> Still others question the assumptions of those who say he can be prosecuted.<sup>9</sup>

Even lawyers who have acted as counsel for the government are not on one accord. In 1973, the Office of Legal Counsel opined that a sitting President cannot be prosecuted.<sup>10</sup> In 1998, during the investigation of President William “Bill” Clinton, Independent Counsel Kenneth Starr commissioned an opinion from Professor Ronald Rotunda. Professor Rotunda opined that a sitting President *could* be indicted under the Constitution, but he also said statutory authority was a prerequisite. He concluded that the then-existing Independent Counsel

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*Criminal Prosecution Before Impeachment?* 20 HASTINGS L. Q. 7 (1992) (hereinafter “Freedman, Law as King”).

7. See Dershowitz: *Sitting Presidents Cannot Be Indicted*, FOX NEWS (June 20, 2017), <http://insider.foxnews.com/2017/06/20/alan-dershowitz-sitting-presidents-cant-be-indicted-russia-trump-impeach> (last visited Feb. 10, 2019); Keith King, *Indicting the President: Can A Sitting President Be Criminally Indicted?*, 30 SW. U. L. REV. 417, 418 (2001); Akhil Reed Amar, *On Prosecuting Presidents*, 27 HOFSTRA L. REV. 671, 671 (1999); Jay S. Bybee, *Who Executes the Executioner*, 2 NEXUS 53, 56-57 (1997); Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 11 (1997) (basing conclusion on “the best view of constitutional text, history, structure, and precedent,” citing prior governmental memos, Judge Robert Bork, and others and claiming prosecution would incapacitate a sitting President). Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL’Y REV. 53 (1999) (sitting president immune from compulsory judicial process and only subject to impeachment). But see Greenberg, Mark, *Can Trump Obstruct Justice?* NYR DAILY (Jan. 4, 2018), <https://ssrn.com/abstract=3202398> (last visited Feb. 10, 2019) (arguing that Dershowitz view would lead to almost everything a President did being constitutional).

8. Alan Dershowitz, *You Cannot Charge the President with Obstruction of Justice for Exercising his Constitutional Power*, WASH. EXAMINER (Dec. 4, 2017, 8:14 AM), <https://www.washingtonexaminer.com/alan-dershowitz-you-cannot-charge-a-president-with-obstruction-of-justice-for-exercising-his-constitutional-power> (last visited Feb. 10, 2019). However, Dershowitz says that if the President is acting *outside* those powers, he can be indicted. *Id.* See also Isenbergh, *supra* note 6.

9. E.g., Philip Bobbitt, *Can the President Be Indicted? A Response to Laurence Tribe*, LAWFARE BLOG (Dec. 17, 8:00 AM), <https://www.lawfareblog.com/can-president-be-indicted-response-laurence-tribe> (arguing Professor Tribe’s view, discussed *supra* note 6, depends on debatable assumptions).

10. Memorandum from Robert G. Dixon Jr. on Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973) (on file with Department of Justice at <https://fas.org/irp/agency/doj/olc/092473.pdf> (last visited Feb. 10, 2019) (arguing that “an impeachment proceeding is the only appropriate way to deal with a President while in office.”). The same year, then-Solicitor General Robert Bork argued in a brief that the President can be indicted. Memorandum of the United States Concerning the Vice President’s Claim of Constitutional Immunity (Oct. 5, 1973) (on file with publisher).

statute gave such power to Starr.<sup>11</sup> But he also concluded that a President could fire his prosecutors without “obstructing justice” under a statute.<sup>12</sup> Later, considering the Special Counsel regulations under which Mueller operated, Rotunda opined that Mueller had no authority to indict a sitting President.<sup>13</sup> In 1998, during the Clinton presidency, Congress also held hearings on the question of whether a President could be subpoenaed, indicted or prosecuted. They heard a clash of views from legal scholars and lawyers.<sup>14</sup> And in 2000, the Office of the Independent Counsel revisited its 1973 opinion and reaffirmed that their answer was “No,” the President is not subject to ordinary prosecution.<sup>15</sup>

Those who have addressed this question have looked to a common group of sources. They have analyzed notes of debates during the Constitution’s drafting. Some have looked to state ratification convention notes.<sup>16</sup> Many have analyzed the constitutions of the independent states prior to the founding.<sup>17</sup> The *Federalist Papers*, are fre-

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11. Memorandum of Ronald D. Rotunda, Professor of Law, to Kenneth Starr, Independent Counsel (May 13, 1998), <https://www.nytimes.com/interactive/2017/07/22/us/document-Savage-NYT-FOIA-Starr-memo-presidential.html> (last visited Feb. 10, 2019) (disclosed in response to *New York Times* reporter’s FOIA request and stating, given then existing independent counsel statute, President can face federal indictment for activities unrelated to his official duties as President, but reserving judgment on state indictments or indictments in the absence of statutory authority. The Independent Counsel statute expired in 1999). Roberto Suro, *As Special Counsel Act Expires, Power Will Shift to Reno*, WASH. POST (June 30, 1999), [https://www.washingtonpost.com/archive/politics/1999/06/30/as-special-counsel-law-expires-power-will-shift-to-reno/d091aa10-16fb-4939-b8c8-ab3eac93a25/?utm\\_term=.a35fc816dfd7](https://www.washingtonpost.com/archive/politics/1999/06/30/as-special-counsel-law-expires-power-will-shift-to-reno/d091aa10-16fb-4939-b8c8-ab3eac93a25/?utm_term=.a35fc816dfd7) (last visited Feb. 10, 2019).

12. Rotunda, *supra* note 11.

13. See Ronald Rotunda, *The President Can Be Indicted, Just Not By Mueller*, WASH. POST (July 27, 2017), [https://www.washingtonpost.com/opinions/the-president-can-be-indicted—just-not-by-mueller/2017/07/27/a597b922-721d-11e7-8f39-eeb7d3a2d304\\_story.html?utm\\_term=.5077722e2942](https://www.washingtonpost.com/opinions/the-president-can-be-indicted—just-not-by-mueller/2017/07/27/a597b922-721d-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.5077722e2942) (last visited Feb. 10, 2019; arguing the Constitution does not prohibit indictment of a president, but that the Special Counsel statute authorizing the Mueller Investigation “most likely” does not give Mueller the power to do so). For the regulations, see *supra* note 1.

14. *Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process? Hearings Before the Subcomm. On the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong (1998).

15. Memorandum Opinion for the Attorney General (Oct. 16, 2000) (on file with Department of Justice at [https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf)) (last visited Feb. 10, 2019; reaffirming 1973 view that indictment would “would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions.”).

16. E.g., *Freedman, Law as King*, *supra* note 6, at 17; Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L. J. 707, 728, n. 114 (1988).

17. For significant exploration of state constitutions in the impeachment context, see, e.g., Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History and Practice of Late Impeachment*, 6 TEX. REV. L. & POL’Y 13, 29-39 (2001); P. HOFFER & N. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 68–77 (1984).

quently consulted.<sup>18</sup> Although written after the Constitution was drafted, they are, at least, close in time and authored by those directly involved in the Constitutional mission. Thus, it must be conceded that they reflect at least what *some* of the Founders thought. But those same factors might have led authors to insist on presenting only their *own* interpretations, even if in conflict with other drafters' views. Some consider Justice Joseph Story's writings to be authoritative.<sup>19</sup> Story was born in 1779; he was, therefore, eight years old when the Constitution was signed in 1787. Though a precocious child for sure, he likely had no first-hand knowledge of the Founders' intended meaning and only indirect insight into how the people of a young nation would have understood its language, that is, its original meaning.<sup>20</sup> Alternatively, some scholars rely upon court cases decided long after the Constitution was written. But in terms of discerning how the Founding generation thought, such later-decided cases pose the same problems of other later-written commentary. Moreover, judges may face pressures to be consistent with prior doctrine, even when indications are that they are in error as a matter of original intent or original meaning.

Discerning the Founders' intent in this instance is also fraught with difficulty given the Constitution's ambiguous "silence." It is possible that the Founders did not specifically address prosecution of a sitting President in the Constitution because they could not agree on it. Or perhaps they did agree, which is why they left the subject out. Moreover, although the *office* of the Attorney General existed in colonial times and within states after independence, and while the office

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18. *E.g.*, THE FEDERALIST NOS. 65, 69, 77 (Alexander Hamilton). The first of the *Federalist Papers* are much closer appearing in October of 1787, months after the Constitution was drafted. See *Primary Documents in American History: The Federalist Papers*, LIBR. OF CONGRESS (2005), <https://www.loc.gov/tr/program/bib/ourdocs/federalist.html> (last visited Feb. 10, 2019).

19. *E.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

20. Some scholars frame the constitutional meaning inquiry in terms of the "original public meaning," rather than original intent. In a nutshell, the original public meaning refers to how people would have understood the words in the relevant era. For a discussion of the debate, see, *e.g.*, Richard H. Fallon, *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753 (2015). Some also argue that how the Founders originally felt about their approach should not always govern the day. *E.g.*, Transcript of Oral Argument at 39 (ll. 14-25)–40 (ll. 1-8), *Gamble v. United States* (No.17-646) (Kagan, J., commenting that while some members of the Supreme Court may think original intent is the "alpha and omega of every constitutional question . . . there are other people on this bench who do not.") On the other hand, I suggest that even those who would eschew dogged adherence to an original intent or original public meaning analysis, would at least *begin* with that inquiry, in order to determine whether they must move beyond it and what they are trading away when they do.

would have been quite familiar to the Founders,<sup>21</sup> the federal statute authorizing the U.S. Attorney General did not exist until *after* the Constitution was signed.<sup>22</sup>

This article takes a deep dive into the British and colonial backdrop of the Constitution to investigate how the Founders might have answered the question of whether a sitting President can be prosecuted. To these ends, in addition to consulting the commonly-consulted pool of resources, I look at some lesser-used ones: Parliamentary journals and records of Parliamentary procedures, the *Calendar of State Papers* from the British National Archives,<sup>23</sup> British caselaw and American and British newspapers from the eighteenth century.

Of course, scholars have debated whether we should accept that the British model for impeachment played a significant role in the Founders' discussions. I would offer several reasons why I believe it did. First, it should be remembered that in 1787, the Founders were only eleven years away from the time when they first declared their independence. The British model for impeachment was a natural starting point because it was the model with which they were all familiar. Second, *Blackstone's Commentaries*, a legal Bible for Americans of the time, focused on the British model in its discussion of impeachment. Third, several of the states had used the British model as a starting point in their constitutions after Independence.<sup>24</sup> Fourth, contrary to a common assumption that Americans had angrily "moved on" from their divorce, in fact, they frequently looked back upon England and regularly checked in. Newspapers regularly ran stories,

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21. For the role of royally-appointed attorneys general during the colonial period, see discussion *infra* Section I.A. For an independent state attorney general reference, see, e.g., MA. CONST., 1780 art. IX.

22. The office of the U.S. Attorney General was established in the Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

23. The calendars are 41 volumes of summaries of handwritten correspondence from the royally-appointed colonial leaders in America and the West Indies to the British Secretaries of State, relating to colonial affairs and received between 1574 and 1739. The notations largely reflect the substance of the original papers. See CALENDAR OF STATE PAPERS, COLONIAL AMERICA AND THE WEST INDIES, 1574-1739, BRITISH HISTORY ONLINE, <https://www.british-history.ac.uk/search/series/cal-state-papers—colonial—america-west-indies> (hereinafter "CALENDAR OF STATE PAPERS") (last visited Feb. 13, 2019). Thus, they reflect the early conflicts between the colonies and the Crown.

24. E.g., MD. CONST. *Decl. of Rights*, art. III ("That the inhabitants of Maryland are entitled to the common law of England"); NY. CONST. art. XXXV (declaring "that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State").

even columns, with news of what was going on in England, thus demonstrating that ordinary Americans remained keenly interested in what was going on there.<sup>25</sup> Consider that this author's search for the word "Parliament" in *Readex's Early American Newspapers* database, between January 1, 1786 and September 16, 1787 (the day before the Constitution was signed) yielded 9,692 newspapers that used the word. Overwhelmingly, these are references to the British Parliament. That figure does not include the papers that reference the "Commons" or "House of Lords," or report the decisions of British courts. And it does not include newspapers found on other databases. Indeed, at the same time that the Americans were drafting the Constitution, they were reading in American papers about British attempts to impeach and later try British subject Warren Hastings.<sup>26</sup> This keen interest in Great Britain makes sense because as immigrants, or the children or grandchildren of immigrants, many Americans of the Founding Generation still had family in England. And America was, after all a superpower within its time. Hoping to found a new nation, the Founders naturally looked to other examples for ideas. And there is a fifth reason to look to the British model. Hamilton, in *Federalist* No. 65, tells us that the drafters looked to it.<sup>27</sup> No, the Americans were definitely not going back to their old relationship. But they did not discount it as a total loss from which nothing could be learned.

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25. Every newspaper with a significantly circulation regularly ran stories of what was going on in England. *E.g.*, *European Politicks, England, London*, October 27, AMERICAN HERALD, Jan 2, 1786 at 1; *Foreign News, London, October 9*, NEW-YORK PACKET, Jan. 2, 1787, at 2. Sometimes they repeated verbatim stories from European papers. *From the London General Advertiser*, CONNECTICUT JOURNAL, July 25, 1787, at 2 (on Hastings trial); *History of the Late War in America from the British Annual Register, for 1778*, MASSACHUSETTS SPY (PUBLISHED AS THE WORCESTER MAGAZINE), Jan. 4, 1787, at 479. Newspapers often reported British news three to six months after it had happened. Much of the news came from newspapers brought by ship and from sea captains. *E.g.*, *By Tuesday's Eastern Post Paris, April 20*, U.S. CHRONICLE, July 12, 1787, at 2 (referencing news of Warren Hasting's impeachment trial from Captain Hunter of *The George*).

26. *E.g.*, *Extract from a Letter From Turin*, Feb. 10, INDEP. J., May 2, 1787, at 1 (discussing trial); *Halifax, July 12*, INDEP. GAZETTEER, Aug. 4, 1787 at 2 (letter to newspaper sending an excerpt of articles of impeachment against Hastings so that Americans could review them and noting the spectacle of the great "Nabob" on his knees for four hours as the articles were read); *see also London, House of Commons, Feb. 7, 1787*, AMERICAN HERALD, June 4, 1787, at 1; *Legislative*, BOSTON GAZETTE & THE COUNTRY J., July 2, 1787, at 2; *Legislative*, INDEP. GAZETTEER, June 23, 1787, at 2; *Legislative, British House of Lords, Monday, May 8*, NEW HAMPSHIRE-SPY, July 21, 1787, at 310; *By Tuesday's Eastern Post Paris, supra*; *Introduction to the Articles of Impeachment of High Crimes and Misdemeanors Against Warren Hastings*, NEW-YORK PACKET, Aug. 14, 1787, at 2. For more on the *Hastings* case, *see* discussion *infra* beginning at Section I.B.1.c.

27. FEDERALIST No. 65 (Hamilton) ("The Powers of the Senate").

Believing that we can learn more from British and colonial history, I add this supplement to the astounding body of existing constitutional and historical literature on impeachment. I seek to expand our understanding of the larger *context* in which the Founders wrote the Constitution. As part of this effort, I tie in the independent state constitutions in existence prior to the Founding. I offer here a new framework for understanding how to analyze the question, that is, that we should consider the impeachment provisions as *jurisdictional*. It is not my goal to discuss here whether or not the answers the Founders would give are *practical* or *wise* in the present day. For now, I wish to establish the relevance of British history to the question and why impeachment and removal provisions are jurisdictional. And I want to begin a discussion of how this understanding should shape our understanding of prosecutions of sitting Presidents. I do this by positing how the Founders might have answered several questions relating to the issue. Further defining the contours of this perspective, I reserve until another day.

Part I considers British approaches both to prosecution and to impeachment before American independence. It discusses tensions between the King's prosecutors and local grand juries in seeking justice against British soldiers and officials. It also discusses the ability of the King's courts and the colonies to prosecute officials for high crimes and misdemeanors and why, in the colonies' case, the possibility of prosecution was insufficient. And it discusses the efforts of the colonists to remove royally-appointed authorities from office, despite the Crown's denying them impeachment authority.

Part II notes how the courts of the common law and Parliament, acting as a court of impeachment, had concurrent jurisdiction and how the British balanced jurisdictional squabbles between these courts at home. Here, I focus on a case that produced a clash of jurisdictions between Parliament and the King's courts: the prosecution(s) of Edward Fitzharris for treason. From this and other precedent, I propose that the Founders would tell us that while concurrent jurisdiction exists, prosecutions in the two courts for the same crimes at the same time is not possible. When Parliament properly issued articles of impeachment, the proceedings in common law courts, including grand jury proceedings, were to be automatically stayed.

Part III then considers how the Founders approached impeachment in the Constitution. It considers the Convention notes and Hamilton's views. It also argues that state constitutions after indepen-

dence but before the Constitution, demonstrate that the Founders were well aware tht there were many ways to allocate jurisdiction in prosecuting a Chief Magistrate. I show how the Founders allocated criminal jurisdiction between courts of law and the High Court of Impeachment, how they separated removal from punishment, and how they dealt with the problem of double jeopardy.

Finally, Part IV offers up the Founders' answer to the various questions surrounding whether a sitting President can be prosecuted. It argues that they would say they considered the prosecution of a President as raising a jurisdictional question. And it argues that the key jurisdictional inquiry is whether or not the threatened prosecutorial action would result in removal of the President, including a partial or constructive removal, by curtailing his discretion when performing his constitutional duties.<sup>28</sup>

The matter of prosecuting a sitting President raises other questions that I do not examine here. I leave to another day an exploration of the definition of "high crimes and misdemeanors;"<sup>29</sup> the questions of whether Congress can impeach for actions that are not criminal; of whether Congress can reach persons *other than* current government officials; of whether impeachment can occur after one has left office; of whether a trial after impeachment and conviction raises a possibility of issue preclusion; and of whether Congress can impose penalties other than removal and a ban from public office upon an impeached official. Certainly, some of the arguments put forth here

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28. The notion that constructive removal is a central question in presidential prosecutions has been raised Judge MacKinnon of the D.C. Circuit in *Nixon v. Sirica*, 487 F.2d 700 (1973). The case concerned the investigation of a break-in into the Democratic National Committee headquarters. The Court considered whether it could enforce a subpoena duces tecum to require President Richard Nixon to produce tapes of his conversations with others in the White House. While agreeing the Court had jurisdiction to decide the question of executive privilege, MacKinnon dissented from the majority's finding that the subpoena was enforceable. He wrote:

Sound policy reasons preclude criminal prosecution until after a President has been impeached and convicted. To indict and prosecute a President or to arrest him before trial, would be constructively and effectively to remove him from office, an action prohibited by the Impeachment Clause. A President must remain free to travel, to meet, confer and act on a continual basis and be unimpeded in the discharge of his constitutional duties. The real intent of the Impeachment Clause, then, is to guarantee that the President always will be available to fulfill his constitutional duties.

*Id.* at 163. MacKinnon said he would recognize an absolute privilege for confidential Presidential communications. *Id.* at 81. Later, in *U.S v Nixon*, the Supreme Court held that executive privilege is not absolute but should yield to a narrowly-tailored subpoena duces tecum. *United States v. Nixon*, 418 U.S. 683 (1974).

29. *Id.* art. II, § 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"). Scholars have debated the meaning of these terms. *E.g.*, Isenbergh, *supra* note 7.

could apply to state prosecutions. This article focuses solely on federal prosecutions.<sup>30</sup> I also do not discuss civil actions against the President. And I take no position on the propriety of the Mueller investigation; on whether or not a particular President *should* be indicted, impeached or convicted; or on whether federal courts should intervene to stay any prosecution in a given case. My goal here is to zero in on how the Founders would have understood the intersection of prosecuting a sitting president and impeaching and trying one for criminal behavior.

## I. THE BRITISH BACKDROP FOR PROSECUTIONS AND IMPEACHMENTS

I contend that, despite independence, the Founders of the constitutional period would have understood prosecutorial and impeachment powers with respect to a Chief Magistrate in the context of their colonial experience and its British common law backdrop. This section thus discusses that backdrop for prosecutions and impeachments.

### A. Prosecution by Common Law or Statute

#### 1. Approaches in England/Great Britain

Under the common law, the primary means of commencing a prosecution were through (1) an indictment by a grand jury or (2) charges by way of an information presented to a judicial officer.<sup>31</sup>

The tradition of the grand jury began in 1166 with an edict by King Henry II, the “Assize of Clarendon”.<sup>32</sup> The English grand jury was required to have between twelve and twenty-three people.<sup>33</sup> An indictment was a written statement of criminal charges against an individual, as to which a grand jury had issued its approval.<sup>34</sup>

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30. For exploration of many of the legal questions relating to impeachment generally, see, e.g., RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973); Cass R. Sunstein, *IMPEACHMENT, A CITIZEN’S GUIDE* (2017); Charles Black, Jr. *IMPEACHMENT: A HANDBOOK* (Philip Bobbitt, ed. 2018).

31. W.S. Holdsworth, *The History of Criminal Information*, 1 *CAN. BAR REV.* 300 (1923) (hereinafter, “Holdsworth, *Information*”); see also 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*301–07 (discussing indictments); *id.* at \*308–12 (discussing informations).

32. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 321 (7th ed. 1956) (origin in 1166). For the text of the Assize, see The Avalon Project. *Assize of Clarendon*, 1166, <http://avalon.law.yale.edu/medieval/assizecl.asp> (citing WILLIAM STUBBS, *SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH LAW*, 143–146 (1913) (available at, [https://archive.org/details/select\\_chartersa01stubgoog/page/n4](https://archive.org/details/select_chartersa01stubgoog/page/n4)) (last visited Feb. 10, 2019).

33. 4 BLACKSTONE, *supra* note 31, at \*302.

34. E.g., 4 BLACKSTONE *supra* note 31, at \*302 (referring to an indictment as a written statement of charges); see also SIR JAMES ASTRY, *A GENERAL CHARGE TO ALL GRAND JURIES*

In England and early America, the grand jury was sometimes called the “grand inquest.”<sup>35</sup> English grand juries had broad powers to investigate and present accusations (“presentments”) on their own, without the Attorney General.<sup>36</sup> A written statement of the charges (an indictment or “bill”) was prepared either by the Attorney General or by a judicial officer.<sup>37</sup> If convinced by evidence they had gathered or that was presented to them, the grand jury signed the bill “*vera*” (or “true”), thus indicting; if not convinced, the grand jury wrote “*Ignoramus*”, thus indicating that they deemed the evidence insufficient.<sup>38</sup> Although at first, their proceedings were in public, their deliberations were made secret in 1368 to protect them from Crown influence.<sup>39</sup>

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4–5 (1703); *Copy of a Presentment Made by the Grand Jury of Middlesex to the Judges of the King's Bench: Trinity Term*, STAMFORD MERCURY, July 18, 1723, at 32 (indicting persons disseminating publications critical of government-sponsored religion) (provided courtesy of the British Newspaper Archive and British Library Board).

35. E.g., *London*, AM. WEEKLY MERCURY, Apr. 16–23, 1724, at 3 (American paper referring to “Grand Inquest” indictment in London).

36. See 4 BLACKSTONE, *supra* note 31, at \*301; 4 WAYNE R. LAFAYE, & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 15.2 (g) (1984) (“[T]he grand jury at common law could bring charges on its own initiative through the use of the presentment. This allowed the grand jury to initiate a prosecution over the opposition of the prosecutor.”). See also BLACKSTONE, *supra* note 31, at 298 (“A presentment, *properly* speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation without any bill of indictment laid before them at the suit of the king . . .”).

For discussion of the early grand jury process, see RICHARD GUDE, I PRACTICE ON THE CROWN'S SIDE OF THE COURT OF THE KING'S BENCH AND THE PRACTICE OF THE SESSIONS, THE GENERAL RULES OF COURT. FROM THE REIGN OF JAMES I, TO THE PRESENT TIME 85–96 (1828) (discussing the “Mode of Preferring Indictments in the King's Bench”).

Some have argued the indictment was and is jurisdictional in felony cases. See Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 409 (2008) (arguing that an indictment was a jurisdictional prerequisite to prosecution of some felonies, contrary to later Criminal Procedure Rules allowing waiver of same); Renee B. Lettow, *Note, Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1337 (1994) (discussing history of grand jury presentments and indictments); see also BERNARD SCHWARTZ, THE GREAT RIGHT OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS, 76–77 (arguing that North Carolina's 1776 *Decl. of Rights* guaranteeing the right to indictment was the “direct precursor” to the Grand Jury Clause in the 5th Amendment).

37. E.g., STAMFORD MERCURY, Nov. 10, 1715, at 239 (British newspaper referencing Attorney General presenting indictments for high treason to grand jury on which they wrote *vera*); 4 BLACKSTONE, *supra* note 31, at \*301 (referring to an “officer of the court” framing an indictment after a grand jury takes notice of an offense).

38. *Id.*; 1 FRANCIS BACON, THE ELEMENTS OF THE COMMON LAWS OF ENGLAND 16 (1629) (noting a judge would present the grand jury with a written indictment and the grand jury would write upon it “either *Billa vera* [i.e., true bill], and then the prisoner standeth indicted, or else *Ignoramus*, & then hee is not touched”); 4 BLACKSTONE, *supra* note 31, at \*305–06. Blackstone translates “*Ignoramus*” as “[w]e know nothing of it[.]”, intimating that, though the facts might possibly be true, the truth did not appear to them.” *Id.* at \*305.

39. M. FRANKEL & G. NAFTALIS, THE GRAND JURY AN INSTITUTION ON TRIAL 7 (1977) (discussing when grand jury stopped being public). Cf. JOHN HAWLES, THE GRAND JURY MAN'S OATH AND OFFICE EXPLAINED AND THE RIGHTS OF ENGLISH-MEN ASSERTED, A DIALOGUE BETWEEN A BARRISTER AT LAW AND A GRAND-JURY MAN 5–6 (1680) (anonymous pamphlet

The Crown could also proceed without a grand jury, by *information*, directly presenting evidence to a judge and asking the judge to find the evidence sufficient for a trial. In their seminal *History of English Law*, Pollack and Maitland noted broad debate over the history of criminal information.<sup>40</sup> The earliest instance they could find of a trial without a grand jury indictment occurred during the reign of Edward I.<sup>41</sup> The King brought a man to trial for treason and felony.<sup>42</sup>

The information is almost as old as the grand jury indictment.<sup>43</sup> Holdsworth traced it to the thirteenth century as well, but said it likely arose before formal statutes, “very naturally to the centralized royal justice of the thirteenth century.”<sup>44</sup> For example, he noted that if someone took property that belonged to the King, the King could inform his courts, and they could act.<sup>45</sup> He asserted that the informal practice was later formally developed through legislation.<sup>46</sup>

The earliest statute allowing informations may have been the statute of Winton (or statute of Winchester) passed in 1285 at the behest of Edward I.<sup>47</sup> The statute expressly applied to felonies and misdemeanors alike.<sup>48</sup> Noting the growth in crime and difficulty of jury conviction, it allowed constables and other watchmen to keep the peace and gave them certain powers to bring perceived lawbreakers (including “strangers” and “suspicious” persons) before a Justice.<sup>49</sup> It pro-

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referencing the secrecy obligation and oath); see also ASTRY, *supra* note 34, at 9 (referring to secrecy obligation & the oath).

40. See 2 FREDERICK POLLACK AND FREDERIC WILLIAM MAITLAND, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 662 (2d ed. 1898).

41. *Id.*

42. *Id.* (Treason and felony are separately referenced. In the seventeenth century, as the *Fitzharris* case *infra* demonstrates, a person charged with treason was denied certain rights. See, e.g., note 143, *infra* (court denying Fitzharris copy of indictment because he was charged with high treason).

43. 4 BLACKSTONE, *supra* note 31, at \*309 (stating the information is almost as old as the common law itself); HOLDSWORTH, *Information*, *supra* note 31, at 300;

44. Holdsworth, *Information*, *supra* note 31.

45. *Id.* at 301.

46. *Id.* at 301. Holdsworth notes that there were civil and criminal informations and, different kinds of each. *Id.* at 301–02 (discussing different types).

47. 13 Edw. I. st. 2, c. 4. (1285); see also 1 HANNIS TAYLOR, *ORIGIN OF ENGLISH CONSTITUTION* 503 (1904); cf. 2 MATTHEW HALE, ET AL., *HISTORIA PLACITORUM CORONAE. THE HISTORY OF THE PLEAS OF THE CROWN* (1st American ed.) 94–96 (1847) (discussing power of constables and watchmen; Statute of Winton authorization).

The Statute of Winton (a/k/a Statute of Winchester) also required that every person between the ages of 13 and 60, take up arms and be available to serve as watchmen, constables or other peacekeepers according to the value of their lands. 13 Edw. I, st. 2, c. 4.

48. 13 Edw. I. st. 2, c. 4. (1285).

49. *Id.*; see also 2 HALE, *supra* note 47, at 95, 96 (discussing different types of watchmen and constables assigned to keep the peace and their ability to bring prisoners on charges before a justice of the peace).

vided that “inquests” could be held by the “lord of the ville” (essentially the mayor).<sup>50</sup> Holdsworth suggests that by the time of Henry VIII’s reign, the King had “a somewhat indefinite power of proceeding by way of information for offenses under the degree of felony.”<sup>51</sup>

## 2. Approaches in the American Colonies

Given the separate founding histories of each colony and state sovereignty immediately after American independence, each state has its own history with respect to charging persons with crime and prosecuting them, including the evolution of grand jury authority.<sup>52</sup> From the earlier times, however, colonial grand juries operated much like English grand juries in their investigative functions, dealing with a wide range of misbehavior, both misdemeanors and felonies.<sup>53</sup>

Conflicts between the Crown and locals began to strain the relationship between the Crown’s attorneys and the grand juries. A regular source of American concern was the conduct of British soldiers. In

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The evolution of some statutory exceptions to grand jury presentment is recounted in *King v. Bridgewater and Taunton Canal Co.*, 108 Eng. Rep. 814 (1827) (also known as *King v. Justices of Somersetshire*) discussed *infra* at note 51. The *Bridgewater & Taunton* case cites to LAMBARD EIRENARCHA 508. *E.g.*, WILLIAM LAMBARD, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF THE PEACE IN FOURE BOOKS 508 (1599).

50. 13 Edw. I. st. 2, c. 4. (1285).

51. Holdsworth, *Information*, *supra* note 31, at 307. In 1827, the King’s Bench invalidated a longstanding custom of constable presentment without a grand jury because the practice lacked statutory authorization and was deemed to be unfair to defendants. *Bridgewater & Taunton*, *supra* note 49, at 815. The judges determined that the constable’s mere offer was invalid as a presentment because it was not under oath and that if the constable could sign it, he could thus appear before a grand jury and swear to it. With other judges concurring, Chief Justice Tenterden stated “I am sorry to hear that the custom . . . has prevailed so long; it is clearly unjust and illegal and must be discontinued.” *Id.* at 815 (noting that the presentment of a justice on his own knowledge had, by force of statute, sometimes sufficed for a grand jury but a constable was not a judge and no statute authorized this practice).

52. *E.g.*, 1 PHILIP ALEXANDER BRUCE, INSTITUTIONAL HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY: AN INQUIRY INTO THE RELIGIOUS, MORAL, EDUCATIONAL, LEGAL, MILITARY, AND POLITICAL CONDITION OF THE PEOPLE BASED ON ORIGINAL AND CONTEMPORANEOUS RECORDS, 607–10 (1910) (discussing operation of constables and of the grand jury operations in early Virginia); JUDICIAL AND CIVIL HISTORY OF CONNECTICUT, 171–73 (Dwight Calhoun & J. Gilbert eds. 1895) (discussing constables and grand juries).

53. *E.g.* BRUCE, *supra* note 52, at 608–09; *see also e.g.*, *America, New York, May 4*, BOSTON EVENING-POST, May 11, 1741, at 1 (care and vigilance of grand jury has successfully discovered gangs causing crime); *Philadelphia*, Jan. 1, N.H. GAZETTE & HISTORICAL CHRONICLE, Jan. 30, 1767, at 1 (letter reporting 1766 proceeding in which Attorney General presented several bills of indictments to grand jury which then left to deliberate). For more history, *see* Ron. S. Chun, *The Right to Grand Jury Indictment*, 26 AM. CRIM. L. REV. 1457, 1461 (1989) (explaining role of attorneys generals); *id.* at 1457–67; Lettow, *supra* note 36, at 1336–37 (explaining the history; tensions with Crown); Robert Gilbert Johnston, *The Grand Jury: Prosecutorial Abuse in the Indictment Process*, 65 J. CRIM. L. & CRIMINOLOGY 157, 157–60 (1974) (discussing history).

1769, a Boston newspaper reported that the Attorney General had entered a “*noti prosequi*” plea (*sic*) in a case involving soldiers alleged to have assaulted American citizens. In other words, he pleaded *nolle prosequi* or “no prosecution” for the Crown, despite the local grand jury’s indictment.<sup>54</sup> It said that the Crown claimed the facts did not support some of the grand jury’s charges, and the Crown also insisted that some other participants in the affair, whom the grand jury did not indict, should be tried.<sup>55</sup> (It seems, the Crown wanted to put Americans involved in the conflict on trial.) Frustration with their inability to use grand jury powers to curb soldier misconduct was so significant that Americans complained of it within the Declaration of Independence. They stated that the King had protected soldiers “by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States . . . .”<sup>56</sup> In 1770, a newspaper commentator complained about pressure on the grand jury to reduce the rigor with which the grand jurymen investigated claims as well as pressure upon them to only pay attention to prosecution’s evidence.<sup>57</sup> Such comment suggest that grand juries did not always trust the King’s offers.<sup>58</sup>

One letter from a royal official in the colonies to the Crown notes the tensions in the colonies. It stated that when the grand jury twice refused to issue a true bill, the Court kept adding more and more people to the grand jury until finally it got an indictment approval.<sup>59</sup>

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54. *E.g.*, *Boston*, Jan. 30, N.Y. JOURNAL; OR THE GEN. ADVERTISER (Mar. 2, 1769), at 1.

55. *Id.*

56. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

57. *See On the Importance, Privileges and Duty of Grand Juries*, N.Y. GAZETTE OR THE WEEKLY POSTBOY, Apr. 16, 1770, at 1 (celebrating the grand jury as a protector of the rights of Englishmen and complaining that judges were telling grand jurors that as accusers and not triers they should “relax the Rigour of their Enquiries, after the Truth” and that “to promote a favorite Prosecution, [some] tell them, that as *Accusers* and *not Triers*, they ought to proceed *ex parte*, and hear only the Evidence offered by the Prosecutor, and that this will be a full Discharge of their Oath).

58. Similar concerns were expressed in Canadian colonies. *Mr. Majeres, His Majesty’s Attorney General for Canada, His Letter to the Grand Jury of Montreal*; N.Y. JOURNAL; OR THE GENERAL ADVERTISER, June 30, 1768, 2 (Crown’s Attorney General responding by letter to grand jury concerns that he hid evidence from the grand jury and did not bring appropriate indictments).

59. The notation of the letter in the *Calendar of State Papers* reads:

Boston. April 15, 1700. At a Court of General Trials held at Newport, March 16, 1700, narrator was foreman of a Grand Jury, which twice returned a verdict of “*Ignoramus*” upon the indictments against Joseph Pembarton, John Lewis and Edward Blevin (*sic*) (xvi.). The Court had already added three more to the Jury. and now added six, and, in spite of protest and after many hours’ debate, 12 of the 21 now agreed to bring in a *Billa Vera*, because the Court would not receive it otherwise. The Judges constituting the Court were Governor Cranston, Dep. Gov. Green, Walter Clarke, Robert Carr, James Barker, Gyles Slocom, Joseph Sheffield, Joseph Hull, etc.

The King sometimes bypassed a colonial grand jury and proceeded by information.<sup>60</sup> One American colonial writer in 1770 suggested that the option of an information was especially favored by the Crown if it believed it could find no grand jury to indict.<sup>61</sup> Americans also allowed prosecution of crimes to be presented by constables and others but these seem to have been lower level crimes or persons deemed entitled to lower justice.<sup>62</sup>

This erosion of the grand jury power under Crown rule as the Crown attempted to protect its own interests, combined with their conception of the rights of British citizens, likely led the Founders to include in the Constitution a right to a grand jury in the case of a capital or “infamous” crime.<sup>63</sup>

## B. Prosecution by Impeachment

Historians agree that the first use of impeachment power in England occurred in 1376 under Edward III.<sup>64</sup> This section discusses how the British approached the issue of impeachment.

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Letter, Governor the Earl of Bellomont to the Council of Trade and Plantations, Boston (June 22, 1700) (reporting details of letter Bellomont received from Capt. Christopher Almy) in 18 CALENDAR OF STATE PAPERS, *supra* note 23, at 356–70, 369, <https://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol18/pp354-380> (last visited Feb. 10, 2019) (notation “(sic) (xvi.)” in original).

60. PROVIDENCE GAZETTE, AND COUNTRY JOURNAL, March 30, 1770, at 51.

61. *Id.*

62. *E.g.*, *Sasquehanah*, May 20, 1723, NEW ENGLAND COURANT, July 8–15, 1723 (Letter referring to Justice of Peace ordering constable to bring Negro slave before him for prosecution). Slaves were deemed property and not citizens before the Fourteenth Amendment, thus, they would not have had even a common law right to a grand jury.

63. U.S. CONST. amend V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . .”)

64. TAYLOR, *supra* note 47, at 503. Taylor says Lords Lattimer and Neville were accused by the commons of “fraud upon the revenue” or stealing public monies. *Id.*; see also Craig S. Lerner, *Review: Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Stafford Trial*, 69 U. CHI. L. REV. 2057, 2070, note 45 (2002) (discussing early impeachments). Says Lerner, “The word ‘impeachment’ (or more precisely, its precursor in law French, ‘empeschement’) first appeared in the Parliament Roll in 1324, and the reign of Edward III (1328-77) witnessed a flurry of parliamentary efforts to punish royal advisors who had abused their powers.” *Id.* citing M.V. Clarke, *FOURTEENTH CENTURY STUDIES* 242 (Oxford 1937).

1. Approaches in England/Great Britain

a. The Statement of “Impeachment”

Impeachments began in Parliament, in the House of Commons.<sup>65</sup> The written statement of impeachment was the Commons’ own version of a bill of indictment.<sup>66</sup> The House of Lords then had the sole power to try the defendant on the issues charged in the Commons’ impeachment.<sup>67</sup>

b. Impeachment as a Criminal Matter: Parliament’s Broad Powers

The British understood an impeachment trial as a type of criminal trial. It ended with a conviction or acquittal.<sup>68</sup> As Blackstone noted, when the House of Commons prosecuted an impeachment before the House of Lords, the Lords was trying impeachments as a court of criminal jurisdiction, and not as a legislative body.<sup>69</sup> By the Founders’ time, common law courts and Parliament had concurrent jurisdiction to consider crimes (even high crimes) and misdemeanors at all levels.<sup>70</sup> Parliament’s jurisdiction was superior to other courts considering the same question and when it acted, other courts were stayed.<sup>71</sup> While a commoner could be tried in a common law court, any “peer” or noble person had an absolute right to “remove” criminal cases involving treason and other crimes from common law courts to the

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65. 4 BLACKSTONE, *supra* note 31, at \*260.

66. *See, e.g.*, 4 BLACKSTONE, *supra* note 31, at \*260.

67. *See* 4 BLACKSTONE, *supra* note 31, at \*260.

68. *See* discussion of conviction in *Fitzharris* case *infra* Section I.C.

69. 4 BLACKSTONE, *supra* note 31, at \*259.

70. *See* discussion of King’s request to Parliament to allow him to try high treason case against *Fitzharris* *infra*, beginning at Section I.C.1.b. *Cf.* 84 Eng. Rep. 1056 (*Cf. King v. Eliot*, 79 Eng. Rep. 759 (1630) (holding that King’s Bench could try a member of Parliament for assaulting the speaker of the House of Commons and forcibly detaining him in his chair, for seditious statements against the King, and rejecting defendants’ argument that the alleged behavior could only be punished by Parliament). The reporter summarized the holding as “The Court of the King’s Bench may try and punish crimes and misdemeanors committed by members in the House of Commons.”

71. 4 BLACKSTONE, *supra* note 31, at \*259 (the House offers “a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom”); *id.* (calling the “high court of *parliament* . . . the supreme court in the kingdom”) (emphasis in original); SIR EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING THE JURISDICTION OF COURTS* 1 (1644) <http://lawlibrary.wm.edu/wythepeedia/library/CokeFourthPartOfTheInstitutesOfTheLawsOfEngland1644.pdf> (“4TH INSTITUTE”) (last visited Feb. 10, 2019); *cf.* GUY MEIGE, *NEW STATE OF ENGLAND UNDER OUR PRESENT SOVEREIGN QUEEN ANNE*, pt. 3, 23 (4th ed. 1702) (calling Parliament in this capacity “the Grand Inquest of the Realm”). On the matter of Parliamentary action staying other judicial action, *see* discussion of the *Fitzharris* case in Section II.C.

Court of the Lord High Steward or Parliament to be tried there by “peers.”<sup>72</sup>

Parliament’s impeachment power was broad. While Parliament tended to reserve impeachments for crimes involving official concerns,<sup>73</sup> legally, a target did not have to hold an official position to be impeached, nor did the crime have to be one of a uniquely official or high nature.<sup>74</sup> Parliament could exercise jurisdiction over a case even when a common law court was incapable, due to political pressure, malfeasance or negligence.<sup>75</sup> It could impeach after one had resigned<sup>76</sup> or even after an accused had died.<sup>77</sup> Spiritual Lords (i.e., those members of Parliament representing the official Church), did not usually vote in capital cases, on the religious belief that they had no power to determine life or death.<sup>78</sup> At the trial, members of the House of Commons were selected as “managers” to press the case before the House of Lords.<sup>79</sup> The King could attend parliamentary proceedings in his royal capacity.<sup>80</sup> The Lord High Steward presided over impeachment proceedings.<sup>81</sup> So long as at least twelve members

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72. TAYLOR, *supra* note 47, at 439–41 (discussing rights of “peers” a/k/a nobles to be tried by those of their own status); *id.* at 439 (original meaning of Magna Charta references to trial by peers was to nobility’s right to be tried by nobility); cf. THOMAS ERSKINE MAY, A TREATISE UPON THE LAW, PRIVILEGE, AND USAGE OF PARLIAMENT 380-81 (1844) (“at common law, the only crimes for which a peer is to be tried by his peers, are treason, felony, misprison of treason, and misprison of felony . . .” but noting later statutory changes). Erskine May was an assistant librarian in the House of Commons when he wrote this volume. While he served in a period after the Constitution, his work reflects Parliament’s history as well.

73. ERSKINE MAY, *supra*, 375; 4 BLACKSTONE, *supra* note 31, at \*259.

74. ERSKINE MAY, *supra* note 72, at 375 (noting that by practice impeachments are reserved for extraordinary crimes and extraordinary offenders[,] but “by the law of Parliament, all persons, whether peer or commoner, may be impeached for any crimes whatever”); see also *e.g.*, discussion of Fitzharris prosecution *infra* at p. 14 (discussing a general impeachment with the intent to produce specific articles of impeachment later).

75. ERSKINE MAY, *supra* note 72, at 375.

76. Thus, the impeachment of Warren Hastings continued despite his resignation. PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635–1805, at 113–14 (1984).

77. The Duke of Gloucester was impeached after death. *E.g.*, WILLIAM COBBETT, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803, 156, 223, 225 (1806) (Hurst et. al pubs. 1808) (hereinafter 1 “COBBETT, PARL. HIST.”). Parliament issued a writ that he be brought over from prison to face charges, but received a response from the marshal, on September 24 that the Duke had died in prison. *Id.* at 228–29. Thereafter, Parliament declared him guilty anyway, stating that his treason was widely known to everyone. *Id.* at 229–30.

78. MEIGE, *supra* note 71, at 23.

79. *Id.* Cf. Don Van Natta, Jr. *The President’s Trial: The Standards; House Prosecutors Compare Clinton to Judges Who Lied and Were Ousted*, N.Y. TIMES, Jan. 17, 1999 (actions of house managers in Clinton impeachment trial).

80. MEIGE, *supra* note 71, at 23 (noting King sits “in his Royalle politik capacity” Parliament) (emphasis in original).

81. *Id.* at 24.

were present a majority vote of the House of Lords could convict or acquit.<sup>82</sup> The House of Lords then had to request that the Commons issue judgment.<sup>83</sup> The activities of Parliament were considered matters of public record and were written down.<sup>84</sup>

c. Conviction/Sentencing/Acquittal

Apart from removing a person from office, Parliament had broad authority to issue sentences, from fines<sup>85</sup> to executions.<sup>86</sup> In the post-mortem impeachment of the Duke of Gloucester, the judgment declared that all his lands and tenants would be forfeited to the King. It further declared that none of his heirs or issue of his body should have a right to bear royal arms or to inherit the crown.<sup>87</sup> Some believed that the King could never be removed because he was either appointed by God and served by divine right or that he served by absolute right due to heredity<sup>88</sup> In fact, Parliament did issue articles of deposition against Richard II in 1399, but there was no trial and they simply removed him.<sup>89</sup> He was later murdered in jail.<sup>90</sup> The King set the time for the start of Parliament.<sup>91</sup> He also had the power to dissolve a Parliament if he did not like the way it was proceeding.<sup>92</sup> A dissolution required a new election.<sup>93</sup> But even if the King dissolved a

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82. 4 BLACKSTONE, *supra* note 31, at \*256.

83. ERSKINE MAY, *supra* note 72, at 379.

84. *See infra* note 106, (references to *Journal of the House of Lords; Journal of the House of Commons*).

85. 1 COBBETT, *PARL. HIST.*, *supra* note 77, at 1510 (Parliament fining the Earl of Middlesex 50,000£).

86. *Id.* at 213 (Simon Burley, after impeached and convicted, was sentenced to be drawn and hanged, his head cut off, all his lands, tenets and chattels forfeited to the King, but because he was a Knight of the Order of the Garter, the King remitted his drawing and hanging and ordered only that he be beheaded the same day).

87. 1 COBBETT, *PARL. HIST.*, *supra* note 77, at 229.

88. *See* 1 BLACKSTONE, *supra* note 311, at \*208–09, (discussing hereditary titles in England and the belief that “there was something divine in this right, and that the finger of providence was visible in its preservation” but arguing that Parliament accepted hereditary title not as divine, but as “inherent birthright, and lawful and undoubted succession.”).

89. *See* 1 COBBETT, *PARL. HIST.*, *supra* note 77, at 254–67 (articles of impeachment); *id.* at 265–67 (sentence of deposition). Parliament replaced him immediately with Henry IV. *Id.* at 267.

90. 2 DAVID HUME, *THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688*, 241, 274 (new ed.1762) (hereinafter “X Hume”).

91. MEIGE, *supra* note 71, at 21.

92. *See* discussion *infra* Section I.C.1.d. (dissolution of Parliament among protests to King taking *Fitzharris* case).

93. MEIGE, *supra* note 71, at 21.

Parliament, an impeachment proceeding in a former Parliament could continue into the next session of Parliament.<sup>94</sup>

## 2. Approaches in the American Colonies

As noted in section I(A)(2), theoretically, American colonies had the power to enforce the criminal law on the local level, although that power was sometimes thwarted by the Crown.<sup>95</sup> But the Crown denied the colonies the power to impeach or to try impeachments of royally-appointed officials who oversaw them.

Having no representatives in Parliament, to remove a chief executive or other official, the colonists made their impeachment appeals to royal authorities.<sup>96</sup> In 1720, the colony of South Carolina sent the Crown a petition for relief, complaining that royally appointed heads of the colonies (Lords Proprietors) had violated the duties to deal fairly with colonists and to establish churches and, through their policies, had subjected colonists to undue risk from “Indians.”<sup>97</sup>

South Carolina colonists also issued articles of impeachment of their Chief Justice, stating, “The notorious crimes and offences which immediately relate to him as Chief Justice will appear in a Remonstrance and Impeachment brought against him by the Commons house of Assembly now sent to your Majestyes judges in England.”<sup>98</sup>

South Carolina featured prominently in another dispute in 1763. The colony sent a detailed statement to the King complaining of their Governor and alleging that he had interfered in the election of mem-

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94. Though impeachments had continued before, in the Warren Hastings case, the House of Lords debated and decided this point. *Debate in the Commons on the Abatement of an Impeachment by a Dissolution of Parliament in 28 COBBETT, PARL. HIST., supra note 77, at 1018–1170; Debate in the House of Lords on the Abatement of an Impeachment by a Dissolution of Parliament, 29 COBBETT, PARL. HIST., supra note 77, at 514–44 (1817); Protest Against the Resolution for Proceeding in the Trial of Mr. Hastings, in id. at 544–45.*

95. See discussion *supra*, I.B.2.

96. E.g., *Address of the Council and Representatives of the Massachusetts Bay to the King, Boston in New England, 1731*, 38 CALENDAR OF STATE PAPERS, *supra* note 23, at 136–137 (Jun. 18, 1731), <https://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol38/pp134-138> (last visited Feb. 10, 2018) (seeking removal and noting they have no right of impeachment in Parliament).

97. *Petition of the Council and Assembly of the Settlements in South Carolina to the King . . .*, February 3, 1720, CALENDAR OF STATE PAPERS, *supra* note 23, at 332–43, <https://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol31/pp323-352> ((last visited Feb. 10, 2019).

98. *Id.*

bers of their legislative body. They begged the King for the ability to determine their own leaders.<sup>99</sup>

In 1731, the Representatives of Massachusetts complained to the King of misbehavior of royal officers. They argued that delay “can serve only to aggravate our distress, but noways helps to refund the money, or gain any relief: there being no possibility of impeachment here, as there is in such cases, in our Mother Country, . . . in Parliament . . . .”<sup>100</sup>

In 1773, three years before the Declaration of Independence, the Massachusetts legislature issued articles of impeachment against Peter Oliver, Chief Justice of the Superior Court. The key charge was that Oliver acted as a puppet of the Crown and not in the colony’s interest.<sup>101</sup> The legislature asked the royal Governor and Council overseeing the colony to hold an impeachment trial in Massachusetts. However, the Governor declined, stating that any high crime or misdemeanor, if committed, was punishable under law but that he had no concurrent power to lead an impeachment.<sup>102</sup> Of course a punishment in courts of law would have been unsatisfactory for it had to be led by the King’s prosecutors before a judge appointed by the King.

Given the colonists’ yearning for the impeachment power, I contend that many of them would have considered impeachment to be a significant power. These facts may explain, in part, the Constitutional emphasis on *impeachment* (for removal) and the lack of reference to prosecution. For a better understanding, of how the colonists and the Founders considered the link between impeachment prosecutions and prosecutions in courts of law, the next section explains clashes in jurisdiction between common law courts and Parliament under the British model.

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99. A FULL STATE OF THE DISPUTE BETWIXT THE GOVERNOR AND THE COMMONS HOUSE OF ASSEMBLY OF HIS MAJESTY’S PROVINCE OF SOUTH CAROLINA IN AMERICA (1763).

100. *Address of the Council and Representatives of the Massachusetts Bay*, *supra* note 96, at 136–37.

101. *To the House of Representatives . . .*, PENN. CHRON., July 5–12, 312 [Re Massachusetts resolution protesting dependency of local Judges upon the Crown]; *see also* MASSACHUSETTS GAZETTE & BOSTON POST-BOY & ADVERTISER, Feb. 28, 1774, 1 (referencing that Massachusetts House had resolved to impeach Peter Oliver, Esq., Chief Justice of the Superior Court before the Governor for High Crimes and Misdemeanors and that Articles of Impeachment had been prepared); *In Council March 4, 1774. . .*, MASSACHUSETTS GAZETTE & BOSTON POST-BOY & ADVERTISER, Feb. 28, 1774, 2 (noting Massachusetts House of Representatives has impeached Oliver but tabled the matter waiting for the Governor and Council would present a time to proceed); MASSACHUSETTS SPY, OR THOMAS’S BOSTON JOURNAL, Mar. 3, 1774, 1 (Justice Oliver’s response to impeachment)).

102. BOSTON GAZETTE AND COUNTRY JOURNAL, Mar. 7, 1774, 2; *Friday, May 27, America*, KENTISH GAZETTE, May 28, 1774, 1.

## C. Common Law Courts vs Parliament

### 1. The *Fitzharris* Trial

When impeachment talk arises during an ongoing criminal investigation, questions also arise as to how the two criminal proceedings intersect. Can a Department of Justice criminal investigation or prosecution in courts of law continue, despite the impeachment? If not, when is the operation of proceedings tied to courts of law stayed? This section explains that because an impeachment is an overlapping criminal proceeding by a higher court within the same sovereign, it would have the effect of staying any other investigation or prosecution relating to the same offenses.

The focus here is the *Fitzharris* case (1681) which arose both in the King's Bench and in Parliament. Fitzharris was impeached by the House of Commons which desired to stop a Crown prosecution. But the Crown then intervened to ask the House of Lords not to try Fitzharris, but instead, to allow a criminal trial in the common law courts.<sup>103</sup> The House of Lords agreed to defer, but Fitzharris sought to use the Commons' impeachment as a bar to a trial at common law. The result was a confusing precedent, and yet one that underscores both that jurisdiction was concurrent and that most people considered Parliament to be the superior court in a criminal case. The principles generally recognized in *Fitzharris* help us to understand the historical understanding of impeachment that the Founders would have brought to the question of the power of courts to prosecute a sitting President.

#### a. The House Impeaches *Fitzharris*

There are not many English cases discussing the conflict between impeachment and prosecution. However, the most significant is that involving Edward Fitzharris.<sup>104</sup> Fitzharris, a commoner who held no

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103. See discussion *infra* Section I.C.1.b.

104. The story of Fitzharris' Parliamentary impeachment and common law trial is told in several "State Trials" collections as well as in Parliamentary journals and other books. According to the Oxford Library Guides, *State Trials* was a series of case and proceedings reports, many of which are verbatim or close paraphrase, published in various editions between the eighteenth and nineteenth centuries. The series was the main source of information about the history of English criminal procedure and evidence and early volumes were produced by various editors including Thomas Salmon, Sollom Emyln, and Francis Hargrave. Bodleian Libraries, Oxford University, *Legal History: England & Common Law Tradition: State Trials*, OXFORD LIBGUIDES, <https://libguides.bodleian.ox.ac.uk/law-histcom/sttr> (last visited Nov. 16, 2018) ("LibGuides") (citing Lindsay Farmer, *State Trials*, THE NEW OXFORD COMPANION TO LAW (2008)), <http://www.oxfordreference.com/view/10.1093/acref/9780199290543.001.0001/acref-9780199290543-e-2095> (last visited Nov. 16, 2018). According to LibGuides, in 1808 William

official position, was both indicted and impeached for allegedly conspiring against the King with France to make the Catholic religion in England supreme over Protestantism.<sup>105</sup> Apparently in a rush, the Commons impeached him by a general statement of impeachment, with the intent to provide more specific articles later.<sup>106</sup>

b. The King “Requests” to Try Fitzharris in Common Law Courts

Before the trial began in the House of Lords, the Attorney General, for the Crown, appeared before them to state that he had an order from the King, dated two weeks earlier. He asked the House of Lords to stay their proceedings so that the Crown could indict Fitzharris for treason and try him in the common law courts.<sup>107</sup> The Attorney General announced that he had already prepared a draft indictment to present to a grand jury.<sup>108</sup>

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Cobbett employed William Howell as editor to produce a new set of State Trials. Howell subsequently produced other volumes assisted by his son. *Id.* (citing Gordon Goodwin, *Howell, Thomas Bayly* (1767–1815)); Rev. Jonathan Harris, *Oxford Dictionary of National Biography*, (2004), <http://www.oxforddnb.com/view/article/13980>, (last visited Nov. 16, 2018).

For reports of the Parliamentary proceedings in the *Fitzharris* matter, see 13 JOURNAL OF THE HOUSE OF LORDS 755 (1675-1681) (digitized at BRITISH HISTORY ONLINE, <https://www.british-history.ac.uk/lords-jrnl/vol13/pp754-756>) and 9 JOURNAL OF THE HOUSE OF COMMONS 710-11 (digitized at BRITISH HISTORY ONLINE, <https://www.british-history.ac.uk/commons-jrnl/vol9/pp710-712#h3-0010>) (last visited Feb. 10, 2019).

Other sources also report on the trial or on both the trial and impeachment proceedings. *See, e.g.*, 3 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS IN GREAT BRITAIN (Francis Hargrave ed. 1797); *id.* at 252–95 (impeachment proceedings); *id.* at 295-331 (common law trial); 8 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783 (W. Cobbett & T.B. Howell eds. 1816) (“8 HOWELL, STATE TRIALS”).

*See also* DEBATES OF THE HOUSE OF COMMONS: FROM THE YEAR 1667 TO THE YEAR 1694, 1680-85 (Anchitell Grey, ed. 1769); IV COBBETT, PARL. HIST., *supra* note 77, at 1313–17, 1331–41 (Parliament’s impeachment, debate and rejection of impeachment).

At least one anonymous pamphlet was also produced on the trial. *See* the TRYAL AND CONDEMNATION OF EDW. FITZHARRIS, ESQ. FOR HIGH TREASON (1681).

105. 9 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 104, at 710; *see also* 8 HOWELL, STATE TRIALS, *supra* note 104, at 224, 227.

106. *Id.* The message sent to the Lords, as recorded in the *Journal of the House of Lords* was:

The Commons of England, assembled in Parliament, having received information of divers traitorous practices and designs of Edward Fitzharris, have commanded me to impeach the said Edward Fitzharris of high treason: and I do here, in their names, and in the names of all the Commons of England, impeach Edward Fitzharris of high treason.

They have further commanded me to acquaint your Lordships, that they will, within convenient time, exhibit to your Lordships, the articles of charge against him.

13 JOURNAL OF THE HOUSE OF LORDS, *supra* note 104, at 755.

107. *Id.*

108. *Id.*

c. The Lords Decide Not to Try Fitzharris

During the House of Lords debate on the issue, the question was recorded this way: “The question was put ‘Whether *Edward Fitzharris* shall be proceeded with according to the Course of the Common Law, and not by way of Impeachment in Parliament, at this Time.’”<sup>109</sup> The House of Lords voted in the affirmative (i.e., to stay its proceedings) and Fitzharris was sent to be tried at common law.<sup>110</sup>

On Monday, the 28th of March 1681, several Lords protested the House of Lords’ refusal to try Fitzharris.<sup>111</sup> They argued that the House of Lords had no power to ignore an impeachment by the House of Commons.<sup>112</sup> They argued that the type of offense with which Fitzharris was charged (treason) was one that influenced the government: “Offenses that influence the Government are most effectually determined in Parliament.”<sup>113</sup> And they argued that the public’s interest in such proceedings would not be as well protected in a case prosecuted at law.<sup>114</sup> The *Journal of the House of Lords* reports the argument as below:

Because that in all Ages it hath been an undoubted Right of the Commons to impeach before the Lords “any Subject, for Treasons or any Crime whatsoever; “and the Reason is, because great Offences that influence the Government are most effectually determined in Parliament.

We cannot reject the impeachment of the Commons, because that Suit or Complaint can be determined no where else: For if the Party impeached should be indicted in the King’s Bench, or in any other Court, for the fame Offence, yet it is not the same Suit; for an Impeachment is at the Suit of the People, and they have an Interest in it. But an Indictment is the Suit of the King; For one and the same Offence may entitle several Persons to several Suits; as, if a Murder be committed, the King may indict at His Suit, or the Heir or the Wife of the Party murdered may bring an Appeal; and the King cannot release that Appeal, nor His Indictment prevent the Pro-

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109. *Id.*

110. *Id.* Apparently, the Spiritual Lords participated in the vote to reject the impeachment, although they normally did not vote in capital cases. See, 8 HOWELL, STATE TRIALS, *supra* note 104, at 233 .

111. *Id.* See also 8 HOWELL, STATE TRIALS, *supra* note 104 at 231–32.

112. 13 JOURNAL OF THE HOUSE OF LORDS, *supra* note 104, at 755. See also 8 HOWELL, STATE TRIALS, *supra* note 104, at 231.

113. *Id.*

114. *Id.*

ceedings in the Appeal, because the Appeal is the Suit of the Party, and he hath an Interest in it.

It is an absolute Denial of Justice, in regard it cannot be tried no where else. The house of peers, as to Impeachments, proceed by virtue of their Judicial Power, and not by their legislative; and as to that, act as a court of record; and can deny suitors (especially the commons of England that bring legal complaints before them), no more than the judges of Westminster can deny any suit regularly commenced before them.<sup>115</sup>

In short, this view argued that the House of Lords *had* to try the case once the impeachment was issued. Significantly, this argument *also* conceded that, at least until Parliament intervened to assert its authority, concurrent jurisdiction existed between the common law courts and Parliament.

#### d. The Commons' Protest/The King Dissolves Parliament

The House of Commons also protested the Lords' refusal and the King's action and insisted that it had superior jurisdiction. It resolved on March 26, 1681, that "it is the undoubted Right . . . to impeach . . . any Peer or Commoner for Treason, or any other Crime or Misdemeanour" and called the Lord's refusal to proceed to trial upon their impeachment a "Denial of Justice, and a Violation of the Constitution of Parliaments."<sup>116</sup> It further resolved "for any inferior court to proceed against *Edward Fitzharris*, or any other person lying under an Impeachment in Parliament for the same Crimes for which he or they stand impeached, is a high Breach of the Privilege of Parliament."<sup>117</sup>

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115. *Id.* (accents appearing in the original have been removed from this quotation).

116. 9 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 104, at 711 at British History Online, <https://www.british-history.ac.uk/commons-jrnl/vol9/pp710-712#h3-0010> (last visited Feb. 12, 2019).

117. *Id.* The U.S. Supreme Court has never directly addressed the question of whether the Senate could avoid an impeachment by refusing to try the case put forth by the House. But in dicta, in an unrelated 2004 gerrymandering case, a plurality did suggest that it could not. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004) plaintiffs challenged state gerrymandering as a violation of the principle of one person, one vote. The plurality held that political gerrymandering challenges therein raised nonjusticiable political questions because the Court could not discern manageable standards for determining when constitutional offenses had occurred and what the lines should be. Justice Stevens agreed that state-wide challenges were nonjusticiable, but argued, *inter alia*, that district-wide challenges to severe partisan gerrymandering were justiciable because they were incompatible with democratic principles. Regarding the democratic principles argument the Court said, "We do not disagree with that judgment, any more than we disagree with the judgment that it would be unconstitutional for the Senate to employ, in impeachment proceedings, procedures that are incompatible with its obligation to "try" impeachments. See *Nixon*, 418 U.S. at 683. [Note that the Court here cites *generally*, not specifically, to *Nixon*.] The issue we

In short order, the King took care of this resistance. He dissolved the Parliament.<sup>118</sup> He kept his plan to dissolve a secret until he arrived.<sup>119</sup>

e. The Political Backdrop of *Fitzharris*

As noted, the conflict between the House of Commons and the House of Lords and the King in *Fitzharris* involved politics. Before the impeachment, Fitzharris had already been arrested and was in jail awaiting indictment.<sup>120</sup> Deeming Fitzharris of value in political wars, the Commons impeached him in order to prevent a common law prosecution and a most certain execution.<sup>121</sup> Presumably they planned to mismanage the trial to ensure an acquittal or, because they were the ones who had to issue judgment, they planned to declare a light sentence.<sup>122</sup> The King's request and the refusal of the Lords to follow through, then, was intended to thwart the Commons' plan.<sup>123</sup> (Perhaps one should not be surprised then, that persons associated with the Commons would later be involved as part of Fitzharris' defense team in asserting his jurisdictional claim.<sup>124</sup>)

The means by which the Lords proceeded to avoid a trial arose out of a fourteenth century controversy involving King Edward III. He overlooked the House of Commons and directly appealed to the House of Lords to try several commoners who had allegedly committed crimes.<sup>125</sup> Initially, the Lords protested this bypass of the House

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have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.”

118. 8 HOWELL, STATE TRIALS., *supra* note 104, at 242.

119. *Id.*; IV COBBETT, PARL. HIST., *supra* note 77, at 1339. Cobbett adds a note that he attributes to Burnet: “very suddenly, and not very decently, he came to the house of lords, the crown being carried between his feet in a sedan: and he put on his robes in haste, without any previous notice, and called up the commons and dissolved the parliament . . .” *Id.* at 1339n.

120. 6 HUME, *supra* note 90, at 332; *see also generally id.* at 332–34.

121. *Id.* at 334. In a what may have been a plea to Parliament for aid for her and her children after her husband's execution, Mrs. Fitzharris also stated that the impeachment was undertaken to block the common law courts. *See* 10 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 104, 61–62 (March 22, 1688), BRITISH HISTORY ONLINE, <https://www.british-history.ac.uk/commons-jrnl/vol10> (last visited Feb. 10, 2019). Her own access to a pension, based on her father's service, was blocked after her husband's execution. *Id.*, 180–81 (June 16, 1689), at <https://www.british-history.ac.uk/commons-jrnl/vol10/pp180-182>.

122. For discussion of the House of Commons' power over judgment, *see* discussion *supra*, at Section I.C.1.b.

123. *Id.* at 334; *see also* discussion *infra* note 125.

124. *See* note 139 *infra*.

125. The dispute arose out of the case of Simon de Beresford, 4th Edw. 3. *See* 8 HOWELL, STATE TRIALS, *supra* note 104, at 235–39n (editor's notes); 4 COBBETT, *supra* note 77, 1332n; ERSKINE MAY, *supra* note 72, at 375. Edward III asked the House of Lords to put on trial six commoners who, allegedly, plotted against Edward II. After some resistance, the Lords did so.

of Commons, but eventually, they did have a trial.<sup>126</sup> Afterward, they adopted a resolution that this was never to be done again.<sup>127</sup> But from that situation, there emerged confusion about whether commoners charged with capital crimes (as opposed to misdemeanors) could be tried in the House of Lords, who were not their peers or even impeached by the Commons for a capital offense.<sup>128</sup>

Of course, Fitzharris' counsel *had* to argue that Parliament *could* impeach commoners for treason because they needed the impeachment to be good in order to thwart jurisdiction by the King's Bench.<sup>129</sup> However, in light of so many later commoner impeachments, the assertion that Parliament cannot impeach a commoner was later soundly rejected.<sup>130</sup>

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The House of Commons protested this procedure, and Parliament adopted an resolution that such action was barred in the future. 8 HOWELL, STATE TRIALS, *supra* note 104, at 231–39; Blackstone describes the matter in this way:

When, in 4 Edw. III. The king demanded the earls, barons, and peers, to give judgment against Simon de Beresford [sic] who had been a notorious accomplice in the treasons of Roger earl of Mortimer, they came before the king in parliament, and said all with one voice, that the said Simon was not their peer; and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and to give judgment against him, the following protest and proviso was entered on the parliament roll. “And it is assented and accorded by “our lord the king, and all the great men, “in full parliament, that albeit the peers, “as judges of the parliament, have taken “upon them in the presence of our lord the “king to make and render the said judgment; yet the peers who now are, or “shall be in time to come, be not bound or “charged to render judgment upon others “than peers; nor that the peers of the land “have power to do this, but thereof ought “ever to be discharged and acquitted: and “that the aforesaid judgment now rendered “be not drawn to example or consequence “in time to come, whereby the said peers “may be charged hereafter to judge others “than their peers, contrary to the laws of “the land, if the like case happen, which “God forbid.” (Rot. Parl. 4 Edw. III. N 2 & 6. 2 Brad. Hist. 190. Selden. Judic. In parl. Ch. 1.).

See 4 BLACKSTONE *supra* note 31, at \*259, n. b (quotation marks in original; but note that some editions omit these quotes). See *id.*; *The Avalon Project*, Yale Law School, Lillian Goldman Library, [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk4ch19.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk4ch19.asp) (last visited Feb. 12, 2019).

Relying on de Beresford's case, Blackstone argued that the House of Commons could not impeach a commoner for a capital crime. See 4 BLACKSTONE *supra* note 31, at \*259 (“de Beresford” case). Other treatises note disagreement. See, e.g., 2 HALE, *supra* note 47, at 84, n. 4 (stating the better view seems to be that the Lords had no jurisdiction but noting disagreement); COBBETT, PARL. HIST., *supra* note 77, at 1332n (saying the Fitzharris impeachment was rejected upon a “pretense” of a rule against impeachment by the Commons that was provided by Lord Nottingham”); ERSKINE MAY, *supra* note 722, at 375–76, 658 (noting Blackstone reliance on de Beresford's case and saying he ignored later authorities).

126. See discussion *supra* note 125.

127. *Id.*

128. *Id.*; see also note 72 (for discussion of Magna Charta right to trial by “peers”).

129. Cf. 8 HOWELL, STATE TRIALS., *supra* note 104, at 234.

130. See also EDWARD FISCHER, THE ENGLISH CONSTITUTION 499 (Richard Jenery Shee, trans., 2d ed. 1863) (noting various Parliamentary impeachments of commoners and the edict of the “supreme tribunal”); ERSKINE MAY, *supra* note 72, at 376 (*Fitzharris* of little value on issue of Commons impeachment power & noting Chief Justice Scroggs, Sir Adam Blair and other

This political context for the *Fitzharris* controversy matters to the American experience for two reasons. First, it indicates that, however speciously, the Lords ultimately refused the impeachment on the ground that they lacked *jurisdiction*. Thus, *Fitzharris* cannot support a view that the Senate, which is charged with trying impeachments in the U.S., could refuse to try a case for purely political reasons.<sup>131</sup> Second, the legal effects of allowing impeachment of commoners by the House of Commons in capital cases was that a commoner ended up being tried by nobility, in the House of Lords, rather than by a jury of laypersons and it was believed, an accused was deprived of certain defenses.<sup>132</sup> Although the Americans had no titles of nobility, that issue may have underscored the importance of trial by jury of one's peers in the American experience.<sup>133</sup>

f. The Grand Jury's Indictment and the Trial at Common Law

Fitzharris was subsequently indicted by a grand jury and brought to trial before the common law courts.<sup>134</sup> Due to the King's dissolution, no Parliament was in session.

In Fitzharris' day, one accused of treason had no absolute right to counsel at either arrest, arraignment, or trial. He was examined without counsel while he was held a prisoner in the Tower of London.<sup>135</sup> Fitzharris' wife consulted lawyers on her own and brought word of their advice, back to him, but later a written plea challenging jurisdiction was rejected because no lawyer had signed the papers.<sup>136</sup> With

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commoners impeached and tried by Lords for capital crimes afterward); A. S. Turberville, *The House of Lords Under Charles II*, 45 ENGLISH HISTORICAL R. 58, 68–69, & note 3 (1930); ERSKINE MAY, *supra* note 72, at 375–76 (saying that the issue was clearly resolved later). The *Scroggs* case mentioned in *Erskine May*, *supra*, was one of those argued in *Fitzharris* as a prior precedent. 8 HOWELL, STATE TRIALS., *supra* note 104, at 233. The *Scroggs* case appears at 8 HOWELL, STATE TRIALS., *supra* note 104, 163–224 (*Proceedings Against Lord Chief Justice Scroggs, Before the Privy Council; and Against the said Lord Chief Justice and Other Judges in Parliament*); *id.* at 195–201 (resolution & articles of impeachment).

131. It should be noted that when the “Rump Parliament,” the House of Lords also refused to try the King on the Commons' charges which they believed to have been coerced. Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 381–82 (2010).

132. 8 HOWELL, STATE TRIALS., *supra* note 108, at 240n (citing authority that, by impeachment, a commoner is “deprived of his legal challenges”).

133. U.S. CONST. amend. VII (“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 . . .”).

134. *Id.* at 243.

135. *Id.* at 254 (Lord Chief Justice referring to sending a clerk to examine him in the Tower).

136. *Fitzharris' Case*, 86 Eng. Rep. 228 (1693) (rejecting written challenge). *See also* 8 HOWELL, STATE TRIALS., *supra* note 104, at 250 (wife telling Fitzharris to enter a plea challenging court's jurisdiction and giving him a written plea she obtained from a lawyer).

her help, Fitzharris, though proceeding *pro se*, was able to argue that the common law courts had no jurisdiction because he had been impeached by the House of Commons.<sup>137</sup> Under this argument, jurisdiction lay in Parliament as long as an impeachment was pending. In the meantime, the Crown's position was represented by the Attorney General, the Solicitor General, and several other lawyers.<sup>138</sup>

Recognizing his indigency, the court appointed four *pro bono* counsel (recommended by the Fitzharris' wife) to assist him pretrial. These lawyers also pressed the point.<sup>139</sup> They argued that Parliament was a *superior* court.<sup>140</sup> They argued that the indictment and the impeachment charge were one and the same and that, therefore, no inferior court to Parliament could now exercise jurisdiction.<sup>141</sup> Yet, they were still limited to arguing only the pretrial jurisdictional point.<sup>142</sup>

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137. 8 HOWELL, STATE TRIALS, *supra* note 104, at 260 (Crown counsel saying Fitzharris received knowledge about how to plead jurisdiction in the first instance from his wife who must have consulted a lawyer); *id.* at 253 (wife telling Fitzharris not to talk too much); *Id.* at 257 (Lord Chief Justice identifying Fitzharris' *pro se* plea as one challenging jurisdiction).

138. *Id.* at 332–33 (reference to Sergeant Jeffries); *id.* at 324 (reference to Sir. Francis Withins); *id.* at 361 (reference to Maynard resting the Crown's case).

139. Fitzharris' requested several prominent lawyers to serve as his *pro bono* counsel on the plea. These included Sir Henry Pollexfen, Sir Francis Winnington; Sir William Williams (former Speaker of the House of Commons);" Mr. Wallop. *Id.* at 252. For background on these lawyers, see their respective entries at *The History of Parliament Online*, <https://www.historyofparliamentonline.org/> (last visited Feb. 10, 2019) (maintained by the UK Institute of Historical Research, School of Advanced Study, University of London). See, e.g., HENRY POLLEXFEN, <https://www.historyofparliamentonline.org/volume/1660-1690/member/pollexfen-henry-1632-91> (last visited Feb. 3, 2019). Winnington was on the Commons' committee that drafted the articles of impeachment against Fitzharris and he spoke there against the Lord's rejection. 9 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 104, at 710–712.

140. E.g., 8 HOWELL, STATE TRIALS, *supra* note 104, at 284 (argument of Williams). Fitzharris' counsel challenged the Court's jurisdiction arguing four main points; (1) that Fitzharris was impeached of High Treason; (2) that the impeachment remained in full force at that time; and (3) that the High Treason for which Fitzharris was impeached is one and the same Treason that was the subject of the indictment. E.g., *Id.* at 283 (argument of Williams). Note that the record of Parliament's proceedings was not yet available to Fitzharris' attorneys, and they were relying upon notes taken; see *id.* at 265I (Sir. Francis Winnington for Fitzharris referring to effort to obtain record but House of Lords clerk out of town; Attorney General referring to his notes taken).

In insisting on the superiority of the court of Parliament, lawyers relied on Coke's *Institutes*. See 4TH INST., *supra* note 71, at 1.

141. E.g., 8 HOWELL, STATE TRIALS, *supra* note 104, at 233.

142. *Id.* at 263 (Attorney General warning Fitzharris' counsel, "Gentlemen, remember you have not liberty to plead anything, but to the jurisdiction of the Court); *id.* at *id.* at 263, 279 (counsel acknowledging limitation to pleading jurisdiction). The Attorney General sought to block Fitzharris' counsel from meeting alone with him out of fear they would "step beyond bounds." *Id.* at 252; see also *id.* at 260; cf. *id.* at 332 (Crown counsel challenging whether anyone, including prisoner's wife, can assist prisoner "as to matters of fact"). After his conviction and sentencing to death, his wife was finally allowed visit him without a warden present. *Id.* at 393.

They also were not given a copy of the indictment (it was read), and were given a few days to prepare.<sup>143</sup>

The King's prosecutors sought to have the jurisdiction plea dismissed both as to form and as to substance. They conceded that Parliament was a higher court generally as to matters before it.<sup>144</sup> But they argued that the *form of the pleading* as flawed as well as what they called the "fact" of it.<sup>145</sup> They attacked whether the two actions were the same. And relying on strict English pleading rules then in force, they said that the House of Commons' impeachment was a *general* one for treason, and that the prisoner's pleadings did not set forth with sufficient specificity the *type* of treason charged.<sup>146</sup> The Attorney General argued, that the accused's failure to plead the treason with specificity was fatal and that the accused had not shown that the treason for which he was impeached and the treason with which he was charged before the King's Bench were the same.<sup>147</sup>

The Crown's counsel also challenged the meaning of Parliament's superior status. They argued that, although no indictment had issued and the common law courts were inferior, the latter had *original* jurisdiction of Fitzharris' person and subject matter, and that jurisdiction could not be ousted after it attached.<sup>148</sup> They also argued that since

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143. *E.g., id.* at 255–57; (attorneys and Fitzharris complaining about limited time to prepare; argument over timing); *id.* at 274 (Lord Chief Justice resisting pleas for more time); *id.* at 279–80 (additional timing arguments; judge granting till "Saturday"); *id.* at 230–31 (moving to Saturday hearing because tomorrow, Friday, was heavily booked).

In refusing to give Fitzharris or his assigned lawyers a copy of the indictment, the court stated that such access was not granted in high treason cases. 8 HOWELL, STATE TRIALS, *supra* note 104, at 257, 258 (judge saying not allowed in treason cases); *id.* at 257–58; 262, 272, (lawyers complaining they have not seen indictment); *id.* at 259 (Wallop arguing sources suggesting that denying a copy was an abuse); *id.* at 281 (judge denying copy of indictment, but allowing copy of plea and demurrer); *see also* 86 Eng. Rep. at 228 (after assigning him lawyers; refusing Fitzharris' lawyers' request for a copy of the indictment). The indictment was read to Fitzharris before he had counsel and, apparently again on the day that appointed counsel argued the plea (but not afforded to counsel before that time). *Id.* at 249, 231.

144. *Id.* at 284 (Fitzharris' counsel stating of the King's Counsel "[H]e does allow the parliament to be a superior court").

145. *Id.*

146. *Id.* at 266 (Attorney General saying plea insufficient and frivolous); *id.* at 237 (Attorney General arguing that House issued impeachment for general treason while indictment points to violation of particular statute); *see also id.* at 241 (saying Fitzharris was impeached generally for treason); *id.* at 259–60 (Sir Francis Withins arguing the same); *id.* at 235 & n.195 (Withins saying no one can be generally impeached of treason; same).

147. 8 HOWELL, STATE TRIALS, *supra* note 104, at 273, 277.

148. *Id.* at 266 (noting the King's Bench has universal and original jurisdiction over such cases and argued that Parliament could not oust it); *id.* ("[T]here was never a thing of a Crime so great, but this Court of the *King's Bench* which hat a sovereign Jurisdiction, for commoners especially, could take Cognizance of it . . ."); *id.* at 282 (stating "it is a plea to the jurisdiction of the Court; and, with submission, there the point will be, whether a suit depending, even in a

all courts were ultimately of the King, he could *elect* how to proceed, i.e., through Parliament or through common law courts.<sup>149</sup>

Fitzharris' lawyers responded that a general impeachment was a good impeachment.<sup>150</sup> They argued that, given the fact of a general impeachment, Fitzharris' plea could not be more specific.<sup>151</sup> They brought forth precedents wherein a person had been both indicted and later impeached to support their view that Parliament had superior authority.<sup>152</sup>

The issue of parliamentary privilege<sup>153</sup> also arose in Fitzharris. As part of their jurisdictional argument, Fitzharris' lawyers argued that if

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superior Court can take away the jurisdiction of an inferior Court, who had original jurisdiction of the cause, of the person and of the fact, at the time of the fact committed").

149. *Id.* at 431 (Attorney General stating that the King has the power to proceed by Impeachment or Indictment at his "election"). This claim arose from the view that even proceedings in Parliament were proceedings on behalf of the King. *See, e.g.*, Case of Earl of Ferrers, 168 Eng. Rep. 69, 70 (1760). Ferrers, a peer, was convicted in the House of Lords for murder. As to judgment, Parliament was unsure as to whether Ferrers could be given the same judgment as provided for in a statute prohibiting such murders (e.g., execution). They also wondered whether, a new execution date could be set if the execution could not occur on the set day, and who could set the new date. They asked the common law courts to rule on these questions. The King's Bench responded that a new date for execution may be set either by Parliament or by the King's Bench "the Parliament not then sitting." *Id.* at 69. The court stated that "Every proceeding in the House of Peers acting in its judicial capacity, whether upon writ of error, impeachment or indictment removed thither by *certiorari*, is in judgment of law a proceeding before the King in Parliament . . ." *Id.* at 70. It said the judgment was "founded upon immemorial usage, upon the law and custom of Parliament, and is part of the original system of our constitution." *Id.*

150. *E.g., id.* at 297 (Mr. Winnington).

151. *E.g., id.* at 308–10 (Mr. Pollexfen asking how else could Fitzharris have pleaded the case given the general impeachment).

152. *Id.* at 306 (Wallop arguing "that a general Impeachment without Articles is a Bar to any Indictment for the same Matter was resolv'd . . . in the Case of the *Lords in the Tower* . . .") Wallop argued that Fitzharris' case was even stronger because in *Fitzharris* Parliament impeached *before* the indictment. *Id.* (noting "the first suit was in the House of Lords by the Commons").

The reference to the *Lords of the Tower* case is to the trial of five Catholic or "Popish" Lords who were accused of treason for trying *inter alia* to overthrow the laws of England and to institute the Catholic religion, a claim similar to that in *Fitzharris*. *E.g., Proceedings Against the Five Popish Lords*, 7 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON OR MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME, at 1218–1576 (Bagshaw et al. ed. 1810); *id.* at 1215–16 (referencing the warrant and later Parliamentary involvement). Another case referenced by Fitzharris' counsel was the Case of Lord Shaftesbury. Parliament sought to impeach Shaftesbury after he had been placed in the Tower by the Crown. *See* 3 JOHN CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND FROM THE EARLIEST TIMES TILL THE REIGN OF KING GEORGE IV, 271–73, 273 (1847). They also referenced "*Northumberland's Case*." *See* 8 HOWELL, STATE TRIALS, *supra*, 104, at 311 (described as Parliament insisting that confession of treason is in their jurisdiction not that of the common law courts and cited as 5 H. IV. Fol. 426).

153. The notion refers to a host of rights Parliament and its members were deemed to possess. 4TH INSTITUTE, *supra* note 71, at p. 24–25 (recognizing the privilege); *see generally* 1 JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS; WITH OBSERVATIONS, (collection of cases on Parliamentary privilege to be free from arrest). In this case, the right seems to be jurisdiction, as the higher court, to impeach.)

the common law courts assumed jurisdiction in the case while an impeachment was pending, they would invade Parliament's privileges.<sup>154</sup> The Crown's counsel argued, in response, that there was no such privilege because Parliament had done nothing.<sup>155</sup> Moreover, they stated that one can never know what Parliament would have said had it issued a more specific impeachment statement, thus one cannot say the plea addresses the impeachment.<sup>156</sup>

The participants also approached the question of jurisdiction through the lens of whether Fitzharris would be subjected to *double jeopardy* in one court if tried after conviction or acquittal in the other court. Fitzharris' counsel argued that the impeachment shifted jurisdiction to Parliament and so to try Fitzharris would constitute double jeopardy.<sup>157</sup> The Solicitor General, for the Crown, responded that an acquittal in the common law courts would not bar a later impeachment by the Commons and trial.<sup>158</sup> Counsel for Fitzharris seemed to agree that the common law court could not block an impeachment, but said that an impeachment could block a common law court proceeding.<sup>159</sup>

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154. 8 HOWELL, STATE TRIALS., *supra* note 104, at 311 (Mr. Pollexfen stating, "it is a matter of parliament, and determinable among themselves" and referencing Parliament asserting the privilege in other cases).

155. *Id.* at 315.

156. *E.g., id.* at 324 ("Who can prove the intention of the House of Commons . . .?"); *id.* at 324 (Commons has right to define impeachment and no one can restrict); *Id.* at 325.

157. *Id.* at 306 (Fitzharris counsel Wallop arguing, in an impeachment in Parliament, the other Side will acknowledge, that after Articles exhibited, there can be no proceedings upon an indictment for the same offense, although the defendant in the impeachment be neither convict nor acquit. Otherwise you may bring back all the Lords in the Tower to the King's Bench to be tried, which Mr. Attorney, will not, I suppose attempt"); *id.* at 300; (Sir Francis Winnington for the prisoner arguing it is "against natural justice" that after being tried at Parliament, he should be tried again at common law).

The hallmark of double jeopardy was that a second trial would twice place one at risk of life or limb. Some courts viewed the requirement strictly *See, e.g.,* Vaux's Case, 76 Eng. Rep. 992 (1591) (holding that because the indictment had been insufficient, even though the defendant had been tried in a capital case and a sentence ordered, he was never truly in jeopardy and could be retried when the error was found).

158. *Id.* at 319 (Solicitor General stating, "What if he should be acquitted here, he could not plead *auter foitz acquit*, so would be twice brought in jeopardy for the same offense"); *id.* at 313 ([a]ssume it was a good impeachment and he had been acquitted, had the Prisoner then pleaded that as a bar to this court "it would not have been a good Plea; but he had lost his advantage by misleading, then certainly an impeachment depending singly cannot be a good plea to jurisdiction.").

159. *Id.* at 301. He said, "Suppose this Man should be try'd here, and he acquitted; is it to be presum'd that he can plead this Acquittal in bar to the impeachment before the Lords . . .?" and suggesting he cannot). He continued, "My Lord, I say with Reverence to the Court, that should you proceed, a Man shall be twice put in danger of his life for one offense, which by the Law he cannot be, and therefore, I urge that as a Reason, why you cannot proceed here on this Indict-

The Court repeatedly insisted that, from its view at least, the matter of concern was only the sufficiency of the pleadings, not jurisdiction, parliamentary privilege, double jeopardy or other impact of the prior impeachment.<sup>160</sup> Fitzharris' counsel did not agree but; ultimately, the Court rejected Fitzharris' challenge.<sup>161</sup>

For trial, Fitzharris had no counsel. The Court stated the law did not allow him counsel because the trial involved only matters of "fact."<sup>162</sup> He was left to examine and call his witnesses himself.<sup>163</sup> His wife continued to help him throughout, despite being repeatedly chastised by the bench and Crown counsel.<sup>164</sup> She used the law's recognition of a wife's special relationship with her husband to help her spouse.<sup>165</sup>

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ment.") Later, I argue that the Founders addressed this double jeopardy difficulty by uniquely limiting the judgment in impeachment cases. See discussion *infra* Section III.C.3.

160. Stating counsel had taken up too much time on such matters, the Lord Chief Justice noted:

We have nothing to do here, whether the Commons House at this day can impeach for treason any commoner in the House of Lords; we have nothing to do with this, what the Lords' jurisdiction is, nor with this point, whether an impeachment in the Lords' House (when the Lords are possessed fully of the impeachment) does bar the bringing of any suit, or hinder the proceeding in an inferior court: But here we have a case that rises upon the pleadings; whether you have brought here before us a sufficient plea to take away the jurisdiction of the court, as you have pleaded it, that will be the sole point that is before us. And you have heard what exceptions have been made to the form, and to the matter of your pleading.

See *id.* at 325; see also *id.* at 295 (Lord Chief Justice denying that the case involved the right of Parliament to impeach, the Lord's jurisdiction, parliamentary privilege and directing counsel not to spend time on it The Court asked if counsel wished to amend the pleading. They did not. *Id.* at 325.

161. *Id.* at 325 (Lord Chief Justice stating, "For words spoken, or facts done in the Commons-House, or in the Lords, we call none to question here, nor for any thing of that nature . . .").

162. *Id.* at 329–30 (stating of counsel "we cannot allow you them anymore; for now we are come to a matter of fact only; and we cannot by the rules of law allow you counsel"); *id.* at 327 (denying him counsel before he pleads guilty or not).

163. *E.g., Id.* at 346. When the Crown did not oppose, the Court allowed Fitzharris a solicitor to aid in obtaining papers he needed. *Id.* at 329–330.

164. *Id.* at 333 (Solicitor General objecting that wife has brought a brief to Fitzharris); *id.* at 331 (King's Counsel arguing wife should not be able to pass messages from counsel to Fitzharris); *id.* at 331–32 (Crown counsel complaining wife has entered courtroom with papers in her hand and court warning papers prepared by counsel are not allowed; she claiming they are mere notes, and judge saying he may refresh his recollection with notes); *id.* at 332 (Chief Justice threatening to remove her if she not be "modest and civil"); *id.* at 332 (Chief Justice warning that "if she be troublesome, we shall remove her" and wife stating "I will not be removed"); *id.* at 345 (Sergeant Jeffries, complaining "they continue to give the prisoner papers"). Fitzharris clearly viewed his wife as indispensable. *Id.* at 252, 254, 329 (Fitzharris asking for his wife).

165. *Id.* at 332–34 (Both Fitzharris and wife arguing she has a right to help her husband at trial); *id.* at 333 (Solicitor General noting a wife has a "very great privilege to protect her husband" but cannot bring instructions already drawn").

g. The Jury's and Grand Jury's Questions about the Trial

When the case was submitted for verdict, the petit jurors knew that the House of Commons had impeached Fitzharris. They also knew that the Commons had stated that the common law courts had no jurisdiction. The foreman asked the judge whether the jury should render a verdict under those circumstances.<sup>166</sup> The question demonstrated that even ordinary people understood that there were jurisdictional lines between Parliament and the common law courts.

In response, the Lord Chief Justice first urged the jury to consider the facts and not to be concerned about jurisdiction.<sup>167</sup> But he also revealed that the *grand jury*, before indicting Fitzharris, had also raised the same question. Apparently, so too did some of the judges. He said that, anticipating the grand jury's concerns, all of the judges of the King's Bench had met to consider the question. At that meeting, he said, the King's Bench, *en banc*, decided that it did indeed have jurisdiction to try the case.

But I'll tell you further, gentlemen, this doubt was moved to us by the grand jury, before the bill was found; we had an intimation that they would move such a doubt to us as seems to be your doubt now. Therefore, for their Satisfaction, and the taking away any scruple that might be in the case, all the judges of England did meet together, and seriously debate the matter and substance of all this; and it was not our opinion of this court only, but the opinion of all the judges of England that we had a jurisdiction to try this man.<sup>168</sup>

Yet, this statement does not tell us *why* the King's Bench opined that they had jurisdiction. Was it because the impeachment was definitely not proceeding by a decision of the House of Lords? Was it because, as the Crown argued, the King had the power to choose? Was it because the Court believed that the House of Commons had no jurisdiction? Or was it because they concluded that, as the Crown argued, the common law courts' jurisdiction was unaffected by the subsequent assertion of jurisdiction of Parliament? One clue comes from the Lord Chief Justice's admonishment to lawyers that the case (in his view) had nothing to do with the impeachment power of Parliament "when the Lords are possessed fully of the impeachment."<sup>169</sup>

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166. 8 HOWELL, STATE TRIALS, *supra* note 104, at 388.

167. *Id.* at 389.

168. *Id.* at 389.

169. *See supra* note 160.

That statement suggests that the King's Bench had determined that Parliament either had no jurisdiction or had surrendered it.

A subsequent case report broadly interpreted *Fitzharris' Case* as holding that a pending impeachment is no bar to *indictment* for the same crime.<sup>170</sup> But it also indicated in a footnote that the *en banc* court had ruled that the jury “ought not to take notices of the transaction of the House of Commons.”<sup>171</sup> The reference to “take notices of the transaction” suggests that the King's Bench had concluded that the actions of the Commons was void or had been voided. As discussed in the next section, other courts used *Fitzharris* to justify providing ancillary relief when Parliament was out of session.

Despite the *Fitzharris* lawyers' efforts, the jury returned a verdict of guilty.<sup>172</sup> *Fitzharris* was sentenced to be hanged and was executed shortly thereafter.<sup>173</sup>

## 2. Common Law Courts and the Power to Issue Relief Incidental to Impeachment

Early English courts also dealt with the question of whether courts had any power to act in an impeachment case once Parliament had dissolved. In the *Case of Earl Ferrers*, the King's Bench noted that it had been formerly doubted whether a Court could proceed to set a new date for execution if the one set by Parliament could not be

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170. *Fitzharris' Case*, 89 Eng. Rep. 862 (“An impeachment depending [e.g., pending] cannot be pleaded to an *indictment* for the same crime.”).

171. The note stated:

An *impeachment* for high treason was insituted [sic] against *Fitzharris* by the House of Commons. A bill of *indictment* was also, and at the same time, preferred against him; but the grand jury conceiving that they could not receive the bill while the impeachment was pending against the indictee, the question was referred to the twelve Judges, who were unanimously of opinion that the grand jury ought not to take notices of the transaction of the House of Commons, and therefore ought to hear the evidence upon the bill.

*Id.* at 862, n. a. (emphasis in original). The English Reports cite to 2 Show. K.B. 163. *Fitzharris' case* has also been cited as precedent in other English cases. *E.g.*, *Earl of Danby's Case*, 89 Eng. Rep. 973 (1683-84) (King's Bench using *Fitzharris* to argue for jurisdiction of common law courts to grant bail after pardon when Parliament not in session, though requiring party to reappear when Parliament resumes); *Burdett v. Abbot*, 123 Eng. Rep. 384, 386 (1812) (dismissing claim of trespass and assault brought against Speaker of House of Commons). *See also infra* note 175.

172. *Id.* at 391 (guilty verdict).

173. *Id.* at 393 (sentenced to hanging); *id.* at 396 (execution). At his execution, *Fitzharris* was encouraged to denounce his Catholic faith and confess. He refused and went to his execution leaving behind, with a religious counselor, a long letter acknowledging some errors but generally denying extensive involvement in the plot and reaffirming his Catholic religious beliefs. *Id.* at 400-12.

met.<sup>174</sup> In the *Earl of Danby* case the King's Bench held that though Danby was impeached, given that he had a King's pardon, a common law court had jurisdiction to determine his bail if Parliament was not in session. (As support, it noted that "the case of Fitzharris did go much further, and if that impeachment did not hinder this Court from trying, sure this will not hinder from bailing.<sup>175</sup>) To support his plea for bail, Danby's lawyers argued that an impeachment "is a judicial proceeding in Parliament, and not relating to Parliament's legislative power." They continued:

[N]ow during no Parliament this is the Supreme Court in being for the defense of the King's prerogative; and by the dissolution of the Parliament, all the judicial proceedings there are discontinued, and the Inferior courts are let into their jurisdiction. Though proceedings in Inferior Courts are superceded during their session, yet upon a dissolution they proceed here below: and so is the law and so is the practice and this is so in cases originally beginning here.<sup>176</sup>

The court must have accepted this view, because it granted bail, but it also required Danby to appear before Parliament at its next session.<sup>177</sup>

### 3. Other Use of Impeachment as a Bar

Another use of an impeachment trial to block a common law court proceeding is found in a case involving Warren Hastings, Governor of Bengal (modern day India). The impeachment, which was go-

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174. 168 Eng. Rep. 69 (1760) (Ferrers was indicted in Parliament and convicted of murder; As he was a peer (nobleman), Parliament asked the common law judges to rule on whether he could receive the same sentence for murder that the criminal statute would provide had he been tried in common law courts).

175. *E.g.* *Rex v. Danby*, 89 Eng. Rep. at 973. *See also* *Burdett v. Abbott*, 3 Eng. Rep. 1289 (1817) (in action for trespass against Speaker of the House of Commons and others for breaking into complainant's home and forcibly incarcerating him, the fact that the Commons had authorized a warrant for complainant's arrest for libel and was then sitting and had accused complainant of breach of the privileges of Parliament by libel was a sound defense and courts may determine whether or not a privilege actually belongs to the House of Commons in the case. *Id.* at 1300 (using *Fitzharris* to argue that the court may investigate whether party had a Parliamentary privilege that Parliament claimed); *Stockdale v. Hansard*, 112 Eng. Rep. 1112, 1143-44 (in a Parliamentary privilege matter narrowly construing *Fitzharris* to say that the only point determined in *Fitzharris* is that an impeachment in a Parliament which was dissolved did not abate an indictment in the common law courts).

176. 89 Eng. Rep. at 973 (Mr. Pollexfen arguing for Danby). Note that while Parliament was out of session, Danby's lawyers moved for a writ of habeas corpus. *Id.* at 974. He had been pardoned by the King, despite impeachment. *Id.* at 974. The Commons protested and resolved that the pardon was void. IV COBBETT, *PARL. HIST.*, *supra* note 77, a 1129-1131. Later, in the Act of Settlement (1701), Parliament declared that a pardon could not affect impeachment. *E.g.*, BLACKSTONE, *supra* note 321, at \*261. Under the U.S. Constitution, a pardon cannot apply to an impeachment. U.S. CONST. art. II, § 2.

177. 89 Eng. Rep. at 974.

ing on when the U.S. Constitution was being drafted, charged *inter alia* that Hastings accepted money from locals and had violated British statutes prohibiting such acts. While the impeachment was proceeding (but after the Constitution was drafted), one of those locals, Nobkissen, claimed the money was a loan, not a gift, and he sued Hastings in the common law courts to recover it. When Nobkissen asked for discovery, Hastings pleaded that complying with the discovery request would incriminate him. To support his claim, he referenced his prosecution before Parliament under the impeachment and his possible vulnerability to prosecution before the common law courts, under a statute. Citing British pleading rules prohibiting inconsistent pleas, the Lord Chancellor ruled that Hastings could not plead both vulnerabilities. He said, “One part of this plea overrules the other. If the defendant relies upon the impeachment, the necessary consequence is, that, the impeachment pending, there can be no prosecution under the act.”<sup>178</sup>

#### D. The Legacy of English/British and Colonial History

We can glean several lessons from *Fitzharris* and from British history generally. First, Parliament sitting in an impeachment proceeding was considered a criminal court. Second, the Court of Parliament and the common law courts had concurrent jurisdiction over crimes and misdemeanors, but both could not validly exercise jurisdiction at the same time. Third, Parliament’s jurisdiction was superior. Fourth, while Parliament theoretically had the power to try anyone for anything, in practice, it focused its attention on the types of crimes or misdemeanors that posed a substantial threat to government. However, as the *Fitzharris* and other cases indicate, it did not limit its jurisdiction to public officials. Fifth, special rules favored nobility over commoners; commoners also were denied certain defenses when tried in impeachment proceedings. High treason trials also had special rules. Sixth, both common law courts and Parliament had the ability to issue broad punishment and to place a person at risk of “life and limb,” and so, principles of double jeopardy applied to prevent a trial in both venues or a repeat trial. Seventh, an investigation by Parliament into impeachment did not thwart the work of the Attorney General, however, if Parliament properly assumed jurisdiction by issuing

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178. See discussion *supra* Introduction. Nobkissen v. Hastings, 30 Eng. Rep. 535 (1793). See also P.J. Marshall, *Nobkissen versus Hastings*, 27 BULL. OF THE SCH. OF ORIENTAL & AFRICAN STUDIES 384, 85 (1964).

an impeachment, then proceedings in the common law courts had to give way. This was why the King had to request that the Lords defer and why the jury and grand jury in *Fitzharris* questioned the jurisdiction of the King's Bench.<sup>179</sup> Eighth, Parliament and the Crown's courts sometimes jostled over jurisdiction. Ninth, the American colonists had no power to impeach their Chief Magistrates, although they had the power, at least theoretically, to prosecute them. Because they had to rely on Crown prosecutors and Crown-controlled courts, their power to prosecute royally-appointed leaders was regularly thwarted by the Crown. This experience likely made impeachment an important right for the newly independent states, and ultimately the Founders, to secure.

## II. PRESIDENTIAL IMPEACHMENT AND PROSECUTION UNDER THE CONSTITUTION

In Federalist No. 65, Hamilton stated that the Founders "borrowed" from the British model in fashioning their approach to impeachment.<sup>180</sup> He also noted awareness of the approaches of the states after independence and that the states had also borrowed from the model of Great Britain.<sup>181</sup> This section discusses how, with respect to impeachment, the Founders both adopted some of the British and independent state approaches, but also deviated from them. And it shows how they reflected the harsh lessons of unfairness they had learned from the colonial experience.

Here, I propose that the Founders would have understood the relationship between impeachment and prosecution as a *jurisdictional* one between courts, i.e., the court of Congress and the federal courts, rather than a question about the power of a particular officer or department or violation of a particular statute. They would not have focused on the specific powers of an Attorney General's office that had not yet been created. They would have assumed the jurisdiction of Congress and of the courts of law to be concurrent as to allegations of significant presidential criminal activity. They would have believed that there would be times when courts of law would be insufficient vehicles for delivering justice. They assumed it to be Congress' job to step in both to protect the government's interests and to ensure a fair

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179. See discussion, *supra* Section I.C.1.

180. THE FEDERALIST NO. 65 (Hamilton).

181. *Id.* ("Several of the State constitutions have followed the [British] example.") See also discussion *infra* Section II.B.

proceeding by impeachment proceedings. Under the scheme they adopted, Congress triggers its *exclusive* jurisdiction by issuing articles of impeachment.

The section considers the relevant convention discussions, Hamilton's comments and relevant themes in the constitutions of the states.

#### A. The Founders' Discussions at the Convention

It is helpful to begin with a review of the Founders' discussions about impeachment at the Constitutional Convention, as reflected in James Madison's notes. While there are several references to impeachment in his notes, the key recording is of the July 20, 1787 meeting.<sup>182</sup> The proposed language was that the President was "to be removable on impeachment and conviction for malpractice or neglect of duty."<sup>183</sup>

Madison's notes indicate that debates focused on whether there was a need to set forth in the Constitution a means of removing a President.

Mr. PINKNEY & Mr. Govr. MORRIS moved to strike out this part of the Resolution. Mr. P. observed. he ought not to be impeachable whilst in office

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

Mr. WILSON concurred in the necessity of making the Executive impeachable whilst in office.<sup>184</sup>

This entire discussion, and Pinkney's comment—that the President ought not to be impeachable while in office—indicates an understanding that impeachment could occur, as in Parliament, once one had *left* office.<sup>185</sup> The comment confirms that, however they ended up, the Founders began with a broad view of the impeachment power.

Ben Franklin supported including a means of impeachment of a sitting President as well. He argued that without a means for "regular

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182. MADISON NOTES, July 20, 1787, at THE AVALON PROJECT (Yale University, Lillian Goldman Library), [http://avalon.law.yale.edu/18th\\_century/debates\\_720.asp](http://avalon.law.yale.edu/18th_century/debates_720.asp) (last visited Feb. 10, 2019) (hereinafter "MADISON NOTES"). The shorthand appearing in these notes are all by Madison.

183. *Id.*

184. *Id.*

185. For this power in Parliament, see discussion *supra* Section I.B.C. For provision in Virginia's Constitution, see discussion *infra* Section II.B.

punishment”<sup>186</sup> of the President, people would resort to drastic means of retribution or removal. To establish the point, he looked to England and the controversial trial of Charles I.<sup>187</sup> The notes reflect:

Doctr. FRANKLIN was for retaining the clause as favorable to the Executive. History furnishes one example only of a first Magistrate being formally brought to public Justice. Every body cried out agst. this as unconstitutional. What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character. It wd. be the best way therefore to provide in the Constitution for the regular punishment of the Executive where his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.<sup>188</sup>

Franklin’s reference to a Chief Magistrate rendering himself “obnoxious,” in his day, meant liable to punishment.<sup>189</sup> He seemed to desire a standard procedure for removing and punishing the executive and he seemed to fear that judicial responses would not be sufficient.<sup>190</sup> As Franklin indicates, the founding generation would have known that the impeachment process had been used as a tool of political revenge in England.<sup>191</sup>

Franklin’s also suggests that the reason for inserting the impeachment provision was to provide a *process* that would be in place for punishing a chief executive. He refers to impeachment as a means of “regular punishment of the Executive where his misconduct should deserve it.”<sup>192</sup> The suggestion is that punishment might *not* occur without impeachment. The obvious reason would be that, like the

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186. MADISON NOTES, *supra* note 182.

187. *Id.* Scholars believe Franklin was referencing Charles I of England, as the only Western monarch to be criminally tried. He was sentenced to death after Parliament convicted him of High Treason. See, e.g., Louis J. Sirico, Jr., *The Trial of Charles I: A Sesquicentennial Reflection*, 16 CONST. COMMENT 51, 52 (1999); Chafetz, *supra* note 131, at 352-67. Historians say the trial was viewed as a sham. E.g., Chafetz, *supra* note 131, at 385-86. Parliament deposed Richard II by vote, apparently without a trial—but then he was murdered in jail. See discussion, *supra* Section I(B)(c).

188. MADISON NOTES, *supra* note 182.

189. Johnson’s 1968 dictionary defines the term obnoxious would likely have been understood as “liable to punishment.” SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768) (unpaginated).

190. Among its definitions, Johnson’s 1768 dictionary defined the term “regular” as “Agreeable to Rule; consistent with the mode prescribed” or “Governed by strict regulations.” *Id.*

191. See discussion *supra* p. 58; Jack N. Rakove, *Statement on the Background and the History of Impeachment*, 67 GEO. WASH. L. REV. 682, 684 (1999) (discussing use of impeachment as a political weapon in Stuart England).

192. MADISON NOTES, *supra* note 182.

King during colonial times,<sup>193</sup> a President would have means to thwart it.

We find the quandary the Founders faced expressed by Gouverneur Morris (New York).

Mr. Govr. MORRIS. He can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence. Besides who is to impeach? Is the impeachment to suspend his functions. If it is not the mischief will go on. If it is the impeachment will be nearly equivalent to a displacement and will render the Executive dependent on those who are to impeach.<sup>194</sup>

Morris insisted that co-conspirators could likely be punished, but seemed to imply the President could or would not be. Although some suggest that he believed the President immune, there is another reason: he knew the President, like the King, controlled the arms of power. Thus, he insisted that the penalty of impeachment had to include the Chief Executive's *removal* from office—which suggests that *other* penalties were, in his mind, at least, on the table. He too was likely thinking against the backdrop of Parliament's broad powers.

Morris' comments also demonstrate a concern about political prosecutions and a need for Chief Magistrate flexibility. He was worried about instituting too vigorous a power to impeach.

Mr. Govr. MORRIS admits corruption & some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined.<sup>195</sup>

George Mason of Virginia insisted that the right of "impeachment should be continued"<sup>196</sup> and tied it the principal that no one was above the law. His emphasis on "continued" suggests that he was borrowing the notion from someplace else. But it also suggests that he thought it might be *discontinued*. (Could the provision the Founders adopted have been a compromise between those two poles?) He specifically asked, "Shall any man be above Justice?"<sup>197</sup> Again, this comment echoes the notion that without impeachment, there would be no remedy. But again, the colonial experience suggests that he feared the President would hold great power under the new Constitution. He

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193. See discussion *supra* Section I.

194. *Id.*

195. *Id.*

196. It is unclear whether in referencing "continued," Mason was referring to impeachment as embraced in the state constitutions or to the British model of impeachment.

197. MADISON NOTES, *supra* note 182.

went further to insist that if a President gained election through corrupt means, it would be a double insult to then allow him to escape justice by “repeating his guilt” while in office.<sup>198</sup>

Col. MASON. No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors. There had been much debate & difficulty as to the mode of chusing the Executive. He approved of that which had been adopted at first, namely of referring the appointment to the Natl. Legislature. One objection agst electors was the danger of their being corrupted by the Candidates; & this furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?<sup>199</sup>

Here, again, Mason seems to be looking to a broad view of impeachment like that Parliament possessed. The notion that a Chief Magistrate should not be above justice was also emphasized by Elbridge Gerry of Massachusetts. He seemed to compare a lack of an impeachment power to the existence of a royal executive.

Mr. Gerry urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped the maxim would never be adopted here that the chief Magistrate could do no wrong.<sup>200</sup>

Madison argued that impeachment of the President was important because of the singular nature of a President’s status. While it was unlikely that all legislatures or other officials would join together and be able to commit crimes, the President was one person with a great deal of power. But he also seemed worried about removal of a President in noncriminal cases, such as incapacity, where there could

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198. Some have made this argument with respect to President Trump, claiming that he won the election in an unfair manner and that he continues to break the law. See David Priess, *Even With Evidence of “High Crimes,” Impeaching Trump Would Probably Fail*, WASH. POST (Nov. 14, 2018), [https://www.washingtonpost.com/outlook/2018/11/14/even-with-evidence-high-crimes-impeaching-trump-would-probably-fail/?noredirect=on&utm\\_term=.691aa2613c90](https://www.washingtonpost.com/outlook/2018/11/14/even-with-evidence-high-crimes-impeaching-trump-would-probably-fail/?noredirect=on&utm_term=.691aa2613c90) (last visited Feb. 10, 2019). However, at press time, the Special Counsel has discussed no evidence of Trump’s involvement in any such scheme and not pressed charges against him.

199. MADISON NOTES, *supra* note 182.

200. *Id.*

be no true criminal mens rea.<sup>201</sup> He felt impeachment was also important as a guard against “negligence or perfidy”<sup>202</sup> of a President.

Throughout, Pinkney seemed to remain resistant to including impeachment. However, his comments underscored a fear shared by others: the fear of political prosecution.

He was sure they ought not to issue from the Legislature who would in that case hold them as a rod over the Executive and by that means effectually destroy his independence. His revisionary power in particular would be rendered altogether insignificant.<sup>203</sup>

Charles Pinkney’s concern directly raised the question of jurisdiction. What “court” should have the power to try the case to remove a president?

## B. State Models With Respect to Prosecution and Impeachment

The constitutions of the independent states also provided models for the Founders. We see broad variations in how they balanced power between courts of law and legislatures. The choices were likely driven by the then-existing balances of power between the executive and legislative branches, how officers were appointed, and whether there existed a well-developed judicial branch. This section examines a few states to illustrate attention given to the division of power.

*Pennsylvania.* Under its 1776 “Plan or Frame of Government,” Pennsylvania placed its executive power in a President and a Council.<sup>204</sup> Pennsylvania designated impeachment for “state criminals.”<sup>205</sup> It allowed for impeachment of “[e]very officer of state, whether judicial or executive.” And it allowed it “for maladministration.”<sup>206</sup> Pennsylvania gave the right to impeach to its legislature.<sup>207</sup> But it selected a special court to decide the matter, a panel comprised of the President of the Senate (or, in his absence including, impeachment, the Vice President) and the Council.<sup>208</sup>

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201. *Id.*

202. By “perfidy,” he likely meant “Treachery; want of faith; breach of faith.” JOHNSON, *supra* note 189.

203. MADISON NOTES, *supra* note 182.

204. PA. CONST. 1776, § 3, [http://avalon.law.yale.edu/18th\\_century/pa08.asp](http://avalon.law.yale.edu/18th_century/pa08.asp) (last visited Feb. 13, 2019). Pennsylvania’s Constitution had two sections, a “Declaration of Rights” and a “Plan or Frame of Government.”

205. *Id.* § 9.

206. *Id.*, § 22.

207. *Id.*, § 22.

208. *Id.*, §§ 20, 22.

*Maryland.* In its 1776 constitution, Maryland hearkened back to the British model for impeachment, referring to its lower House, the House of Delegates, “as the grand inquest of this State.”<sup>209</sup> It gave that body broad investigative and prosecutorial powers with respect to “any crime” and “any person.”<sup>210</sup> The House could “inquire on the oath of witnesses, into all complaints, grievances, and may commit any person, for any crime, to the public jail, there to remain till he be discharged by due course of law.”<sup>211</sup> Thus, it seems, after House impeachment, the accused would be tried in courts of law.

This lower House could “expel any member, for a great misdemeanor.”<sup>212</sup> The state seemed particularly concerned about bribery, fraud on the public, and related financial crimes. It delegated trials on these issues to courts of law and required conviction “by oath of two credible witnesses.”<sup>213</sup> In article 53, it proscribed such financial misdealings by the Governor, Chancellor, Judge, Attorney General, and a long list of others.<sup>214</sup> In both articles 39 and 53, Maryland provided that conviction for financial misdealing would void the officeholder’s position “and *he shall suffer the punishment for wilful and corrupt perjury, or be banished this State forever, or disqualified forever from holding any office or place of trust or profit, as the court may adjudge.*”<sup>215</sup>

Maryland’s Constitution gave its legislature the power to appoint the governor.<sup>216</sup> And it expressed distrust of officials serving in power for long periods, stating “long continuance in the first executive departments of power or trust, is dangerous to liberty; a rotation, therefore, in those departments, is one of the best securities of permanent freedom.”<sup>217</sup>

*North Carolina.* For addressing official misconduct by the Governor and other officials, North Carolina’s 1776 Constitution allowed

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209. MD CONST. OF 1776, *Constitution & Form of Government*, art. 10, “[http://avalon.law.yale.edu/17th\\_century/ma02.asp](http://avalon.law.yale.edu/17th_century/ma02.asp), (last visited Feb. 10, 2019). For references to the “grand inquest,” in the context of grand juries and impeachments, see discussion *supra* notes 35, 71 and Section I.A.

210. *Id.* art. 10.

211. *Id.* art. 10.

212. *Id.*

213. *Id.*; *id.* art. 39.

214. *Id.* art. 53 (applying to any Governor, Chancellor, Judge, Register of Wills, Attorney-General, Register of the Land Office, Register of the Chancery Court, or any Clerk of the common law courts, Treasurer, Naval Officer, Sheriff, Surveyor or Auditor of public accounts).

215. *Id.*

216. MD. CONST., 1776, *Constitution*, art. XXV.

217. *Id.* art. XXXI.

either impeachment by the legislature or prosecution in courts of law. It provided that “the Governor, and other officers, offending against the State, by violating any part of this Constitution, mal-administration, or corruption, may be prosecuted, on the impeachment of the General Assembly, or presentment of the Grand Jury of any court of supreme jurisdiction in this State.”<sup>218</sup> North Carolina provided for the annual appointment of the governor by the legislature.<sup>219</sup> It also imposed term limits.<sup>220</sup> North Carolina’s approach for removing an officer was, therefore, relatively simple and not directly in the hands of the people. The legislature also appointed judges and the Attorney General; the governor “commissioned” them.<sup>221</sup>

*Virginia.* In its 1776 constitution, Virginia targeted those “offending against the state, “either by mar-administration, corruption, or other means, by which the safety of the State may be endangered.”<sup>222</sup> But Virginia is particularly worth mentioning because it required that its governor be *out* of office before he could be impeached.<sup>223</sup> Of course, Virginia’s governor was elected annually by the legislature.<sup>224</sup> Thus, its legislature could simply refuse to reappoint a governor. The requirement, however, suggests great concern about impeaching a person while in office.

*New York/Massachusetts.* These two states have been left near the end of discussion for a reason. The Founders substantially borrowed from New York’s approach to jurisdiction, (which had, also been followed, in part, by Massachusetts).

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218. 1776 N.C. CONST. ART. XXIII at [http://avalon.law.yale.edu/18th\\_century/nc07.asp](http://avalon.law.yale.edu/18th_century/nc07.asp) (last visited Feb. 10, 2019) (emphasis added). North Carolina followed the approach of having two sections to its Constitution: a “*Declaration of Rights*” and a “*Constitution*.”

219. *Id.* art. XV.

220. *Id.*

221. *Id.* art. XIII.

222. VA. CONST. 1776, Constitution, ¶37 [http://edu.lva.virginia.gov/docs/VAConstitution\\_trans.pdf](http://edu.lva.virginia.gov/docs/VAConstitution_trans.pdf) (last visited Feb. 10, 2019). Virginia first adopted a “*Declaration of Rights*” and then two weeks later, added a section designated “*Constitution*.” See First Virginia Constitution, June 29, 1776, [http://edu.lva.virginia.gov/online\\_classroom/shaping\\_the\\_constitution/doc/va\\_constitution](http://edu.lva.virginia.gov/online_classroom/shaping_the_constitution/doc/va_constitution) (last visited Feb. 10, 2019). The paragraphs in the “*Declaration of Rights*” were enumerated, but those in the “*Constitution or Form of Government*” were not. In citing this document, the author has added paragraph indications where none are designated. The two are collectively cited as the Virginia Constitution, with reference to the subpart and an added paragraph number.

223. *Id.* ¶37 “The Governor, when he is out of office, and others, offending against the State, either by mar-administration, corruption, or other means, by which the safety of the State may be endangered, shall be impeachable by the House of Delegates.”

224. *Id.* ¶ 27.

In Article 33 of its 1777 Constitution, New York looked to its legislature for impeachment. It provided that “the power of impeaching all officers of the State, for mal and corrupt conduct in their respective offices, be vested in the representatives of the people in assembly.”<sup>225</sup> It required a two-thirds vote for conviction or acquittal.<sup>226</sup>

The 1777 Constitution of New York gave the power to impeach to its legislature but created a special court for the trial of impeachments made up of “the president of the senate, the senators, chancellor, and judges of the supreme court, or the major part of them” unless of course one of them were impeached.<sup>227</sup> But New York limited the judgment that the special court could issue. Speaking of judgment, this New York Constitution read:

[N]or shall it extend farther than to removal from office and disqualification to hold or enjoy any place of honor, trust or profit under this state. But the party so convicted shall be, nevertheless liable and subject to indictment, trial, judgment and punishment according to the laws of the land.<sup>228</sup>

New York’s limitation on its special court of impeachment indicates that New York understood impeachment as primarily for the purpose of removal from public office (and securing the state from further harm). Its other courts handled punishments under the law if an impeached person were convicted.

Massachusetts’ 1780 Constitution allowed its House to issue impeachments “against any officer or officers of the commonwealth, for misconduct and maladministration in their offices.”<sup>229</sup> Massachusetts’ Senate could convict or acquit by a majority.<sup>230</sup> The state liked New York’s idea of limiting judgment in impeachment, but preserving prosecution after conviction and adopted it.

Art. VIII. The senate shall be a court, with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and maladministration in their offices; . . . Their judgment, however, shall not extend further than to removal from office, and dis-

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225. N.Y. CONST. art. XXXIII (1777), at [http://avalon.law.yale.edu/18th\\_century/ny01.asp](http://avalon.law.yale.edu/18th_century/ny01.asp) (last visited Feb. 10, 2019).

226. *Id.*

227. *Id.* XXXII.

228. *Id.*

229. MA. CONST. pt. 2, ch. 1, § 3 art. VIII, at <http://www.nhinet.org/ccs/docs/ma-1780.htm> (last visited Feb. 13, 2019).

230. *Id.* pt. 2, ch. 1, § 2 art. VIII.

qualification to hold or enjoy any place of honor, trust, or profit under this commonwealth; but the part so convicted shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land.<sup>231</sup>

New York and Massachusetts both elected their governors in state-wide elections,<sup>232</sup> although the governor of Massachusetts was elected annually.<sup>233</sup> Compared to other states, both had established judiciary systems.

From these examples of state constitutional references, we know several things. First, those who participated in the Constitutional Convention were aware not only from British history and their colonial experiences, but also from the experiences of the states, that there were several options with respect to balancing jurisdiction between courts of law and a court of impeachment. It seems reasonable to think that they expected a well-established national judiciary, although they would later battle about its contours. It seems to this author, that they were trying to decide, as a jurisdictional matter, how to divide the responsibility of prosecution to protect the office of the Presidency, afford fairness to the accused, and also have a process that would assure the people that justice had been done. The Founders looked to New York (and to Massachusetts) for their answer.

## C. The Founders' Decisions

### 1. The General Scheme

As is well known, the Constitution divides the work of impeachment among the Congressional houses. It provides that the House of Representatives (like the British House of Commons) “shall have the sole Power of Impeachment.”<sup>234</sup> The Founders gave the Senate (like the British House of Lords) the sole power “to try all impeachments.”<sup>235</sup> Consistent with approach of Parliament, the House appoints “managers” to press its case in trial before the Senate.<sup>236</sup> The Chief Justice of the Supreme Court (instead of a Lord Steward) presides over the proceedings.<sup>237</sup> Consistent with New York’s approach

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231. *Id.*

232. N.Y. CONST. art. XVII; MA. CONST., ch. II, § 1 art. II.

233. MA. CONST. pt. 2, ch. II, § 1, art. 2.

234. U.S. CONST. art. I, § 2, ¶5; THE FEDERALIST NO. 65 (Hamilton) (noting parallel with House of Commons and House of Lords).

235. *Id.* art. I, § 3, ¶6; THE FEDERALIST, NO. 65 (Hamilton), *supra*.

236. Compare discussion *supra* Section I.B.1.

237. *Id.*

they required a two-third's vote of the Senate (instead of a majority) for conviction or acquittal.<sup>238</sup>

## 2. Why Not the Supreme Court or Special Courts?

Although some of the states had adopted special courts for impeachment, the Founders relied upon the Senate, following the approach of Parliament (The House of Lords) and Massachusetts. Thankfully, Hamilton left future generations his own insights into how the Founders dealt with dividing jurisdiction between courts of law and Congress acting as a national grand jury and a High Court of Impeachment. In his embrace of the Senate as the correct place to try impeachments, Hamilton focused on the proceedings as a hedge against political prosecutions. This concern would have appealed to a nation that felt bruised by oppression in the administration of criminal justice. He used language that emphasized the investigative role of the Senate.<sup>239</sup> Of an impeachment trial, he noted, "Is it not designed as a method of NATIONAL INQUEST?"<sup>240</sup> The reference to "inquest" hearkens back to Blackstone's reference to impeachment as "the most solemn grand inquest of the whole kingdom."<sup>241</sup> It hearkens back to the notion of the grand jury as the "grand inquest."<sup>242</sup>

Hamilton also shared the concern that courts may not be able to balance impartiality and vigor in prosecutions. He noted of the Senate: "What other body would be likely to feel CONFIDENCE ENOUGH IN ITS OWN SITUATION, to preserve, unawed and uninfluenced, the necessary impartiality between an INDIVIDUAL accused, and the REPRESENTATIVES OF THE PEOPLE, HIS ACCUSERS?"<sup>243</sup> Here Hamilton's words stressed both the criminal nature of the impeachment proceeding and the political risks to the union involved in such a trial.

Hamilton also offered the view that impeachment targets official misconduct by "public men." For him, mere allegations of serious misconduct by public officials were likely to inflame the passions of a community. This approach would have played well with a public that had only recently freed itself from royal rule in a bitter war.

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238. U.S. CONST. art. I, § 3, ¶ 6. New York also required a supermajority. N.Y. Const. 1777, § 33 (requiring "two third parts of the members present").

239. *Id.*; MADISON NOTES, *supra* note 182.

240. *Id.* (capitalization in original).

241. See discussion *supra* Section I.B and note 71.

242. See discussion *supra* Section I.A.1 and note 35.

243. THE FEDERALIST NO. 65 (Hamilton) (emphasis in original).

The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused.<sup>244</sup>

Although the Founders gave the right to hear impeachment cases to the Senate, we know that they *considered* other options because the states had embraced other options. Hamilton suggested that the options included (1) trying impeachment cases in the regular courts, (2) creating a separate Supreme Court for impeachments, and (3) using a court made up of the highest Court judges from each state.<sup>245</sup> In *Federalist* No. 65 Hamilton discussed at least his own view of why these other options fell short.

Could the Supreme Court have been relied upon as answering this description? It is much to be doubted, whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public tranquillity.<sup>246</sup>

As a remedy for the “hazard” he feared, Hamilton stressed the need for a large number of judges in impeachment cases, a need met by placing the power in the Senate.

The hazard in both these respects, could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments, is equally dictated by the nature of the proceeding. *This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges,* as in common cases serve to limit the discretion of courts in favor of personal security. There will be no

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244. *Id.*(emphasis in original).

245. See, e.g., Brendan Fox, *Justiciability of Challenges to the Senate Rules of Procedure for Impeachment Trials*, 60 GEO. W. L. REV. 1275, 1277–78 (1992); THE FEDERALIST No. 65 (Hamilton).

246. THE FEDERALIST No. 65 (Hamilton).

jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.<sup>247</sup>

Hamilton's statement also tells us something about the judges of his day. He mentions "personal security" as a factor that might affect their judgments. In other words, in backing the Senate as the place of trial, he believed there was safety in numbers and a greater ability of representatives to convince the people to accept the trial's outcome.

### 3. Splitting Jurisdiction/Dividing "Punishments"/ Avoiding Double Jeopardy

But the Founders did not want the Senate, the High Court of Impeachment, to have all of the power. They also wanted to split jurisdiction in the criminal trial, allowing a second trial in courts of law. Hamilton proffered some reasons for this approach in *Federalist* No. 65. He argued that the Senate, having convicted a person, if allowed to impose a broader sentence, might well register a bias in the sentence. On the other hand, he proposed that a jury might be able to take a fresh look at a case if the person has already been disgraced by removal from public office.

The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who had disposed of his fame, and his most valuable rights as a citizen in one trial, should, in another trial, for the same offense, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know anything of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a

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247. *Id.* (emphasis added).

great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismissal from a present, and disqualification for a future, office. It may be said, that the intervention of a jury, in the second instance, would obviate the danger.<sup>248</sup>

But other defendants in criminal trials faced the difficulty of juries acting as both factfinder and the party delivering a sentence. Others faced public humiliation. Was Hamilton concerned that political officers would extract political revenge for personal slights? Or perhaps the Founders wanted the split in jurisdiction, to give the public its red meat, but only after Congress had saved the Republic from further damage. But a two-trial split with equal opportunities for punishment would also possibly have exposed a convicted defendant to double jeopardy. The Founders found a solution by borrowing language from the state of New York, (the same language that had also been adopted by Massachusetts). They wrote:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.<sup>249</sup>

Not long thereafter, the Founders would also expressly state the longstanding common law principle against double jeopardy in their Constitution. The Fifth Amendment states: “[N]or shall any person be subject for the same offence to be twice put in *jeopardy of life or limb*. . . .”<sup>250</sup>

Justice Story later opined that the limitation on sentencing in impeachment was intended to curb the Congressional incentive to heavily punish one’s political enemies.<sup>251</sup> But he also recognized the provision to be necessary for the avoidance of double jeopardy.<sup>252</sup>

Why didn’t Hamilton mention double jeopardy or jurisdiction as descriptions or explanations in these writings? Perhaps his target audience would not have easily understood such references. Perhaps

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248. *Id.*

249. U.S. CONST. ART. 1, § 3, ¶ 7. See discussion *supra* Section II.B.

250. *Id.* amend. V (emphasis added). See also discussion of double jeopardy at pp. 41–42.

251. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES: CONTAINING A BRIEF COMMENTARY OF EVERY CLAUSE, EXPLAINING THE TRUE NATURE, REASONS, AND OBJECTS THEREOF; DESIGNED FOR THE USE OF SCHOOL LIBRARIES AND GENERAL READERS § 116, 79 (1865).

252. *Id.*

these aspects were not the most important features of the provisions to him. But also, here Hamilton is making a psychological argument that anyone in his day could understand. A person's reputation as to character was considered to be incredibly important in the world in which he lived. He notes above the risk of *ostracism* of one brought down from such a high tower of official position. He refers to acquittal as an honorable acquittal. Remember that Franklin used similar language in speaking of how impeachment proceedings could be a benefit to a President as well as to a nation.<sup>253</sup> One could argue that these same notions of reputation and honor are less prevalent in modern society. Yet, in this context, they resonated with the Founders who hoped future public servants to the Republic would bring that high respect for reputation and honor to their tasks.

#### 4. Must Impeachment Always Come First? Hamilton's View

On the point of whether impeachment must come before a prosecution of a sitting President, the Founders somewhat left us hanging. Always ready to talk, Hamilton has offered us an idea. Hamilton suggested that, at least where "high crimes and misdemeanors" are involved (whatever those terms mean), removal must precede prosecution. In *Federalist* No. 65, he stated:

The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. *After* having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.

And in *Federalist* No. 69, he added:

The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would *afterwards* be liable to prosecution and punishment in the ordinary course of law.<sup>254</sup>

There is still a wee bit of wiggle room in Hamilton's comments. If, for example, the term "high crimes and misdemeanors, means really *big* crimes or crimes that harm the state, then there is room for a President to still be prosecuted in courts of law for offenses that only subject him to fines or probation and that, while obnoxious, are not so awful that we would remove him. But there is no wiggle room in

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253. See discussion *supra* Section II.A.

254. THE FEDERALIST NO. 69 (Hamilton) ("The Real Character of the Executive")

Hamilton's belief that *removal* was the sole province of Congress. Thus, considering a prosecutorial act from the view of whether or not it would *effect* a removal makes sense.

### III. THE FOUNDERS ANSWER

This article began by delving into the history of impeachment in Great Britain and in the American colonies. It established that impeachment was understood as a type of criminal proceeding, although it had political attributes. Parliament was considered the highest court of the land when it assumed impeachment jurisdiction. It established that Parliament had the power to prosecute any crime and any person, although in the colonial period, it tended to focus its attention on treason and other felonies against the national interest.

The article established that the American colonies had no impeachment powers. Although they did have prosecutorial powers these powers were weakened by the Crown's ability to overrule local grand jury decisions. I argued that the theoretical existence of a power to prosecute a President would have been presumed by the Founders as they were writing the Constitution, but they would also have assumed prosecution of a sitting President would be impracticable.

The article moved on to discuss how the Americans incorporated parts of British model of impeachment and the approaches of the independent American states. I emphasized their concern about political prosecutions and protecting the Presidency through removal. And I argued that their solution was to divide jurisdiction, a split that placed removal power solely in Congress as the grand inquest and the High Court of Impeachment and allowed a second trial to proceed in courts of law if the accused were convicted and removed.

In this final section, I will purport to discern how the Founders would have answered key questions relating to whether a President can be prosecuted. With the aforementioned, backdrop, I draw the following conclusions.

A. The Founders Would Have Believed that, at the Outset of a Criminal Investigation, Common Law Courts and Courts of Impeachment Have Concurrent Jurisdiction Over Matters That Could Be the Subject of Impeachments

The Founders would tell us that before impeachment, courts of law on the one hand, and Congress, as a grand jury (the House) and court of impeachment (the Senate) on the other, have *concurrent* jurisdiction over criminal claims that *might* come within the impeachment power. The Founders would have drawn this design of concurrent powers from the long history of concurrent jurisdiction shared by Parliament and common law courts, as well as from confirmation of this approach in the various state law approaches to impeachment.

The question of what constitutes a removal and raises a jurisdictional question is beyond the reach of this article but obviously there are degrees of concern. This author believes that beginning a prosecution of any serious charges that pose the risk of a president being incarcerated certainly satisfy the standard. The Founders are quite clear that, when the target is the President, protecting the national interest cannot be seen merely through the lens of a prosecutor's eye. There are many other matters to consider. At the same time, the production of papers depending on their nature may raise fewer concerns. Concerns may even arise when a President is not directly targeted.

Federal courts are equipped to determine, in the first instance, when enjoining behavior or applying prosecutorial pressure to convince an accused to comply with a prosecutor's request constitutes a removal. A long history of considering privilege claims and Supreme Court precedent clearly establishes that Courts have the power to decide claims of executive privilege.<sup>255</sup> Presidential communications can be viewed in camera for an additional layer of protection for both sides although in camera review can raise concerns.

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255. Nixon, 418 U.S. at 683. I do not mean here to suggest a view on Nixon.

- B. The Founders Intended that Impeachment Be the Only Way to *Remove* a Sitting President; Thus, the President is Immune from Prosecution in Federal Courts if a Prosecution, or Prosecutorial Action, Pose the Threat of Directly or Constructively to Removing Him from Office

In response to our question regarding whether a sitting president can be prosecuted, the Founders would have posed a different question. They would have told us to focus upon the word *removal*, and they would have asked whether one potential result of the proposed prosecution or prosecutorial conduct is to remove the president either directly or indirectly by curtailing in whole or in part his discretion to exercise of constitutionally-appointed duties. They would disregard whether this curtailment was intended by a prosecutor. They would not care whether a prosecutor has no intention to seek jail time. The Founders would focus upon the effect of the prosecution or prosecutorial action. They would not only be concerned that a President would have his power to affect the public interest curtailed, but also they might fear that he might turn against the country to save himself. Prosecutorial pressure might lead a President to act in a way that protects his personal interest, rather than the interests of the nation.

With these thoughts in mind, they would say a prosecutor has no power to accomplish removal: not by prosecution, not by plea bargain, not by arrest, not by personal injunction, or not by incarceration of a President. A court has no jurisdiction to recognize, grant, or enforce such actions. The risks to the nation are too great. The president must be first removed from office. Thus, it seems that the Founders would say that any charge that puts the President in jeopardy of restraint or forced action to avoid further penalty is a charge that is outside the jurisdiction of courts of common law to enforce. I believe, therefore, that the overwhelming number of cases that put the President in jeopardy of incarceration or other restraint or enjoin him to act, a prosecutor has no ability to press beyond the investigative stage.

C. The Attorney General Can Investigate Charges to Ascertain the Nature and Extent of an Alleged Crime Despite the Inability to Remove a President, But Has Limited Ability to Force Presidential Compliance

Because concurrent jurisdiction between courts of law on the one hand and Congress, acting as a grand jury and a court of impeachment on the other, does exist, an inability to remove a President or to curtail presidential power does not prevent a Congressionally-authorized prosecutor from investigating allegations of criminal misconduct. Historically, as demonstrated in *Fitzharris*, discussed in Part II(C), the Crown's counsel maintained a power to investigate crimes (and Crown courts maintained jurisdiction), even as Parliament was considering impeachment. Note that were there no concurrent jurisdiction for courts of law, a prosecutor could not even begin an investigation. He would have nowhere to file his papers or obtain his subpoenas. However, when directed toward the President, a criminal investigation should be to ascertain the nature and the extent of Presidential involvement.<sup>256</sup>

When it becomes clear to the prosecutor that removing the President (including curtailing his freedom to act on behalf of the nation) is in view, that prosecutor has a duty to consider *which* court should consider the issue. The fact that Congress declines to exercise jurisdiction does not mean that courts of law can then proceed. They have no power to remove a sitting President.

D. A Prosecutor Has a Duty to Exercise Prosecutorial Discretion in Deciding Whether or Not to Press a Prosecution Against a President in Courts of Law

The Founders would say that, having sworn to uphold the Constitution, a prosecutor is constitutionally required to use discretion in the consideration of prosecuting a sitting President in courts of law. The office of "Attorney General" was a position with which the Founders were well familiar. Discretion was also a notion that was known to them. They expected that all officers of the law should keep in mind the welfare of the Republic.

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256. See, e.g., Rotunda, *supra* note 11.

E. The President Can Fire Prosecutors Without Committing Statutory Obstruction of Justice; The Answer is Impeachment

The Founders would tell us that a President can fire at will federal prosecutors pursuing claims against him. He can order the Department of Justice not to investigate a matter. He cannot be prosecuted in federal courts for statutory obstruction of justice based on this conduct either when he acts or after an impeachment conviction. However, he could be prosecuted for any underlying offenses that he sought to cover up.<sup>257</sup> And he could be prosecuted if he obstructed as part of a conspiracy to facilitate misconduct by others.

To understand this answer, one must return to history. The office of the Attorney General was created by statute in 1789, two years after the Constitution was signed.<sup>258</sup> Some have attributed the President's power to appoint the Attorney General to merely an assumption that he had this power in the absence of designation in the statute.<sup>259</sup> But in England throughout the colonial period and even in the independent states, such appointment and the corollary of removal, was understood to be part of the inherent power of the Chief Magistrate. In colonial Massachusetts, the Governor appointed authorities, upon advice from local councils.<sup>260</sup> After independence Massachusetts provided that its Governor would appoint the Attorney General, with the advice and consent of the legislature.<sup>261</sup> No obstruction of justice *statute* can define the exercise of a constitutional

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257. Accord Dershowitz, *supra* notes 7 & 8; Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005) (As a matter of original understanding, the President has the power to control federal prosecutors); Rotunda, *supra* note 11. A more complex case might arise if the firing of the officer, or a pattern of firing, violates the rights of third parties protected by another Constitutional provision, such as the Fourteenth Amendment, and civil rights statutes based upon it.

258. The Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

259. Bruce Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 4 (2018).

260. The approach was followed in Massachusetts. In 1733, a newspaper noted that a General Counsel for Nominating and Appointing Civil Officers had met and that the Governor then nominated several individuals to judgeships on the Court of Common Pleas, as “Indian judges” and as justices of the peace “To which Nominations his Majesty’s Council did Advise and Consent.” *Boston, May 10*, BOSTON NEWSLETTER, May 3–10, 1733, at 2; *Boston, NEW ENGLAND WEEKLY JOURNAL*, July 1, 1734, at 2 (same regarding Coroner, Surveyors and Justice of the Peace with similar advise and consent. Note the similar language used in the Constitution regarding nominating Supreme Court justices, ambassadors, and others with advice and consent of the Senate. U. S. CONST. art. II, § 2).

261. MA. CONST. ch. 2, § 1, art. IX (providing governor shall nominate and appoint “with the advice and consent of the council, “[a]ll judicial officers, the attorney-general, the solicitor-general” and others).

power as obstruction of justice. The answer to any misbehavior lies in impeachment which, is, one must be reminded, also considered a criminal prosecution.

The Founders knew that Presidents might misuse their powers to thwart prosecutions.<sup>262</sup> They had lived these experiences under a King. But they also knew (1) that a President needed flexibility in order to protect the nation's interest and (2) that Chief Magistrates have long looked to their nation's chief lawyers to advise them on important legal matters.<sup>263</sup> The risk of prosecution for crimes offering serious punishment also might conflict with the nation's interest. While the prosecutor is focused on a single case with respect to the presidency, the President may need advice on a host of others, but may be reluctant to include the Attorney General or a larger staff in his circle.

In the decades after the Constitution was signed and ratified, some of the Founders expressed thoughts consistent with the view that the President has the power to remove an Attorney General at will. In a letter to President Monroe in 1820, James Madison, looking back on the Constitutional promise, criticized an Act of Congress that limited the terms of certain officers, including Attorneys General, to four years.<sup>264</sup> Therein, he took a broad view of appointment power as including the exclusive right to remove.

Is not the law vacating periodically the described offices an encroachment on the Constitutional attributes of the Executive? The Creation of the office is a Legislative Act. The appointment of the officer the joint act of the President and Senate, the tenure of the office the judiciary excepted, is the pleasure of the P. alone so decided at the commencement of the govt. so acted on since, and so expressed in the commission. After the appointment has been made neither the Senate nor H. of Reps. have any power relating to it unless in the event of an impeachment by the latter and a judicial decision by the former or unless in the exercise of a legislative

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262. See discussion of King's use of power to thwart colonial prosecutions *supra* Section I.C.1.b.

263. Mr. Wirt to Mr. Adams, AUGUSTA CHRONICLE, Dec. 15, 1824, 1 (Attorney General's opinion to President Adams that S.C. statute seeking to punish vessels who bring "free negroes" into the state and migrant blacks seeking employment is constitutionally void).

264. *Laws of the United States*, AMERICAN DAILY ADVERTISER, May 20, 1820, 3 (applying four-year term to district attorneys, naval officers, surveyors of the customs, navy agents, receivers of public monies lands, and others). See also *stat. at large 582, 16th Cong. 1st Sess. Ch. 102, § 1-2* (Act to Limit the Term of Office of Certain Officers, Therein Named and for Other Purposes, May 15 1820). Subsequent, laws purporting to restrict terms also were passed. See *United States v. Parsons*, 167 U.S. 324 (1897) (citing 16 Stat. 6 (1869)).

power by both abolishing the office itself by which the officer indirectly loses his place and even in this case if the office were abolished merely to get rid of the tenant and with a view by its re-establishment to let in a new one on whom the Senate would have a negation it would be a virtual infringement of the Constitutional distribution of the powers of Government. If a law can displace an officer at every period of four years, it can do so at the end of every year or at every session of the Senate and the tenure will then be the pleasure of the Senate as much as of the President and not of the President alone.<sup>265</sup>

In 1897, in *Parsons v. United States*, the Supreme Court addressed how bills that purported to provide term limits for officers affected the Presidential power to remove the officers before the limits were up.<sup>266</sup> The case involved President Grover Cleveland's attempt to remove a district attorney before the statutorily-prescribed four-year term had expired.<sup>267</sup> The district attorney moved for a writ of mandamus to compel the President to allow him to serve out his term and to pay him.<sup>268</sup> The Court rejected the request.

At issue in *Parsons* was the fact that earlier statutes specifically referenced a Presidential power of removal, but later ones did not.<sup>269</sup> The Court interpreted such statutes as only a limitation on the *length* of an appointment and not a reduction of the inherent power of the President to terminate before the assigned period was up.<sup>270</sup>

The *Parsons* court extensively reviewed appointment and removal power as discussed in various Congressional discussions and initiatives up to that time. It concluded that Congress would have assumed that the power to appoint included the power to remove. Thus, regarding why the 1789 act did not mention Presidential power to remove officers before four years, the *Parsons* Court stated "No provision was made in the act for the removal of such officer" and that "In the view held by that Congress as to the power of the President to

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265. Letter from James Madison (Founding Father) to James Monroe (President), Dec. 28 1820 in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1816-1828 (1867).

266. 167 U.S. at 324-41.

267. *Id.* at 324 (prior history).

268. *Id.*

269. The Court noted that the Judiciary Act of 1789, which established federal district attorneys, had no provision for removal of the officers. *Id.* at 338. The 1820 act then was passed, providing for four-year terms, but said that the officers were removable "at his pleasure." *Id.* at 338 (citing 3 Stat. 582). Then on March 2, 1867, Congress passed the first "Tenure" act. *Id.* at 339 (citing 14 Stat. 430 (1867)). It also passed an army appropriations act that appeared to restrict Presidential powers to remove generals. *Id.*

270. 167 U.S. 324 (1897).

remove, it was unnecessary.”<sup>271</sup> The Court further said that the President had the power to remove “when in his discretion he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office.”<sup>272</sup>

In another case, *Blake v. United States* the Supreme Court punted on the question. It narrowly construed a statute to avoid it.<sup>273</sup>

President Monroe’s own approach also provides an example. He appointed his own Attorney General, William Wirt, in 1817, by replacing the prior Attorney General Richard Rush.<sup>274</sup> Wirt was later reappointed by President John Adams after the 1820 term limit statute was passed.

Indeed, if the Attorney General were independent of the President, then he, an unelected official, could have the power to displace a civil officer at will through prosecution. The President’s tenure and that of other officers would then be at the will of the Attorney General, not at the will of the people as indicated through their votes or as represented in Congress.

Some have argued that if the President has a “motive” to obstruct justice then he has done so.<sup>275</sup> But the President has a constitutional right (not merely a statutory one) to appoint members of the execu-

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271. *Id.* at 338.

272. *Id.* at 343.

273. In *Blake v. United States*, 103 U.S. 227, 236–37 (1881), the Court narrowly construed term language in the Appropriations Act of 1866 to avoid the question of whether Congress can restrict Presidential appointment power not spelled out in the Constitution. It read the statute’s language narrowly to require how a President might remove and replace an officer, but not limiting his power to do so. It left open the question of whether an attempt to limit Presidential appointment or removal power would be constitutional. The Court said, “If the power of the President and Senate, in this regard, could be constitutionally subjected to restrictions by statute (as to which we express no opinion), it is sufficient for the present case to say that Congress did not intend by that section to impose them.” The Court held, “It is, in substance and effect, nothing more than a declaration, that the power theretofore exercised by the President, without the concurrence of the Senate . . . shall not exist, or be exercised, in a time of peace, except in pursuance of this sentence of a court-martial, or in commutation thereof. There was, as we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their places.”

274. *E.g.*, *The American Beacon and Commercial Diary*, Nov. 19, 1827, 3 (“William Wirt, of Virginia, has received from the President the appointment of Attorney General of the United States.”); *Mr. Monroe’s Cabinet*, *THE TIMES*, Jan. 1, 1817, 3 (noting rumors that Monroe intended to move then Attorney General Richard Rush to Secretary of State).

275. Daniel Hermer and Eric Posner, *Presidential Obstruction of Justice*, 106 *CAL. L. REV.* 1277 (2018) (claiming President’s firing of prosecutors pursuing legitimate claims against him would violate the “take care” and other clauses and thus constitute obstruction of justice); Berke, et al., *supra* note 6 (firing would constitute obstruction); Green & Roiphe, *supra* note 259 (arguing Department of Justice is “independent” of the President and immune from presidential interference).

tive branch.<sup>276</sup> It flows, as Madison suggested, from his inherent authority as the chief executive. Attaching a “motive” requirement to a constitutional right is an impermissible attempt to amend the Constitution by statute. If a motive requirement exists, it exists in the “Take Care” Clause.<sup>277</sup> But an Attorney General has no authorization to enforce that clause.

Thomas Jefferson might also disagree with the motive theory. In 1801, Jefferson ordered his Justice Department to stop a prosecution of journalist William Duane under the Sedition Act.<sup>278</sup> Duane was the editor of the *General Advertiser, or Aurora*. The Senate alleged he had libeled them.

Jefferson’s clear intent is memorialized in a letter to Duane.<sup>279</sup> He asked Duane for a list of any public prosecutions against him “over which I might have a control” and promised that “in the line of my functions” he would treat the Sedition Act as “a nullity.” Thus, he said, “even in the prosecution recommended by the Senate, if founded on that law I would order a *nolle prosequi*.” He added, however, that “out of respect to that body should be obliged to refer to the attorney of the district to consider whether there was ground of prosecution in any court and under any law acknowledged of force.”<sup>280</sup> Did Jefferson obstruct justice? He acted with the motive to stop a prosecution. But he seemed to assert that his action was a legitimate exercise of his power over prosecutors because he believed the Sedition Act to violate the Constitution. Clearly many in the Senate disagreed with him. But they did not move to impeach him.

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276. U.S. CONST. art. II, § 2 (referencing Presidential power . . . [to] nominate, and by and with the Advice and Consent of the Senate . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .”).

277. U.S. CONST. art II, § 3 (The President “shall take Care that the Laws be faithfully executed.”).

278. CHARGES UNDER THE SEDITION ACT [https://www.archives.gov/exhibits/treasures\\_of\\_congress/Images/page\\_5/19b.html](https://www.archives.gov/exhibits/treasures_of_congress/Images/page_5/19b.html) (last visited Feb. 3, 2019).

279. Letter from Thomas Jefferson (President) to William Duane (Lawyer/Publisher) (May 23, 1801), in *Founders Online*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-34-02-0130> from 34 THE PAPERS OF THOMAS JEFFERSON, 169–170 (Barbara B. Oberg, ed 2007) (last visited Feb. 10, 2019).

280. *Id.*

F. Courts Have the Power to Stay or Narrow Presidential Prosecutions Undertaken in Courts of Law and When the Matter Raises a Prospect of Constructive Removal, the Balance Should Always Tip in the President's Favor

Conceiving removal as a *jurisdictional* problem affects the balancing that courts do in determining whether or not a particular prosecution or prosecution strategy should be enforced against a sitting President. By making removal jurisdictional, the Founders would say, they intended to tip the balance in the President's favor.

Such a tipping may justify granting a stay. It is axiomatic that courts *do* have the power to affect ordinary prosecutorial proceedings. Before granting a Presidential request for a stay, a court could require the waiver of affirmative defenses such as the statute of limitations. It may also see a need to reach agreements or impose rules for the preservation of evidence as a prerequisite. But again, courts may be limited in how much they can enforce without imposing an unconstitutional requirement upon the President.

G. A Formal Impeachment Will Automatically Stay Federal Prosecution Proceedings Addressing the Same Allegations

Even if a prosecution has begun, when the House issues a bill of impeachment, it takes a jurisdictional act that automatically stays any other proceedings in any other courts considering the same questions.<sup>281</sup> It will also stay the work of a federal grand jury. This stay principle is consistent with British common law, which treated an impeachment trial and a trial under the common law as mutually exclusive.<sup>282</sup> It is consistent with the notion of the High Court of Impeachment as a superior court on the question of Presidential removal. Indeed, without such a stay, the whole point of placing the power of removal in Congress is lost.

CONCLUSION

Some who urgently feel that a particular President must be removed from office for what they perceive to be political or legal misconduct may find the afore-mentioned conclusions personally unsatisfactory. Those who yearn for bright lines may be equally dis-

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281. See discussion *supra*, note 152 (lawyer stating in *Fitzharris* that Parliament file the first "suit" because it impeached).

282. See discussion *supra* Section I.C.

mayed. The Founders certainly appreciated the risk that a President would act contrary to the country's interest. But they also feared that impeachment could be misused for political purposes. And they understood that the future of the country rested on the need for broad consensus before reversing the results of an election. They believed that power to select a President rests in the people, not in the Courts or in unelected prosecutors. The framework they set forth in the Constitution represents a system of checks and balances that ensures that power over the Republic and its people remains in those people writ large, and not in advocacy groups, lobbyists, powerful individuals or powerful families. The framework also mimics a pattern of flexibility that is reflected throughout the Constitution.

