

**Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President**

moved.<sup>825</sup> By an opinion of the Attorney General many years later, however, the President, even after he has signed a commission, still has a *locus poenitentiae* and may withhold it; nor is the appointee in office till he has this commission.<sup>826</sup> This is probably the correct doctrine.<sup>827</sup>

**SECTION 4.** The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

**IMPEACHMENT**

The impeachment provisions of the Constitution<sup>828</sup> were derived from English practice, but there are important differences. In England, impeachment had a far broader scope. While impeachment was a device to remove from office one who abused his office or misbehaved but who was protected by the Crown, it could be used against anyone—office holder or not—and was penal in nature, with possible penalties of fines, imprisonment, or even death.<sup>829</sup> By contrast, the American impeachment process is remedial, not pe-

<sup>825</sup> *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 157–58, 173 (1803). The doctrine applies to presidential appointments regardless of whether Senate confirmation is required.

<sup>826</sup> 12 Ops. Atty. Gen. 306 (1867).

<sup>827</sup> For various reasons, *Marbury* got neither commission nor office. The case assumes, in fact, the necessity of possession of his commission by the appointee.

<sup>828</sup> Impeachment is the subject of several other provisions of the Constitution. Article I, § 2, cl. 5, gives to the House of Representatives “the sole power of impeachment.” Article I, § 3, cl. 6, gives to the Senate “the sole power to try all impeachments,” requires that Senators be under oath or affirmation when sitting for that purpose, stipulates that the Chief Justice of the United States is to preside when the President of the United States is tried, and provides for conviction on the vote of two-thirds of the members present. Article I, § 3, cl. 7, limits the judgment after impeachment to removal from office and disqualification from future federal office holding, but it allows criminal trial following conviction upon impeachment. Article II, § 2, cl. 1, deprives the President of the power to grant pardons or reprieves in cases of impeachment. Article III, § 2, cl. 3, excepts impeachment cases from the jury trial requirement.

Although the word “impeachment” is sometimes used to refer to the process by which any member of the House may “impeach” an officer of the United States under a question of constitutional privilege (see 3 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2398 (impeachment of President John Tyler by a member) and 2469 (impeachment of Judge John Swayne by a member) (1907), the word as used in Article II, § 4 refers to impeachment by vote of the House, the consequence of which is that the Senate may then try the impeached officer.

<sup>829</sup> 1 W. HOLDSWORTH, HISTORY OF ENGLISH COURTS 379–85 (7th ed. 1956); Clarke, *The Origin of Impeachment*, in OXFORD ESSAYS IN MEDIEVAL HISTORY, PRESENTED TO HERBERT EDWARD SALTER 164 (1934); Alex Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651 (1916).