

## Sec. 4—Impeachment

the impeachment of the Earl of Suffolk in 1388.<sup>850</sup> Treason is defined in the Constitution.<sup>851</sup> Bribery is not, but it had a clear common law meaning and is now well covered by statute.<sup>852</sup> “High crimes and misdemeanors,” however, is an undefined and indefinite phrase, which, in England, had comprehended conduct not constituting indictable offenses.<sup>853</sup> Use of the word “other” to link “high crimes and misdemeanors” with “treason” and “bribery” is arguably indicative of the types and seriousness of conduct encompassed by “high crimes and misdemeanors.” Similarly, the word “high” apparently carried with it a restrictive meaning.<sup>854</sup>

Debate prior to adoption of the phrase<sup>855</sup> and comments thereafter in the ratifying conventions<sup>856</sup> were to the effect that the President (all the debate was in terms of the President) should be removable by impeachment for commissions or omissions in office which were not criminally cognizable. And in the First Congress’s “removal” debate, Madison maintained that the wanton dismissal of meritorious officers would be an act of maladministration which would render the President subject to impeachment.<sup>857</sup> Other comments, especially in the ratifying conventions, tend toward a limitation of the term to criminal, perhaps gross criminal, behavior.<sup>858</sup> The scope of the power has been the subject of continuing debate.<sup>859</sup>

<sup>850</sup> 1 T. HOWELL, *STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIMES* 90, 91 (1809); A. SIMPSON, *TREATISE ON FEDERAL IMPEACHMENTS* 86 (1916).

<sup>851</sup> Article III, § 3.

<sup>852</sup> The use of a technical term known in the common law would require resort to the common law for its meaning, *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818) (per Chief Justice Marshall); *United States v. Jones*, 26 Fed. Cas. 653, 655 (No. 15,494) (C.C.Pa. 1813) (per Justice Washington), leaving aside the issue of the cognizability of common law crimes in federal courts. *See* Act of April 30, 1790, § 21, 1 Stat. 117.

<sup>853</sup> Berger, *Impeachment for “High Crimes and Misdemeanors,”* 44 S. CAL. L. REV. 395, 400–415 (1971).

<sup>854</sup> The extradition provision reported by the Committee on Detail had provided for the delivering up of persons charged with “Treason[,] Felony or high Misdemeanors.” 2 M. Farrand, *supra*, at 174. But the phrase “high Misdemeanors” was replaced with “other crimes” “in order to comprehend all proper cases: it being doubtful whether ‘high misdemeanor’ had not a technical meaning too limited.” *Id.* at 443.

<sup>855</sup> *See id.* at 64–69, 550–51.

<sup>856</sup> *E.g.*, 3 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON ADOPTION OF THE CONSTITUTION* 341, 498, 500, 528 (1836) (Madison); 4 *id.* at 276, 281 ©. C. Pinckney: Rutledge); 3 *id.* at 516 (Corbin); 4 *id.* at 263 (Pendleton). *Cf.* THE FEDERALIST, No. 65 (J. Cooke ed. 1961), 439–45 (Hamilton).

<sup>857</sup> 1 ANNALS OF CONG. 372–73 (1789).

<sup>858</sup> 4 J. Elliot, *supra* at 126 (Iredell); 2 *id.* at 478 (Wilson). For a good account of the debate at the Constitutional Convention and in the ratifying conventions, see Alex Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651, 676–95 (1916).

<sup>859</sup> *See generally* CHARLES L. BLACK, *IMPEACHMENT: A HANDBOOK* (1974); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973); MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2d ed. 2000); PETER CHARLES