collective cabinet, yielding to the gravitational pull of widespread state executive-branch practice. Yet even as weak presidents occasionally tried to duck behind strong cabinets, Article II fixed the public eye on the chief executive himself. Legend tells us that Lincoln once submitted a pet proposal to his cabinet and, when met with a unanimous chorus of nays, quipped that "the aye has it." Though too good to be true, the legend captures a deep truth about Article II. James Wilson framed the issue well in 1791:

> The British throne is surrounded by counsellors. With regard to their authority, a profound and mysterious silence is observed. . . . Between power and responsibility, they interpose an impenetrable barrier. . . . Amidst [the ministers'] multitude, and the secrecy, with which business, especially that of a perilous kind, is transacted, it will be often difficult to select the culprits; still more so, to punish them. . . .
>
> In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subject to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people.[50]

"Impeachment"

With his blunt references to "culprits" and "punishment," Wilson doubtless meant to remind his audience of one of the Constitution's essential instruments for assuring executive-branch accountability to the American people: the high court of impeachment. Of course, Article II's detailed provisions governing presidential selection and succession aimed at preventing a corrupt or easily corruptible leader from ever reaching the pinnacle of power. Yet even the best of selection systems might occasionally fail and even a well-chosen president might sometimes fall. Thus, the Constitution took care to fashion a peaceful and politically accountable mechanism for removing a president before the end of his fixed term.[51]

By a majority vote, the people's House, acting as a special grand jury, could impeach a president—in effect, indict him—for treason, bribery, or any other "high Crimes [or] Misdemeanors" that made him unfit to serve. (Likewise, the House could impeach any other executive or judicial "Offi-

cer[].")* Sitting as both judge and jury deciding law and fact, the Senate would try the impeached defendant. In a case of presidential impeachment, the chief justice would preside over the trial but would have no voice in the verdict. The presence of the chief made double sense, signaling the special gravity of a presidential impeachment and avoiding the conflict of interest that would arise were the trial chaired by the Senate's ordinary presiding officer, the vice president (who stood to gain the presidency in the event of a conviction). If two-thirds of the Senate voted to convict, the defendant would be removed from office, and the Senate could further choose to disqualify him from all future federal office.[52] Anything less than a two-thirds vote would effectively acquit. No appeal from the verdict of the impeachment court would lie to any other tribunal.[53] Its decisions of fact and law were res judicata that could not be undone in separate state or federal court proceedings. Senators could impose only the political punishment of removal and future disqualification. All other possible punishments would be decided in ordinary criminal proceedings that would not be obliged to follow the Senate's findings or verdict.

This system of federal impeachment broke decisively with English impeachment practice. First and foremost, American-style impeachment rendered the president himself accountable for any grave misconduct, while British law had no regularized legal machinery for ousting a bad king. The monarch himself was immune from impeachment and also from ordinary criminal prosecution. In a quasi-feudal system that took the idea of a jury of one's peers seriously, commoners could judge commoners, and lords lords, but who could judge the One who truly had no peers? Although a rump Parliament in the 1640s had purported to try Charles I and then proceeded to execute him, the legality of these actions after the Restoration seemed doubtful to orthodox jurists. In the 1680s, the Glorious Revolution ousted another monarch, with less bloodshed. Yet because James II had fled the throne and the island—and thus arguably abdicated—this episode offered a rather murky precedent for dealing with a bad king who had the bad grace to stay put. The 1689 English Bill of Rights and 1701 Act of Succession provided that no monarch could be a Catholic or marry one, or leave the realm without parliamentary

*Congressmen themselves were not, strictly speaking, "Officers," and were thus not impeachable, as the Senate decided in the 1790s in proceedings involving Senator William Blount. Under Article I, section 5, each house was authorized to expel miscreant members upon a two-thirds vote. In this system, unlike impeachment, the House would play no role in ousting senators, and senators would likewise stay out of any effort to unseat House members.

consent—and thus presumably defined these acts as constructive abdications—but specified no procedure for dealing with the myriad other ways in which a future monarch might unfit himself.

In America, by contrast, the head of state could be ousted whenever he committed any "high Crimes [or] Misdemeanors" that warranted his immediate removal. In context, the words "high . . . Misdemeanors" most sensibly meant high misbehavior or high misconduct, whether or not strictly criminal. Under the Articles of Confederation, the states mutually pledged to extradite those charged with any "high misdemeanor," and in that setting the phrase apparently meant only indictable crimes. The Constitution used the phrase in a wholly different context, in which adjudication would occur in a political body lacking general criminal jurisdiction or special criminal-law competence. Early drafts in Philadelphia had provided for impeachment in noncriminal cases of "mal-practice or neglect of duty" and more general "corruption." During the ratification process, leading Federalists hypothesized various noncriminal actions that might rise to the level of high misdemeanors warranting impeachment, such as summoning only friendly senators into special session or "giving false information to the Senate." In the First Congress, Madison contended that if a president abused his removal powers by "wanton removal of meritorious officers" he would be "impeachable . . . for such an act of maladministration."[54] Consistent with these public expositions of the text, House members in the early 1800s impeached a pair of judges for misbehavior on the bench that fell short of criminality. The Senate convicted one (John Pickering) of intoxication and indecency, and acquitted the other (Samuel Chase) of egregious bias and other judicial improprieties.[55]

An impeachment standard transcending criminal-law technicalities made good structural sense. A president who ran off on a frolic in the middle of a national crisis demanding his urgent attention might break no criminal law, yet such gross dereliction of duty imperiling the national security and betraying the national trust might well rise to the level of disqualifying misconduct. (Leaving the Anglican Church or marrying a Catholic, however, would seem very far from impeachable misbehavior under a Constitution that pointedly rejected religious tests; in fact, the impeachment clauses themselves confirmed the document's general religious openness by permitting senators to sit either by "Oath" or by "Affirmation" when hearing impeachment cases.)

The word "high" surely meant what it said in the Article II impeachment clause. Elsewhere the Constitution omitted the word "high" in describing "Treason, Felony and Breach of the Peace" in the Article I ar-

rest clause and "Treason, Felony, or other Crime" in the Article IV extradition clause. But how high was "high"? The Article II clause gave readers some guidance by giving two specific examples of impeachable misconduct: "Treason" and "Bribery." Both were "high" offenses indeed. "Treason"—defined in detail elsewhere in the Constitution—meant waging war against America or betraying her to an enemy power. "Bribery"—secretly bending laws to favor the rich and powerful—involved official corruption of a highly malignant sort, threatening the very soul of a democratic republic committed to equality under law. In the case of a president who did not take bribes but gave them—paying men to vote for him—the bribery would undermine the very legitimacy of the election that brought him to office.

Because reasonable people might often disagree about whether a particular president's misconduct approximated "Bribery" or "Treason" in moral gravity or dangerousness to the republic, the Constitution prescribed not only a linguistic standard but also a legal structure. The House and Senate, comprising America's most distinguished and accountable statesmen, would make the key decisions. Acting under the American people's watchful eye, these leaders would have strong incentives to set the bar at the right level. If they defined virtually anything as a "high" misdemeanor, they and their friends would likely fail the test, which could one day return to haunt them. If, instead, they ignored plain evidence of gross presidential malignance, the apparent political corruption and backscratching might well disgust the voters, who could register popular outrage at the next election.

In making Congress the pivot point, the Constitution structured impeachment as a system of national accountability. Because the president would uniquely represent the American people as a whole, the decision to oust him could come only from representatives of the entire continent. Though the Constitution did not expressly say so, its basic structure afforded a sitting president temporary immunity from ordinary criminal prosecution during his term of office. All other impeachable officers, including vice presidents, cabinet secretaries, and judges, might be tried, convicted, and imprisoned by ordinary courts while still in office. But as Hamilton/Publius passingly implied in *The Federalist* Nos. 69 and 77 and Ellsworth and Adams reiterated in the First Congress,[56] America's president could be arrested and prosecuted only after he left office. Unlike other more fungible or episodic national officers, the president was personally vested with the powers of an entire branch and was expected to preside continuously. Faithful discharge of his national duties might ren-

der him extremely unpopular in a particular state or region, making it essential to insulate him from trumped-up local charges aiming to incapacitate him and thereby undo a national election. (Imagine, for example, some clever South Carolina prosecutor seeking to indict Lincoln in the spring of 1861 and demanding that he stand trial in Charleston.) Thus, only the House, a truly national grand jury, could indict, and only the Senate, a national petit jury, could convict, a sitting president. Of course, the people of the nation could also remove a sitting president at regular quadrennial intervals. Once out of office, an ex-president might be criminally tried just like any other citizen.

Here, too, in sharply separating impeachment from ordinary criminal proceedings, the Constitution broke with historic English practice. Although the British monarch was personally immune from impeachment, his aides were not, and as a practical matter monarchs could do little without ministers. By allowing Parliament to impeach a king's "wicked" counselors,[57] English law achieved a measure of executive accountability, but only by criminalizing politics. In order to remove a minister from power, Parliament over the centuries had repeatedly felt itself obliged to try him as a criminal, in a quintessentially criminal process that imposed quintessentially criminal sanctions, including death—though the monarch might mitigate the punishment with his pardon pen.

America's Constitution transformed impeachment into a more precise and proportionate system of political punishment. While the English High Court of Parliament claimed jurisdiction to impeach even private citizens, in America only federal "Officers" would be subject to impeachment. America's impeachment tribunal would itself be politically accountable, structured to permit judgments of statecraft to percolate into the process and thereby enhance the public legitimacy of the verdict. Most important of all, the only punishment that could result from American impeachment would be political punishment—automatic removal from office and possible disqualification to hold future office. All other sanctions were reserved to ordinary criminal courts, state and federal. In England, because impeachment substituted for ordinary criminal prosecution, an impeachment acquittal barred subsequent criminal prosecution. America rejected this rule, and for good reason: It would have encouraged conviction in the impeachment court for any crime, howsoever low and irrelevant to public officeholding, lest an impeachment defendant escape all punishment. Also, as we have seen, the American test of impeachment culpability was broadly political: Was the defendant's

misconduct—whether or not technically criminal—so grave as to warrant his removal from office and possible future disqualification?

Though ultimately political, this test required genuine *misconduct;* it was political *punishment,* not simply politics as usual akin to a bland vote of no confidence. Impeachment was a judicialized ritual in which senators sat not as lawmakers, but as judges and jurors. Though as lawmakers they were free to vote against a president's policies merely because they disagreed with him politically, more was required before they might properly vote to impeach or convict him. Thus, no impeachment would be warranted merely because a president in good faith vetoed a bill that Congress favored. The point was implicit in the Constitution's basic structure: Surely it made no sense to say that while a two-thirds vote of each house was needed to override a good-faith veto, a lesser vote would suffice to remove a good-faith vetoer from office. In America's first great presidential-impeachment drama, in 1868, a Senate that would ultimately vote to overrule Andrew Johnson's vetoes a staggering fifteen times out of twenty-one override opportunities (compared to six successful overrides out of thirty-six opportunities for all previous presidents combined) nevertheless acquitted him of the House's impeachment charges.[58]

In offering up a New World impeachment model strikingly different from England's, the Constitution built upon Revolutionary state prototypes—in particular and unsurprisingly the impeachment provisions of New York and Massachusetts. Both states provided that all officers (and only officers) could be tried by an impeachment court and removed and disqualified upon conviction for "mal and corrupt conduct in . . . office[]" (in New York) or "misconduct and mal-administration in . . . office[]" (in Massachusetts). All other sanctions were expressly reserved for ordinary state criminal courts. New York required a two-thirds vote of the lower house to impeach and a two-thirds vote of the upper to convict. Simple majorities sufficed in the Bay State.[59] On this point, the Philadelphia plan split the difference. Perhaps because New York made it harder to trigger an impeachment trial, the state required an impeached governor to hand over power, which he might regain upon acquittal. Neither Massachusetts nor the federal Constitution required an impeached chief executive to step aside before conviction.[60] As did the federal model, these state prototypes rendered their heads of state (and other officers) politically accountable for political misconduct via a political tribunal that could impose only limited political punishments.

Taken as a whole, Article II envisioned the president as an officer who

would generally defend the Constitution, but who might at times come to threaten it. Vested with breathtaking power, the president would nonetheless be checked by the House and Senate, as the American people looked on, poised to render ultimate political judgment on all concerned.

Except for the largely ceremonial presence of the chief justice in cases of presidential impeachment, the Article III judiciary would play no adjudicatory part in impeachment dramas. In other constitutional contexts, the third branch was expected to assume a larger role—though not, as we shall now see, a role quite so large as it currently claims for itself.