Impeachment: A Countercritique

Raoul Berger

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the President/Executive Department Commons

Recommended Citation

Available at: https://digitalcommons.law.uw.edu/wlr/vol49/iss3/3

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
IMPEACHMENT: A COUNTERCRITIQUE

Raoul Berger*

This article is written primarily in response to the issues raised by Professor Arthur Bestor's review in 49 Washington Law Review 255 (1973) of Professor Berger's book, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS.

Impeachment too long has escaped the searching examination that so important a constitutional provision demands. My own attempt at ground-breaking in Impeachment: The Constitutional Problems1 by no means exhausted the field. Further investigation probably will uncover additional historical materials; it may reveal oversights and imperfections, and sharpen understanding. In a relatively unplowed field criticism can only serve to encourage further study; and the more history and political science are brought to bear upon constitutional problems, the more fruitful analysis will be. Thus it was that I welcomed Professor Arthur Bestor's review of my book,2 hoping for illumination and fresh insights. Bestor has contributed to the field by his discussion of the effect of resignation on the power to impeach, of whether impeachment must precede indictment. And, as he noted, I wrote under the influence of the then preoccupation with judicial removal; for when I began my study better than five years ago, who could anticipate the developments which since have made impeachment of a President both thinkable and possible, this more than 100 years after the unsuccessful impeachment of Andrew Johnson. Were I writing today, assuredly I would attempt a "unified treatment of the special problems involved in presidential impeachments."

3 Hindsight wonderfully sharpens the faculties.

1. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973) [hereinafter cited as BERGER].
3. Id. at 258. For procedural details respecting impeachment proceedings, see 1 J. Story, Commentaries on the Constitution of the United States §§ 807–11, at 587–90 (5th ed. 1905) [hereinafter cited as Story]; Comm. on Rules and Adminis-
I do believe, however, that I brought the "meaning to be given to
the phrase 'high crimes and misdemeanors,'" which he rightly de-
clares to be "the central question to be examined in any discussion of
the constitutional law of impeachments," into focus. And here Bestor
beclouds rather than clarifies. But for the current importance of the
subject I might have waited for other scholars to sift the wheat from
the chaff. "High crimes and misdemeanors" presently are of more
than scholarly concern, however, and I feel constrained to speak out,
and in the same forthright fashion as did Professor Bestor.5

I. THE ENGLISH STATUTE OF TREASONS
OF 1352–ITS SALVO

Because the Founders were deeply influenced by the seventeenth-
century English revolutionary period6 and its impeachments, I began
my book with "The Parliamentary Power to Declare Retrospective
Treasons," which dealt with the legitimacy of the seventeenth-century
impeachments for treason, a theme much debated in terms of the
saving clause or salvo of the Statute of Treasons of 1352. That Act
branded a wide range of offenses as treason; it left untouched Parlia-
ment’s power to enact new treasons; and in the salvo it instructed the
Justices to forward unspecified treasons for the judgment of the King
in Parliament. It was the effect of the salvo on the power of Parlia-
ment to adjudge fresh treasons that was my sole concern.7

Of the salvo Bestor states that8

[it] could be read in two opposite ways, either as a restraint imposed
upon the justices in order to prevent an oppressive enlargement of the
domain of treason, or as a reservation by King and Parliament of the
power to punish as a traitor a person whose offense had not amounted
to treason at the time he committed it.

---

5. The vigorous criticism, the complete lack of indulgence, that is shown by
the scientific world, is one of its most agreeable characteristics. Its one simple
and devastating criterion, "Is it true?" is perhaps the chief characteristic that
makes it seem such an oasis for the spirit of the modern world.
6. BERGER, at 328 (under "Founders").
7. Id. ch. I.
These are not two "opposite" readings but complementary ways of dealing with the same problem. The salvo was a response to a petition by the Commons in 1351 to curb the "constructive treason" interpretations of the Justices; and the salvo provided that in any case "which is not above specified," i.e., other than the expressly defined categories of treason in the Act, the Justices should forward the case for the judgment of the King and his Parliament. Thus the Act operated both as a restraint on the Justices to decide such unspecified cases and as a reservation to Parliament of the right to adjudicate unspecified treasons. Parliament, it will be recalled, exercised both judicial and legislative functions, and the reservation spoke only to the judicial function and had no application to the legislative function.

It is for this reason that the learning mustered by Bestor, which apparently I am charged with overlooking, is without relevance to my purpose. Of course, "new statutes . . . could create new treasons," first, because the salvo did not purport to affect the legislative power of Parliament; and second, because no Parliament could curtail the power of future Parliaments. For the same reason, the salvo left bills of attainder, which were legislative acts, untouched. When, therefore, Bestor concludes that "[g]iven all these means of casting the dragnet of treason wider, the question whether the salvo of 1352 permitted or forbade Parliament 'to declare retrospective treasons' pales into relative insignificance," he is pursuing his own interests and stepping outside the focus of my inquiry. My object, to repeat, was solely to demonstrate that nothing contained in the salvo curtailed the power of Parliament, sitting in judgment on impeachment, as distinguished from legislating, to declare retrospective treasons. That issue may hold no interest for Bestor, but it was at the core of the seventeenth-century impeachment debates.

The congressional power to impeach for "subversion of the Constitution," it may be added, does not stand or fall on the parliamentary power to declare retrospective treasons. Charles I conceded that subversion of the Constitution, the ground on which the Earl of Strafford

12. Id. at 29; Bestor, at 260–61.
14. Id. at 259.
was impeached for treason, could be viewed as a "misdemeanor" which made him unfit to serve "the Commonwealth in any place of trust." (The charges of subverting the Constitution plainly made this a "high misdemeanor," for which an unschooled King unthinkingly substituted "misdemeanor.") Our own George Mason, noting the narrow compass of treason as defined in the Convention, proposed that such subversion be made an impeachable offense, which was subsumed in "high crimes and misdemeanors." Consequently, whatever may be the impact of the salvo on retroactive decisions of treason by Parliament sitting in judgment, impeachment for subversion of the Constitution in terms of "high crimes and misdemeanors" seems to me to stand on independent, incontestable ground.

II. "HIGH CRIMES AND MISDEMEANORS"

The words "high crimes and misdemeanors" have received two diametrically opposed interpretations: (1) The phrase means a criminal offense; (2) it means whatever House and Senate determine that it means. These are poles apart, irreconcilable; and not a little confusion arises from the fact that Professor Bestor apparently concludes that the phrase contemplates criminal offenses, but offenses that are incapable of being defined, and thus confer unlimited discretion. My own historical studies led me to conclude that as employed by the Framers "high crimes and misdemeanors" did not require a criminal offense, and that the scope of the phrase was limited and well understood. Thus my view falls between the two extremes.

A. Does the phrase "high crimes and misdemeanors" refer to a criminal offense?

On this score I concluded that the separation in Article I, Section 3, between the judgment on impeachment—removal from and disqualification to hold office—and liability to indictment and punishment itself indicated that the former was prophylactic and noncriminal
Impeachment

whereas criminal punishment was set apart. No longer would an officer be swept to the gallows by political passions. Two provisions of the Constitution buttress this analysis.

First, if impeachment be criminal, a subsequent indictment would be barred by the double jeopardy clause in the fifth amendment. To this Bestor responds that this clause refers to “jeopardy of life and limb” (a fact I had considered), and that “[t]he original Constitution limited the penalties in impeachment trials so that they did not and could not extend to life or limb. The double jeopardy clause of the fifth amendment thus explicitly excepted impeachments.”

What is crystal clear to Bestor, however, was not the view of Justice Story, who explained that the separation between removal and indictment was designed to bar a plea of double jeopardy, and that the latter embraced peril to “liberty” as well as “life or limb,” a view earlier adumbrated by James Wilson. Assuming Story’s statement to be doubtful, the Supreme Court squarely held in 1873 that double jeopardy means “placed in peril [a second time] of legal penalties upon the same accusation.” On Bestor’s reasoning removal and disqualification constitute “punishment,” in other words “penalties,” so that under the 1873 interpretation, an impeachment would preclude subsequent indictment, or a prior indictment would preclude a subsequent impeachment.

Strange indeed is Bestor’s comment: “The mere fact that 80 years later, in 1873, the Supreme Court extended the protection of the double jeopardy clause to cases not involving life and limb, can hardly be construed as a judicial holding to the effect either that the impeachment clause was repealed by the fifth amendment, or that impeachment is a non-criminal proceeding.” Bestor assumes that the Founders had placed a criminal stamp upon the separate impeach-

19. Id. at 79; 1 STORY, at 573.
20. BERGER, at 80–81.
22. Explaining the separated provisions for removal and indictment, Story stated in 1833 that “[o]therwise, it might be matter of extreme doubt whether, consistently with the great maxim [double jeopardy], established for the security of the life and limbs and liberty of the citizen, a second trial for the same offence could be had.” 1 STORY § 782, at 571 (emphasis added). Much earlier James Wilson had come to a similar conclusion. BERGER, at 80.
23. BERGER, at 81.
24. Bestor, at 267, quoted in text accompanying note 34 infra.
ment provisions when to the contrary they were presumably aware that the familiar "abuse of power," and "neglect of duty," were not crimes under the ordinary criminal law. The issue is not "repeal" of the impeachment provisions, but how they are to be read in light of the 1873 Supreme Court "legal penalties" holding. Shall the removal provision be regarded as civil or criminal? One may quarrel with the judicial "expansion" of double jeopardy, but it is a fact of life; so that were a criminal conviction to follow a removal for "high crimes and misdemeanors," were the Court to accept Bestor's view that removal constitutes a criminal punishment, inescapably it would hold that the criminal conviction had twice placed the accused "in peril of legal penalties upon the same accusation." Since the Court prefers an interpretation that saves rather than "repeals" a provision of the Constitution it would feel impelled to view impeachment as a non-criminal proceeding in order to preserve both removal and indictment proceedings.

Second, I pointed out that Article III, Section 2, had expressly exempted impeachment from the jury "Trial of all Crimes," and, that with this exception before them, the draftsmen of the sixth amendment omitted the former exception and extended trial by jury to "all criminal prosecutions," thereby eliminating the exception. Presumably the draftsmen felt no need to exempt impeachment from the sixth amendment because they did not consider it a criminal prosecution. Bestor finds this "unconvincing" because "[n]othing in the debates on the Bill of Rights indicates an intention to eliminate this exception." This puts the wrong foot forward, for the rule of construction is that if the provision is plain, "intentional or not, reasonable or unreasonable; the court is bound by the clearly-expressed language . . . ." In lay terms, by actual elimination of the exception, the draftsmen are presumed to have intended the consequences of their acts. Moreover, the subjection of "all crimes" to jury trials cannot be disregarded. As Professor Henry Hart remarked, one who would make "all" mean less

26. See note 22 supra.
than all has the burden of proving why the ordinary meaning should not prevail, of advancing "a strong and independent reason for rejection of the excluded application." Particularly is this true when a pre-existing exception is eliminated.

Let us now examine Bestor's own theories. Apparently he rejects my treatment of impeachment, "not as a form of criminal trial but as a non-penal 'removal procedure,' " despite the fact that the word 'crimes' stares one in the face in the chapter title itself, 'High Crimes and Misdemeanors.' This smacks not a little of the air of Little Jack Horner, for I had, of course, considered this as well as other indicia of criminality. "To be sure," he continues, "certain criminal penalties cannot be inflicted in impeachments, but those that can—removal and disqualification—are certainly punishments, as the Supreme Court has held in various of its decisions on bills of attainder." Those decisions, however, involved statutes; a bill of attainder is a legislative punishment without trial, not an adjudication after the trial of an impeachment. More direct testimony in the very context of impeachment for "the misconduct of the persons" in office is furnished by Hamilton's distinction between "their removal from office" or "their actual punishment in cases which admit of it." "To the extent that impeachment retains a residual punitive aura," I had written, "it may be compared to deportation, which is attended by very painful consequences but which, the Supreme Court held, 'is not punishment for a crime . . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions' laid down for his residence, precisely as impeachment is designed to

32. Bestor, at 267.
33. BERGER, at 85.
34. Bestor, at 267 n.41.
35. BERGER, at 29; Bestor, at 260–61. Compare with text accompanying note 37 infra.
36. THE FEDERALIST No. 70, at 461 (Mod. Lib. ed. 1937) (A. Hamilton) (emphasis added). From this reference to "misconduct" of persons in office, Bestor wrings an extraordinary inference: "The punishment in question, as Hamilton's words make clear [!], is punishment for irresponsible use of power." Bestor, at 282. Since by "actual punishment" Hamilton referred to criminal proceedings, since but for treason and bribery, there are no federal crimes such as "abuse of power," "neglect of duty," "usurpation of power," Bestor is wide of the mark. See text accompanying notes 46–51 infra.
remove an unfit officer for the good of the government."\textsuperscript{37} Such decisions, rather than those respecting bills of attainder, furnish the more apt analogy.

Having argued that removal from office constitutes a criminal penalty, Bestor would then wed it to an utterly incompatible concept—the crime is indefinable. Thus he is critical of my rejection of Story's statement that\textsuperscript{38}

political offenses are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it.

Presumably, therefore, Bestor embraces impeachable crimes that are "utterly incapable of being defined,"\textsuperscript{39} and is brought into collision with the void-for-vagueness doctrine. A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."\textsuperscript{40} In other words, "the constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."\textsuperscript{41} Given a crime that is "utterly incapable of being defined" there is no notice whatsoever. This rule is no less applicable to constitutional criminal provisions, such as "high crimes and misdemeanors" (on Bestor's reading of Story); for since the due process amendment came after adoption of the Constitution it governs all of its provisions.\textsuperscript{42} In short, offenses that are "incapable of being defined" are likewise incapable of giving a person "notice that his contemplated conduct is forbidden." Such a reading would nullify "high crimes and misdemeanors."

\textsuperscript{37} Berger, at 81.
\textsuperscript{38} Bestor, at 271; the quotation is from 2 Story § 795, at 264.
\textsuperscript{39} Bestor, at 271. At this point Story was showing that there were but two statutory impeachable offenses, treason and bribery, and that it would be a staggering task to require the enactment of a code of statutory crimes as a basis for impeachment, with all the exactitude required of criminal statutes. Story, therefore, like myself, looked to the common law and emerged with almost the same categories. 2 Story §§ 796–97, 799–800, at 380–600. See text accompanying notes 82–83 infra.
\textsuperscript{40} Connally v. General Construction Co., 269 U.S. 385, 391 (1926).
\textsuperscript{41} United States v. Harris, 347 U.S. 612, 617 (1954).
\textsuperscript{42} Schick v. United States, 195 U.S. 65, 68 (1904); Boylan v. United States. 310 F.2d 493, 498 (9th Cir. 1962).
The argument that "high crimes and misdemeanors" involves criminal conduct has not been adopted by the Senate; on a number of occasions it has held judges guilty of noncriminal offenses. To the Senate, at least in the first instance, was left the interpretation of the meaning of "high crimes and misdemeanors"; and since Bestor rejects my view that the Supreme Court, as the "ultimate interpreter" of the Constitution, must decide what is the scope of "high crimes and misdemeanors," he would lock the door to adoption of a different view of those words. More important, there are no federal common law crimes; all federal crimes are creatures of statute. Early on Congress enacted statutes which made treason and bribery crimes; a few statutes have made certain minor acts criminal "high misdemeanors." One seeks in vain for statutes that declare criminal "subversion of the Constitution," "abuse of power," "abuse of trust," "neglect of duty," or "oppression," yet the Founders unmistakably regarded these as impeachable offenses. From this we may deduce a continuing construction by Congress of its own impeachment powers, that they are not exclusively activated by federal crimes but instead comprehend non-indictable offenses. To tie impeachment to "crimes" exclusively would, in the absence of statutory crimes, let an officer who had been guilty of an abuse of power, of betrayal of trust, of subversion of the Constitution, escape scot-free, a result rejected by Story and, if I read Professor Bestor right, that would hardly find favor with him.

---

43. Berger, at 57 n.15 and 305.
44. Id. at 57 n.15.
45. See text accompanying note 104 infra.
47. Gebardi v. United States, 287 U.S. 112, 120 n.4 (1932); "an offense against the United States [is] necessarily statutory.
48. Treason, Act of April 30, 1790, ch. 9, 1 Stat. 112; Bribery, Act of April 30, 1790, ch. 9, 1 Stat. 117.
50. Story noted the absence of such statutes. 1 Story § 796, at 580.
51. Berger, at 89. Story stated, "[t] here are many offences purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute-book." 1 Story § 797, at 581.
52. "Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct . . . ." 1 Story § 799, at 583; see also id. §§ 796–97, at 580–81.
53. Is the silence of the statute-book to be deemed conclusive in favor of the party until Congress have made a legislative declaration and enumeration of the offences which shall be deemed high crimes and misdemeanors? If so, then . . . the power of impeachment, except as to the two expressed cases [treason, bribery],
B. The Framers did not by "high crimes and misdemeanors" confer unlimited power to impeach

First it needs to be asked: What is the relation between "high misdemeanor" and "misdemeanor"? Beyond the verbal affinity—none. No opinion stands higher than the evidence upon which it rests, so I beg to telescope my findings. "High crimes and misdemeanors" is first met in a 1386 impeachment, at a time when there was no such crime as a "misdemeanor." Felonies were at that time coupled with "trespasses," the term used to describe lesser crimes. "Misdemeanor" is first met in the general criminal law in the sixteenth century, when it displaced "trespasses." As "trespasses" itself suggests, it responded to torts or private wrongs; and of its successor "misdemeanor," Fitzjames Stephen stated that "prosecutions for misdemeanors are to the Crown what actions for wrongs are to private persons." On the other hand, "high crimes and misdemeanors," like treason and bribery, were crimes against the state, so-called "political" crimes, a differentiation that Bestor recognizes. It also needs emphasis that "high crimes and misdemeanors" meant "high crimes" and "high misdemeanors"; and that in England "high misdemeanors" remained a term of art peculiar to impeachment and did not find its way into the ordinary criminal law. Until this evidence is controverted or impeached, which Bestor does not attempt, it justifies the conclusion that "high crimes and [high] misdemeanors" were words of art confined to impeachment, without roots in the ordinary criminal law, and having no relation to the familiar criminal "misdemeanor."

To circle around this demonstration Bestor launches on a discourse, detailed analysis of which would go far beyond the confines of

is a complete nullity, and the party is wholly dispensable, however enormous may be his corruption or criminality.

Id. § 796, at 580.

57. Bestor, at 263–64, quoted in text accompanying note 70 infra.
58. Berger, at 328 (under "high misdemeanors").
59. Bestor, at 263–64. These views have been adopted in a report on the law of presidential impeachment by the Committee on Federal Legislation of the Association of the Bar of the City of New York, and by John Doar, Special Counsel, and Albert Jenner, Minority Counsel, to the House Judiciary Committee, now investigating the impeachment of President Nixon. N.Y. Times, Feb. 22, 1974, at 14. The curious reader will find that a number of distinguished reviewers have likewise found these materials convincing.
a countercritique. A few highlights must suffice. For example, he cites Blackstone for the statement that the "first and principal kind" of misdemeanor was the mal-administration of such high officers, as are in public trust and employment."\textsuperscript{60} Blackstone, however, was not talking of "misdemeanors" but of "high misdemeanors,"\textsuperscript{61} and Bestor's oversight is part of a persistent confusion of the two. Thus he states that "[t]he common element in all these [impeachment] accusations was obviously the injury done to the state and its constitution, whereas among the particular offenses producing such injury some might rank as treasons, some as felonies and some as misdemeanors . . . ."\textsuperscript{62} He cites no instances of such "misdemeanors," and so far as my reading of English impeachment proceedings goes, I found only one case in which reference to a "misdemeanor" was made. That was the impeachment of Lord Chancellor Macclesfield who was charged in 1725 with the sale of offices of Master in Chancery against the "laws and statutes of this realm," an offense against the state, not against a private person, and thus a "high misdemeanor" not a "misdemeanor." A statute made the sale of offices a judicially triable criminal offense and the House found it convenient to invoke the statute.\textsuperscript{63} So too, Parliament regarded the statutory "bribery" as a "high crime and misdemeanor," that is, a "high misdemeanor."\textsuperscript{64}

For Bestor the distinction between a "high" crime or misdemeanor from an ordinary one "goes back to the ancient law of treason, which differentiated 'high' from 'petit' treason." The latter applied to such offenses as the murder of a lord by his wife or servant, the former to an attack upon the Crown.\textsuperscript{65} In "high" treason the lands of the wrongdoer were forfeited to the king whereas in "petit" treason the lord obtained the escheat;\textsuperscript{66} but both were punishable by death. If anything, this distinction fortifies the differentiation between "high" offenses against the state and "petit" offenses against private persons.\textsuperscript{67} No

\textsuperscript{60.} Bestor, at 269 (emphasis partially added); BERGER, at 61–62.
\textsuperscript{61.} 4. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 121 (1765–69).
\textsuperscript{62.} Bestor, at 265 (emphasis added).
\textsuperscript{63.} BERGER, at 305.
\textsuperscript{64.} \textit{Id.} at 62.
\textsuperscript{65.} Bestor, at 264.
\textsuperscript{66.} Declaration of What Offences Shall be Adjudged Treason, 25 Edw. 3, 1 Statutes at Large 244 [Hawkins ed. 1735] (Great Britain).
\textsuperscript{67.} See accompanying note 56 supra, and text accompanying note 70 infra.
such distinction could be drawn between "high misdemeanors" and "misdemeanors" in the "ancient law" because the "misdemeanor" was as yet unborn. Next Bestor relies on a "gradation" between "high misdemeanor" and misdemeanor "implicit in Blackstone's classification of 'high misdemeanors' among 'such high offences as are under the degree of capital, but nearly bordering thereon.' "68 Bestor mistakes Blackstone's meaning; he was distinguishing "high misdemeanor" from a capital offense against the state, e.g., treason, not from "misdemeanor," which in his time was a crime against a private person. After defining the "principal" "high misdemeanor" as "mal-administration" by officers in the public trust, Blackstone referred to "other misprisions," "generally denominated contempts or high misdemeanors," such as contempts against the King's prerogative, against his person and government "not amounting to treason," in short, political offenses.69 Indeed, Bestor agrees that "[t]he element of injury to the commonwealth—that is, to the state itself and to its constitution—was historically the criterion for distinguishing a 'high' crime or misdemeanor from an ordinary one;"70 that criterion is not clarified by an appeal to his "gradation" theory which implies a hazy relation between the two when in fact there is none. Ever since Ockham, scientists have preferred the simpler to the more complicated explanation.

Let us now turn to the case made for the "limited" content of "high crimes and misdemeanors," resorting to Bestor's own words:71

On August 28, 1787, the extradition clause of the Constitution came up for discussion. As then phrased, it called for the rendition of fugitives "charged with treason, felony, or high misdemeanor." It seems clear [?] that the word "high" was intended as a synonym for grave or serious or gross. But various members recognized that "high misdemeanor" was the term commonly used to signify an impeachable offense, and they expressed doubt "whether 'high misdemeanor' had not a technical meaning too limited." . . . The Convention responded by substituting "other crimes."

Thus the Convention unmistakably recognized that "high misdemeanor" was a term of art in impeachment, and that it had a limited, tech-

69. 4 BLACKSTONE, at 121–24; BERGER, at 62.
70. Bestor, at 263–64.
71. Id., at 269 (footnotes omitted).
nical meaning. Bestor would downgrade this incident by his remark that "The point was, of course, that only persons charged with impeachable offenses would be within the terms of the clause."72 Tangential though the recognition was (so too were most of the remarks in the Convention about judicial review) it yet constitutes incontrovertible evidence of the Convention's understanding that "high misdemeanor" had a limited, technical meaning. Bestor continues:

Eleven days later, on the 8th of September, a clause relating to impeachment came up for discussion, with only two grounds specified, namely "treason or bribery." Noting that treason had already been narrowly defined . . . Mason pointed out that "[a]ttempts to subvert the Constitution may not be treason as above defined." . . . Mason moved to add "maladministration" to "treason" and "bribery" as grounds for impeachment. Madison . . . objected that "maladministration" was "[s]o vague a term"73 that it would be equivalent to providing "tenure during the pleasure of the Senate." At this point, Mason proposed . . . "other high crimes and misdemeanors," and the Convention adopted the suggestion, thus enlarging the grounds for impeachment that had been specified in the original draft.74

In sum, the Framers substituted "high crimes and misdemeanors," a phrase they knew to be of "technical meaning too limited," for "maladministration," because the latter, in Madison's words, was so "vague" as to leave presidential tenure "at the pleasure of the Senate." The argument that "high crimes and misdemeanors" was thus in-

72. Id.
73. Bestor states that Madison was "unaware or forgetful of Blackstone's definition" of "high misdemeanor" as "maladministration" by public officers. The State Constitutions of Virginia, New Jersey, North Carolina, Pennsylvania, and Vermont provided for removal for "maladministration," BERGER, at 145, so Madison can hardly have been "unaware" of the nexus between maladministration and impeachment. Just as the Framers could narrow the definition of "treason" precisely because they were aware of its scope, so Madison could prefer "high crimes and misdemeanors" because of a clearer "technical, limited" meaning.
74. Bestor, at 269-70 (footnotes omitted); BERGER, at 74, 86. Bestor adds: Berger puts the matter somewhat disingenuously: "Manifestly, this substitution was made for the purpose of limiting, not expanding the initial Mason proposal." BERGER, at 86 (emphasis added). The only vote actually taken resulted in expanding the draft that was before the Convention. Bestor, at 270 n.54. While the draft "treason, bribery" was expanded by the addition of "high crimes and misdemeanors," that phrase was designedly more "limited" than "the initial Mason proposal" of "maladministration." Bestor nods when he labels as "disingenuous" a statement that an amendment to a proposed amendment "limits" that proposal, although ultimate adoption of the amendment (as amended) expands the original draft.
tended to be a phrase of limited meaning, which the Senate may not expand at "pleasure," can hardly be disputed.

This demonstration is airily dismissed by Bestor as resting "upon an extremely strained interpretation of rather tenuous evidence—specifically on two minor episodes in the Constitutional Convention." If these be indeed "minor episodes" (because the Framers saw no need to waste words), they resemble Mercutio's wound—"not so deep as a well, nor so wide as a church door; but 'tis enough, 'twill serve." And what is "extremely strained" about the Framers' explicit recognition that "high crimes and misdemeanors" had a limited technical meaning, and that the words were adopted in order that presidential tenure would not be at the "pleasure of the Senate"?

The evidence mustered by Bestor is considerably more "tenuous." He makes a stab at reinstating "maladministration" into Article II, Section 4, on the ground that in the First Congress Madison "used the word 'mal-administration' to describe a class of impeachable offenses." Referring to presidential displacement "from office [of] a man whose merits require that he should be continued in it," Madison stated that the President "will be impeachable by this House, before the Senate, for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal. . . ." Patently Madison was not attempting to substitute "maladministration" in general for "high crimes and misdemeanors," but merely indicating that a particular act of maladministration, a wanton removal, constituted an impeachable offense. It hardly follows that he viewed every act of maladministration as a "high misdemeanor," or that he sought to replace the latter by recurring to Mason's rejected "maladministration." Even if this was his object, it was beyond his power to reverse the adoption by the Convention of "high crimes and misdemeanors" in place of Mason's "maladministration."

When the Framers used a common law, "technical" term, it was because they were aware of its meaning and because it comprehended familiar practice, as is exemplified by "habeas corpus," "bribery," and the like. From earliest times the Supreme Court therefore turned to

---

75. Bestor, at 269.
76. Shakespeare, Romeo and Juliet, III.i. 96–97.
77. Bestor, at 270 n.54 (emphasis added).
78. For "the definition of bribery, resort is naturally and necessarily had to the
the common law for light as to the meaning of constitutional terms, an approach doubly justified in the case of "high crimes and misdemeanors," because the Framers recognized that the words have a limited, technical, that is, common-law, meaning, and exhibited familiarity with that meaning. Following in the path of this tradition, I searched for the meaning of "high crimes and misdemeanors" at the time the Constitution was adopted and emerged with the following categories: abuse of official power, betrayal of trust, encroachments on and contempts of Parliament, corruption, pernicious advice by ministers to the King, and most important subversion of the Constitution or usurpation of power.79 Mason, as we have seen, was solicitous to preserve subversion of the Constitution as an impeachable offense; and the Founders referred to "corruption," "negligence," "betrayal of trust," "oppression" or abuse of power, ministerial bad advice and still others.80

Bestor agrees that "high crimes and misdemeanors" "must be read . . . as a technical term" but charges with habitual exaggeration that Berger would read it "as a term with almost as specific a meaning as 'robbery' or 'bribery.' "81 One who sets out five or six broad categories of high crimes and misdemeanors, e.g., abuse of power, scarcely has attempted to give the phrase as "specific a meaning as bribery," which has only one meaning, and that a narrow one. Here I did no more than Bestor's oracle, Story:82

Resort, then, must be had either to parliamentary practice and the common law, in order to ascertain what are high crimes and misde-

---

79. BERGER, at 69-70.
80. Id., at 89. How one who delineated these categories can be charged with "abandon[ing] any real effort to explain the role of impeachment as a check on the usurpations of executive officials and seems anxious instead to explain away into virtual nothingness the whole procedure," Bestor, at 267, is beyond me.
81. Bestor, at 270.
82. 1 STORY § 797, at 581.
meanors, or the whole subject must be left to the arbitrary discretion of the Senate . . . . The latter is so incompatible with the genius of our institutions, that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice . . . . The only safe guide in such cases must be the common law . . . .

When Story went on to consult the common law he came up with virtually the same categories of impeachable offenses as I did. Describing the offenses of a "purely political character [which] have been deemed high crimes and misdemeanors," he instanced impeachment for "acting grossly contrary to the duties of their office . . . for attempts to subvert the fundamental laws, and introduce arbitrary power," and the like.8 His examples are mine.

But, says Bestor, according to Berger, "the framers . . . intended to convert 'high crimes and misdemeanors' from an obviously flexible category, which comprised illegal acts of almost every conceivable sort, provided they threatened to subvert the state or the Constitution, into a rigidly limited class of specific acts, for which exact precedents would have to be found in English impeachments."84 Apparently Bestor forgot that I alluded to subversion, both in the trial of the Earl of Strafford and in Mason's successful effort to retain it as an impeachable offense,85 so that in fact I did not rigidify his "flexible" subversion category. Moreover, "abuse of power" or "neglect of duty" are no more rigid than other traditional formulae such as "due process," "restraint of trade" and the like. Such formulae afford large room for judgment and are far removed from a demand for "exact precedents." In his peroration Bestor lauds the statement of Burke—"the most profound of the conservative thinkers"—that statesmen "who abuse their power" could be impeached.86 Why is "abuse of powers" "rigid" in the mouth of Berger but the sage advice of a "profound thinker" when it falls from Burke?

Bestor states that my categorization neglects an essential point:87

Only under certain circumstances does conversion of public property

---

83. Id. § 800, at 584.
85. Berger, at 32, 86. Bestor states that the gravamen of "high treason" was "injury to the state and subversion of its constitution or fundamental law." Bestor, at 264.
86. Bestor, at 285.
87. Id. at 270–71.
rise to the level of a “high” crime or misdemeanor. Only in particular contexts, where particular results follow, can the giving of pernicious advice be reckoned as a punishable offense at all. To define inductively the category “high crimes and misdemeanors” requires one to search not for some common element in the particular actions that have been censured, but for some common element in the particular situations that gave to misdeeds of exceedingly diverse kinds the ominous character of threats to the state and its constitution. The crucial determinant is not the intrinsic nature of the action itself, but the context that elevated it to the level designated “high.”

Perhaps I am incapable of rising to Professor Bestor’s level of abstraction, being accustomed to follow Justice Holmes’ admonition to “think things, not words,” but I own that I am baffled by Bestor’s criteria. What circumstances in the “particular situation” other than the “conversion of public property” by a public official elevates the offense “to the level designated ‘high’”? So, too, pernicious advice to the Crown by Ministers, which resulted in a treaty which Parliament (and subsequent historians) concluded was a betrayal of Dutch allies, was considered impeachable. What is the “common element in the situation” beyond the “element of injury to the state itself and to its constitution” which Bestor himself concedes “was historically the criterion for distinguishing a ‘high’ crime or misdemeanor from an ordinary one”?

Bestor would substitute for intelligible categories—cited by the Framers, and by Story, on whom Bestor so heavily relies—an abstract formula which explains nothing, and which is without warrant in any impeachment proceeding that I have examined. For lawyers bred to the common law, categories derivable from English precedents are more illuminating.

Even more puzzling is Bestor’s approach to my analysis of “political” offenses. Of course, I posited James Wilson’s epitomization that “impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments.” More concretely, “political characters” are men who occupy public office; “political crimes and misdemeanors” are offenses, not necessarily criminal, against the state as distinguished from crimes against a private person; and “political punishment” under our Constitution consists in removal

88. Id. at 263–64.
89. Id. at 263; Berger, at 75.
from and disqualification to hold office. My second chapter is strewn with references to "political" offenses; and, as Bestor notices, the concept is basic to my analysis. But he asserts that though I thus "glimpse the answer," I shy "away from it," and "draw back in alarm from the idea of vesting in 'a political tribunal' (as Story frankly described it, [meaning that it was the political as contrasted with the judicial branch]) any power over the judiciary." Now I discussed the impeachment of judges at length; and though I urged that the judiciary was authorized to remove judges for breaches of "good behavior," as distinguished from congressional removal for "high crimes and misdemeanors," I stated that "[t]he congressional power to impeach is better held in reserve against the failure or neglect of either the Executive or Judiciary to rid the government of servants who have demonstrated their unfitness to hold public office." To spare Congress the needless labor of removing petty grafters, while holding its own powers in reserve, hardly adds up to a "draw back in alarm from the idea of vesting" in Congress "any power over the judiciary." Nor am I the man to view with alarm powers already vested in any branch by the Constitution, such as the congressional power to impeach judges.

But let me come to grips with Bestor's "possibility that the framers did in fact contemplate—and may have been justified in contemplating—'proceedings of a political nature.'" Nowhere does Bestor nakedly state that Congress must be left entirely free to determine

---

90. See THE FEDERALIST No. 65, at 423 (Mod. Lib. ed. 1937) (A. Hamilton); cf. id. No. 70, at 461 (A. Hamilton).
91. Bestor, at 262, 266.
92. Id. (footnotes omitted). Story distinguished between the "presentment . . . in the ordinary forum" and bringing "the political part [removal] under the power of the political department . . . ." 1 STORY § 786, at 573. Bestor would deduce "the inescapably political nature of impeachment" from Story's statement that:

The jurisdiction . . . over offences, which are committed by public men in violation of their public trust and duties. Those duties are, in many cases, political . . . .

Strictly speaking, then, the power partakes of a political character, as it respects injuries to the society in its political character.

Bestor, at 263, quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 744, at 217 (1st ed. 1833). This is the statement cited by Bestor, at 266, for Story's "frank" description of the Senate as a "political tribunal." He unwarily glides from Story's meaning of "political" as concerning offenses against the state to "political" in the sense of politically expedient.
94. BERGER, at 297–98.
95. Bestor, at 266.
what "high crimes and misdemeanors" means, but coming after his statement that Ford's view of unlimited power to impeach "rings sour in Berger's ears,"96 plus his sustained attack on "limits," and on an attempt to define "high crimes and misdemeanors," this is what his reference to "proceedings of a political nature" indicates that he has in mind. To some, such discretion was an unpleasant prospect when Congressman Gerald Ford proposed the impeachment of Justice William O. Douglas and asserted that "an impeachable offense is whatever a majority of the House of Representatives [with Senate concurrence] consider it to be."97 Story, it will be recalled, considered that such discretion would constitute "absolute despotism." Although I share Professor Bestor's well-known distaste for many of President Nixon's acts, I cannot bring myself to vary the construction of the Constitution according to whether I like or dislike the incumbent. To my mind, Mr. Ford was clearly wrong when he stated that "there are few fixed principles" to govern the matter.98 It was my conviction that the Constitution did not confer unlimited power upon any branch of the government that led me to explore whether it imposed limits upon the power of impeachment.

What does Bestor mean by a "political tribunal"? "Political" is a many-hued word. In the context of "high crimes and misdemeanors" it meant offenses against the state; in the context of "political characters" it meant occupants of public office; and in the context of "political tribunal," I submit, it merely meant Congress as distinguished from the courts.99 If I do not misunderstand Bestor, he considers that a "political tribunal" was chosen to try impeachments so that it would be free to act on considerations of political expediency rather than within the "limits" imposed by the choice of the "technical" term, "high misdemeanor." It is difficult to explain his many-pronged attack on my demonstration that such "limits" were contemplated on any

96. Id.
98. Bestor, at 266.
99. See note 92 supra, Compare Frankfurter's reference to Congress and the President as the "democratic forces in our . . . government," text accompanying note 120 infra. After referring to Hamilton's designation of injuries "to the society itself" in violation of some public trust as an impeachable offense, Professor Arthur Schlesinger, Jr. states that "a political proceeding in this sense means something different from a proceeding designed to promote the fortunes of one or another political faction." The "political proceeding" is merely differentiated from a "criminal proceeding." Wall Street Journal, Feb. 28, 1974, at 14.
other grounds. And if in fact such limits were adopted, if the President was not left at the "pleasure" of the Senate, "political tribunal," the words used by Story, cannot be so construed as to enthrone the "absolute despotism" he condemned. For such "limits" proof has been avouched; there is none for a free-wheeling interpretation of "political tribunal."

The Senate was not chosen as the impeachment tribunal in order that it might give free rein to political considerations. Quite the contrary. Story, on whom Bestor so often relies, explained that the choice was made because the Senate will not "lend themselves to the animosities of party... which may... induce the House... to the acts of accusation."\(^\text{100}\) The House, Hamilton explained, being "the most popular branch [and] generally the favorite of the people [e.g., the House of Commons], will be as generally a full match, if not an overmatch, for every other member of the Government."\(^\text{101}\) The Senate, said Hamilton, would be "unawed" by the fact that the House lodged charges, whereas it was doubtful whether the Supreme Court would be "endowed with so eminent a portion of fortitude" to execute "so difficult a task," a view earlier expressed in the Convention by Gouverneur Morris.\(^\text{102}\) In the contemplation of the Framers the Court had nothing like the stature it has today, as one can perceive from the difficulties Washington experienced in recruiting a Court, in the repeated dropouts from the early Court for more attractive posts.\(^\text{103}\) To repeat, a "political tribunal" acting purely on considerations of polit-

\(^{100}\) Story § 775, at 567. It was Story who stressed that the "great objects to be attained in the selection of [the] tribunal... are impartiality, integrity..." Id. § 745, at 546. Story cautioned that the power "requires to be guarded in its exercise against the spirit of faction, the intolerance of party," id. § 746, at 547, considerations which leave no room for a "political tribunal" governed by political expediency.

Hamilton foresaw that the prosecution of "political" offenses would "agitate the passions of the whole community and divide it into parties... connect itself with the pre-existing factions, and will enlist all their animosities," so that "there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by real demonstrations of innocence." The Federalist No. 65, at 424 (Mod. Lib. ed. 1937) (emphasis added). Thus partisanship is to be shunned rather than welcomed. And the Senate was chosen because it would "preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers." Id., at 425 (emphasis in original). To my mind this connotes the impartial administration of "law" not of political expediency.

\(^{101}\) The Federalist No. 66, at 431-32 (Mod. Lib. ed. 1937) (A. Hamilton).

\(^{102}\) Id. No. 65, at 425 (A. Hamilton); Berger, at 113.

\(^{103}\) Cf. R. McCloskey, The American Supreme Court 4 (1960).
Impeachment

ical expediency would abort the constitutional design to put removal beyond the mere “pleasure” of the Senate.

III. JUDICIAL REVIEW

In discussing my chapter on judicial review Bestor parades his own remarkable theories without really pausing to examine my reasoning. He begins by saying that “nothing in the English precedents and nothing in the discussions during the making of the American Constitution contradict the universally accepted view that the Senate in impeachments was intended as a court of last resort.”104 Lawyers are so often charged with being precedent-bound that it is odd to find an historian taking refuge in a lack of “precedent.” And “universally accepted” is hardly the way to describe the few uncritical utterances105 about a matter which has received precious little analysis. When precedents are lacking it is the practice of judges and lawyers to argue from principle. Nowhere is this more important than in constitutional construction, as the 1780 Massachusetts Constitution, drafted by John Adams, admonished: “A frequent recurrence to the fundamental principles of the constitution [is] absolutely necessary to preserve the advantages of liberty and to maintain a free government.”106

So I began with the premise that if “high crimes and misdemeanors” in fact has discernible limits, these, like all the limits upon the enumerated powers in the Constitution, are to be enforced by the courts. The most recent instance was the exclusion of Adam Clayton Powell from the House on the ground that he had defrauded the government. This was set aside by the Supreme Court in Powell v. McCormack107 on the ground that the only standards for membership enumerated in the Constitution were age, residence and citizenship and, despite the fact that the House was made the “judge of the qualifications of its members,” the House was without power to add to those qualifications, a decision, the Court held, that fell within its own powers as the “ultimate interpreter” of the Constitution.108

104. Bestor, at 268.
105. BERGER, at 103.
106. MASS. CONST. art. 18 (1780), in 1 B. POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS 959 (1878).
108. Id. at 521–22; BERGER, at 104–07.
would have done well to set out my argument and to meet it; instead he set off on a frolic of his own.

First, Bestor maintains that there must be found some party with standing to sue, who can show that his individual rights are adversely affected. This doctrine is a judicial construct, not a constitutional imperative, much diluted in recent years. Bestor's unarticulated premise that neither the President nor the Congress has "standing" to protest against impairment of its functions by the other branch runs afoul of the fact that agency after agency of the Executive Branch has been permitted to sue for impairment of its functions by some other agency. He also urges that the "possibility of putting a constitutional issue into a form suitable for adjudication depends a great deal on what kind of constitutional issue it is. Where clearly defined restrictions have been placed upon the exercise of governmental powers, as in the Bill of Rights, judicial enforcement can perhaps be relied on, in theory at least, as all-sufficient." Apparently Bestor confines judicial review to violation of constitutional prohibitions, whereas in fact many a statute has been set aside because it was in excess of the power conferred, exactly as the Founders intended.

When Bestor turns to "conflicts between the executive and legislative branches," he pays no heed to the cases which illustrate judicial arbitrament of such disputes. It is not Berger alone who "sees no difficulty in turning over to the courts the enforcement of these political parts of the supreme law." My "tranquillizing description" of such conflicts as "a boundary dispute" can summon Madison to witness. Neither of the two departments, he stated, "can pretend to an exclusive or superior right of settling the boundaries between their respective powers."

111. Bestor, at 275.
113. Bestor, at 276.
115. Bestor, at 276. This is but another of Bestor's disturbingly exaggerated statements. In Chapter III, I collated and faced up to all the adverse materials, the "most formidable argument against review," BERGER, at 112. Would that Bestor had done as much for my demonstration.
most indispensable when power . . . is balanced between different branches, as the legislature and the executive . . . . Each unit cannot be left to judge the limits of its own power.” Still later Justice Frankfurter stated in Youngstown Sheet & Tube Co. v. Sawyer, where the Court set aside President Truman’s seizure of the steel plants because it conflicted with implicit congressional policy, “[t]he judiciary may, as this case proves, have to intervene in determining where the authority lies as between the democratic forces in our scheme of government,” i.e., between Congress and the President.

When Bestor invokes the criteria of “justiciability,” also known as “political questions,” he overlooks the great inroads that have been made upon that doctrine by the “reapportionment” cases and by Powell v. McCormack. In Powell the Court proceeded from the premise that it is the “ultimate interpreter of the Constitution,” vested with the “responsibility” to decide “whether the action of another branch . . . exceeds whatever authority has been committed.” Looking at those cases, the noted legal historian Willard Hurst stated that it is “no longer unrealistic to contemplate that judicial review may also be extended to encompass challenges to the legality of grounds taken for impeachment.” Instead of meeting my reasoning Bestor resorts to speculation which has little correspondence to realities.

Consider his distinction between review of congressional and executive acts:

If Congress attempts to usurp the powers of the President, and if his

---

118. R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 9 (1941); BERGER, at 110.
119. 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring).
120. BERGER, at 110 n.40. Hamilton stated that it “cannot be the natural presumption” that the “legislative body are themselves the constitutional judges of their own powers . . . . It is far more rational to suppose, that the courts were designed . . . to keep the [legislature] within the limits assigned to their authority.” THE FEDERALIST No. 78, at 506 (Mod. Lib. ed. 1937) (A. Hamilton). On what reasoning are we to conclude that congressional encroachments on presidential prerogatives are excluded from this principle, or that presidential invasions of congressional powers, e.g., impoundment of appropriated funds, may not be judicially curbed?
121. Bestor, at 275.
123. 395 U.S. at 549; BERGER, at 327–28.
126. Bestor, at 276.
veto is overridden, the legislation that results is almost certain to affect
individual rights and therefore to be reachable by the normal proc-
esses of judicial review. By contrast, if the President attempts to usurp
the powers of Congress, the latter possesses neither the equivalent of
the veto nor the power to bring suit in the courts in its own name to
defend its authority.

Bestor overlooks that *executive* action which “usurps the powers” of
Congress can also “affect individual rights” and be “reachable by the
normal processes of judicial review,” as the *Youngstown Steel* and the
current “impoundment” cases illustrate. In upwards of 25 cases the
courts, at the suit of counties, cities and the like, have held the Presi-
dent’s impoundments unconstitutional, chiefly because they encroach
on the exclusive power of Congress to appropriate and to select priori-
ties under its power to provide for the general welfare. If third persons
may thus protest against the impairment of congressional functions,
common sense urges that the victim himself, *i.e.*, the Congress, must
be permitted to ask judicial protection against such impairment.
“Tranquillizing” or no, a judicial resolution seems to me preferable to
such “High Noon” showdowns as preceded President Nixon’s compro-
mise on the continued bombing in Cambodia, in order to avoid
grinding the wheels of government to a halt by virtue of a cutoff of
funds.\(^{127}\)

Bestor would also distinguish between judicial review of executive
acts and legislative statutes on the ground that the latter\(^{128}\)

operat[es] continuously over an indefinite period of time. Accord-
ingly, it can be judicially examined at leisure, and if found unconstitu-
tional its operation can be cut short and its previous effects largely
nullified . . . . Quite different, however, is the operation of an exec-
utive order. Its purpose is to put something into effect, more or less
immediately . . . . [A]n executive action once initiated can rarely
be halted in mid-course. Moreover, to say that an order has been exe-
cuted or a measure carried into effect means, in general, that some-
thing has been accomplished beyond recall. The community is pre-

\(^{127}\) *Newsweek*, July 9, 1973, at 27.

\(^{128}\) Bestor, at 276–77. He concludes that “with such an effective remedy available,
it would be absurd to think of prosecuting the individual legislators who voted the
unconstitutional statute.” *Id.* at 276. Indeed, the customary suit does not even proceed
against the Congress collectively but against the executive or administrative agency
which is empowered to administer the statute.
Impeachment

sented with a *fait accompli*. Hence the safeguards and remedies available against an unconstitutional statute are largely unavailable against an unconstitutional act of executive power. What has been done cannot be undone, and those injured have little chance of effective recompense.

Alas, such *a priori* reasoning has little relation to the facts. When newly enacted statutes become effective they can be attacked immediately, as when the utility industry filed numerous suits to stop the Public Utility Holding Company Act in its tracks. Suits against *executive* attempts to enforce unconstitutional statutes—the customary way of testing such Acts—are a staple of litigation. Moreover, a great part of executive action is embodied in "regulations" which function very much as statutes do and can be attacked in the same manner. Executive regulations or "orders" which *threaten* injury to private interests can also be enjoined; and the great mass of executive or administrative action that impinges on private interests is conditioned on notice and hearing. Our problem is very different: Whether the remedies employed by private litigants against usurpations of power are available to either Congress or the President as against the other branch.

Finally, Bestor favors me with a "sharp reminder" of Justice Stone's statement that "[c]ourts are not the only agency of government that must be assumed to have capacity to govern," and of his warning against "any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction." But that was a case where, Justice Stone thought, the Court was trying to substitute its judgment of the *wisdom* of a statute for that of Congress; Stone did not challenge the power of the Court to resolve "crucial constitutional issues." Very carefully he set those issues to one side in his dissent:

[C]ourts are concerned only with the *power to enact* statutes, *not* with their *wisdom* . . . .

The constitutional power of Congress to levy an excise tax upon the processing of agricultural products is not questioned. The present levy is held invalid, not for any want of power in Congress to lay such a tax

---

129. *Bestor*, at 274–75.

869
... but because the use to which its proceeds are put is disapproved.

It was decisions such as these which, in the words of Professor Felix Frankfurter, "distorted the power of judicial review into a revision of legislative policy, thereby usurping powers belonging to the Congress."\(^{131}\) With that criticism I am in full accord; it is emphatically not the function of the Court to decide upon the wisdom of congressional enactments; but as Justice Stone's words show, it is the Court's function to police constitutional limits, and it only beclouds analysis to confuse the two. Remains Bestor's warning against the "dangerous illusion that all crucial constitutional issues are ultimately resolvable in the courtroom."\(^{132}\) Powell v. McCormack furnishes a recent illustration of the Court's readiness to decide a most prickly question of constitutional boundaries, and that is the sole "constitutional issue" that is under discussion here.

Needless to say, I was well aware that my proposal to extend judicial review to restrain excesses in the impeachment process was novel, but novelty did not condemn Copernican astronomy or Einsteinean physics. My proposal deserves a more complete statement and sharper analysis than it received at the hands of Professor Bestor. So too, where I looked to him for enlightenment as to the meaning of "high crimes and misdemeanors" he has obscured rather than illuminated. If my analysis is to be rejected, it will not be on the reasoning of Professor Bestor.

\(^{131}\) M. Freedman, Roosevelt and Frankfurter: Their Correspondence 384 (1967).

\(^{132}\) Bestor, at 275.