

THE HISTORY OF HIGH CRIMES AND MISDEMEANORS

Ed. note: Longtime friend of the blog Cynthia Kouril moderated a CLE on impeachment. She wrote up this statement after the panel. She has given us permission to post her statement from that here.

For all of you out there wondering what “High Crimes & Misdemeanors” means and whether or not there has to be an ‘underlying crime’ let me help you out here.

Last week I moderated a CLE on Impeachment and you are welcome to the fruits of my labors on that topic.

A basic rule of legal interpretation is that you cannot define a legal term using information not yet in existence at the time the term was used. At the time the Constitution was debated and adopted, there was no federal criminal code, much less the US Code we have today. So, you cannot use anything in the current Code to define “High Crime & Misdemeanor”.

You have to use that term, and it is a legal ‘term of art’ as the phrase was understood when it was inserted into the Constitution. It is interesting to note that this phrase is ONLY used in connection with impeachment. Crimes in the criminal code are low crimes.

The term is first recorded in the impeachment of of the King’s Chancellor, Michael de la Pole, in 1386. One of the “High Crimes & Misdemeanors” de la Pole was charged with, was the failure to expend moneys appropriated by Parliament as the appropriation directed him to do, just like Trump withholding funds appropriated by Congress which was required to be given to Ukraine by a date in September. Contrary to the GOP’s claims, not all the Ukraine aide was committed in time and Congress had to do a second appropriation to

restore the unspent money.

Not every impeachment in the next 400 years used this phrase, but in each instance where it was used, it was 1) only in the context of impeachment, and 2) referred to offenses that implicated either misuse of their office (including using their office for self enrichment) or failure to obey Parliament (basically a failure to observe separation of powers).

At the time the Constitution was being written and edited there was a famous impeachment trial going on involving the Viceroy of India. A Viceroy ("vice king", 'roi' being french for king) is the representative of the crown in a way far more important than a governor. A British governor was subject to instruction from London, the Viceroy was imbued with the monarch's own Majesty and ruled an entire country (such as Ireland or India) rather than an individual colony.

So, the impeachment of Warren Hastings ran from 1786 to 1795, while the Constitution was being debated and was the "trial of the century" of its day. Everybody talked about it. He was charged with "gross maladministration, corruption in office, and cruelty towards the people of India".

At the time of Nixon's impeachment Peter Rodino commissioned a staff report on the history of impeachment including the meaning of this phrase. The report which runs some 60 pages with footnotes and endnotes, is fascinating to read. It's conclusion with respect to this term of art: "[t]wo points emerge from the 400 years of English parliamentary experience with the phrase "high Crimes and Misdemeanors". First, the particular allegations of misconduct alleged damages to the state in such forms as misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament's prerogatives, corruption, and betrayal of trust. Second the phrase "high Crimes and Misdemeanors" was confined to

parliamentary impeachments; it had no roots in ordinary criminal law, and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions or crimes."

I hope you find the above helpful.

Update: I updated the intro to make it clear that Kouril moderated, did not put together, the CLE, and this contribution was written afterwards.