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PRESIDENTIAL IMPEACHMENT: THE ORIGINAL MISUNDERSTANDING

*John V. Orth**

We must never forget that it is a[n eighteenth-century] constitution we are expounding.

John Marshall

Presidential impeachment and removal from office undoes the result of the last presidential election. So much is indubitably true. What is not true is that the Framers of the Constitution necessarily understood this to mean a rejection of the people's choice. The Constitution's Executive Article, Article II, proceeds in logical order: Section 1 concerns the election of the President, Section 2 the President's powers, Section 3 the President's relations with Congress, and Section 4 the President's impeachment and removal from office. Section 4 is, in other words, the negative analog of Section 1; the election of the President and the President's removal from office are the brackets that enclose the substance of the Executive Article. The architecture of the Constitution, therefore, suggests that something about the original understanding of presidential impeachment and removal may be learned from an examination of the process of presidential election.

The American President has never, of course, been directly elected by the people. Rather, the President is elected by "electors" chosen by the states: "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"¹ The electors meet in their respective states and vote for two persons, one of whom at least must not be an inhabitant of the same

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1. U.S. Const., Art. II, § 1, cl. 2.

state.² According to the original plan, the person with the greatest number of votes, assuming it was a majority of the electoral votes, would become President and the runner-up Vice-President.³ As it turned out, the choice of the President went according to plan only three times: in 1789 and 1793, when George Washington and John Adams were chosen, and in 1797, when the ill-assorted team of John Adams and Thomas Jefferson prevailed. The experience of the 1801 election, when Thomas Jefferson and Aaron Burr each received the same number of electoral votes, led to the prompt proposal and adoption of the Twelfth Amendment, which created the present system of distinct electoral ballots for President and Vice-President.⁴

It is a commonplace of American constitutional history that the Framers did not foresee the development of a system of durable nationwide political parties. In the words of a distinguished historian: "the [Constitutional] Convention, not anticipating the rise of a two-party system, expected each state to vote for a 'favorite son,' so that seldom would one candidate obtain a majority of electoral votes Madison thought this would happen 'nineteen times out of twenty'"⁵ Careful provision was therefore made for the election of the President in case no candidate received a majority of the electoral votes. The House of Representatives, then the only directly elected element of the federal government, was designated by the Constitution to make the choice: "[F]rom the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President."⁶ The deadlocked electors would, therefore, be replaced by a new set of electors, the Representatives. In recognition of their new role the Representatives would vote in an extraordinary manner, not by individual Yeas and Nays but by ballot as delegates from the several states: "[I]n choosing the

2. U.S. Const., Art. II, § 1, cl. 3; U.S. Const., Amend. XII (superseding similar provision in Art. II, § 1, cl. 3).

3. U.S. Const., Art. II, § 1, cl. 3 (superseded by U.S. Const., Amend. XII).

4. The key provision in the Twelfth Amendment instructed the electors to "name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President."

5. Samuel Eliot Morison, et al., 1 *The Growth of the American Republic* 254-55 (Oxford U. Press, 7th ed. 1980).

6. U.S. Const., Amend. XII (superseding provision in U.S. Const., Art. II, § 1, cl. 3, directing House of Representatives to choose from among the five highest on the list).

President, the votes shall be taken by states, the representation from each state having one vote.”⁷

The drafters, both of the original Constitution and of the Twelfth Amendment, expected the House of Representatives to play a major role in presidential elections, as indeed it would have, had a party system not developed to operate the constitutional machinery. National parties focused attention on a limited number of candidates and organized the electors behind the party’s choice. Only in 1825, when the party system fractured, did a majority of electors not unite behind one person. The result in that case, when the House chose the austere John Quincy Adams over the popular Andrew Jackson, did not commend the process.⁸

While the Twelfth Amendment tinkered with the constitutional mechanism, the emergence of parties altered its actual operation beyond recognition. The development of the party system, however, changed only half the constitutional equation: presidential election but not presidential removal. The House of Representatives, which had been expected to elect the President more often than not, was almost never called upon to play its constitutional role in the choice of the President, but it retained unaltered “the sole Power of Impeachment.”⁹

As the presidential selection process came to approximate direct popular election, the logical analog would have been provision for recall elections, in which the people acting directly (or through electors) could remove an executive in whom they had lost confidence.¹⁰ The United States Constitution is, however, notoriously difficult of amendment, and many of the amendments that have been ratified (like the Twelfth) are triggered by crises such as the deadlock in the Electoral College in 1801. Presidential impeachment has, thankfully, been a rarity.

As originally designed, then, the constitutional architecture was symmetrical: the House of Representatives, the only federal body involved in choosing the President, was also the only federal body that could initiate proceedings for the President’s re-

7. U. S. Const., Amend. XII (superseding similar provision in U.S. Const., Art. II, § 1, cl. 3).

8. Morison, 1 *The Growth of the American Republic* at 412-13 (cited in note 5).

9. U.S. Const., Art. I, § 2, cl. 5.

10. Oregon pioneered the recall election with a constitutional amendment in 1908; by 1915 eleven states had followed Oregon’s lead. Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development* 641 (W.W. Norton & Co., 4th ed. 1970).

moval. It was also practical: removal might be more likely in those cases, expected to be frequent, when the majority of electors could not agree on one candidate and the House made the choice for them. Had the House of Representatives developed into a real Electoral College, as anticipated, it was the logical body to begin the reconsideration of its choice.

The Framers' misunderstanding of the role the House would play in presidential elections distorted the arrangements they made for presidential impeachment. Their failure to anticipate the rise of the party system destroyed the constitutional symmetry they had so carefully devised. The political system that actually developed affected presidential election and presidential removal differently. The party discipline and organization needed to secure a majority of electors did not necessarily translate into a majority in the House of Representatives, and the very different constituencies provided for the House of Representatives and the President meant that popular opinion bore on the two in very different ways. For the same reason, national opinion polls, so prevalent in the late twentieth century but unforeseen in the late eighteenth century, could not really provide the functional equivalent of the recall election.

Thus when the modern House of Representatives initiates the process of presidential removal, it threatens to overturn someone else's decision, contrary to the Framers' expectations, and in consequence the House should act with a reserve that would not be necessary when having second thoughts about its own choice for chief executive. Treason and bribery are obvious grounds for removal and are unsurprisingly enumerated in the Constitution as impeachable offences;¹¹ the former expressly defined elsewhere in the text,¹² the latter defined at common law before American Independence.¹³ It is the debatable and ill-defined "high crimes and misdemeanors," presumably added to the list of impeachable offences to encompass unforeseen violations, that requires most interpretation and that is therefore most subject to abuse. The invocation of this cause requires the greatest care, particularly when the House proposes to reject a choice made elsewhere. The impeachments both of President Andrew Johnson in 1868 and of President Bill Clinton in 1999

11. U.S. Const., Art. II, § 4.

12. U.S. Const., Art. III, § 3, cl. 1.

13. See, e.g., William Blackstone, 4 *Commentaries on the Laws of England* 139-40 (Oxford, 1769).

demonstrate the use that partisanship, another by-product of the political party system that reshaped the constitutional process, can make of that elastic phrase.

History has not rewritten the constitutional provisions concerning presidential impeachment any more than it has rewritten the constitutional provisions concerning presidential election, but it has dramatically altered the reality of the two processes. It is perhaps too much to expect political partisans not to exploit every opening left by text and context, but constitutional commentators can at least point out that the original words do not necessarily express the original intention.

The eighteenth-century constitution is gone beyond recall; to recover it one would have to recreate the eighteenth century. One aspect misunderstood distorts the understanding of all related aspects. Time and practice eventually efface the original design, and to focus on one feature at the expense of others produces only unanticipated results, despite the appearance of fidelity. Adhering to original understandings maintains the original arrangements only if everything else remains the same — which it never does.