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RESEARCH ARTICLE

Impeachment as an EU Law Concept

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Abstract

This article is the first panoramic survey of the various, idiosyncratic procedures relating to the removal for cause of EU institutional officeholders scattered throughout the Union's primary and secondary law. After describing these provisions, the article argues that these procedures may be considered as impeachment. The article then examines the character of EU impeachment, concluding that it is conceptualised narrowly as addressing individual misbehaving officers, rather than as a means to address wider, systemic, policy-based threats to the EU and its values. The article also offers some observations regarding defects in the EU's current impeachment provisions and suggests possible reforms.

Keywords: constitutional character of EU impeachment; Deficiencies in and ossification of EU impeachment; Impeachment; removal of EU institutional officeholders for cause as impeachment

I. Introduction

In 2008, historian David Kyrig dubbed the period since 1960 in the United States 'the age of impeachment'.[1] At the time, the world was in the throes of the Global Economic Crisis, which—along with its aftermath—coincided with a number of high-profile impeachments globally.[2] If impeachment may be defined broadly as a process leading to the removal or sanctioning of public officeholders of constitutional significance for cause in a defined and usually legalistic or politico-legal procedure, impeachment procedures differ greatly from one constitutional design to another. It may be stated as a rule, save for perhaps in the most Bolivarian constitution, that impeachment ought not to be a prosaic matter.[3] Impeachment is normally regarded as a safeguard against a feature of presidentialism: the possibility that executive officeholders, due to their independence from democratic controls during their term, may abuse their powers or commit misconduct which may be harmful to the office or to the wider constitutional community. Impeachment may also serve as a guarantee against similar abuses by judicial or technocratic officeholders, who, due to their high security of tenure, may be otherwise difficult to dissuade or hold to account.

Since the Second World War, there has been a growth in supranational regional organisations to which states have transferred significant areas of sovereign decision-making powers. Despite this,

[1] D Kyrig, *The Age of Impeachment: American Constitutional Culture Since 1960* (University Press of Kansas, 2008). Kyrig's book is a fascinating account of the weaponisation of impeachment by the far-right John Birch Society in a campaign against Chief Justice Earl Warren in the early 1960s and the subsequent mainstreaming of impeachment as a means of attacking political and judicial opponents.

[2] See, C Monaghan, M Flinders, and A Huq (eds), *Impeachment in a Global Context: Law, Politics, and Comparative Practice* (Routledge, 2024).

[3] See, T Ginsburg, A Huq, and D Landau, 'The Comparative Constitutional Law of Presidential Impeachment' (2021) 88(1) *University of Chicago Law Review* 81.

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there has been curiously little consideration of the relevance of impeachment at international or supranational level. To take the EU specifically, there are a number of reasons why one would assume that impeachment would be a core constitutional concept. The creation and evolution of the EU have led to Member States transferring increasingly significant decision-making powers to the Union. While it was arguably a core tenet of the neofunctionalism that may have underpinned the ideas of the EU's founders to technocratise decision-making in these areas of transferred competence,[4] a foreseeable danger of this transfer would be corruption or abuse of power, since the increased distance from citizen to decision-maker would reduce accountability of the latter.[5] Moreover, while the EU does not align neatly with any constitutional system known before or since, presidentialism, to some degree at least, as well as significant guarantees of institutional and individual officeholder security are discernible features of the EU's design.[6] The framers of the EU's founding treaties recognised the perils of executive and judicial over-insulation by including provisions to deal with misbehaving officeholders. Apart from abstract considerations of the EU's constitutional design, the lack of scholarship or public debate around EU impeachment is also remarkable when one considers wider conversations about the Union. There have been a number of historical and more recent scandals involving officeholders in EU institutions, some of which have involved the use of what might be termed the EU's impeachment procedures.[7]

This article commences by considering the provisions of the Treaties, Protocols, and secondary law that allow for the removal of EU institutional officeholders[8] in accordance with a defined procedure for cause. Subsequently, the question of whether these powers can be understood as impeachment is considered. The article then continues with an examination of the character of EU impeachment, focussing on whether it is conceptualised narrowly as addressing individual misbehaving or corrupt officers, or whether it is understood as addressing wider, systemic, policy-based threats to the EU and its values. Thereafter, some observations regarding defects in the EU's current impeachment provisions and possible reforms are enumerated.

[4]Legitimacy under this perception of European integration was to be measured by output legitimacy, rather than democratic legitimacy. See generally, LN Lindberg and SA Scheingold, *Regional Integration* (Harvard University Press, 1970), pp. 268-269.

[5]The antifederalists who opposed the ratification of the US constitution relied on Montesquieu's assertion that "[i]t is natural to a republic to have only a small territory, otherwise it cannot long subsist.' See, MNS Sellers, *American Republicanism: Roman Ideology in the United States Constitution* (Palgrave Macmillan, 1994), pp. 163-171. Hamilton and Madison responded to these arguments in Federalist Nos IX and X, respectively (J Madison, A Hamilton, and J Jay, *The Federalist Papers* (1788)).

[6]While the EU's institutions are formally of a collegiate design, the Commission President, in particular, has over a series of Treaty reforms acquired significant organisational powers over the College of Commissioners, including since the Treaty of Lisbon, the power to compel the resignation of Commissioners unilaterally (Article 17(6) TEU). This dynamic, as well as a succession of increasingly assertive Commission Presidents, have contributed to a more presidentialist conception of the role. See, J Cotter, 'La Commission, c'est moi? The invisible hand of Article 17(6) TEU in the presidentialisation of the European Commission', *Verfassungblog*, https://verfassungsblog.de/eu-commission-new-von-der-leyen-president/, last accessed, 22 October 2024.

[7]In particular, *Commission v Cresson*, Case C-432/04, ECLI:EU:C:2006:455, which entailed proceedings brought under now Article 245 TFEU against a former Commissioner to deprive her of her pension rights, and *Court of Auditors v Pinxten*, Case C-130/19, ECLI:EU:C:2021:782, which involved similar proceedings brought under Article 286(6) TFEU against a former member of the Court of Auditors. Proceedings were also commenced against Commissioner Bangemann (*Council v Bangemann*, Case C-290/99) following his decision to take up a role at Telefonica in between the period in which the Santer Commission had resigned and the Prodi Commission had taken office, but these proceedings were later discontinued. More recently, the ongoing Qatargate scandal, in which a number of Members and officials of the European Parliament have been accused of taking bribes from Qatar and Morocco in return for influence before the European Parliament, has led to Members of the European Parliament being deprived of their immunity.

[8]The focus in this article is on impeachment powers relating to officeholders in the EU institutions listed in Article 13(1) TEU, i.e., the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors. The article focusses also on removal of officeholders, rather than other sanctions that may be imposed on some officeholders, such as deprivation of pensions and other benefits.

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II. Removal of EU institutional officeholders

Several removal procedures relating to officeholders in EU institutions are dotted around the Treaties, Protocols, and procedural rules. There is, therefore, no unified procedure for dealing with misconduct by EU institutional officeholders.[9] Indeed, closer analysis of the procedures that provide for removal will reveal an idiosyncratic and disjointed approach, with a panoply of different grounds and procedures.

In terms of political leadership or management, the EU has a dual presidential or 'separate hats' design and it is, therefore, no surprise that the Treaties provide expressly for the removal of the European Council President and for individual Members of the European Commission, including its President. The provision relating to the European Council President, Article 15(5) TEU, is notable for a number of reasons. First, it entrusts the power of removal ('end[ing] the President's term of office') to the European Council, acting by a qualified majority, rather than to the Court of Justice. Second, one of the two grounds for removal is so malleable as to render it essentially a vote of no confidence: the President may be removed '[i]n the event of an *impediment* or serious misconduct'.[10] The President of the Commission as well as ordinary Members of the Commission (including the High Representative of the Union for Foreign Affairs and Security Policy[11]) are all subject to the same removal procedure contained in Article 247 TFEU. This procedure allows the Court of Justice to remove ('compulsorily retire') a Commissioner where he or she 'no longer fulfils the conditions required for performance of his duties or if he has been guilty of serious misconduct'. The procedure may be initiated by the Council, acting by a simple majority, or by the Commission.

The Treaties and their Protocols also provide removal procedures for the Union's judicial and administrative institutions. Article 6 of Protocol (No. 3) allows for a Judge of the Court of Justice or the General Court (or an Advocate General, by virtue of Article 8) to be 'deprived of his office' if 'he no longer or fulfils the requisite conditions or meets the obligations arising from his office.' Such a removal must be effected by unanimous opinion of the Judges and Advocates-General of the Court of Justice. Article 286(6) TFEU provides a similar removal procedure in respect of members of the Court of Auditors, allowing for deprivation of office on grounds identical to those relating to Judges and Advocates-General of the Court of Justice of the EU (CJEU). There are, however, subtle but important procedural differences: members of the Court of Auditors may, just like Commissioners, be removed by the Court of Justice without a unanimity requirement; moreover, the procedure must be instigated by a request of the Court of Auditors.[12] Removals of members of the Governing Council of the European Central Bank (ECB), governors of the national central banks of Member States whose currency is the Euro and members of the Executive Board of the ECB, are regulated by Articles 14(2) and 11(4) respectively of Protocol (No. 4). While removal of national governors is done at national level, Article 14(2) does provide EU law parameters: a governor may only be dismissed from office if they no longer fulfil the conditions required for the performance of their duties or have been guilty of serious misconduct. Additionally, Article 14(2) allows for a national decision to relieve a governor

[9] This may be contrasted, for instance, with the comprehensive impeachment procedure provided for in Article II, Section 4 of the US Constitution, which applies to '[t]he President, Vice-President and all civil officers of the United States'. There may, of course, be solid reasons for the disjointed approach to EU impeachments: disparate compositions and functions of varying institutions may justify different procedures. Moreover, certain procedures, such as those relating to Members of the Court of Justice were inspired evidently by existing procedures in international and regional legal instruments: Article 6 of Protocol (No. 3) closely resembles Article 18 of the Statute of the International Court of Justice and Article 23(3) of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

[10] Emphasis added. One may argue of course that the word 'impediment' might be a reviewable standard. Nevertheless, the mere fact that a qualified majority of the European Council view the President's position as an impediment would appear to be strong evidence of such an assertion and one may anticipate that the Union's judiciary would be slow to intervene in the absence of a manifest error.

[11] Hereafter, the 'High Representative'.

[12] The procedure is set out in Article 4 of the Rules of Procedure of the Court of Auditors of the European Union [2010] OJ L103/1.

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of their duties to be referred to the Court of Justice, which may review the decision on the grounds of infringement of the Treaties or any rule of law relating to their application.[13] Article 11(4) allows the Court of Justice, on an application by the Governing Council or the Executive Board of the ECB, to compulsorily retire a member of the Executive Board of the ECB on the same grounds applicable to national governors.

In contrast to the EU's executive and judicial institutions, the EU's parliamentarians are generally beyond the reach of EU removal powers. The same is true of national representatives in the European Council and the Council. There are some qualifications or possible qualifications to these statements, however. As regards Members of the European Parliament (MEPs), there are generally no means by which they can be removed from office other than by elections. However, certain officeholders within the European Parliament, including the President and Vice-residents, may be deprived of their offices, though not their seats in the Parliament, for serious misconduct under the Parliament's Rules of Procedure.[14] These procedures are, however, entirely in-house matters, with the ultimate decision being taken by two-thirds of the Parliament, constituting a majority of its component members. Moreover, Article 228(2) TFEU allows for the dismissal of the European Ombudsman by the Court of Justice, on a proposal of the European Parliament, in circumstances in which the Ombudsman no longer fulfils the conditions required for the performance of their duties or is guilty of serious misconduct.

III. EU removal powers as impeachment

A question arises as to whether the foregoing removal procedures may be described as impeachment. This question is not a merely theoretical question, but one which may influence perceptions as to the purposes of the removal powers, as well as the nature of the procedures themselves and the rights attaching to individuals facing them.

In the only two cases in which the Court of Justice has given judgment under the Treaties' powers of sanction against individual institutional officeholders, the Advocates General were quick to characterise the powers as impeachment, while the Court, perhaps for reasons of judicial economy, chose to remain silent on the question. In *Cresson*, in which the Commission alleged that former Commissioner Édith Cresson had breached her (now) Article 245 TFEU obligations by, *inter alia*, being guilty of favouritism in conferring benefits on personal acquaintances, AG Geelhoed, rejecting the characterisation of the sanctioning power as a mere disciplinary procedure, highlighted its constitutional character,[15] and drew direct comparisons between the Treaty powers and national-level removals, including—tellingly—the impeachment procedure in the US Constitution.[16] In *Pinxten*, a case brought by the Court of Auditors under Article 286(6) TFEU against one of its former members relating to a host of allegations of impropriety, AG Hogan was even more explicit, describing that procedure as an impeachment process, and again stressing its constitutional significance.[17]

Notwithstanding the comments of the Advocates General, there are at least two conceivable—and interrelated—objections to describing EU removal procedures as impeachment, both of which relate to the historical origins and definition of impeachment.

[13] Such a challenge was brought successfully by the Governor of the Central Bank of Latvia in *Rimšēvičs v Latvia*, Joined Cases C-202/18 and C-238/18ECLI:EU:C:2019:139 against a decision of the national authorities to suspend him from office. See, A Hinarejos, 'The Court of Justice annuls a national measure directly to protect ECB independence: Rimšēvičs' (2019) 56(6) *Common Market Law Review* 1649; R Smits, 'A National Measure Annulled by the European Court of Justice, or: High-level Judicial Protection for Independent Central Bankers' (2020) 16(1) *European Constitutional Law Review* 120.

[14] Rule 21 of the Rules of Procedure of the European Parliament, January 2025.

[15] *Commission v Cresson*, Case C-432/04, ECLI:EU:C:2006:140, para. 94 (Opinion of Advocate General Geelhoed).

[16] Ibid, para. 70.

[17] *Court of Auditors v Pinxten*, C-130/19, ECLI:EU:C:2020:1052, para. 68 (Opinion of Advocate General Hogan).

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First, impeachment is often used to connote what might be described as an Anglo-American iteration of the concept: generally, a procedure leading to the removal or sanctioning of senior executive or judicial officers for cause by a legislature. This narrower understanding derives from the English/British tradition of impeachment, which originated in the practice of the 'Good Parliament' in the tumultuous later years of Edward III's reign (1327–1377), when Parliament improvised a procedure through which the House of Commons could impeach or charge an individual, usually a powerful executive official, with 'high crimes or misdemeanours', and the House of Lords would then conduct the trial.[18] Ironically, impeachment was already falling into abeyance in Britain by the time the Constitutional Convention was held in Philadelphia, where an adapted form of the British impeachment process was included in the US Constitution.[19] This version of impeachment, which removed the possibility of criminal sanction and narrowed its application to defined officials, allows a majority of the House of Representatives to impeach the President, the Vice-President, or any civil officer of the United States for treason, bribery, or 'high crimes and misdemeanors', with trial and the decision to convict or acquit entrusted to the Senate, which must vote by a two-thirds majority to convict.[20] This American version of impeachment has proven highly influential, and impeachment procedures modelled on it have been included in multiple constitutions globally. There are also examples of parliamentary impeachment powers in Europe.[21] The EU's removal powers do not fit neatly with the Anglo-American conception of impeachment. In contrast to the Anglo-American conception, the EU's removal powers are highly technocratic or judicialised. The EU's legislature, or at least its only directly elected component, the European Parliament, plays no role in removals of officials of other institutions, neither as instigator nor as trier.[22] Instead, EU law leaves it either, in rare cases, to an institution to remove its own errant officeholders—as is the case with the European Council President and CJEU Judges and Advocates General—or, more commonly, provides for a judicial process for removal. This technocratisation or judicialisation may also signal that removal from office in EU law has a narrower purpose than the Anglo-American model.

Second, impeachment may be seen as a concept which is tied intimately to the traditional sovereign state. Again, drawing on the common Anglo-American conception of the process, impeachment has often been understood as having developed from the law on treason and a need to address political

[18] There is considerable debate as to the origins of impeachment and specifically how it related to existing and subsequent procedures. A good summary of this debate can be found in C Monaghan, 'Impeachment during the Fourteenth and Fifteenth Centuries and Its Abeyance in the Sixteenth Century' in C Monaghan and M Flinders (eds), *British Origins and American Practice of Impeachment* (Routledge, 2024), pp. 17-41.

[19] The rise of the parliamentary vote of no confidence, which largely obviated the need for other means of removal against executive figures, began the slow and steady decline of impeachment in Britain. However, as the delegates of the Constitutional Convention met in Philadelphia in 1787, the lengthy impeachment procedure (1787-1795) against Warren Hastings had already begun in the House of Commons. Edmund Burke's unsuccessful attempt to have Hastings, a former colonial official, convicted on impeachment would prove another nail in impeachment's coffin. See, R Eagles, 'British Politics and Impeachment in the Eighteenth Century' and M Mukherjee, 'Edmund Burke, India and the Impeachment Trial of Warren Hastings' in C Monaghan and M Flinders (eds), supra note 18, pp. 64-83 and pp. 84-113. For a critical account of Burke's impeachment of Hastings, see, PJ Marshall, *The Impeachment of Warren Hastings* (Oxford University Press, 1965).

[20] For extensive accounts of the Anglo-American origins of impeachment, see generally, C Monaghan and M Flinders (eds), supra note 18.

[21] AG Geelhoed in *Cresson* pointed to Article 61(2) of the German Grundgesetz, Article 68 of the Constitution of the French Republic, and Article 90 of the Italian Constitution, all of which allow for parliamentary removals of the head of state (*Commission v Cresson*, Case C-432/04, ECLI:EU:C:2006:140, para. 70 (Opinion of Advocate General Geelhoed)). AG Hogan added the example of Article 12.3.1° of the Constitution of Ireland in *Pinxten*, which allows for the removal of the President of Ireland by the Oireachtas (Irish Parliament) (*Court of Auditors v Pinxten*, C-130/19, ECLI:EU:C:2020:1052, para. 68 (Opinion of Advocate General Hogan)). For an account of impeachment in central and eastern Europe, see P Köker, 'Impeachment in Central and Eastern Europe' in Monaghan, Flinders, and Huq (eds), supra note 2, pp. 239-254.

[22] Although, under Article 228(2) TFEU, the European Parliament may instigate removal proceedings against the European Ombudsman.

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crimes against the state or the commonwealth.[23] One may argue that the EU, at least in form, was not established or conceived in this way, being as it is a creature of international treaties, and lacking a single sovereign, against whom a crime akin to treason could be committed. In support of this view, one may point to the fact that the procedures and grounds for removal are either consistent with removal procedures which pre-existed in other international organisations[24] or are narrowly focussed on individual misconduct and suitability for office, rather than potentially harmful political conduct.

However, there are also compelling arguments in favour of a proposition that the removal powers in EU law pertaining to EU institutional officeholders may be properly understood as impeachment powers.

First, there is no reason why impeachment should be defined so narrowly as to be understood only by reference to the Anglo-American conception. The idea of powerful public figures being ostracised for cause by means of a procedure is a phenomenon of some antiquity.[25] Moreover, the Anglo-American conception is not the only form of impeachment globally. The grounds, procedure, and purpose of impeachment differ significantly in different countries and contexts. The fact that the EU's removal powers are highly judicialised, for instance, is hardly unusual.[26] Even the European Court of Human Rights had to acknowledge this fact as it encountered Scandinavian-style impeachments, with their specially constituted Courts of Impeachment.[27] If one is to adopt a wider definition of impeachment, one that encompasses removal of senior officers by means of a legal or political process (or something in between) for cause, then it is clear that the EU's removal powers may be seen as impeachment.

Second, the argument that the impeachment must be inherently connected to the traditional sovereign state may also be rebutted. Even if one accepts that the EU was not initially conceived of as a constitutional entity or that it remains in form an organisation established by means of international treaties, it is undoubtedly the case that it constitutes a constitutional polity.[28] While the EU may lack all of the indicia of a classic federal entity, it also possesses many of the core characteristics.[29] In particular, one may point to the foundational values of the EU under Article 2 TEU, the principle of representative democracy in Article 10 TEU, as well as the concept of citizenship of the Union. There is, therefore, in real terms a constitutional polity or commonwealth which requires protection against abuses that may be committed by individual officeholders, and which may be analogous—in this specific context at least—to an embryonic federal system.

On balance, the arguments recited above in favour of considering the removal powers relating to EU institutional officeholders as impeachment appear more compelling. There is little reason why the concept of impeachment should be applied to an Anglo-American iteration only and there are strong arguments to support an assertion that the EU is a constitutional polity entitled to protection

[23] MJ Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (University of Chicago Press, 2019), pp. 105-106.

[24] As noted above (supra note 9), the judicial removals process in Article 6 of Protocol (No. 3) closely resembles Article 18 of the Statute of the International Court of Justice and Article 23(3) of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

[25] The US Supreme Court Justice James Wilson traced the origins of impeachment to Athens and the idea of ostracism after a conviction (JR Vile, 'Impeachment in the Eighteenth and Nineteenth Centuries in the Early United States' in Monaghan and Flinders (eds), supra note 17, p. 157).

[26] For a global survey of presidential impeachments procedures, see, Ginsburg, Huq, and Landau, supra note 3. See also, Monaghan, Flinders, and Huq (eds), supra note 2.

[27] *Ninn-Hansen v Denmark* (Application no. 28,972/95); *Haarde v Iceland*, (Application no. 66847/12).

[28] The Court of Justice in its Opinion on the EEA Treaty described the EEC Treaty as the constitutional charter of what is now the EU (Opinion 1/91, ECLI:EU:C:1991:490, para. 21).

[29] See, R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, 2009).

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against individual officeholder misconduct. Two Advocates General have categorised EU Treaty procedures as impeachment and there are examples of non-Anglo-American impeachment procedures in Europe, most notably in the Nordic countries.

IV. The constitutional character of EU impeachment

A. Normative conceptions of impeachment

If the removal powers in EU law are impeachment, an enquiry may be opened as to how impeachment is conceived of in EU law. At the heart of this enquiry is the question as to what the role of impeachment is in the EU context. Impeachment is conceived of in varying ways in different constitutional designs. At one extreme, it may be wielded by a legislature with such ease against an executive or judicial officeholder that it amounts almost to a democratic control or vote of no confidence. At the other end of the spectrum, the procedure may be a tightly limited exception to the independence and security of the officeholder or the institution they inhabit: grounds for impeachment may be tightly delineated to cover specific criminal or corrupt behaviour or the procedure, in terms of instigation and trial, may be unwieldy and highly legalistic. Naturally, numerous shades may exist between the two extremes on this spectrum.

Ginsburg, Huq, and Landau in their global survey of presidential impeachments identified two broad conceptions of impeachment: a bad actor model and a political reset model.[30] The former model is 'about removing serious criminals from office', with elections seen as a remedy to settle all other issues.[31] The latter model, in contrast, focusses not on 'individual criminality or unfitness' of the officeholder; instead, impeachment is seen as a procedure to address more generalised systemic problems, and, in particular, to 'provide an exit from a situation of ungovernability'.[32] There are a number of reasons why Ginsburg et al.'s conceptualisation is not readily applicable to EU impeachments. Most obviously, in the stronger presidential systems in which impeachment tends to be a core constitutional feature, elections and term limits may serve as a more reliable remedy to generalised governability problems. In contrast, the executive officeholders subject to impeachment in the EU derive their mandate only indirectly through European Parliament and national elections. Moreover, Ginsburg et al. are writing in the context of unitary presidencies, rather than in the case of the EU's model, in which executive power is shared by the European Council/Council and the Commission, led or coordinated by two Presidents (or three, if one includes the rotating Presidency of the Council). In this context, a complete political reset cannot really be achieved by the removal of a single officeholder. While there is the possibility of removing the Commission in its entirety via a European Parliament motion of censure, the only limited resets that would appear possible via an impeachment-like procedure in EU law would be the removal of the European Council President or the Commission President. However, a European Council President may have little concrete power beyond persuasion, meaning that their ouster would be unlikely to result in any substantive policy change. Similarly, the removal of a Commission President, notwithstanding the extensive organisational power of that office, may have a limited directional impact when compared to the removal of a unitary executive president. It must also be recalled, even if both Presidents had significant influence over their respective institutions, those institutions are also reliant on others, in particular the Union's legislature, to further their agendas, and that their removals will be unlikely to result in an overall change of direction given the diffusion of the Union's executive power.

Given that the political reset conception of impeachment appears to be a limited to non-existent phenomenon in the EU system, we appear to be left with the other conception described by Ginsburg

[30] Ginsburg, Huq, and Landau, supra note 22, at 144-151.
[31] Ibid, at 144.
[32] Ibid.

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et al.: the bad actor model. However, this model may exist on its own spectrum. A narrow conception of a bad actor model may limit impeachment to cases of individual unethical or criminal conduct, usually of a wilful nature. Such a narrow conception may be more directed at matters like straightforward self-enrichment and less focussed on constitutionally problematic behaviour, i.e., policy choices which undermine constitutional values or constitutional balance. A wider conception, in contrast, may encompass not merely individual grubby or criminal conduct, but also breaches of constitutional values.[33] This wider conception may, therefore, encompass an officeholder's policy choices. The adoption of these differing conceptions may have a number of significant consequences in terms of overall constitutional balance and the impeachment procedure itself: adjudication on the question of whether behaviour amounts to a threat to constitutional values may be a far more open-ended and subjective enquiry than whether an accused officeholder has had their hand in the till. The open-ended and subjective nature of that enquiry may then give rise to questions about the security of tenure of the officeholder and the legitimacy of the chosen adjudicator (legislative, judicial, or hybrid) to conduct that enquiry.

The tensions in practice between these narrow and wider conceptions of impeachment were especially marked in the highly partisan early years of the US republic. During this period, it was federal judges who generally faced the greatest threat of impeachment, particularly after the victories of Jefferson's Democratic-Republican Party in 1800. During this time, differing ideas of impeachment emerged, which may be instructive in classifying conceptions of impeachment more generally, particularly as they relate to popularly unelected officials in an embryonic federal structure like the EU. Hoffer and Hull in their study of early American impeachments identified three differing conceptions of impeachment during the 1790s and 1800s: (1) impeachment for cause; (2) dangerous tendencies; and (3) popular will.[34] The first conception, which evolved in a manner that required proof of wilful misconduct, is proximate to the narrow vision of the bad apple model discussed above. However, this conception proved of limited use in forcing the removal of judges or other civil officers for what were essentially political reasons or substantive disagreements with judgments in circumstances in which many Democratic-Republican legislators perceived Federalist judges to be a threat to the US Constitution. After 1800, the Democratic-Republicans sought to develop two doctrines of impeachment that would allow easier removal of judges aligned with their Federalist opponents on more political or substantive grounds. The first, dangerous tendencies, did not require proof of wilful misconduct; rather, it was sufficient to demonstrate that the impugned conduct posed a threat to the constitutional order, a formulation which obviously allowed more scope for legislators to convict on the basis of substantive policy choices or outlooks.[35] The dangerous tendencies doctrine may be regarded as more closely aligned with the wider conception of bad apple model impeachments described previously, which focuses less on individual conduct and *mens rea* and more on the constitutional consequences of the behaviour. The third doctrine, which failed to find success, that of popular will, espoused most famously by the radical Republican Congressman John Randolph, went even further, maintaining that impeachment was a valid constitutional weapon of democratic control over the judiciary.[36]

[33] Article 89 of the Constitution of the Republic of South Africa, for instance, makes an express distinction between 'serious misconduct' and 'a serious violation of the Constitution or the law' as grounds for removal from office.

[34] PC Hoffer and NEH Hull, *Impeachment in America, 1635-1805* (Yale University Press, 1984), pp. 179ff.

[35] These dynamics were also present in many British impeachments, in which prosecutors would argue for a wider, bad tendencies-style conception of impeachment, and the accused would adopt an argument for a narrower version requiring proof of a specific, often criminal, offence. The failed impeachment trial of Warren Hastings (1788-1795), the prosecution of which was led by Edmund Burke, serves as a good example: see, FO Bowman, *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump* (Cambridge University Press, 2nd edn, 2024), pp. 31-33.

[36] Randolph most famously led the prosecution in the unsuccessful impeachment trial against Supreme Court Justice Samuel Chase (1804-1805); see, Hoffer and Hull, supra note 30, pp. 228ff.

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There appears to be some scope to synthesise Ginsburg et al.'s conceptions of presidential impeachments and those of Hoffer and Hull to establish a crude conceptual model to examine EU impeachments. Given its closeness to Ginsburg et al.'s political reset model, it is evident that the popular will doctrine has little or no role in the EU's present constitutional design; this is immediately evident from the fact that EU citizens nor the European Parliament play any role in the instigation or trial of impeachments.[37] If the EU's impeachments are in the mould of the bad actor model and it is acknowledged that even this model exists on a spectrum, it may be asked where on that spectrum EU impeachments tend to lie. Hoffer and Hull's description of the two initial doctrines of impeachment in the early US republic provide a useful, if crude, conceptualisation of the two ends of the bad apple spectrum that may be applied more generally: first, impeachment for cause, requiring wilful[38] misconduct, and second, conduct which, though not narrow or wilful misconduct, poses a threat (or dangerous tendency) to EU constitutional balance or values.

B. Indicia of the constitutional character of impeachment

There are at least three interrelated indicia of the constitutional character of an impeachment procedure, in terms of whether it is intended to be a narrow procedure of limited availability or a wider, more readily available one. These three factors will be (1) the constitutional text, in particular, how the grounds for impeachment are expressed; (2) the wider constitutional context, specifically the nature of the conferral and separation of powers, but also constitutional and political culture; and (3) the nature of the procedure for impeachments. None of these factors will in themselves present a complete picture. For instance, the limiting effect of the constitutional text may be undermined if the procedure is entrusted to a legislative body, without judicial oversight, and legislators do not regard themselves as bound by any legal meaning attributed to those words of limitation. This effect will be enhanced further if the thresholds for instigation and conviction are low. In such cases, impeachment may become a matter of purely political judgment. Conversely, the most open-ended constitutional formula may be less relevant if executive or judicial power is conferred in a manner that makes it so diffuse that a single individual is so constrained that they may be incapable of committing any offence of dangerous tendency. Similarly, the substantive flexibility afforded by a constitution over what constitute impeachable offences may also be constrained by procedural practicalities: how far the franchise to commence impeachments extends; what the burdens and standards of proof for instigation and conviction are; whether judicial or legislative bodies are involved; quora and decisional thresholds, etc. The way all these factors interact with one another should paint a picture of the role that a constitution's framers intend for impeachment in their design, though constitutional evolution and politics may cause some shifts in emphasis over time.

C. Textual indicators of the constitutional character of EU impeachment

The language of the various impeachment provisions relating to EU institutional officeholders, as diverse and idiosyncratic as they are, all suggest—on an initial reading—a narrow or individualised bad apple conception of EU impeachment adjacent to a wilful misconduct understanding. There is little indication in the wording of these provisions that the focus of the procedures should be on the

[37] With the exception of its right to initiate a procedure against the European Ombudsman, the closest the European Parliament gets to having any power to remove an individual officeholder outside of the Parliament is its power (under Point II.5 of the Framework Agreement on relations between the European Parliament and the European Commission) to ask the President of the Commission to withdraw confidence in an individual Member of the Commission ([2010] OJ L304/47).

[38] It is unclear to what extent serious misconduct in EU impeachments or breach/failure to fulfil the obligations of office extends to reckless, negligent, or otherwise incompetent conduct, and it is beyond the scope of this article to explore this question in full.

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constitutional consequences or dangerous tendencies of an officeholder's actions or inactions in the course of their duties.

The standard of 'serious misconduct' is applicable as a ground for removal from office in the case of the European Parliament President, as well as Vice-Presidents and other officers of the Parliament.[39] It is also a ground for removal of the European Ombudsman,[40] the European Council President,[41] Commissioners (including the President and the High Representative),[42] and members of the Governing Council[43] and the Executive Board of the ECB.[44] Treated literally, this formula would appear to envisage individualised conduct which reaches a certain threshold of gravity. The serious misconduct standard was introduced in the Treaty of Paris in Article 12, in relation to members of the High Authority, and Article 160 of the Treaty of Rome, applicable to Commissioners. Consideration of this ground in the preponderance of the four official languages of the original six Member States would also militate towards a narrow reading of serious misconduct, since they appear to originate in employment law or civil law, rather than political offences in the realm of treason, etc.[45]

Another common expression as a ground for removal of EU officeholders is either a failure to fulfil the conditions required for performance of the duties of office or breach of the obligations of office, or a materially similar formulation. This standard is applicable to the European Ombudsman,[46] Commissioners (including the President and the High Representative),[47] Judges and Advocates General of the CJEU,[48] members of the Governing Council[49] and the Executive Board of the ECB,[50] and members of the Court of Auditors.[51] This formulation may in fact be divided into two distinct grounds for removal: (1) failure to fulfil conditions; and (2) breach of conditions. The former may be understood as covering incapacity.[52] It could also potentially encompass circumstances in which an officeholder was found to no longer possess requisite qualifications for taking up the office, though it is likely that a breach of obligations could also cover such circumstances.[53] The second ground, a failure to meet the obligations arising from office/breach of obligations, is more in the way of an impeachment ground. The breach of obligations ground initially appears to cast a narrower net than the 'serious misconduct' ground in that the obligations flowing from an office may be specified in

[39] Rule 21 of the Rules of Procedure of the European Parliament.

[40] Article 228(2) TFEU.

[41] Article 15(5) TEU.

[42] Article 247 TFEU.

[43] Article 14(2) of Protocol (No. 4).

[44] Article 11(4) of Protocol (No. 4).

[45] The French version, 'une faute grave' appears to be an employment law concept in French law, which would appear to relate to individualised misbehaviours (see, https://www.service-public.fr/particuliers/vosdroits/F1137, last accessed, 22 October 2024). The German version, 'eine schwere Verfehlung', appears to have distinct private or civil law associations: in German law, it is a ground for exclusion from a procurement process under § 124 Absatz 1 Nr. 3 GWB (Law against Competition Restrictions) and § 530 BGB (Civil Code) allows for the revocation of a gift in circumstances in which the donee has committed 'eine schwere Verfehlung'. The Italian version, 'una colpa grave' appears to resemble the French version closely, and seems, in Italian law, to appear in a variety of civil or private law contexts, all relating to individual conduct (see, https://www.brocardi.it/dizionario/1489.html, last accessed, 22 October 2024). The Dutch version, 'op ernstige wijze is tekortgeschoten', would appear, at first glance, wider in scope in that it appears to relate to 'deficiencies', rather than positive misconduct.

[46] Article 228(2) TFEU.

[47] Article 247 TFEU.

[48] Articles 6 and 8 of Protocol (No. 3).

[49] Article 14(2) of Protocol (No. 4).

[50] Article 11(4) of Protocol (No. 4).

[51] Article 286(6) TFEU.

[52] This standard in the precursor to the current Article 247 TFEU was used to end the term in office of former Commissioner Albert Borschette in 1976 due to his suffering 'irreversibly unconsciousness' (R Geiger, D-E Khan, and M Kotzur, *European Union Treaties: A Commentary* (CH Beck, 2015), p. 837).

[53] For instance, if a Commissioner's conduct demonstrated that they had ceased to be independent.

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the Treaties, secondary law, or codes of conduct.[54] In any event, the focus once again appears to be on individual conduct. Indeed, a comparative reading of Articles 245 and 247 TFEU might also suggest that the breach of obligations standard and serious misconduct effectively amount to the same thing, since the former provides that removal from office may follow breach of obligations, but the latter eschews this formulation in favour of serious misconduct. This being so, serious misconduct can be understood as a breach (of sufficient weight) of the obligations that attach to the office in question.[55] The corollary of this observation is that the precise meaning of serious misconduct or breach of obligations will not necessarily be uniform across all the impeachment provisions in which they occur: the nature of the roles may give rise to different obligations or different expectations, which will require a more contextual understanding.[56]

The CJEU in its limited case law on impeachment also appears to regard EU impeachments as having a narrow scope. Although Advocate General Geelhoed in *Cresson* was keen to emphasise the constitutional stature of the procedure against individual Commissioners, at the same time he expressly excluded the possibility of individual officeholders in collegiate institutions being removed 'for reasons relating to the exercise of the functions' of those institutions.[57] This would appear to preclude the possibility of censure for policy-based conduct which is sanctioned by the College of Commissioners.

The one obvious exception to the apparent general trend of narrow, individualised impeachment powers is Article 15(5) TEU relating to the European Council President. While the President may be removed on the ground of serious misconduct, they may also be removed on the grounds of an 'impediment'. This latter formulation, allied with the fact that the power of removal is vested in the hands of a qualified majority of the European Council, may amount essentially to a vote of no confidence in the President and, as such, appears much closer to the political reset model of impeachment. Moreover, the impediment ground does not necessarily require that the President themself be the cause of the problem. This ground does appear to be an outlier in this regard in EU law, however.

One must, however, raise some notes of caution about any unqualified statement that the grounds for impeachment, apart from the impediment ground applicable to the European Council President, may only be understood in a purely narrow and individualised manner to cover wilful misconduct. As previously observed, the wording of the provisions, though significant, will not be determinative; regard must be had to institutional and procedural factors that govern the use and availability of the procedure.

D. Institutional context and design

In the EU's constitutional design and practice, there are numerous aspects which would imply that there is little need for an expansive conception of impeachment. The EU's constitutional arrangements appear to distribute power in such a manner as to significantly reduce the types of concentration of power in a single individual that can imperil presidential systems. In the widest sense, the EU

[54] The importance of codes of conduct is demonstrated in *Court of Auditors v Pinxten*, Case C-130/19, ECLI:EU:C:2021:782, in which the Court repeatedly measured Pinxten's behaviour against the 2004 and 2012 Codes of Conduct applicable to members of the Court of Auditors.

[55] In both *Cresson* and *Pinxten*, the Court required the breach of/failure to meet obligations under (now) Articles 245 and 286(6) TFEU to be of sufficient seriousness to attract censure: *Commission v Cresson*, Case C-432/04, ECLI:EU:C:2006:455, para. 72; *Court of Auditors v Pinxten*, Case C-130/19, ECLI:EU:C:2021:782, para. 243.

[56] For instance, although the same textual standard applies (treason, bribery, or other high crimes and misdemeanors) to the President and federal judges, the behavioural standards expected of both may vary given their different roles, democratic legitimacy, and terms in office. See, MJ Gerhardt, supra note 19, pp. 108-109.

[57] *Commission v Cresson*, Case C-432/04, ECLI:EU:C:2006:140, para. 94 (Opinion of Advocate General Geelhoed), para. 67.

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Treaties create institutions in which there tends to be little overlap of individual officeholders.[58] Powers are then allocated among these institutions in a manner that tends to engender a high degree of mutual codependence. There is, in many respects, also a high degree of dependence on cooperation with national-level institutions.[59] Moreover, even the EU's executive leadership is a dual presidency, rather than a unitary one, with responsibility for political leadership or management shared between the Commission President and the European Council President. Additionally, within institutions, power—at least formally—tends to be exercised in a collegiate manner, which inhibits the ability of individual officeholders to pursue an independent agenda. This applies in both the executive and judicial or administrative institutions.[60] It means that a single individual is rarely responsible for any official action, unless the question is more a matter of personal conduct, such as corruption or criminal behaviour. As such, it is unlikely, formally at least, that an EU officeholder is ever singularly responsible (or identifiable) for a systemic harm in the way a unitary executive president might be.[61] This factor also tends to anonymise EU officeholders to the outside world, which in turn reduces, though it does not entirely remove, the ability of EU officeholders to develop a personal brand. Even if an individual is the primary author of a systemic harm, the pluralistic nature of EU institutions may serve to obscure the fact.[62] Moreover, the Court of Justice in *Cresson* appeared to suggest that a Commissioner would not be impeachable for an action of their institution,[63] and there is little reason to believe that the same reasoning would not be applicable to other institutions.

In addition, there are numerous legal and political mechanisms to deter, limit, and punish systemic or specific excesses of power which may obviate the need for recourse to removal powers, and—particularly—a wide conception of such powers. Most obviously, there is the Article 263 TFEU annulment procedure, the Article 265 TFEU procedure to challenge a failure to act, as well as actions for damages under Article 268 TFEU in conjunction with Article 340 TFEU. The Commission President may also avail of the power under Article 17(6) TEU to effectively dismiss an individual Commissioner.[64] Moreover, in the context of the European Commission as a body, the European Parliament holds the nuclear option of dismissing the Commission pursuant to Article 17(8) TEU and Article 234 TFEU.

[58] The double-hatted role of the High Representative in the Council and the Commission being a notable exception (Article 18 TEU).

[59] The various schools of political science theorising on European integration would likely concur: a neofunctionalist would emphasise the reliance of supranational institutions on national institutions empowered by their interactions (see, for instance, A-M Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', (1993) 47(1) *International Organization* 41), while an intergovernmentalist would highlight the centrality of national governments (see, for example, G Garrett and BR Weingast, 'Ideas, Interests and Institutions: Constructing the European Community's Internal Market' in Goldstein and RO Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Ch*ange (Cornell University Press, 1993), pp. 173-204.

[60] The Commission, for instance, acts by a majority of its Members (Article 250 TFEU). Article 32 of the Rules of Procedure of the Court of Justice provides, *inter alia*, that the conclusions of the majority of the Judges determine the decision of the Court, and that deliberations 'shall be and shall remain secret'.

[61] The truth of this observation may depend on the real dynamics within an institution in a given era, however. If individual Commissioners are given significant latitude by the Commission President and the College of Commissioners, what are in fact actions of individual Commissioners, such as the use of discretion in issuing Article 258 TFEU infringement proceedings, may simply be rubber stamped by the College.

[62] Alexander Hamilton in Federalist No. 70 expressed his opposition to a plural executive in the following apposite manner: 'But one of the weightiest objections to a plurality in the Executive … is that it tends to conceal faults and destroy responsibility.… It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall.' (Madison, Hamilton, and Jay, supra note 5).

[63] *Commission v Cresson*, Case C-432/04, ECLI:EU:C:2006:140, para. 94 (Opinion of Advocate General Geelhoed), para. 67.

[64] See, J Cotter and G Butler, 'The President of the European Commission and the Power to Request a Commissioner's Resignation' (2024) 61(3) *Common Market Law Review* 593.

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As a final point, it should be noted that EU officeholders are subject to fixed terms of office, which are, in some contexts at least, comparatively short.[65] This would tend to suggest that the indirect mandate of European elections, in the case of the Commission, and re-appointment processes, in the case of the European Council President and members of the CJEU and the Court of Auditors, are a safeguard against systemically problematic conduct in office. These pragmatic factors might also militate against the wider conceptions of impeachment that may be more justifiable where an officeholder has life tenure, as is the case of judges in many constitutional systems, or with officers who hold significant personal power.

The above characteristics of the EU's constitutional design may, therefore, be viewed as providing a comprehensive system of features or remedies which obviate the need for a wide conception of impeachment that would enable political resets or sanction for policy-based action or inaction. These features, it is arguable, are intelligently designed to ensure strong, independent institutions which are insulated to a significant degree from parliamentary or popular pressures during the relevant term of office. A wider conception of impeachment that might target anything other than individual misconduct does not seem to sit easily with these features.

E. Procedural cues

Several aspects of the procedural design of EU impeachments suggest a narrower conception of the process. Indeed, it is arguable that procedural questions—such as who holds the right of initiation, who tries impeachments, and what the voting rule for conviction is—are the most significant indicators of the framers' own perception of the role of impeachment. Impeachment procedures that cast the net wide in terms of the power of initiation, or that entrust the trial of impeachments to political institutions, or that provide for lower evidentiary or voting thresholds for conviction may imply a preference for a model along the lines of the political reset idea or popular will and dangerous tendencies models. Conversely, impeachment powers that regulate the right of initiation tightly, or entrust the trial of impeachments to a judicial body, or which establish a legalistic procedure, or one with high evidentiary standards or conviction thresholds, will be more consistent with a narrower conception. Of course, many, perhaps most, systems will exist somewhere in between these two dichotomies. It is, nevertheless, worth examining where the EU's impeachment powers might lie on this spectrum.

Many aspects of the EU's impeachment provisions are tightly controlled in terms of initiation and trial, and tend to exclude any parliamentary or popular participation. As regards initiation, the right is generally held in-house exclusively, as is the case in respect of officers of the European Parliament,[66] the President of the European Council,[67] members of the Executive Board of the ECB,[68] and members of the Court of Auditors.[69] By way of exception to this general rule, a simple majority of the Council can call on the Court of Justice to remove an individual Commissioner (including the Commission President and the High Representative),[70] and the European Parliament has the sole right of initiation against the European Ombudsman.[71] The position as regards CJEU Judges and Advocates General is somewhat vague, in that Article 6 of Protocol (No. 3) refers to a situation '[w]here the Court is called

[65] The term in office of the President of the European Council is especially short: two and a half years, renewable once (Article 15(5) TEU). By way of some other examples, the term in office of Members of the European Commission is tied to the five-year term of the European Parliament (Article 14(3) TEU), while Judges and Advocates-General of the CJEU hold office for a renewable term of six years (Article 253 TFEU). The same applies to Members of the Court of Auditors (Article 286(2) TFEU). The lack of life tenure for Judges and Advocates General may, therefore, obviate the need for stronger impeachment proceedings against individual officeholders.

[66] Rule 21 of the Rules of Procedure of the European Parliament.

[67] Article 15(5) TEU.

[68] Article 11(4) of Protocol (No. 4).

[69] Article 286(6) TFEU.

[70] Article 247 TFEU.

[71] Article 228(2) TFEU.

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upon' without specifying who may so call upon it. All of this would tend to suggest that the removal powers are not to be used as a response to wider governability/policy-driven or popular concerns but are designed as opportunities for institutions to rid themselves of misbehaving individuals.[72]

The EU treaties also generally opt for highly judicialised procedures for impeachments. In the case of the European Ombudsman, Commissioners, CJEU Judges and Advocates General, members of the Executive Board of the ECB, and members of the Court of Auditors, the Court of Justice enjoys the sole right to try impeachments. The only exceptions to this position are limited and narrow. Certain officeholders within the European Parliament may be removed from offices within the Parliament, though not stripped of their status as MEPs, by in-house procedures.[73] As noted previously, the European Council President may be removed by a qualified majority of the European Council in a process that may resemble a hybrid impeachment-confidence procedure.[74] The entrusting of impeachments to the judiciary rather than the legislature or other political institutions suggests that the decision-making process is one that should be narrow in focus, examining questions of individual wrongdoing, rather than policy actions or inactions. Courts will enjoy less legitimacy to enquire into policy-based conduct, given that to do so may involve making judgements on the wisdom of policy choices. Judicialisation of impeachment processes also means a legalisation of the process, implying more stringent evidentiary and procedural rules than may apply in a trial by legislature. The introduction of legal procedural standards often has the observable effect of narrowing the scope of an inquiry and stymying the utility of impeachment as a more generalised procedure to address alleged systemic wrongs.[75] In the specific context of the Commission, the existence of the Commission President's power to compel a Commissioner's resignation under Article 17(6) TEU tends to suggest that judgement of a Commissioner's performance in the wider sense is a matter for the Commission President and that the Article 245 and 247 TFEU procedures are reserved purely for breach of ethical standards.[76] In other words, if the impugned behaviour does not relate to misconduct in the narrow sense, all other matters are for the Commission President to decide in their capacity as organisational leader of the Commission and it is not for the Court to interfere.[77]

The above factors present a compelling case in favour of the view that the various EU impeachment procedures are designed to address a narrow set of individual forms of misconduct or failure to meet certain standards in office, rather than a wider corrective power to address dangerous tendencies behaviour that may represent broader, systemic threats to the EU polity.

[72]Indeed, both impeachment-style proceedings initiated thus far that have proceeded to judgment were commenced by the institution of which the defendant officeholder was a former member: the Commission in Cresson's case and the Court of Auditors in Pinxten's: *Commission v Cresson*, Case C-432/04, ECLI:EU:C:2006:455 and *Court of Auditors v Pinxten*, Case C-130/19, ECLI:EU:C:2021:782, respectively. That said, the discontinued proceedings in *Council v Bangemann*, Case C290-/99 were instigated by the Council against Commissioner Bangemann.

[73]Rule 21 of the Rules of Procedure of the European Parliament allows for removal of the President, a Vice-President, a Quaester, a Chair or Vice-Chair of a Committee, a Chair or Vice-Chair of an interparliamentary delegation, or of any other officeholder elected within the Parliament, as well as a rapporteur.

[74]Article 15(5) TEU.

[75]Lord Chancellor Thurlow's insistence on the application of the ordinary rules of evidence in the impeachment trial of Warren Hastings (1788-1795), which inhibited Edmund Burke and the other managers of the impeachment from pursuing more generalised accusations against Hastings, is often seen as having contributed to Hastings' acquittal: C Monaghan, *Accountability, Impeachment and The Constitution: The Case for a Modernised Process in the United Kingdom* (Routledge, 2022), pp. 47-52.

[76]See, PJ Kuijper, 'Missteps by Commissioners: Legal or political sanctions' in Fabian Amtenbrink, G Davies, D Kochenov, and J Lindeboom (eds), The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley (Cambridge University Press, 2019), p. 470, at pp. 490-491.

[77]Although, conversely, the existence of the Article 245 and 247 TFEU procedures need not interfere with the Commission President's power to dismiss a Commissioner on the basis of allegations that might also be subject to those procedures: see, Cotter and Butler, supra note 59, at 602-604.

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V. Reform of EU impeachment

Having concluded that EU impeachment procedures are generally framed in a manner that suggests a narrow conception of impeachment, the question of whether reform of EU impeachments is required or desirable arises. In the paragraphs that follow, two forms of potential reform are considered: first, whether there is a case for a wider conception of impeachment that might encompass a dangerous tendencies doctrine; second, whether there is a case for procedural amendments to the existing processes. The introduction of political reset or democratic will conceptions of EU impeachment would require a wholesale re-conception of the EU constitutional order, which is beyond the scope of this article. It should also be noted that even minor alterations, whether in interpretative approach to existing provisions or in alterations to text, may have a butterfly effect; for instance, widening the scope of impeachable offences may call into question the legitimacy of the Court of Justice to try cases that may involve adjudication on policy choices. Some of these consequences may be foreseeable and some may not. Suffice it to say that pulling at any one thread in the impeachment tapestry may cause a more general constitutional unravelling, a point which is borne in mind in the analysis below.

A. A case for a wider, dangerous tendencies, conception of EU impeachment?

There are at least four arguments that can be advanced in favour of a wider conception of EU impeachment.

First, while there may have been a strong case for a narrow iteration of impeachment at the EU's inception, the EU has undergone a fundamental constitutional evolution since which may call for a wider conception. Even if the EU was established in both substance as well as form as an international organisation, it is difficult to sustain an argument that it has not since—through judicial innovation, expansion of competences, increased democratisation, and the creation of concepts such as Union citizenship—evolved into a constitutional entity. Seen in this light, impeachment powers that have existed since the founding Treaties or have been added in subsequent treaty revisions, should be interpreted as living procedures to accord with constitutional change. Viewed this way, there is a case to be made that the various impeachment powers should be understood—particularly as they relate to executive or administrative institutional officeholders—in a wider sense to allow the expression of disapproval by countervailing actors of the policy-based conduct of individual officeholders, without having to collapse an entire institution's composition as a European Parliament motion of censure does in the Commission's case. Put differently, it may be argued that the evolution of the EU at least justifies an idea of impeachment more in line with a dangerous tendencies conception that might even allow for greater democratic input in initiation, if not trial, of impeachments. Whether the existing narrowly worded grounds and—more significantly—the overwhelming judicialised procedures provide sufficient flexibility for such an evolutionary reading is another matter.

Second, it may be argued that the increased power and influence that has been accrued by some individual EU institutional officeholders calls for a wider conception of impeachment that would interrogate their decision-making in office. Previously, of course, the argument was advanced that the anonymity and limited independent power of individual EU officeholders militated against the need for wider impeachment powers addressed at systemic political conduct. This assertion is contestable on at least three grounds. First, it may be argued that the fact that officeholders are more individually anonymous should support greater, rather than lesser, scrutiny of individual conduct. Second, at least in the case of the Commission, it is increasingly the case that individual Commissioners have used their offices in a manner which increases their own personal profile and makes them the face of a particular portfolio or pet policy.[78] With the benefits of this more personal brand of politics should come

[78] Ready examples of this would be Margrethe Vestager, as Commissioner for Competition in the Juncker and von der Leyen Commissions, and Thierry Breton, as Commission for the Internal Market, both of whom have enhanced their personal brands in their bullish regulatory pursuits of powerful multinational companies.

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some risks also, perhaps; if Commissioners may now become the face of a particular policy direction, it is arguable that they might also become targets of individualised censure. Third, over time, there has been a subtle increase in some of the powers of individual officeholders. The most obvious example of this phenomenon is in the case of the Commission President, who through the addition of what is effectively a unilateral power to dismiss individual Commissioners under the Lisbon Treaty, can now act much more assertively over other Commissioners.[79] The wide-ranging nature of the Commission President's organisational powers over the College might support an argument that a President could be held accountable via the impeachment procedure for failures to control or adequately sanction conduct within the College. The increased judicialisation of the EU's Article 2 TEU foundational values also provides standards against which the conduct of individual officeholders might be measured.[80] Finally, it should be noted that how collegiate an institution such as the Commission will be in real terms, as opposed to formally, may depend on the personalities and power dynamics within each College; what appear to be formally collegiate actions or inactions may well be *de facto* individual decisions.

Third, one may point to the incompleteness of judicial and other controls on the conduct of EU institutional officeholders. While there are numerous features in the EU's constitutional design that serve as guardrails against wider or systemic abuses of power or against behaviour going beyond individualised misconduct that might obviate the need for a wider iteration of EU impeachment, it is also the case that these features are not without their limitations. The EU's judicial procedures, such as Articles 263, 265, and 267 TFEU, do not provide a complete system of remedies against unlawful institutional behaviour, given the restrictive standing rules relating to natural and legal persons in the former two procedures and the reliance on national procedures in the latter. Additionally, in the specific context of the European Commission, the European Parliament is limited, in terms of Treaty powers,[81] to the use of the nuclear option of the motion of censure, which involves the removal of the Commission as a body and is extremely difficult to wield.[82] Moreover, in many constitutional systems, the potential use of ordinary criminal proceedings will exist as an alternative or additional option, but, in the EU context, reliance will be placed on national authorities due to the lack of ordinary or criminal EU courts.

There are, of course, also arguments against any expansion in the scope of EU impeachable offences. As previous stated, a widening of the scope of grounds would have considerable knock-on effects on the EU's constitutional landscape. If individual officeholders may have their conduct impugned on the basis of policy decisions or dangerous tendencies, then the legitimacy of the Court of Justice as trier of that question arises. While the Court is not and was never intended to be a typical law court, but one which was tasked with contributing to the wider economic, social, and political integration of Europe, this does little but dilute the power of the legitimacy objection. It is also unlikely that the Court would relish this role for itself, a role which would increase the dangers of a perception of the institution's politicisation.[83]

A middle ground of sorts between the two positions (expansion of impeachable grounds versus the status quo) is likely possible and even desirable. While there seems only a limited case for the

[79] Cotter and Butler have asserted that certain misuses of the Commission President's power to effectively dismiss individual Commissioners could constitute grounds for impeachment under Article 247 TFEU, especially if used in a pattern that could destabilise the Commission: Cotter and Butler, supra note 59, at 616-617.

[80] See, for instance, *Hungary v Parliament and Council*, Case C-156/21, ECLI:EU:C:2022:97.

[81] Although the European Parliament may express a lack of confidence in an individual Commissioner, in response to which the Commission President must either dismiss the individual Commissioner or explain their decision not to do so: Framework Agreement on relations between the European Parliament and the European Commission, [2010] OJ L304/47, Point II.5.

[82] Article 234 TFEU requires that a motion of censure be carried by a two-thirds majority of the votes cast, representing a majority of the component Members of the European Parliament.

[83] Judicial reluctance to have any involvement in impeachments because of their political nature is discernible in the negative manner in which Sir Ross Cranston in interview with Chris Monaghan responded to Monaghan's proposal to establish a Court of Impeachment which would include judges in the United Kingdom: Monaghan, supra note 70, p. 185.

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broadening of impeachable grounds against EU institutional officeholders generally, there is, as stated above, an argument to be made that the existing grounds, without the need for textual amendment to the Treaties, could be interpreted in a manner that would hold the Commission President responsible for failure to sanction individual Commissioners. Such a differential understanding of Article 247 TFEU as it applies to the Commission President and other Commissioners is tenable given the wide-ranging organisational powers held by the President which have served increasingly to centralise power within that institution.[84]

B. A case for procedural reforms to EU impeachment

Some of the EU's impeachment procedures may be unfit for purpose as accountability mechanisms even if impeachment is to be conceived of in the narrowest sense. In general, it may be observed that many of the EU impeachment procedures have not evolved along with momentous changes, whether by Treaty amendment or judicial developments, in the EU's constitutional arrangements. This ossification, in turn, may serve to inhibit the usefulness of these procedures in dissuading officeholders from committing misconduct or holding them accountable when they do.

The most obvious example of this lack of adaption may be the provisions of Protocol (No. 3) relating to the removal of Judges and Advocates General.[85] These provisions, which appear to be modelled on Article 18 of Statute of the International Court of Justice, have not changed since the entry into force of the foundational treaties. As aforementioned, there is no specification as to who may initiate impeachment proceedings against a Judge or Advocate General, which may imply that only the Court itself may commence the process. More bizarrely, the requirement that the Court of Justice votes unanimously to remove a Judge or Advocate General remains, notwithstanding the fact that the Court has grown immensely in size since 1958. The effect of these features, which make the prospect of a member of the CJEU being removed from office appear highly remote, is to make the procedure appear rather ornamental. Moreover, the existing procedure seems to take little account of institutional dynamics, in that the instigation of an impeachment proceeding by a member or members of the Court against a peer would leave behind an awkward legacy if the impugned member were not removed subsequently. Then again, that may be another feature of intelligent design: in making a move against a fellow member of the CJEU, the accusers will have to be sure that if they decide to shoot (figuratively), they do not miss. Such a dynamic serves to disincentivise initiation of the procedure save for in the most egregious and transparent cases of personal misconduct. However, there is surely a case to be made that a threshold of two-thirds of the Court of Justice (or four-fifths) at trial for an adverse finding would provide a sufficiently robust guarantee against abuse of the proceeding while at the same time achieving a realistic threshold.

This ossification of the impeachment procedures is also evident in the lack of any democratic or parliamentary input into the impeachment processes, especially in initiation. While there are good reasons not to make impeachments of independent officeholders too easy to instigate, especially in reaction to fleeting changes in popular mood, it is striking that the European Parliament, despite its dramatic growth in significance since the EU's founding, cannot instigate impeachment proceedings against officeholders in any other institution. It is especially noteworthy in the context of Commissioners, against whom only the Council and the Commission itself may initiate proceedings.[86] This exclusion of the EU's only directly elected institution does not sit well with the centrality

[84] J Cotter, 'La Commission, c'est moi? The invisible hand of Article 17(6) TEU in the presidentialisation of the European Commission', Verfassungblog, https://verfassungsblog.de/eu-commission-new-von-der-leyen-president/, last accessed, 22 October 2024.

[85] Articles 6 and 8 of Protocol (No. 3).

[86] Article 247 TFEU. It may also be observed that the Council may be more unlikely to initiate such proceedings given the compromises involved in agreeing the initial composition of the Commission and the link between the number of Commissioners and the Member States.

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of EU citizenship nor with Article 10(3) TEU which asserts that every citizen 'shall have the right to participate in the democratic life of the Union' and that '[d]ecisions shall be taken as … closely as possible to the citizen.'

Moreover, the exclusion of some semblance of democratic involvement in EU impeachments and the maintenance of the existing trend of preference for in-house instigations may create an accountability gap.[87] Institutions may be unlikely to move against their own members. Moreover, EU institutions with weaker or almost non-existent democratic legitimacy such as the Commission, ECB, CJEU, and Court of Auditors are bound to share certain institutional cultures and practices and may likewise be slower to act against or find fault with their institutional cousins. The argument for European Parliament involvement in instigating impeachments would appear compelling, though it would have to be controlled by suitable safeguards and thresholds to avoid abuse of the power. The possibility of abuse of initiation of impeachments by the European Parliament might in any case be overstated in circumstances in which to date only two impeachment-style proceedings have been completed in the EU's entire history, and even then, in both cases the officeholders involved had already left office at the time the proceedings were commenced.[88] Finally, the factionalism that Alexander Hamilton feared might be unleashed in Congress by impeachment appears not to be as grave a danger in the case of the European Parliament, which, partly as a result of the lack of a single European demos and disciplined party structures, as well as the presence of a proportional representation electoral system, remains splintered in such a manner as to make partisan supermajorities difficult to wield.[89] Of course, this characteristic of the European Parliament might also make it a suitable contender for the trial of impeachments more generally, but that would be a momentous change to the EU constitutional order and an argument that is beyond the scope of this article.[90]

VI. Concluding remarks

This article constitutes the first panoramic survey of the impeachment powers applicable to EU institutional officeholders. It has concluded that the various idiosyncratic removal powers scattered across the EU Treaties, their Protocols, and secondary rules may be conceived of as impeachment. Moreover, this article has concluded that these powers as formulated appear to be conceived of in a narrow sense as addressing individual bad actors, rather than as a means of dealing with policy-based behaviour that may be a more systemic threat to the EU as a polity or as a democratic instrument to achieve a political reset. Several aspects of the text of the relevant provisions, the overall constitutional design of the EU, as well as the procedural elements of the impeachments themselves all support this conclusion.

In the absence of a fundamental overhaul of the EU's constitutional character, it is difficult to sustain an argument in favour of a wider, political reset version of impeachment: power is so diffused among the EU's institutions and even within them that political reset by way of the removal of one officeholder is not achievable in like manner to a system with a unitary executive presidency. Moreover, there would appear to be few gaps in the existing system that would necessitate a wider conception of impeachment that would encompass individual dangerous tendencies or policy-based actions/inactions. This is again largely because of the manner in which EU power is diffused

[87] This danger is especially evident from the *Pinxten* case, in which the threshold within the Court of Auditors to refer the case to the Court of Justice (four-fifths) was only barely reached, notwithstanding the number of allegations and their seriousness, as well as the strength of the evidence against Mr Pinxten: *Court of Auditors v Pinxten*, Case C-130/19, ECLI:EU:C:2021:782, paras 176-214.

[88] *Commission v Cresson*, Case C-432/04, ECLI:EU:C:2006:455 and *Court of Auditors v Pinxten*, Case C-130/19, ECLI:EU:C:2021:782.

[89] Hamilton, Federalist LXV (Madison, Hamilton, and Jay, supra note 5).

[90] The consistency of the trial of impeachments by the European Parliament with the rule of law and the role of the Court of Justice is also open to question.

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internally within institutions and also separated externally, both horizontally between other EU institutions and vertically with the Member States. The capacity for any one EU officeholder to cause damage to EU values or constitutional balance is, at least formally, significantly inhibited and, in any event, there are generally existing and adequate legal and political mechanisms to catch such behaviour. However, there are some chinks in the armour, which may require differential application of existing impeachment standards to different officeholders, even within the same institution. The Commission President, given their extensive organisational power over individual Commissioners, serves as the best example of this; a President's failure to use their powers to remove individual bad apple Commissioners might in itself open the President to scrutiny in the form of impeachment proceedings.

Moreover, notwithstanding some seismic constitutional shifts, the EU's impeachment powers appear to have ossified in procedural terms. Initiation of the procedures remains a largely in-house question and generally excludes any input from the European Parliament or Union citizens. The procedures are highly legalistic and judicialised, with the Court of Justice retaining exclusive jurisdiction to try most impeachments. Indeed, the thresholds in some cases for initiation or conviction might even lead a cynic to conclude that some of the procedures may be largely ornamental. While all the above may be a good in terms of institutional independence and individual officeholder security, it appears to be reflective of an overcorrection by the Treaties' framers and revisers which was perhaps based on a distrust of any democratic involvement in impeachments. At the very least, there appears to be a strong case to give the European Parliament a role in the initiation of impeachments, albeit with adequate safeguards, to avoid abuse of this power. What these safeguards ought to be is another day's work, however.

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