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EXAMINING THE ALLEGATIONS OF MISCONDUCT AGAINST IRS COMMISSIONER JOHN KOSKINEN (PART II)

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

JUNE 22, 2016

Serial No. 114–74

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE

20–521 PDF WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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EXAMINING THE ALLEGATIONS OF MISCONDUCT AGAINST IRS COMMISSIONER JOHN KOSKINEN (PART II)

WEDNESDAY, JUNE 22, 2016

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 10 a.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte, (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Chabot, King, Franks, Gohmert, Jordan, Chaffetz, Gowdy, Collins, DeSantis, Nadler, Lofgren, Johnson, and Jeffries.

Staff Present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Zachary Somers, Parliamentarian & General Counsel; Paul Taylor, Chief Counsel, Subcommittee on the Constitution and Civil Justice; (Minority) Aaron Hiller, Chief Oversight Counsel; Susan Jensen, Senior Counsel; and Veronica Eligan, Professional Staff Member.

Mr. GOODLATTE. Good morning. The Judiciary Committee will come to order, and without objection, the Chair is authorized to declare recesses of the Committee at any time. We welcome everyone to this morning's hearing on examining the Allegations of Misconduct against IRS Commissioner John Koskinen (Part II). And I will begin by recognizing myself for an opening statement.

The Constitution sets forth a system of checks and balances, which grants each branch of government tools to ensure that no one branch of government attains too much power. The legislative branch's tools include the power to write the laws, the power of the purse, the impeachment power, and the power to censure, among others. These tools empower Congress to exert oversight over the executive and judicial branches, including rooting out corruption, fraud, and abuse by government officials, and taking further disciplinary action on behalf of the American people when warranted.

The duty to serve as a check on the other branches, including against corruption and abuse, is a solemn one, and Congress does not take, and must not take this responsibility lightly. That is why this Committee has scheduled this hearing today.

In 2013, the American people first learned that their own government had been singling out conservative groups for heightened re-

view by the Internal Revenue Service as they applied for tax-exempt status. This IRS targeting scandal was nothing short of shocking. It was a political plan to silence the voices of groups representing millions of Americans.

Conservative groups across the Nation were impacted by this targeting, resulting in lengthy paperwork requirements, overly burdensome information requests, and long unwarranted delays in their applications. In the wake of this scandal, then-IRS official Lois Lerner stepped down from her position, but questions remain about the scope of the abuses by the IRS.

The allegations of misconduct against Koskinen are serious, and include the following: On his watch, volumes of information crucial to the investigation into the IRS targeting scandal were destroyed. Before the tapes were destroyed, congressional demands, including subpoenas for information about the IRS targeting scandal, went unanswered.

Koskinen provided misleading testimony before the House Oversight and Government Reform Committee concerning the IRS's efforts to provide information to Congress. These are very serious allegations of misconduct, and this Committee has taken these allegations seriously.

Over the past several months, this Committee has meticulously pored through thousands of pages of information produced by the investigation into this matter. On May 24, this Committee held a hearing, at which the Oversight and Government Reform Committee formally presented its findings and evidence to the Members of this Committee.

And today, this Committee holds a second hearing to allow outside experts to assess and comment on the evidence presented to the Committee at its May 24, 2016 hearing, and the many options for a congressional response. I look forward to hearing from all of our witnesses today.

It is now my pleasure to recognize the gentleman from New York, Mr. Nadler, who will offer an opening statement in lieu of the gentleman from Michigan, Mr. Conyers, who is not able to be here due to weather conditions and traffic flying here from Detroit, as I understand it. So, Mr. Nadler, welcome. You are recognized.

Mr. NADLER. Thank you, Mr. Chairman. Today, this Committee will yet again conduct an exploratory discussion of whether various allegations against the commissioner of Internal Revenue warrant the commencement of formal impeachment proceedings. With less than 30 legislative days remaining before this Congress enters near 2-month recess, there are certainly more pressing matters demanding our attention.

The horrible attack in Orlando cries out for meaningful response from this Committee. Millions of immigrants long to come out of the shadows to become legally part of our Nation. With national elections looming just months away, the urgent need for election reform goes unanswered. I could go on.

Instead, we have today's hearing, a potential precursor to impeachment, itself a highly time- and resource-consuming process. Our most recent impeachment took more than a year to complete in the House alone.

This process necessitated the creation of a bipartisan taskforce to conduct an independent investigation of the proposed charges, even though the judge in question had been under investigation for years. The taskforce reviewed the evidence, conducted depositions, held hearings, and gave the accused individual an opportunity to testify, cross examine witnesses, and invite witnesses of his own.

Then and only then did the taskforce consider the merits of the proposed articles of impeachment, and vote to refer them to the full Committee. Then and only then did the full Committee consider a resolution of impeachment, and refer it to the House floor.

The power of impeachment is a solemn responsibility, assigned to the House by the Constitution, and to this Committee by our peers. That responsibility demands a rigorous level of due process. There are no shortcuts if we hope for a successful conviction. Even if we thought that this proposed impeachment were a good idea, and I certainly do not, there are simply not enough days left in the congressional calendar for us to finish the task.

As for the merits of this proposed impeachment, I would like to submit two historical documents into the record. A 1974 report to the House Judiciary Committee, which accompanied the impeachment of President Nixon, and the text of a speech by our late friend and colleague, Representative Barbara Jordan of Texas from that year.

Let me add that during the consideration of impeachment proceedings against President Clinton, I first reviewed everything I could get my hands on, on what was an impeachable offense from Justice Burger's book to various other things. I found this report the most succinct, best, most accurate summary of what is impeachable, the Judiciary Committee report from 24 years earlier.

The 1974 report made an appearance at our first hearing on this topic. The proposed resolution before us rests on a novel legal premise, that we can impeach a government official for gross negligence, rather than personal misconduct. At our last hearing, Mr. Conyers asked the gentleman from Utah if gross negligence constitutes an impeachable offense.

He responded, "I think that is part of it, yes, yes I do." In fact, in 1974, the House Judiciary Committee came out with a report, and it talked about the standard by which an impeachable offense should be held, and I happen to concur with that—that is the quote from Mr. Chaffetz. We have since gone back to review that 1974 report, and it makes no such conclusion about this legal theory. The report never once even uses the term "gross negligence."

Now I am certain that Chairman Chaffetz did not intend to mislead the Committee. His testimony is certainly not grounds for discipline by the House, even though he has not yet corrected his misstatement. We all agree that the tools at our disposal for holding government officials responsible for their conduct are designed for more substantial problems. When considering the case against Commissioner Koskinen, if I pronounce it correctly, it would be wise to apply the same standard.

Which brings me to the statement of the late gentlewoman from Texas. As we considered articles of impeachment against President Nixon, she warned us of the consequences of allowing partisanship to interfere with our responsibilities. At the outset of the impeach-

ment process, she said, "Common Sense would be revolted if we engaged upon this process" for petty reasons.

Congress has a lot to do, appropriations, tax reform, health insurance, campaign finance reform, housing, environmental protection, energy sufficiency, mass transportation. "Pettiness cannot be allowed to stand in the face of such overwhelming problems. . . . It is reason, and not passion, which must guide our deliberations, guide our debate, and guide our decisions."

Those words still ring so true, as does that list of unaccomplished problems. With so many problems facing this Nation, with so much left to do in this Congress, and so little time in which to do it, we seemed to have ignored the counsel of the gentlewoman from Texas.

The continued call to impeach Commissioner Koskinen, despite likely failure in the House and near-certain failure in the Senate, is, using her word, petty. And it is petty. It is beneath the trust that has been placed in this Committee by our peers that we would use 2 days exploring an impeachment that is never going to happen.

The plan to censure the commissioner where impeachment has failed also seems like a pointless partisan exercise. A House resolution does not carry the force of law, or serve any purpose other than to defame a good and decent public servant. And I should add, to the extent that it did carry any force of law, it would be a constitutionally prohibited bill of attainder.

The late gentlewoman from Texas counseled us to let our reason guide us, even when the temptation to lash out for political purposes is strong. Mr. Chairman, we have so much more important work to do. We should focus our attention on that task instead, and put this exercise behind us after today. I thank you, and I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman, and without objection, all other Members' opening statements will be made a part of the record.

We welcome our distinguished witnesses today, and if you would all please rise, I will begin by swearing you in.

Do you, and each of you, solemnly swear that the testimony that you are about to give shall be the truth, the whole truth, and nothing but the truth, so help you God? Thank you, and let the record reflect that all the witnesses have responded in the affirmative.

Our first witness is Jonathan Turley, professor of law at George Washington University.

Our second witness is Andrew McCarthy, former Assistant United States Attorney for the Southern District of New York, and currently a senior fellow at the Foundation for Defense of Democracies.

Our third witness is Michael Gerhardt, professor of constitutional law, and director of the Program in Law and Government at the University of North Carolina, School of Law.

And our fourth and final witness is Todd Garvey, legislative attorney at the American Law Division at the Library of Congress.

Your written statements will be entered into the record in their entirety, and we ask that you each summarize your testimony in 5 minutes. To help you stay within that time, there is a timing

light at the table. When the light switches from green to yellow, you have 1 minute to conclude your testimony, and when the light turns red, that is it, your time is up. Mr. Turley, we will begin with you. Welcome.

TESTIMONY OF JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, THE GEORGE WASHINGTON UNIVERSITY

Mr. TURLEY. Thank you, Mr. Chairman, Ranking Member Nadler, Members of the Judiciary Committee. My name is Jonathan Turley, and I am the Schapiro Professor of Public Interest Law at George Washington University. It is an honor to appear before you today, to talk about the options available to Congress in addressing the alleged misconduct of the IRS commissioner.

Since today's hearing is focused on the options rather than the merits of congressional action, I will solely address the range of remedies available to Congress, and some of the questions raised as to barriers to those remedies facing the Committee.

Having served as lead counsel before the Senate in the last impeachment trial, where I was facing the Chairman on the other side as part of the prosecution, and having represented the House of Representatives recently in a Federal challenge to executive overreach, I do not take these remedies lightly. When we go down this path, there are many constitutional questions and procedural issues to consider.

I would like, hopefully, today to remove a few of the questions that have been raised, which I believe do not have merit in terms of barriers to this Committee. But I also want to emphasize that this is occurring at a critical time for Congress. Congress is facing an unprecedented erosion of its authority vis-&-vis the executive branch.

There is increasing obstruction and contempt displayed by Federal agencies with regard to congressional investigations, and there is a loss of any credible threat of congressional action. To put it simply, Congress has become a paper tiger within the tripartite system. The rise of a dominant and increasingly unchecked executive branch has created a dangerous shift within our system. And that vacuum left by years of passivity by Congress has left the system unstable, and often dysfunctional.

Without delving into the details of the current controversy, on its face, it is a legitimate subject for congressional investigation. The IRS Commissioner is accused of effectively weaponizing the IRS to target political opponents. President Obama, himself, called that type of allegation very serious; in fact, I think he said it was outrageous.

Now once again, the commissioner has every right to defend himself on those allegations. But for my analysis, I am going to assume the allegations are true, and focus on what are the remedies or options that this Committee can take. The most notable and alarming aspect of this case, and something that I have testified about before, is that a small organization like Judicial Watch was more successful in securing information from the Administration than the United States Congress.

Now, that is perfectly bizarre, that using the Freedom of Information Act, which is a relatively weak statutory platform, a small organization had greater success because of the obstruction of this Committee, and I think that the Framers would never have anticipated, let alone condoned, such a bizarre situation.

There is a lack of functional deterrence today to such obstruction. In economics, as I talk about, we often look at the rate of detection and the size of the penalty, which are both balanced in terms of deterrence. Agencies act as rational actors, and right now there is no penalty. That is why this is occurring, because Congress has been largely dormant.

I talk in my testimony about the classic means that Congress has used in the past, from appropriations or legislative slowdowns to confirmation questions to oversight. Those remedies have proven to be unsuccessful because of this vacuum left by congressional passivity.

That leaves what are sometimes called nuclear options, individual courses taken against officials who commit these acts. Things like impeachment, contempt, censure, and fines. I focus my written testimony on each of those options, and I will be happy to talk about them today.

Whatever the conclusion of this body is as to the merits of these allegations, which I am not here to testify about, I think this body should understand that it has the tools to respond. If our system is to function, Congress must matter. Congressional subpoenas must be enforceable. Conduct that is contemptible must be punishable. This body has the means to do that. The question is not the means, but the will to do it.

I thank you for your time today, and I will be happy to answer any questions that you may have.

[The prepared statement of Mr. Turley follows:]

Written Statement

Jonathan Turley,
Shapiro Professor of Public Interest Law
The George Washington University Law School

"Examining The Allegations of Misconduct of IRS Commissioner John Koskinen"

Committee on the Judiciary
United States House of Representatives
2141 Rayburn House Office Building

June 22, 2016

I. Introduction

Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Jonathan Turley and I am a law professor at The George Washington University Law School, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the options available to Congress in addressing the alleged misconduct of IRS Commissioner John Koskinen.

Since today's hearing is focused on the options rather than the merits of congressional action against Commissioner Koskinen, I will be solely addressing the range of remedies available to the Congress under the Constitution. Having served as lead counsel before the Senate in an impeachment trial and represented the House of Representatives as an institution in a federal challenge to executive overreach, I do not take such remedies lightly. Congress, however, is facing an unprecedented erosion of its authority vis-à-vis the Executive Branch. The increasing obstruction and contempt displayed by federal agencies in congressional investigations reflects the loss of any credible threat of congressional action. Congress has become a paper tiger within our tripartite system—a branch that often expresses outrage, yet fails to enforce its constitutional authority. The rise of a dominant and increasingly unchecked executive branch has resulted in a dangerous shift of power in our system. The vacuum left by years of passivity by Congress has left the system unstable and often dysfunctional.

Without delving into the details of the current controversy, the underlying allegations are manifestly serious. Various groups have accused the Obama Administration of effectively weaponizing the IRS to target critics, particularly Tea Party groups. The use of the IRS to target political opponents is expressly prohibited, and President Obama himself has called the targeting of such groups by the IRS outrageous:

> "It's inexcusable and Americans are right to be angry about it. I will not tolerate this kind of behavior in any agency, but especially the IRS, given the power that it has and the reach that it has into all of our lives."[1]

Thus, the investigation by Congress into the IRS is recognized as being based on an alleged core violation of federal law and is a legitimate matter for congressional investigation. As part of its Article I powers, Congress has a right to obtain documents and information from responsible officials. Commissioner Koskinen stands accused of lying to Congress and actively obstructing a congressional investigation. While I will assume these allegations are true for the purposes of constitutional analysis, let me stress that I do not have a dog in this fight. I have testified for both parties in the past and, while I voted for President Barack Obama, I have criticized every president in my adult life for executive overreach, including both President George W. Bush and President Barack Obama. Yet, in seeking evidence from the IRS, Congress was engaged in a well-founded exercise of its investigative authority and that investigation was obstructed in terms of misleading statements and lost or missing evidence. I will proceed from that standpoint in exploring the scope and basis for the different options for Congress.

I have previously written,[2] testified,[3] and litigated[4] in the area of impeachment. I have also written about what I view as a rapid and dangerous diminishment of

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[1] Statement of President Barack Obama, The White House, May 15, 2013 (available at https://www.whitehouse.gov/the-press-office/2013/05/15/statement-president).

[2] Jonathan Turley, *"From Pillar to Post": The Prosecution of Sitting Presidents*, 37 AM. CRIM. L.REV. 1049 (2000); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735-790 (1999) (Symposium); Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439 (1999) (Symposium); *see also* Jonathan Turley, *Five Myths About Impeachment*, Washington Post (Sunday), August 3, 2014.

[3] United States Senate, Senate Impeachment Committee, Pre-Trial Motions and Issues in the Impeachment of Judge Thomas Porteous, August 4, 2010 (testimony of Jonathan Turley, lead counsel to Judge Porteous); United States House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, on "The Background and History of Impeachment," November 9, 1998 (testimony of Jonathan Turley); United States Senate, Committee on the Judiciary, Subcommittee on Constitution, Federalism, and Property Rights on "Indictment or Impeachment of the President," September 9, 1998 (testimony of Professor Jonathan Turley).

[4] Senate Trial, Impeachment of Judge Thomas Porteous (lead counsel Jonathan Turley); United States Senate, Senate Impeachment Committee, Pre-Trial Motions and Issues in the Impeachment of Judge Thomas Porteous, August 4, 2010 (testimony of Jonathan Turley, lead counsel to Judge Porteous).

congressional authority in our system.[5] Through years of congressional passivity and acquiescence, presidents have acquired the very concentration of power that the Framers expressly warned against in the drafting and ratification of our Constitution.[6] This shift of power has also coincided with the rise of a "Fourth Branch" of federal agencies that exercise increasingly unilateral and independent powers.[7] The controversy over Commissioner Koskinen falls at the very crossroads of expanding executive power, diminishing congressional authority, and the rise of the Fourth Branch. Indeed, it embodies the current crisis perfectly in an agency refusing clear and proper congressional oversight demands.

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[5] The President's Constitutional Duty to Faithfully Execute the Laws *Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Jonathan Turley). I also testified in 2012 on the controversy surrounding these recess appointments. *See Executive Overreach: The President's Unprecedented "Recess" Appointments Before the H. Comm. on the Judiciary*, 112th Cong. 35-57 (2012) (statement of Professor Jonathan Turley)

[6] *See* Jonathan Turley, *A Fox In The Hedges: Vermeule's Optimizing Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. Rev. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Jonathan Turley, United States House of Representatives, Committee on the Judiciary, "Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution," May 30, 2006.

[7] *See* United States Senate, Committee on Homeland Security and Governmental Affairs, "*The Administrative State: An Examination of Federal Rulemaking*," April 20, 2016 (testimony of Professor Jonathan Turley); "*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*," United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, March 15, 2016 (testimony of Professor Jonathan Turley); *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) (prepared statement of Professor Jonathan Turley); *Enforcing The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (prepared statement of Professor Jonathan Turley); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Professor Jonathan Turley); *see also Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Professor Jonathan Turley). *See also* Turley, *Madisonian Tectonics, supra*, 83 GEO. WASH. L. REV. at 305; Turley, *A Fox in the Hedges, supra*, 93 B.U. L. REV. at 1523; Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); *see also* Turley, *Constitutional Adverse Possession, supra*, 2013 WIS. L. REV. at 965.

What is most notable, and alarming, about the current state of our government is that private litigants like Judicial Watch have been more successful in securing information from the Administration than the United States Congress. Thus, the relatively weak Freedom of Information Act (FOIA) has proven more effective than Article I of the Constitution in forcing disclosures about alleged governmental misconduct. That is a state of affairs that the Framers would never have anticipated, nor condoned. The Administration has effectively foreclosed avenues like the referral of criminal contempt and other sanctions that should be imposed for providing misleading statements to Congress. That leaves Congress with "nuclear options" in seeking to bring this agency to heel. In my view, Congress should not shy away from such a conflict with an agency refusing to cooperate with a congressional investigation.

The current controversy shows vividly the lack of functional deterrence for executive overreach in today's imbalance of power. In economics, deterrence is often achieved by balancing of the rate of detection with the level of a sanction. A rational actor considers both the chances of detection *and* the expected penalty from misconduct. As the rate of detection increases, a lower sanction is needed to reach the optimal level of deterrence. Conversely, when detection is low, sanctions are often increased to achieve the same level of deterrence. What is fascinating is that, in the constitutional setting, the level of detection in these types of conflicts is near one hundred percent—at least for high-profile controversies. When a president exceeds his authority, or a federal agency obstructs Congress, there are often political critics and media reports to flag the violation. The penalty for such violations, sadly, has become more rhetorical than actual. Thus, under the same rational actor theory, there is little reason for an agency to cooperate, much less take difficult actions to conform to congressional demands. The agency head is often looking at potentially high political or legal costs in complying with Congress, while refusing to cooperate avoids those costs at little risk of sanction or penalty. The decision for the rational agency actor is easy: do not cooperate with Congress, unless the cooperation itself carries benefits.

Congress does have the ability to fight back and regain the authority that it has lost. Its remedies include classic legislative measures directed at the executive branch to force compromise, measures such as appropriation denials, legislative showdowns, confirmation delays or denials, and oversight investigations. However, these measures have lost much of their effectiveness in the last few decades. There are also measures that are directed at individual officials who are committing violations, including impeachment, contempt proceedings, censure, and fines. In my view, all of the latter options are available to Congress as a constitutional matter in the Koskinen controversy. Indeed, as the authority of Congress is curtailed vis-à-vis the President and federal agencies, these individualized measures become more compelling as a vehicle of reasserting congressional checks and balances.

II. The Constitutional Options Available To Congress In Responding To Official Misconduct or Contempt.

The very heart of our constitutional system is the Separation of Powers doctrine. The Separation of Powers sought to combat the central, overriding danger foreseen by the Framers: the concentration of power in one person or one branch. To achieve balance

between the branches, the Framers gave each branch essential powers to protect its inherent powers. In Federalist No. 51, James Madison explained the essence of the separation of powers—and the expected defense of each branch of its constitutional prerogatives and privileges:

> "But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."

While Madison had a very practical view of political and factional interests, he did not anticipate the degree to which partisan affiliation would overwhelm institutional interests in modern politics. He assumed that "ambition" would work to defend the institutional prerogatives of each branch. That has certainly been the case with the Executive Branch, which has historically resisted any encroachment of Article II powers while actively seeking to usurp traditional legislative powers. Conversely, Congress has become passive in the assertion of its own authority, particularly in the last few decades. The degree to which members of Congress have become the agents of their own obsolescence is staggering. Members now routinely applaud their own circumvention, and oppose efforts to force officials to conform to the system of checks and balances.[8]

The defining power given to Congress within this system is the power of the purse. While the President may control the machinery of the state, it is Congress that supplies the gas needed to run those machines. The power of the purse, however, has become something of a constitutional myth in modern government. Presidents know that Congress is unlikely to cause a cascading failure by cutting off all funding for an agency or even a sub agency office. More importantly, the Executive Branch routinely moves billions of dollars around in discretionary or undesignated funding. Cutting off funding to a given part of the government does not have immediate impacts, and may in fact not prevent funding as intended. An example that I have previously discussed is the health care budget. As the *Washington Post* reported, "[t]he Obama administration plans to use $454 million in Prevention Fund dollars to help pay for the federal health insurance exchange. That's 45 percent of the $1 billion in Prevention Fund spending available [in 2013]."[9] Even leading Democratic members denounced this act as "a violation of both

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[8] It was not long ago that Congress fought jealously for its institutional rights. Thus, during the Reagan Administration, the Congress held EPA Administrator Anne Gorsuch Burford in contempt for failing to turn over documents related to the Superfund program. HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, CONTEMPT OF CONGRESS, H.R. REP. NO. 968, 97th Cong., 2d Sess. 7 (1982). The documents were eventually turned over and Burford resigned. Rita Lavelle, who headed the Superfund program, was also held in contempt in 1983 and later indicted for lying to Congress. She was sentenced to six months in jail. Cass Peterson, *House Finds Rita Lavelle in Contempt*, Wash. Post, May 19, 1983.

[9] Sarah Kliff, *The Incredible Shrinking Prevention Fund*, WASH. POST, April 9, 2013.

the letter and spirit of this landmark law."[10] However, that open disregard of the power of the purse resulted in nothing of consequence for the Administration. Likewise, when President Obama declined to ask Congress for authority to go to war in Libya, the Administration funded an entire military campaign by shifting billions in money and equipment without asking Congress for a cent. President Obama not only said that he alone would define what a war is in circumvention of the declaration power, but also unilaterally funded the war as just another discretionary expense. Federal appropriations have become so fluid, and discretionary spending so lax, that presidents are now more insulated than ever before from the threat of de-funding. This is not to say that the power of the purse has no potential hold on Administrations. Congress needs to be more specific on the use of funds, while also reducing the degree to which funds are given for discretionary uses, particularly during periods of circumvention and tension.

Congress has also found that direct legislative action is often unavailing when an administration is already circumventing Congress. Moreover, courts routinely bar access to judicial review through artificially narrow standing rules. When such measures are thwarted, Congress often must consider more direct action against federal officials who violate the law.

A. Contempt Sanctions.

One of the most disturbing areas of erosion of congressional remedy is the effective loss of the ability to hold executive officials in contempt without the approval of the Administration.[11] The Justice Department has declined to submit contempt cases to the grand jury in the cases of Environmental Protection Agency Administrator Anne Gorsuch Burford (1982), White House Counsel Harriet Meirs (2008); White House Chief of Staff Joshua Bolten (2008), and Attorney General Eric Holder (2012). The case against former Attorney General Eric Holder is a prototypical example. The current Administration refused to turn over material to oversight committees, and the House moved to hold Holder in contempt. In my view, this was in flagrant contempt of Congress. The Justice Department however blocked any prosecution of its own Attorney General—refusing to even submit the matter to a grand jury. Thus, while the executive branch has long insisted that only it can prosecute such offenses, it has used this authority to block its own investigation or prosecution. The Administration then tried to block any lawsuit by Congress to enforce a subpoena against Holder.[12] This case is another

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[10] Statement of Sen. Tom Harkin, *The Importance of the Prevention Fund to Save Lives and Money*, May 7, 2013 ("Mr. President, I was deeply disturbed, several weeks ago, to learn of the White House's plan to strip $332 million in critical funding from the Prevention and Public Health Fund and to redirect that money to educating the public about the new health insurance marketplaces and other aspects of implementing the Affordable Care Act.")

[11] I previously discussed the need to revisit contempt procedures and powers in the Senate Judiciary hearing on the nomination of Attorney General Loretta Lynch. *Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Professor Jonathan Turley).

[12] *See Comm. on Oversight and Gov't Reform v. Holder*, 2013 WL 5428834 (D.D.C.

example of how the executive branch has gutted the oversight power by taking control over all contempt prosecutions.

The blocking of any referral to the grand jury in the Holder matter (and other cases) represents a classic bait and switch. Congress has the right to find officials in "inherent contempt" and actually hold trials to that effect.[13] Indeed, an inherent contempt proceeding was held as recently as 1934.[14] The Justice Department has long bristled at the notion of contempt proceedings handled by the legislative branch, while supporting the use of the criminal contempt process, created in 1857, whereby a house approves a contempt citation, at which point either the Speaker of the House or Senate President certifies the citation to the United States Attorney for the District of Columbia under 2 U.S.C. § 194 (2000). This system is based on assurances from the Justice Department that it would be a neutral agent in advancing such claims. In recent years, however, the Justice Department has shown that it is not fulfilling its duty to be a neutral agent when asked to prosecute officials in its own Administration.

The inherent powers of Congress, while long dormant, remain capable of enforcement. Indeed, the Supreme Court has long recognized the inherent contempt power. In *Anderson v. Dunn*,[15] the Court dismissed a civil action brought by a contumacious witness. The Court noted in a statement, which now seems tragically prophetic, that the denial of such inherent authority would lead:

> ... to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the

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Sept. 30, 2013). In *Holder*, the House Committee on Oversight and Government Reform sought to enforce a subpoena seeking information related to the "Fast and Furious" operation by the Bureau of Alcohol, Tobacco and Firearms. Notably, the House of Representatives then passed authorization of the Chairman of the Oversight and Government Operations Committee to initiate the civil lawsuit and the court refused to deny the lawsuit on standing grounds. The Court ruled that "[t]o give the [executive] the final word would elevate and fortify the executive branch at the expense of the other institutions that are supposed to be its equal, and do more damage to the balance envisioned by the Framers than a judicial ruling on the narrow privilege question posed by the complaint." *Id* at 8.

[13] This investigatory authority admittedly got off to a rocky start in *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880), where the Supreme Court questioned "the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges." *Kilbourn*, however, involved a private business venture in which the federal government had invested. That case involved the imprisonment of a businessman, who was later released by a federal court. However, by 1927, in *McGrain v. Daugherty*, , the inherent authority of Congress to pursue such investigations was strongly affirmed in its handling of the Teapot Dome scandal.

[14] MORTON ROSENBERG & TODD B. TATELMAN, CONG. RESEARCH SERV., RL34114, CONGRESS'S CONTEMPT POWER: A SKETCH 7 (2007).

[15] 19 U.S. (6 Wheat) 204 (1821).

> majesty of the people, and charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every corner of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire, that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.[16]

While the courts would curtail inherent contempt authority to keep its use confined to legislative matters,[17] it was affirmed as inherent to the legislative investigatory powers that must be exercised by Congress.

In 1927, the Supreme Court in *McGrain v. Daugherty* reaffirmed the inherent authority of Congress, as well as the insufficiency of having legislative authority without such means of enforcement:

> "While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete, so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period, the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus, there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised."[18]

This authority includes the prosecution of witnesses who refuse to answer questions or supply information to Congress.[19] The courts have continued to recognize that authority, even as the Executive Branch has assumed effective control over its use.[20]

In one of the most recent confrontations, it was a Democratically controlled House of Representatives that sought prosecution for contempt of Bush Administration officials. Following the dismissal of nine United States Attorneys in 2006, both the House and Senate Judiciary Committees sought testimony and documents to address allegations that the dismissals were politically motivated. While the Bush White House

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16 *Id.*

17 *See, e.g.*, *Marshall v. Gordon*, 243 U.S. 521, 536 (1917).

18 273 U.S. 135, 174-75 (1927).

19 *Sinclair v. United States*, 279 U.S. 263 (1929).

20 *See, e.g.*, *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008) ("In short, there can be no question that Congress a right – derived from its Article I legislative function – to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas.").

offered interviews conducted behind closed doors for former White House Counsel Harriet Miers and other officials, it would not agree to transcribed interviews, nor to the release of all of the documents sought by the committees. On June 13, 2007, the House Judiciary Committee issued two subpoenas. The first named Miers to both give testimony and produce documents.[21] The second was directed to White House Chief of Staff Joshua Bolten for the production of documents. President George W. Bush then asserted executive privilege to withhold both the testimony and the documents. That led on July 25, 2007, to the adoption of recommendation for contempt citations for Bolten and Miers by the full House Judiciary Committee and, on February 14, 2008, to a vote of contempt by the full House.[22] After certification by then Speaker Nancy Pelosi of the contempt vote to then United States Attorney for the District of Columbia Jeffrey Taylor, the Attorney General announced that (because the Administration was deemed correct in its use of Executive Privilege), "the [Justice] Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers."[23] This led to the Miers litigation. The refusal to bring the claim to the grand jury captured the breakdown of the agreement between the branches over the use of statutory criminal contempt procedures. The Executive Branch has steadily expanded its view of the Executive Privilege, and even cited its own view to bar the investigation of its own officers.

This same circular process was seen in the Fast and Furious controversy. The Obama Administration claimed that material may be withheld from Congress under a dubious deliberative process claim " regardless of whether a given document contains deliberative content" because release of such material would raise "significant separation of powers concerns." So, the Administration (with the guidance of the Justice Department) first invokes overbroad executive privilege claims and then, when Congress seeks contempt prosecution, it cites its own overbroad executive privilege claims as the basis for refusing to give the matter to a grand jury. What is particularly breathtaking is that the Administration, itself, would confirm the non-privileged status of documents wrongly withheld from Congress, while still insisting that no grand jury could find such conduct the basis for a contempt charge.

The current status of contempt powers in Congress is clearly untenable. In my view, the Justice Department is in flagrant violation of its assurances to Congress in seeking a statutory contempt process. It has taken roughly 200 years since *Anderson v. Dunn*, but the Justice Department has achieved in statutory criminal contempt what the Court feared with regard to inherent contempt: "the total annihilation of the power of the House of Representatives to guard itself from contempts, and leave[] it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it." In gutting the contempt enforcement powers of Congress, the Justice Department has forced Congress to repeatedly consider more extreme measures, including impeachment, for cases that should have been addressed through the contempt process.

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21 *Miers*, 558 F. Supp. 2d at 61.

22 154 Cong. Rec. H962 (Feb. 14, 2008) (registering a final vote of 223 to 32).

23 Letter from Attorney General Michael B. Mukasey to Representative Nancy Pelosi, Speaker of the House 2 (Feb. 29, 2008), online at http://judiciary.house.gov/hearings/pdf/Mukasey080229.pdf (visited Sept 1, 2009).

B. Censure.

When presented with situations of misconduct, but unwilling to vote for impeachment or removal, some members have sought to use the lesser measure of censure. This was the case during the Jackson and Clinton scandals, where members sought to avoid impeachment through such censures. The Constitution does not mention censure as an alternative to impeachment, and the impeachment clause is the only reference to the power of Congress to punish members of the executive and judicial branches. The case for censure has been defended on the notion that the lesser is included in the greater: if Congress can remove an official, it can also take lesser steps like censure in responding to misconduct. To be clear, I do not favor censure measures as part of impeachment proceedings. If wrongdoing is sufficient to justify impeachment, the official should stand trial in the Senate. Censure is something of a "cheat" if it is framed as a type of "impeachment-lite" alternative. Moreover, if the House is proceeding under a derivative of impeachment, the question is whether the other procedures inherent to the impeachment clause also apply. This includes the need for both Houses to act before any measures are taken against an official.

I do not, however, believe that censure should be treated as a creature of impeachment rather than part of the inherent power of Congress. After all, the investigatory powers of Congress and the right to hold individuals in contempt are viewed as inherent authority under Article I. Just as courts have wide inherent powers in dealing with false testimony or obstructive behavior (from fines to referrals to jailing), Congress presumably has a similar range of options. Indeed, it is ironic to see the same Executive Branch officials who have argued for expansive readings of Article II powers object that a vote of censure of a house is impermissible absent express textual authority. Advocates of executive power have little difficulty in finding sweeping implied powers for presidents in carrying out their duties under Article II. Yet, when Congress must use devices like censure or fines to address misconduct in congressional investigation, the Constitution suddenly becomes a strictly textualist matter for those same advocates.

Censure is also consistent with long-standing practices of Congress in carrying out its role in areas of foreign relations and oversight. Both houses regularly express the sentiment of their body on the actions of countries or individuals. Censure is first and foremost a condemnation, a finding of a house that an official has violated his or her duties as a federal officer. A censure is a finding as to an individual's actions as opposed to that of an agency. Unlike a parliamentary vote of "no confidence," a censure vote in the United States does not force a removal from office and does not alone impose a material form of punishment. As such, it is not a power resting in the impeachment clause under Article I, Section 2. Dozens of such measures expressing no confidence, condemnation, "reproof,"[24] or censure have been passed in Congress.[25]

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[24] It was "reproof" that the House used to describe the conduct of President Buchanan for alleged kickbacks in Navy contracts. Congressional Globe, 36th Congress, 1st Sess. 2951 (June 13, 1860) ("*Resolved,* That the President and Secretary of the Navy, by receiving and considering the party relations of bidders for contracts with the United States, and the effect of awarding contracts upon pending elections, have set an example dangerous to the public safety, and deserving the reproof of this House.").

In my view, either house can move to a censure or no confidence resolution at any time. Indeed, should an impeachment fail in the House, or an acquittal occur in the Senate, members could move for such a statement of condemnation to be made in the regular course of business. Ideally, it would not be treated as part of those impeachment or trial proceedings. This may seem a precious distinction, but I believe that it is a valid one. First and foremost, it discourages members from creating *ad hoc* penalties within the context of an impeachment to avoid the serious and difficult decision left to the House under the Constitution. To be frank, my concern is that impeachment votes would go the same way as declarations of war. Once Congress allowed itself to avoid declarations in favor of loosely worded authorizations, the clarity and commitment sought by the Framers for war was lost.

Of course, when faced with such a limited choice, the result may prove highly disadvantageous for the accused. For example, members moved for the censure of U.S. District Court Judge Harold Louderback as an alternative to impeachment in 1933. That move was criticized by Rep. Earl Michener of Michigan, who objected "I do not believe that the constitutional power of impeachment includes censure."[26] Whether the body agreed with the jurisdictional point, or just felt Louderback warranted impeachment, the censure measure was defeated and the House impeached Louderback. Although a case can be made for the "lesser included in the greater" penalty, it is a better practice to separate the two measures. Impeachment in the House is meant to determine if sufficient grounds exist for trial and possible removal. The Senate trial is meant to determine if there is sufficient evidence for conviction and removal. A censure is an act of either, or both houses, to express condemnation as part of their inherent authority. It can be based on the full record, including the record produced in any impeachment proceeding.

Thus, while I have qualms over the use of censure as part of the impeachment process, a vote of censure in my view is well founded as within the inherent powers of Congress. Congress has oversight authority over executive agencies and exercises investigatory authority over violations of federal laws. To say that a house cannot vote to censure federal officials is to suggest that it can never presume to criticize or condemn a president or federal official. For these academics, it is either impeachment or silence. Thus, a house can condemn agencies and it can condemn actions. Yet, it is somehow barred from condemning individuals? Congress represents citizens through legislative findings and actions. To voice the sense of a house on the conduct of either a federal agency or official is a traditional legislative act. It is part of the open and deliberative exchange, not only between the branches, but also between the branches and the American people. Thus, I believe that, if the House finds that Commissioner Koskinen has given false testimony, or obstructed its investigation, or simply engaged in gross

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[25] Jack Maskell & Richard S. Beth, *"No Confidence" Votes and Other Forms of Congressional Censure of Public Officials*, Congressional Research Service 4 (June 11, 2007).

[26] 3 *Deschler's Precedents of the U.S. House of Representatives* [*Deschler's Precedents*], Ch. 14, §1.3, p. 400 (1977).

mismanagement or negligence, it has the authority to censure him for such alleged misconduct.

C. Fines and Financial Penalties.

Congress can also impose fines or other financial penalties for conduct that does not rise to the level of an impeachable or a criminal offense as part of a statutory scheme or as part of its implied authority. For federal employees, pensions and salaries can be conditioned on neutral and generally applied performance standards. Congress could, for example, pass legislation that denies salary or pension payments to officials found in contempt of Congress. A more difficult question is the imposition of fines for acts of contempt. In my view, a strong argument can be made for such inherent authority. Congress exercises many implied powers necessary to carry out its legislative functions. For example, Congress can compel the appearance of witnesses and the production of documents, despite the lack of any express authority under Article I for such measures.[27] As noted above, Congress retains the power to prosecute contempt, and once exercised, also retains its right to jail violators. Given the history and recognized functions, the analogy to the implied court powers is compelling.[28] Like courts, Congress could claim the same inherent authority in dealing with obstructive or contemptuous conduct. Fines, moreover, would appear well within the scope of congressional power previously accepted by the courts. I have strongly encouraged Congress to hold a comprehensive hearing on both creating new means for addressing contempt as well as exploring long dormant means. Ideally, Congress would deal comprehensively with such powers, including the loss of contempt prosecutions, as part of a long-overdue examination of this area with a possible eye toward legislation.

When resolutions of censure are combined with fines or loss of pensions, additional issues arise. The latest version of the bill says only that Commissioner Koskinen "should" lose his pension, but it does not appear to actually negate those benefits. If a pension has vested interest under laws like the Civil Service Retirement System (CSRS) or the Federal Employee Retirement System (FERS), such action can run afoul of due process or bill of attainder[29] protections. Article I, Section 9, clause 3, is an express limitation on Congress that "No Bill of Attainder or ex post facto Law shall be passed." I was lead counsel in the last successful bill of attainder challenge in striking down the Elizabeth Morgan Act.[30] The *ex post facto* problems even came up with regard to the Hiss Act in a challenge by Alger Hiss.[31] Any punishment or penalties must be carefully considered and part of a neutral, generally applicable law. The Congress has

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[27] *See McGrain v. Daugherty,* 272 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178, 187, 200 (1957)

[28] *See, e.g., Spallone v. United States*, 493 U.S. 265, 276 (1990) (upholding implied powers of courts to enforce orders in cases of); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (reaffirming the inherent power of a court to assess attorney's fees).

[29] *See* U.S. Const., Art. I, sections 9 & 10.

[30] *Foretich v. U.S.*, 351 F.3d 1198 (D.C. Cir. 2003).

[31] *Hiss v. Hampton*, 338 F. Supp. 1141, 1148-1149 (D.D.C. 1972) ("The question is simply whether the Constitution permits Congress to deprive them of their annuities by retroactive penal legislation. We conclude that it does not.").

passed laws, like the Hiss Act, which allow for the loss of pensions and benefits of federal employees.[32] That Act was designed, however, to address criminal acts like those involving Alger Hiss, who was accused of perjury and spying. An act of censure does not constitute a criminal conviction. That does not mean that Congress cannot establish non-criminal conditions for the loss of pensions, but once such pensions have vested, the removal of such benefits raise legitimate issues. Financial penalties move censure measures into a different and more challenging framework for analysis, particularly if attempted retroactively rather than prospectively.

D. Impeachment.

The ultimate authority in addressing such misconduct is found in the impeachment power. I have written extensively on my views of the history and meaning of the impeachment power. Without repeating that previously cited research and testimony, I would like to address two issues which have been raised with regard to the Koskinen controversy. As an initial matter, three impeachment provisions are at issue in such cases:

> **Article I, Section 2**: The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.
>
> **Article II, Section 4**: The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.
>
> **Article I, Section 3**: The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

It is Article II, Section 4 that concerns today's discussion as constituting the standard for impeachment in the House of Representatives.

1. The Alleged Necessity of A Crime For Impeachment. Some have argued that Commissioner Koskinen must be accused of criminal conduct to be impeached. Indeed,

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[32] P.L. 83-769, 68 Stat. 1142 (Sept. 1, 1954), see now 5 U.S.C. §§ 8311 et seq. *See also* the Honest Leadership and Open Government Act of2007, P.L. 110-81, 121 Stat. 735 (September 14, 2007), and amended by the
STOCK Act in 2012, P.L. 112-105, 126 Stat. 301-303 (April 4, 2012) (loss of pensions by members of Congress).

some have argued that impeachment requires a felony or serious crime as a precondition. In my view, this is a long-standing misconception of the standard. It was raised unsuccessfully in the impeachment proceedings with regard to President Bill Clinton. As I have previously written, the impeachment standard requires no such threshold showing. Indeed, in my representation of Judge Thomas Porteous in the last impeachment trial in the Senate, we faced a variety of claims that were not crimes and, in some cases, were arguably not violations of the judicial ethics rules in place at the time.

I have previously discussed how "American impeachments stand on English feet."[33] Historically, impeachments in England for high crimes and misdemeanors encompassed a wide range of conduct traditionally considered noncriminal.[34] Under this standard:

> "Persons have been impeached for giving bad counsel to the king; advising a prejudicial peace; enticing the king to act against the act of parliament; purchasing offices; giving medicine to the king without advice of physicians; preventing other persons from giving counsel to the king, except in their presence... Others ... were founded in... malversations and neglects in office; for encouraging pirates; for official oppression, extortions, and deceits; and especially for putting good magistrates out of office, and advancing bad."[35]

Impeachments were viewed as a critical check or tool against executive encroachments and abuse.[36] This included the grounds of "maladministration" and other noncriminal acts.[37]

The Framers relied heavily on the English precedent in crafting our own impeachment standard, though the constitutional convention debates do not clearly answer many of the questions raised over the decades on the meaning of "high crimes and misdemeanors." The most relevant exchanges occurred on a single day, and are found on only a couple pages of record. There was an effort to add the term "or maladministration" after "bribery."[38] Here is the exchange:

> "The clause referring to the Senate, the trial of impeachments agst. the President, for Treason & bribery, was taken up.
>
> Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offense. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined - As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.
>
> He movd. to add after 'bribery' 'or maladministration.'

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33 Turley, *Senate Trials and Factional Disputes*, *supra*, at 9.

34 *Id.* at 9-15.

35 2 Joseph Story, Commentaries on the Constitution of the United States 798, at 269 (Fred B. Rothman & Co. rev. ed. 1991) (1883).

36 *Id.* at 21.

37 *Id.* at 20.

38 *Id.* at 34-36.

> Mr. Gerry seconded him -
>
> Mr. Madison[.] So vague a term will be equivalent to a tenure during pleasure of the Senate.
>
> Mr. Govr Morris[.] It will not be put in force & can do no harm - An election of every four years will prevent maladministration.
>
> Col. Mason withdrew 'maladministration' & substitutes 'other high crimes & misdemeanors' ('agst. the State').
>
> On the question thus altered [Ayes - 8; Noes - 3]"[39]

Thus, Madison objected to the standard and ultimately favored the English standard of "high crimes and misdemeanors." However, as I have previously written, Madison later interpreted the impeachment standard to include "maladministration." Indeed, maladministration would be repeatedly cited in impeachment cases extending into the twentieth century. Likewise, Madison described impeachment as a way of addressing "the incapacity, negligence or perfidy of the chief Magistrate."[40] Similarly, Alexander Hamilton referred to impeachable offenses as "those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."[41]

Of course, it is easy to dismiss any guiding standard since an impeachment vote is effectively unreviewable by the courts. Thus, many have cited the seemingly dismissive statement of Gerald Ford when he was a member of the House that "[a]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."[42] While I do not believe that Ford was as flippant as many have suggested,[43] it is certainly true that each member must decide if the conduct of a federal official rises to the most serious levels of misconduct to warrant impeachment. The standard was left generalized, but not open-ended for members. Members take an oath to faithfully adhere to the Constitution, and they are obligated to ensure that federal officials are not impeached for mere policy disagreements or relatively common conflicts between the branches. Impeachment is a vital protection against abuse and tyranny, but it

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[39] *See generally id.* at 36.

[40] *Id.* at 36-37.

[41] The Federalist No. 65, at 396.

[42] 116 Cong. Rec. 11,913 (daily ed. April 15, 1970). The whole quote is "[a]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results in whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office."

[43] Ford later added, "[t]o remove [the President and Vice President] in midterm ... would indeed require crimes of the magnitude of treason and bribery." *Id.*

can also become the very thing that it was designed to combat. Impeachment power can become a type of tyranny of the majority when used to simply express anger or disagreement with an Administration.

The question of whether Commissioner Koskinen's conduct amount to a "high crime and misdemeanor" would depend on the view of members as to his intent in supplying allegedly false information to Congress, or his failing to act in accordance with congressional subpoenas. There should be no question that an act of perjury or obstruction of Congress would constitute impeachment offenses. These cases can become more difficult when an official is acting under a mistaken view of his duties vis-à-vis Congress. The courts have made an unholy mess of the area of executive privilege and presidential powers. To the extent that an official acts according to such interpretations, it would be difficult to view such actions as reaching the level of an impeachable offense. A distinction can be drawn with the Holder controversy. I viewed Holder's arguments of privilege to be transparently weak and opportunistic.

A case for impeachment can also become more difficult when an official is claiming negligent, but not intentional, misconduct. It will sometimes fall to members to decide whether such actions are truly negligent, or rather acts of "willful blindness." The failure to fully preserve evidence or fully comply with a subpoena is still obstruction if an official intentionally avoids learning of information or withholds necessary orders to comply with Congress. Congress has previously treated willful blindness or deliberate indifference as the same as knowledge in criminal provisions.[44] A subpoena does not allow for a passive aggressive response. The recipient is expected to take the necessary steps to fulfill his or her obligations of preservation and disclosure. I have been counsel in cases where government officials have engaged in willful blindness in the loss of critical evidence. It is for this reason that courts often extend the scienter or intent element in both crimes and torts to include reckless conduct. Thus, a drunk driver may not have intentionally killed a family in a DUI accident, but he is still guilty of the crime if he showed carelessness or a reckless disregard for the safety of others. Impeachable offenses may be based on the same recklessness or willful blindness in the carrying out of public duties.

2. The Limitation of Impeachment To Presidents, Vice Presidents, and Cabinet Officers. It has also been suggested that impeachment does not extend to subcabinet officers like Commissioner Koskinen. This view is fundamentally mistaken and, in my view, finds no support in the text or the history of the impeachment. Article II of the United States Constitution states in Section 4 that "The President, Vice President, and all civil Officers of the United States shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other High Crimes and Misdemeanors." It does not confine the language to cabinet members. That view was also reflected in the comments of critical figures like Joseph Story, who wrote:

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[44] H.R. REP. NO. 610, 100th Cong., 2d Sess. 6 (1988) (noting that "the concept of willful blindness or deliberate ignorance" is consistent with "the normal 'knowing' standard used in many Federal and state criminal statutes." (citing 18 U.S.C. §§ 1028, 1341, 1344 (1988)).

> "All officers of the United states [] who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment."[45]

While there were those who expressed concern over the potential wide scope of officials subject to impeachment,[46] the broader view of the clause as extending beyond department heads is well established in the text and history of the Constitution.

While it is clearly "unprecedented" to impeach a non-cabinet member, it was unprecedented until 1876 to impeach anyone other than a president or judge. We have had only one such case: the impeachment of Secretary of War William Belknap for corruption.[47] Belknap was charged with accepting bribes for contracts associated with the Indian Territory. He was charged with having "disregarded his duty as Secretary of War, and basely prostituted his high office to his lust for private gain."[48]

Putting aside the clear language covering "all civil Officers," the use of the cabinet as a limiting principle would be arbitrary and bizarre. The makeup of the cabinet has changed over time, as has the definition of a "department." George Washington had only four cabinet members, and the number of both departments and cabinet members have fluctuated over time. The Constitution does refer to the "principal Officer in each of the executive Departments"[49] or "Heads of Departments"[50] in discussing Article II offices. These are not part of the impeachment provisions, and should be read in their historical and textual context. In 1790, the federal government had 1,000 non-military members.[51] That makes the entire federal government smaller than the headquarters of the Internal

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[45] Joseph Story, II Commentaries on the Constitution of the United States §790 (1833).

[46] Raoul Berger, *Impeachment of Judges and Good Behavior Tenure*, 79 YALE L. J. 1475 (1970) (statement of Archibald Maclaine) (""[i]t appears to me ... the most horrid ignorance to suppose that every officer, however trifling his office, is to be impeached for every petty offense ... I hope every gentleman ... must see plainly that impeachments cannot extend to inferior officers of the United States.").

[47] Belknap was notable for another reason. Belknap resigned just before the House's impeachment vote, but was still impeached. See House Comm. on the Judiciary, 93rd Cong., Selected Materials on Impeachment 143 (Comm. Print 1973). He argued at his Senate trial that his resignation meant he was no longer a civil officer subject to impeachment, but that defense was rejected and a majority voted for conviction.

[48] Staff of House Comm. on the Judiciary, 93rd Cong., Constitutional Grounds for Presidential Impeachment 49-50 (Comm. Print 1974) [hereinafter Constitutional Grounds] (quoting the third article of impeachment).

[49] See Article II, Section 2, Clause 1

[50] See Article II, Section 2, Clause 2. Likewise, the Twenty-fifth Amendment refers to "principal officers of the executive departments."

[51] WALTER VOLKOMER, AMERICAN GOVERNMENT (11th ed. 2006).

Revenue Agency. Today we have over a dozen departments, almost six-dozen agencies[52], and hundreds of non-military sub agencies.[53] What constitutes a "department" to be listed in 5 U.S.C. § 101 is a meaningless criterion. Massive agencies are not technically headed by a "secretary" but exercise sweeping and largely independent authority over parts of the country and its economy. To suggest that the IRS Commissioner does not constitute a high enough official for the purposes of impeachment ignores the realities of the modern regulatory state. The Commissioner has authority over roughly 90,000 employees collecting roughly $2.5 trillion in tax collection from almost 250 million returns each year. Commissioner Koskinen was appointed by the President and confirmed by the Senate. To say that such a person is not a "civil officer" for the purposes of impeachment is a dubious claim. While there is an open question of how far impeachment would reach a lesser functionary, there is no question in my view as to Commissioner Koskinen.

The attempt to exclude agency heads from the range of impeachable officials defeats the purpose of the impeachment power. In the 1876 trial of Secretary of War William Belknap, Senator Maxey of Texas stressed that "this Supreme punishment is . . . inflicted not only to get rid of a bad man in office... but chiefly, by fearful example, to teach all men that American institutions and the perpetuation of free government, of the people, by the people, and for the people, demand purity in office."[54] The Framers wanted to leave Congress with the ability to remove executive officials who were abusing their authority, rather than wait four years in hopes of a changing administration. These were practical and thoughtful men. They would not have created such a power and then coupled it with criteria that would produce arbitrary results. Indeed, a president could insulate his Administration from the threat of impeachment by going back to a handful of departments. While Commissioner Koskinen may have compelling defenses to the counts of impeachment, a threshold challenge based on the status of his agency in the structure of government would be unavailing in my view.

V. Conclusion

John Stuart Mill wrote:

> "[T]he proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust . . . to expel them, and either expressly or virtually appoint their successors."[55]

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[52] UNITED STATES GOVERNMENT, INDEPENDENT AGENCIES & GOVERNMENT CORPORATIONS, http://www.usa.gov/Agencies/Federal/Independent.shtml (last visited July 9, 2012).

[53] OFFICE OF PERS. MGMT., FEDERAL AGENCIES LIST, http://www.opm.gov/Open/Apps/Agencies/ (last visited July 9, 2012).

[54] Michael J. Broyde & Robert A. Schapiro, Impeachment and Accountability: The Case of the First Lady, 15 Const. Commentary 479, 489 n.52 (1998).

[55] J.S. Mill, Considerations on Representative Government 42 (1875).

One of the most defining duties of the House is to protect the public from abuse, corruption, and, in the most extreme circumstances, tyranny. It has the ability to expose wrongdoing and to force accountability from government officials. Yet, over the last few decades, Congress as a whole has allowed its authority to atrophy. The combination of executive overreach, legislative passivity, and judicial avoidance has now created a dangerous imbalance in our system. There is a lack of deterrence that is evident today in the routine refusals of agencies to produce information to Congress and the defiance of federal officials in the face of congressional investigations.

If our system is to function, Congress must matter. Congressional subpoenas must be enforceable and contemptuous conduct must be punishable. Commissioner Koskinen has every right to be heard fully on these allegations of misconduct. Congress, however, has the means to punish misconduct if it determines that these allegations are substantiated. The question is not the means, but the will to use them.

Thank you again for the honor of testifying before you today. I am happy to answer any questions that you may have.

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Mr. GOODLATTE. Thank you, Mr. Turley. Mr. McCarthy, welcome.

Mr. MCCARTHY. Thank you, Mr. Chairman, Congressman Nadler. Mr. Chairman, let me just clarify, I am not associated with the Foundation for Defense of Democracies, and have not been——

VOICE. You have to push the button.

TESTIMONY OF ANDREW C. McCARTHY, FORMER ASSISTANT U.S. ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. MCCARTHY. Okay, thank you. I just wanted to clarify, I do not have affiliation with that organization. I was a Federal prosecutor in the Southern District of New York for a little over 18 years, retiring from the Justice Department in 2003 as the Chief Assistant U.S. Attorney in charge of the Southern District satellite office.

Since retiring from the Justice Department, I have been a writer focusing on matters of law enforcement, national security, constitutional law, politics, and culture. Conceitedly, I tend to come at policy matters from a conservative or constitutionalist perspective. Nevertheless, I have always believed the application of legal principles and precedent should be a nonpartisan endeavor, just as it was when I was a prosecutor.

In my post-Justice Department career, I have written several books. One, called Faithless Execution, is about impeachment. The Framers saw impeachment as an "indispensable" tool, to quote James Madison, in the constitutional framework of divided authorities, which obliges Congress to police executive overreach.

The principal purpose of the Constitution is to limit the power of government to intrude on the liberties and suppress the rights of the American people. Separation of powers is the primary way the Constitution guarantees these liberties and rights.

Thus, the Framers were deeply worried that maladministration, including overreach, lawlessness or incompetence, could inflate constitutionally limited executives into authoritarian rogues would could undermine our constitutional order.

The Framers settled on high crimes and misdemeanors, a standard elaborated on by Alexander Hamilton, who said that these were offenses which proceed from the misconduct of public men, or in other words, from abuse or violation of some public trust. They are of a nature which may, with peculiar propriety, be denominated political, as they relate chiefly to the injuries done immediately to the society itself.

I am quite sympathetic to Congressman Nadler's remarks about the difficulty of fixing the standard, and I think the difficulty of fixing it is because the standard in each individual case has to balance three different things: the gravity of the misconduct or incompetence alleged, the culpability of the official at issue, and the duty of Congress, and I think this is the one that is underrated the most and needs to be emphasized, the duty of Congress to uphold the constitutional order in light of those two considerations.

Impeachment is one of the principal checks on the damaging tendency toward agglomeration of executive power. Executive overreach invariably involves the usurpation of congressional power, the misleading of Congress, and the abuse of the authority granted to the executive by Congress. The Framers thus expected that law-

makers would have an incentive to defend both the American people and the institution of Congress, notwithstanding partisan ties to the President, or the executive branch.

Nevertheless, it must be stressed that impeachment is a political remedy, not a legal one. Consequently, regardless of how clearly the legal requirement of high crimes and misdemeanors is established, impeachment and removal as a practical matter will not occur absent sufficient public consensus to induce the Senate to remove the official at an impeachment trial.

Impeachment cases must be built politically by aggressive congressional exposure of executive misconduct. If they are not, it is a mistake for Congress to proceed with impeachment, even if lawmakers are in a position to prove many instances of misconduct.

There is, of course, a caveat here. The degree to which political support must be built varies directly with the degree of political connection between the public and the executive branch official in question. The public has a great political investment in a President, the official in whom the Constitution vests all executive power. To take the case of President Obama, for example, the American people have elected him not once, but twice. The public has considerably less political investment in an unelected subordinate official responsible for carrying out the duties of critical executive agencies, the power of which had been abused.

In the latter situation, it is a duty of the President to take action to discipline or terminate the rogue executive agency officials. If the President fails in this duty, it is essential that Congress take action. Thank you, Mr. Chairman.

[The prepared statement of Mr. McCarthy follows:]

Testimony of Andrew C. McCarthy
House Judiciary Committee

Hearing on: "Examining the Allegations of Misconduct Against IRS Commissioner John Koskinen, Part II"

June 22, 2016

Chairman Goodlatte, Ranking Member Conyers, members of the committee, my name is Andrew C. McCarthy. For over eighteen years, I was a federal prosecutor in the Southern District of New York, retiring from the Justice Department in 2003 as the chief assistant United States attorney in charge of the Southern District's satellite office (which oversees federal law enforcement in six counties north of the Bronx).

During my tenure in the office, I investigated, tried and supervised the prosecution of numerous criminal cases, running the gamut from organized crime and narcotics trafficking through political corruption and terrorism. In addition, I held various executive staff positions in the office, including deputy chief of the appellate unit, in which I wrote and edited briefs submitted by the United States to the Court of Appeals for the Second Circuit, and prepared other prosecutor for oral argument (in addition to writing briefs and presenting oral argument in numerous of my own cases).

During my Justice Department Service, I was twice awarded the Justice Department's highest honors: the Attorney General's Award for Distinguished Service in 1987 for the "Pizza Connection" organized crime and international narcotics trafficking case targeting the Sicilian mafia, and the Attorney General's Award for Extraordinary Service in 1996 for the terrorism prosecution against the jihadist cell of Omar Abdel Rahman (a/k/a "the Blind Sheikh") responsible for (among other atrocities) the 1993 World Trade Center bombing and an unsuccessful plot to bomb New York City landmarks.

Introduction

Since retiring from the Justice Department, I have been a writer, focusing on matters of law enforcement, national security, constitutional law, politics and culture. Concededly, I tend to come at policy matters from a conservative and constitutionalist perspective; nevertheless, I have always believed the application of legal principles and precedent should be a non-partisan endeavor, just as it was when I was a prosecutor. In my post-Justice Department career, I have written several books, including (in 2014), *Faithless Execution: Building the Political Case for Obama's Impeachment.*

In a nutshell, *Faithless Execution* argues that the Framers saw impeachment as an "indispensable" tool (to quote James Madison) in the constitutional framework of divided authorities, which obliges Congress to police executive overreach. The principal purpose of the Constitution is to limit the power of government to intrude on the liberties and suppress the rights of the American people. Separation of powers is the primary way the Constitution guarantees these liberties and rights. Thus, the Framers were deeply worried that maladministration – including overreach, lawlessness, or incompetence – could inflate the constitutionally-limited executive into an authoritarian rogue who undermines our constitutional order.

Impeachment is one of the principal checks on that damaging tendency. Executive overreach invariably involves the usurpation of congressional power, the misleading of Congress, and the abuse of authority granted to the executive by Congress. The Framers thus expected that lawmakers would have an incentive to defend both the American people and Congress as an institution, notwithstanding partisan ties to the president.

Nevertheless, I further posited in *Faithless Execution* that impeachment is a political remedy, not a legal one. Consequently, regardless of how clearly the legal requirement of "high crimes and misdemeanors" is established, impeachment and removal – as a practical matter – will not occur absent sufficient public consensus to induce the Senate to convict an impeached official by the required two-thirds supermajority. The theory presented in my book is that, to be viable, impeachment cases must be built politically by aggressive congressional exposure of executive misconduct. If they are not, it is a mistake for Congress to proceed with impeachment, even if

lawmakers are in a position to prove many instances of misconduct that rise to the level of high crimes and misdemeanors.

There is, of course, a caveat here: The degree to which political support must be built varies directly with the degree of political connection between the public and the executive branch official in question. The public has a great political investment in a president – the official in whom the Constitution vests all executive power, and whom Americans, in the case of President Obama, has elected not once but twice. The public has considerably less political investment in an unelected subordinate official responsible for carrying out the duties of a critical executive agency, the powers of which have been abused.

In the latter situation, it is a duty of the president to take action to discipline or terminate the rogue executive agency officials or be deemed personally responsible for that misconduct. Indeed, the point of the Constitution's vesting of all executive power in a single official, the president, is precisely to make the president accountable for all executive branch conduct.

If the president is derelict in this duty, it is essential that Congress take action. The impeachment of subordinate, unelected executive officials in whom the public has evinced no political support is an ideal way to deal with executive lawlessness. It is a far less drastic remedy than, for example, impeaching the president or using Congress's power of the purse to slash the funding of the abusive agency.

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At the 1787 constitutional convention in Philadelphia, George Mason rhetorically asked, "Shall any man be above justice? Above all, shall that man be above it who can commit the most extensive injustice?" These epigrammatic questions elucidate the Framers' rationale for including in the Constitution a procedure for the impeachment and removal of executive officials, up to and very much including the president.[1]

Few matters at the convention addled the delegates as much as the dangerous potential that the

president of the United States – the powerful new position they were creating, the single official in whom they decided to vest the entirety of federal executive power – could become a king. The objective of the Constitution was to safeguard liberty, not sow seeds for the very tyranny from which the American colonies had liberated themselves.

Much of the convention, therefore, was dedicated to foreclosing that possibility. The president would have to face election every four years. While immense, the chief executive's authorities would be checked in every important particular. The president, for example, would be commander-in-chief, but Congress would retain the power to declare war and hold both the purse and significant powers over the armed forces. The president could make treaties and broadly conduct foreign affairs, but international agreements could not amend the Constitution (there being a separate process for that); treaties could not take effect unless approved by a Senate supermajority; and Congress was empowered to regulate foreign commerce. The president would appoint major government officials, but they could not take office without Senate approval.

Indeed, the main point of having a *unitary* executive – vesting awesome powers in one president, rather than in an executive committee or in a minister advised by a privy council[2] – was accountability. Ultimately responsible for all executive conduct and unable to deflect blame for wrongdoing, a single president, Alexander Hamilton argued, would be amenable "to censure and to punishment."[3] The future Supreme Court justice James Iredell concurred: The president would be "personally responsible for any abuse of the great trust reposed in him," a key ingredient in making him "of a very different nature from a monarch."[4]

Palpably, if the president is derivatively responsible for all misconduct committed by subordinate executive branch officials, those subordinate officials are responsible for misconduct committed by themselves and their own underlings when the authorities of their agencies are abused. Indeed, to the limited extend delegates at the Philadelphia convention dissented from the concept of congressional power to remove *a president* from power, it was on the theory that it would be both *essential and preferable to remove subordinate officials who had participated in the abuse of executive power*. Because chief executives would always have subordinates in the commission of any misconduct, some of the Framers thought it sufficient that these "coadjutors" could be punished during the presidential term. The removal of subordinate officials would address abuses

of power without the destabilizing effects impeaching a president would portend.

The Framers further concluded that it would be "indispensible," as James Madison put it, for Congress to have the power to impeach and remove the president in order to protect the nation against "the incapacity, negligence or perfidy of the chief Magistrate." At the Commonwealth of Pennsylvania's later debate over ratification of the proposed Constitution, James Wilson explained that the imperative of a removal power stemmed from both the concentration of executive authority in one public official and the principle that no man was above the law:

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes.... Add to all this, that officer is placed high, and is possessed of power far from being contemptible, yet not a single privilege, is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment.[5]

Support for the impeachment remedy was overwhelming, though not unanimous. Gouverneur Morris and Charles Pinckney, for example, opined that impeachment proceedings might be too much of a distraction, interfering with the president's effective performance of his duties. Morris also offered what may be the ultimate perception that impeachment is a political rather than a legal matter: If a president were reelected, he opined, that would be sufficient proof that he should not be impeached.

Quite rightly, the other delegates were not moved by these qualms. After all, a president who was corrupt in the execution of his duties would spare no corrupt efforts to get himself reelected, especially if winning would immunize him from impeachment. His perfidy might not be discovered until after reelection was secured. These all too real possibilities, Mason pointed out, "furnished a peculiar reason in favor of impeachments whilst [the president was] in office."

Plus, the law regarded principals as responsible and thus punishable for the wrongs of their coadjutors. Manifestly, this should no less be so when it came to the president – the principal capable of doing the greatest harm to the republic.

The Framers' conclusion that the nation's chief executive should be removed from power based

on the misconduct of subordinate officials, notwithstanding the tumult such a removal would portend, bears emphasis. Plainly, if subordinate misconduct would justify the removal of an elected president, it would more than justify – indeed, it would seem to compel – the removal of the subordinate officials complicit in the misconduct, unelected officials who merely exercise the chief executive's power and in whom the public has no political investment.

It was, unsurprisingly, Benjamin Franklin who offered the convention's most bracing point in impeachment's favor: Historically, when no impeachment remedy was available to a society, "recourse was had to assassination" in cases where "the chief magistrate had rendered himself obnoxious" – an intolerable outcome that not only "deprived [him] of his life but of the opportunity of vindicating his character."

Ever concerned about the balance of powers among the branches that is the Constitution's genius, the Framers did worry that granting Congress impeachment authority could give it too much power over the president. After all, any governmental power can be abused, and impeachment is no exception. Nevertheless, though this danger could not be discounted, it would be mitigated by the unlikelihood that a large, bicameral legislature drawn from different states with divergent interests – as opposed to a single chief executive – could be broadly corrupted. Moreover, the high hurdle of a two-thirds' supermajority needed for conviction in the Senate would guard against wrongful removal.[6]

Clearly, history attests to the framers' wisdom. In over two-and-a-quarter centuries of constitutional governance, articles of impeachment have been formally voted by the full House of Representative against only two American presidents, Andrew Johnson and Bill Clinton. In each case, there were insufficient votes to convict and remove the incumbent from office. A third president, Richard Nixon, would surely have been impeached and removed had he, like Johnson and Clinton, chosen to fight to the bitter end.[7] In addition, the House has impeached seventeen other federal officials: fifteen federal judges, one cabinet member, and one U.S. senator; the Senate has removed eight officials, all federal judges.[8]

The delegates at the Philadelphia convention concurred in the principles that the United States is

a nation of laws not men, and that the potential for abuse of the presidency's awesome powers required making provision for removal of an unfit incumbent. This consensus, however, did not immediately translate into agreement on an impeachment standard.

It was assumed from the first that the President (and, derivatively, subordinate executive officials) would be removable for "malpractice or neglect of duty." Yet, consistent with the concern that the executive not become too beholden to Congress, some of delegates suggested a narrower, objective standard that stressed the gravity of impeachment: The president would be removable only for treason and bribery. This, however, was clearly insufficient, failing to account for an array of corruption and incompetence not necessarily related to either cupidity or traitorous conduct.

Such condemnable conduct was not merely foreseeable in the abstract. The framers had a concrete, contemporaneous example: the sensational impeachment trial in Parliament of Warren Hastings, Britain's governor-general in India. The primary, tireless proponent of Hastings' impeachment was Edmund Burke, the renowned Whig parliamentarian, political philosopher, and supporter of the American Revolution. Burke extensively charged Hastings with "high crimes and misdemeanors," the ancient British standard for removing malfeasant public officials. While some of Hastings' offenses involved bribery, most related to widespread extortion, heavy-handed corruption, trumped up prosecutions (resulting in death and other severe punishments), the allegedly reckless conduct of warfare, and what we would today refer to as "human rights" abuses against the indigenous people of England's Indian domains. Far from treasonous, Hastings actions – however wanton they may have been – were designed to preserve and strengthen the British empire's position (even if, to Burke's mind, their immorality and disregard for Indian sensibilities arguably weakened it).[9]

The impeachment inquiry of Hastings' governance formally began in 1786 (dragging on for years afterwards), and articles against him in the House of Commons were voted the next year, only a few weeks before the Philadelphia convention. Mason used the opportunity to posit that limiting impeachment to treason and bribery would inadequately restrain the executive: "Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason[.]"After the

delegates finally agreed to add "high crimes and misdemeanors" to treason and bribery as grounds for impeachment, Hamilton explained that Great Britain provided "the model from which [impeachment] has been borrowed."[10]

"High crimes and misdemeanors" was not Mason's first choice. He urged adoption of "maladministration," the term used in the impeachment provisions of several state constitutions. "Maladministration" was indeed closer than unalloyed treason and bribery to the concept the delegates had in mind. Blackstone's *Commentaries on the Laws of England*, a magisterial legal treatise that profoundly influenced the Framers, described "maladministration of such high officers, as are in public trust and employment," as the "first and principal" of the "high misdemeanors" – offenses "against the king and government" that were punished by "parliamentary impeachment."[11]

Nevertheless, Madison remained sensitive to the concerns about vagueness. Beyond the legitimate objective of empowering Congress to deal decisively with a president who had demonstrated himself truly unfit, promiscuous constructions of "maladministration" could devolve into legislative *dominance* over the executive. Mason responded by amending his proposal to "high crimes and misdemeanors," which had the benefit of being a venerable term of art.[12] This standard was adopted by the convention and enshrined in the Constitution.[13]

All public officials are certain to err at times, and chief executives, who make the most consequential decisions, egregiously so. And of course, there will always be presidents who abuse their powers to a limited extent, whether because of venal character or because it is often the president's burden to navigate between Scylla and Charybdis. Comparatively few presidents, though, will prove utterly unfit for high office. Thus impeachment was designed to be neither over- nor under-inclusive. "High crimes and misdemeanors," complementing treason and bribery, was an apt resolution. It captures severe derelictions of duty that could fatally compromise our constitutional order but eschews impeachments based on trifling irregularities.

As Burke instructed, "high crimes and misdemeanors" had been used by the British parliament for centuries. It is a concept rooted not in statutory offenses fit for criminal court proceedings, but in damage done to the societal order by persons in whom great public trust has been reposed.

Hamilton fittingly described impeachable offenses as those

> which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated *political*, as they relate chiefly to injuries done immediately to the society itself.[14]

Similarly fixing on betrayal of the executive's fiduciary duty and oath of allegiance to our system of government, Mason elaborated that "attempts to subvert the Constitution" would be chief among the "many great and dangerous offences" beyond treason and bribery for which removal of executive officials would be warranted. In cases where Congress has found that *actual, completed* abuses of executive power have occurred, is noteworthy that, for the Framers, mere *attempts* to subvert the constitution were a sufficiently heinous breach of trust to warrant removal by impeachment.

The Constitutional Rights Foundation usefully recounts:

> Officials accused of "high crimes and misdemeanors" were accused of offenses as varied as misappropriating government funds, appointing unfit subordinates, not prosecuting cases, not spending money allocated by Parliament, promoting themselves ahead of more deserving candidates, threatening a grand jury, disobeying an order from Parliament, arresting a man to keep him from running for Parliament, losing a ship by neglecting to moor it, helping "suppress petitions to the King to call a Parliament," granting warrants without cause, and bribery. Some of these charges were crimes. Others were not. The one common denominator in all these accusations was that the official had somehow abused the power of his office and was unfit to serve.[15]

It is this uniquely political aspect of impeachment that distinguishes it from judicial proceedings and technical legal processes. As the Constitution Society's Jon Roland has explained, it was immaterial whether the offenses cited in articles of impeachment "were prohibited by statutes"; what mattered were

> the obligations of the offender.... The obligations of a person holding a high position meant that some actions, or inactions, could be punishable if he did them, even though they would not be if done by an ordinary person."[16]

This synopsis echoes Joseph Story's seminal 1833 treatise, *Commentaries on the Constitution*.

Elaborating on the "political character" of impeachment, Justice Story noted that while "crimes of a strictly legal character" would be included, the removal power

> has a more enlarged operation, and reaches, what are aptly termed political offenses, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits and rules and principles of diplomacy, or departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations of foreign as well as domestic political movements; and in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence.[17]

Definitiveness is an essential attribute of criminal laws. Our jurisprudence mandates that they put a person of ordinary intelligence on notice about what is prohibited. Otherwise, law-enforcement becomes capricious and tyrannical. To the contrary, "high crimes and misdemeanors," is neither conceived for nor applicable to quotidian law-enforcement. The concept is redolent of oath, honor and fiduciary obligation.

It may be freely conceded that these are more abstract notions. It is not as easy to divine what they demand in the various situations confronted by a public official as it is to say whether a given private citizen's course of conduct satisfies the essential elements of a penal statute. This distinction, however, simply makes impeachment rare and reserved for grave public wrongs. It does not make impeachment arbitrary, as implied by the deservedly maligned claim that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history." It is one of history's curiosities that this assertion was made in 1970 by then-Congressman Gerald R. Ford, during his failed effort to impeach William O. Douglas, the irascible liberal Supreme Court Justice. Within a span of ten months beginning in October 1973, Ford would become vice-president in place of Spiro Agnew, then president in place of Richard Nixon, when each resigned to avoid impeachment and removal.[18]

How odd that a politician, law professor, or plaintiff's lawyer who would not think twice about dressing down, condemning, or filing suit against a corporate CEO for breaches of fiduciary

obligations would complain that "high crimes and misdemeanors" is too amorphous a notion to apply to political wrongs. In truth, contrary to a citizen who is presumed innocent in the civilian criminal justice system, executive officials are more akin to military officers, whose duties make them punishable for actions that would not be offenses if committed by a civilian: such things as abuse of authority, dereliction of duty, moral turpitude, conduct unbecoming, and the violation of an oath.[19]

The delegates at the Philadelphia were adamant that impeachment not reach errors of judgment, what Edmund Randolph described as "a willful mistake of the heart, or an involuntary fault of the head." On the other hand, betrayals of the constitutional order, dishonesty in the executive's dealings with Congress, and concealment of dealings with foreign powers that could be injurious to the rights of the people were among the most grievous high crimes and misdemeanors in the Framers' estimation. The concept also embraced the principle that "the most powerful magistrates should be amendable to the law," as James Wilson put it in his *Lectures on the Law*, delivered shortly after the Constitution was adopted.

For example, in response to a hypothetical in which a president, to ram a treaty through to ratification, brought together friendly senators from only a few of the states so as to rig the Constitution's two-thirds approval process, Madison opined: "Were the president to commit any thing so atrocious … he would be impeached and convicted, as a majority of the states would be affected by his misdemeanor." Iredell, furthermore, made clear that the president "must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives." It would be untenable to abide a president's fraudulently inducing senators "to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them."

Finally, the Framers stressed that the impeachment remedy was a vital congressional check on *the executive branch as a whole*, not just on the president's personal compliance with constitutional norms. The chief executive, Madison asserted, would be wholly "responsible for [the] conduct" of executive branch officials. Therefore, it would "subject [the president] to impeachment himself, if he suffers them to perpetrate with impunity high crimes or

misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses."

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It is a common error to think of impeachment in legal terms because there is a legal process for it – just as there is a legal process attendant to many essentially political activities (e.g., the convening of electors to formalize the result of a presidential election). Moreover, to underscore the gravity of impeachment, the framers designed it to resemble a criminal proceeding. In fact, before adopting Gouverneur Morris's proposal that impeachments be tried by the newly created Senate, the framers considered suggestions by Edmund Randolph and Alexander Hamilton, respectively, that they be conducted before "national" (what today are called "federal") or state judges, as well as a report by the Convention's "Committee of Detail" that recommended giving the new Supreme Court jurisdiction over impeachments.[20]

As we've seen, the House was given "the sole Power of Impeachment" – meaning, the plenary authority to lodge the formal accusation – and the articles of impeachment it files are roughly analogous to a grand jury indictment. Though very different in nature and procedure, felony indictments and impeachment articles similarly serve the function of placing the accused on notice of the charges against him. In an impeachment, moreover, there follows a trial in the Senate (in cases of presidential impeachment, presided over by a federal judge, the chief justice of the Supreme Court). This is the simulacrum of a regular criminal trial, with senators ostensibly sitting as petit jurors, determining the fate of the defendant, the president.

Nevertheless, there are salient distinctions between impeachment proceedings and criminal trials – differences of kind, not just degree. The House is a political body, the elected and accountable representatives of the people. It is not a legal buffer between the people and the prosecutor, which is the constitutional role of the grand jury. Because grand juries are generally concerned with private infractions of the law investigated by police agencies, they deliberate in secret. By contrast, hearings in a House impeachment investigation probe wrongdoing by public officials and are conducted on the public record, as, of course, is the Senate's eventual impeachment trial. House members considering impeachment and senators deciding on removal deliberate openly

and cast public votes, ensuring their accountability to voters for that momentous decision.

That is night-and-day different from a legal trial. The law demands that trial jurors be impartial. The venire is thus thoroughly vetted to weed out potential bias. Once seated, jurors are instructed throughout the proceedings to avoid prejudicial influences like press reports and the opinions of their family members about the case. The law mandates that they deliberate without fear or favor, basing their verdict solely on whether the evidence presented is sufficient to prove the allegations in the indictment.

To the contrary, lawmakers are political partisans. Some will be ardent presidential detractors, others loyalists, and all of them are apt to have a political stake in the outcome of a presidential impeachment controversy. The highly charged, over-archingly political nature of the impeachment process inexorably encourages these elected representatives – who of course want to be re-elected – to consider whether their constituents support or oppose the executive official's removal. That practical consideration weighs far heavier in the politicians' deliberations than whether, technically speaking, impeachable offenses have been proven. In fact, at the Clinton impeachment trial, the House "managers" who presented the case for impeachment, were chastised by Chief Justice William Rehnquist not to refer to senators as "jurors" – at the Senate's insistence and on the rationale that their role was not merely to evaluate the evidence like jurors but to judge the effect the president's removal might have on the nation.[21]

In addition, grand jurors are expected to take legal guidance from the prosecutor, and trial jurors from the judge. That guidance must be firmly rooted in the penal statutes and relevant judicial precedents defining the crimes charged and the analytical principles that apply. By contrast, members of Congress judge for themselves what rises to the level of "high crimes and misdemeanors." They are not beholden to statutory law or jurisprudence.

In fact, unlike a judge, who is every bit the presiding government official at a criminal trial, the chief justice at a presidential impeachment trial in the Senate performs the essentially ministerial role of keeping the proceedings moving along. It is the senators who decide how to proceed, what evidence merits consideration, whether witnesses should be called, and whether the articles of impeachment have been proven to their satisfaction. Their calculations are political, not legal

– as seen to a fare thee well in the Clinton impeachment trial, in which, for example, senators permitted no live testimony then conveniently found the case had not been proved.

The double-jeopardy doctrine provides yet another telling constitutional distinction between legal cases and the political impeachment process. The Fifth Amendment, applicable to all federal criminal proceedings, protects Americans from being made "subject for the same offense to be twice put in jeopardy of life or limb." Yet, this protection does not apply to impeachment. Instead, the Constitution expressly provides that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."[22] That is, once the politics is done and the decision is made whether to disqualify the president from holding public office, the law is free to take over and impose its distinct processes and penalties.

The tendency of non-lawyer politicians to view impeachment as a legal process beyond their ken is insidious. It is of a piece with the disturbing proclivity of modern lawmakers to abdicate to staff counsel their basic responsibility to read and understand the bills they enact. It subverts republican democracy. The Framers did not believe free people needed lawyers to figure out how to govern themselves. The standard they gave us for impeachment and removal from high public office is a simple and straightforward one.

The legal grounds for impeachment are vital; without them, the political case for impeachment cannot be built. The primary question, however, is whether the executive official's conduct is so egregious that it has become intolerable to continue reposing power in the official. On that score, I would note that prominently included in Article 2 of the Articles of Impeachment the House was poised to file against President Richard M. Nixon before the president's resignation was the allegation that the president "acting personally and through his subordinates" had "endeavored" to use the Internal Revenue Service to violate the rights of American citizens, including to cause "income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner." President Nixon was further accused, in Article 1, of making false or misleading statements in the course of a lawfully conducted investigation, and of "withholding relevant and material evidence or information" from such an investigation.

As I understand it, the instant matter involving Internal Revenue Service Commissioner John

Koskenin, pertains to an investigation into not a mere "endeavor" (largely unsuccessful in the Nixon case) to abuse IRS powers but actual, concrete abuse, of those powers, including "income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner." I further understand that the instant matter involves the provision of false statements and withholding of evidence from Congress.

I do not purport to have knowledge of the facts of Congress's investigation. I note however that misconduct that was *merely potential* and coupled with blatantly obstructive actions was deemed sufficient to impeach (and would clearly have been sufficient to remove) a twice-elected president of the United States who had recently been reelected in one of the largest landslides in American history. It seems patent, then, that if established, *actual misconduct* in conjunction with blatantly obstructive actions would be sufficient to justify impeaching an unelected subordinate executive official responsible for administering the Internal Revenue Service.

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[1] James Madison's Notes on the Debates in the Federal Convention of 1787 (Max Farrand, *The Records of the Federal Convention of 1787* (1911) (http://memory.loc.gov/ammem/amlaw/lwfr.html)); see also Yale Law School, The Avalon Project (http://avalon.law.yale.edu/subject_menus/debcont.asp). Madison's convention notes are heavily relied on in this chapter, as is the House Judiciary Committee Report prepared and released in connection with articles of impeachment approved in the Watergate investigation, "Constitutional Grounds for Presidential Impeachment" (House Judiciary Committee, 1974) (hereafter "House Jud. Cmte. Report") (http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/watergatedoc_3.htm#TOP).

[2] *Morrison* v. *Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., *dissenting*); see also John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (University of Chicago Press, 2005).

[3] Alexander Hamilton, *The Federalist No. 70* (1788).

[4] Raoul Berger, *Impeachment: The Constitutional Problems* (Harvard University Press 1974) (http://books.google.com/books/about/Impeachment.html?id=UT0_MCzwRW4C); see also House Judiciary Committee report, *supra*.

[5] Jonathan Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836) (Liberty Fund Inc., *The Online Library of Liberty*)

(http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1905&Itemid=27); see also House Judiciary Committee report, *supra*.

[6] U.S. Const., art. I, sec. 3.

[7] Articles of Impeachment against President Nixon were approved by the House Judiciary Committee in late July 1974, and a vote by the full House to approve them was imminent. A contingent of Republican senators led by Barry Goldwater of Arizona visited the White House on August 7, 1974 to inform Nixon that they were unwilling and unable to prevent his impeachment and conviction. Nixon resigned the following day. See, e.g., Richard Lyons and William Chapman, "Judiciary Committee Approves Article to Impeach President Nixon, 27 to 11" (*Washington Post*, July 28, 1974) (http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072874-1.htm); Bart Barnes, "Barry Goldwater, GOP Hero, Dies" (Washington Post, May 30, 1998) (http://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwater30.htm).

[8] Jared P. Cole and Todd Garvey, "Impeachment and Removal" (Congressional Research Service, Oct. 29, 2015) (https://www.fas.org/sgp/crs/misc/R44260.pdf).

[9] For a thorough explication of the relevant history and sympathetic treatment of Burke's campaign against Hastings, see Conor Cruise O'Brien, *The Great Melody: A Thematic Biography of Edmund Burke* (University of Chicago Press, 1992). For a treatment more sympathetic to Hastings, see, e.g., Chris Monaghan, *In Defense of Intrinsic Human Rights: Edmund Burke's Controversial Prosecution of Warren Hastings, Governor General of Bengal* (Academia.edu, 2011) (http://www.academia.edu/1818643/IN_DEFENCE_OF_INTRINSIC_HUMAN_RIGHTS_EDMUND_BURKES_CONTROVERSIAL_PROSECUTION_OF_WARREN_HASTINGS_GOVERNOR-GENERAL_OF_).

[10] Alexander Hamilton, *The Federalist No. 65* (1988); see also Berger, *Impeachment: The Constitutional Problems*, *supra*, at Chapter II.

[11] 4 Blackstone's Commentaries 121, (cited in House Jud. Cmte Report, n.55.

[12] See House Jud. Cmte. Report:

> "High Crimes and Misdemeanors" has traditionally been considered a "term of art," like such other constitutional phrases as "levying war" and "due process." The Supreme Court has held that such phrases must be construed, not according to modern usage, but according to what the farmers meant when they adopted them.[86] Chief Justice Marshall [in *United States* v. *Burr*, 25 Fed. Cas. 1, 159 (No 14, 693) (C.C.D. Va 1807)] wrote of another such phrase:
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> > It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it.

[13] U.S. Const., art. II, sec. 4.

[14] Hamilton, *The Federalist No. 65*, *supra*.

[15] Constitutional Rights Foundation, "High Crimes and Misdemeanors" (accessed Aug. 23, 2013) (http://www.crf-usa.org/impeachment/high-crimes-and-misdemeanors.html).

[16] Jon Roland, "Meaning of 'High Crimes and Misdemeanors'" (Constitution Society, Jan. 16, 1990) (http://www.constitution.org/cmt/high_crimes.htm).

[17] 1 J. Story, *Commentaries on the Constitution of the United States*, 764, at 559 (5th ed 1905) (cited in House Jud. Cmte. Report, n.83).

[18] See, e.g., Berger, , *Impeachment: The Constitutional Problems*, *supra*, at p. 56, n.1.

[19] McCarthy, "It's Not Crazy to Talk about Impeachment", *supra*; see also McCarthy, "Impeachment Lessons", *supra*.

[20] Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (University of Chicago Press 2000)

[21] Douglas O. Linder, "The Impeachment Trial of President William Clinton" (University of Missouri at Kansas City, 2005) (http://law2.umkc.edu/faculty/projects/ftrials/clinton/clintontrialaccount.html).

[22] U.S. Const., art. I, sec. 3. Also note that the Fifth Amendment requires that "no person shall be held to answer for … [an] infamous crime, unless on presentment of indictment of a Grand Jury" (except in matters involving the armed forces that are inapposite for our purposes). As noted, articles of impeachment *resemble* a grand jury indictment but they are not the functional equivalent. If impeachment were a legal rather than a political proceeding, an indictment would be mandatory.

Mr. GOODLATTE. Thank you, Mr. McCarthy. Mr. Gerhardt, welcome.

TESTIMONY OF MICHAEL J. GERHARDT, SAMUEL ASHE DISTINGUISHED PROFESSOR IN CONSTITUTIONAL LAW & DIRECTOR, PROGRAM IN LAW AND GOVERNMENT, UNC SCHOOL OF LAW

Mr. GERHARDT. Thank you, Chairman Goodlatte. I appreciate the honor of being here today. It is an enormous privilege to appear before you not just now, but each and every time I have had the opportunity to come talk to you about important about constitutional law.

As a constitutional law professor, I cannot think of any greater responsibility I have, any greater duty I have, to be able to talk to you about these important questions we are about to talk about today. I have had the chance to talk to you about these before, and I am happy to send our conversation to today's hearings.

As I understand it, there are at least two major questions that you are trying to answer today, trying to think through. The first has to do with who may be impeached, who qualifies as an officer of the United States, so that they then may be subject to impeachment?

I think on this score, the report we have from the CRS is an excellent guide. I think it tells us quite rightly that the critical thing to consider here is whether or not the particular officials you are considering as possible subjects for impeachment hearing have substantial or significant responsibility in their different realms of authority.

It is certainly true that not every officer, that is to say, not every official, is subject to impeachment. And at the same time, it is also true, I think, that some officials that exercise significant responsibility would be covered.

I want to also stress, as the CRS report itself stresses, that we are moving into uncharted waters here. The fact is that as far as impeachment is concerned, this body, the House of Representatives, has never impeached a sub-Cabinet-level official.

And so when we do move into uncharted waters, I would ask everybody to take a deep breath. I would ask everybody to take a pause, and consider in these circumstances what other means are available to keep such officials in check. Do we trust those other mechanism to work? And if we do not trust those other mechanisms to work, I think we have to be candid about why we do not trust them.

The other critical question, of course, you are facing today is the basic standard of impeachment. This is not the first time, I assume it will not be last time. The House Judiciary Committee considers the constitutional standard for impeachment. We have a number of different sources we can look at that will guide us in trying to figure out what qualifies as an impeachable offense. We know from the constitutional language, of course, that treason and bribery are covered, but those are relatively easily defined, and well understood.

The critical language we are trying to unpack here today is high crimes and misdemeanors. The Framers, I think, believed, and

early commentators including Justice Storey believed, that what those terms referred to are what we call political crimes; and political crimes are not self-defining.

What Justice Storey and others expected is that over time, this Committee would develop and effect something akin to the common law that would illuminate what would qualify as an impeachable offense. Political crimes are offenses against the state. Political crimes are serious misconduct, breaches of duty, breaches of the public trust.

But we have to get more concrete. And that is where I think your own decision-making over time, your own historical practices, are an important source to consult, because in my opinion, those also underscore that when we consider whether or not particular misconduct qualifies as an impeachable offense, it has to at least have two elements: one is bad intent, malicious intent and the other is seriously bad conduct.

And so if you are looking at any particular situation, any particular circumstance, I think it is important to ask whether or not you have each of those present based on credible, serious fact-finding, before you can approve any kind of an impeachment article.

To go further, I think it is also worth considering a very critical question. I think this is the question I am sure you always ask yourselves before you undertake an important responsibility. And that critical question is, what kind of precedent are you going to create if you move forward, if you take positive action here?

In my opinion, and I am just a law professor, but in my opinion, I think gross negligence, or gross incompetence, does not qualify as an impeachable offense. That is a step onto the slippery slope of offenses I do not think the Framers and I do not think the common law support as impeachable offenses. I am happy to answer any other questions you have. Of course, you have my written statement.

You can ask questions about that or anything else today. Thank you.

[The prepared statement of Mr. Gerhardt follows:]

Written Statement of

Michael J. Gerhardt,
Samuel Ashe Distinguished Professor of Constitutional Law,
University of North Carolina at Chapel Hill

Hearing on
"Examining the Allegations of Misconduct Against
IRS Commissioner John Koskinen, Part II"

House Judiciary Committee,
U.S. House of Representatives,

June 22, 2016

As someone who has devoted his professional life to studying and understanding our Constitution and the great institution of which you all are a part, I can think of no greater honor and privilege than the opportunity to appear before your committee to discuss important questions of constitutional law. As you know, I appear today solely on my own behalf, and I speak only for myself. I hope my understanding of federal impeachment law will be helpful to you.

What I will share with you today is not something new. As many of you know, the law of impeachment is not a new subject for either this distinguished committee or for me. Many of you have known me from my having appeared before you, more than once, to address constitutional issues related to the federal impeachment process, including the constitutional standard for impeachment. I explored this and other issues relating to impeachment in my second law review article, written and published nearly 30 years ago;[1] and the federal impeachment process was the subject of my first book, published 20 years ago.[2] It has been the focus of several law review articles that I have written over the past few decades[3] and of work I have done as a legal adviser to members of both chambers of this great institution. What I will share with you is, I hope, consistent with what I have said and written about the federal impeachment process – and the questions you consider today -- over the years.

The constitutional framework for impeachment governs whom you may impeach and on what grounds. The constitutional standard for impeachment and removal, which is an integral part of this framework, is not Democratic; it is not Republican. It is the constitutional standard that has governed this process since the beginning of the Republic, regardless of the era or composition of this body.

The starting point for any analysis of the impeachment is, of course, with the constitutional text itself. The Constitution provides, in pertinent part, that "the President, Vice-President, and all other civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanors."[4] One question, which I understand is of interest to the Committee, is whether sub-cabinet officials are "officers of the United States" and are therefore subject to impeachment. There is widespread consensus that this provision makes impeachable not only presidents and vice-presidents but also Supreme Court justices, other Article III judges, and cabinet members. But, as

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[1] *See* Michael J. Gerhardt, "The Constitutional Limits to Impeachment and its Alternatives," 68 Tex. L. Rev. 1 (1989).
[2] *See* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis (Princeton University, 1st edition, 1996) (University of Chicago Press, revised edition, 2000).
[3] *See, e.g.*, Michael J. Gerhardt, "The Lessons of Impeachment History," 67 Geo. Wash. L. Rev. 603 (1999); "Chancellor Kent and the Search for the Elements of Impeachable Offenses," 74 Chicago-Kent L. Rev. 91 (1998).
[4] U.S. Const., Article II, section 4.

we all know, the Congress has never impeached, much less removed, a sub-cabinet level official. As the Congressional Research Service reported, "Historical precedent provides no examples of the impeachment power being used against lower-level executive officials."[5] This might have been because of the uncertainty over whether such officials are impeachable or because there have been other, effective means for holding such officials accountable, including dismissing them. Perhaps, it could be because of a combination of these things. Nonetheless, the Congressional Research Service concluded, after its careful examination of this question, that an executive branch official who exercises "substantial responsibility," such as the head of an agency or a commission, may indeed be impeachable. But, because impeaching a sub-cabinet level official is unprecedented, the House is moving into unchartered waters, which should give everyone pause. Impeachment is supposed to be a last resort and therefore each of you may wish, in the course of these proceedings, to consider what other means are available to hold a sub-cabinet official accountable and whether you trust -- or why you don't trust -- these other alternatives to work in the instant circumstances.

Assuming the Commissioner of the Internal Revenue Service is an official who may be properly subject to impeachment, then a second question is whether he has committed the kind of offense for which he may be impeached and removed from office -- "Treason, bribery, or other high crime or misdemeanor." I gather no one is charging the Commissioner of the Internal Revenue Service with either treason or bribery, which are well defined and well understood. Rather, the critical question is whether, assuming Commissioner Koskinen has engaged in any misconduct, the misconduct in question qualifies as a "high crime or misdemeanor."

Over the course of American history, that phrase has been subject to considerable scrutiny in academia and in Congress. The best work on the historiography on its meaning, including Charles Black's seminal treatise on the subject,[6] suggests that "high crimes or misdemeanors" are terms of art, which refer to "political crimes," which in turn encompass serious abuses of power, or serious breaches of the public trust. I hasten to add that none of the terms I have just mentioned were meant to have broad constructions; the Founders selected the language "Treason, bribery, or other high crimes or misdemeanors" to define a finite range of impeachable offenses for which certain officials may be impeached and removed from office. Indeed, the Founders considered but rejected making certain high-ranking officials impeachable on broader grounds such as "maladministration."[7] The Founders did not want high-ranking officials in the executive or judicial branches to be subject to impeachment for their mistakes in

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[5] Jared P. Cole & Todd Garvey, CRS Report: Impeachment and Removal, October 29, 2015, at 4.

[6] *See* Charles L. Black, Impeachment: A Handbook (reissued 1998).

[7] In several different publications, I discuss the Founders' deliberations over and discussions of the scope of impeachable offenses. *See, e.g.,* Gerhardt, "Chancellor Kent," *supra* note 3, at 109-112.

office; and the historical practices of this great institution – the Congress including both its chambers – support construing more narrowly the terms "or other high crimes or misdemeanors," than the term "maladministration," to achieve several purposes, including distinguishing the newly ratified constitutional process for impeachment from the British system in which anyone could be impeached for any reason *and* ensuring that the misconduct had to be serious and deliberate and not merely a mistake in judgment or policy or partisan differences or a difference of opinion between the Congress and the officials under consideration for impeachment.

The constitutional standard is not different for different kinds of officials. It does not change depending on whose conduct is being questioned. There is, in other words, only one impeachment standard, which is, to be sure, adapted to the particular duties of the officials who are subject to impeachment. The standard is not meant nor designed to be lower for some officials than for others. Impeachable officials, as high as the President or the Chief Justice or as not quite so high as the head of a department or the Internal Revenue Service, are subject to the same constitutional standard.

The Framers chose terms – and designed a process – to make certain high-ranking officials impeachable and removable for serious misconduct in office, and the serious misconduct in office must have, at least in my judgment, two essential elements that are relevant to the instant proceedings. These elements derive from the common law, on which the Framers modeled the language used in the Constitution to reference impeachable offenses. At common law, crimes consisted of the essential elements of *mens reus* and *actus reus*. Put more colloquially, the Constitution requires both a bad (or malicious) intent *and* a bad act as the basis for an impeachment. As I explained on a previous occasion, "While there is ample evidence to suggest that the Founders did not intend for the impeachment process to track the criminal law in all essential respects, the criminal law did provide a backdrop, as did the impeachment experiences in England and the states, for the drafting of the Constitution. The influence of these disparate sources on the [impeachment] clauses is evident in both the language adopted and post ratification historical practices."[8] Both original meaning and historical practices, including Alexander Hamilton's commentary on impeachment in *The Federalist Papers* and Justice Joseph Story's revered *Commentaries on the U.S. Constitution*, have long held that "the bad acts constituting impeachable offenses are what the Founders understood to be political crimes."[9] Political crimes include serious offenses against the State, which include not only serious offenses, which are indictable, but also serious breaches of the public trust, which might not be indictable. In the article quoted above, I referenced the debates at the constitutional convention and during the ratification campaign, which make clear that the Founders had adopted this language (which had first been suggested by James Madison) to narrow the scope of

[8] Id. at 108 (footnote omitted).
[9] Id.

impeachable offenses to include great offenses, which seriously injured the Republic and were not easily – or perhaps at all – actionable in other forums.

As I have suggested, a principal concern among the Founders was to distinguish the federal impeachment process from the English one, in which anyone could be impeached for any reason. Narrowing the scope of impeachment was thought to be an important safeguard against its abuse. Even then, the Constitution provides other safeguards, including dividing the impeachment authority between the House and the Senate and requiring that at least two-thirds of the Senators approve conviction and removal. These safeguards are integral to the constitutional framework for impeachment and removal and the standards for this committee and the House to follow whenever it considers the possible impeachment of a high-ranking official of our government. The fact that the Senate has convicted and removed from office barely more than half of the people, whom the House has impeached, further reflect the Constitution's safeguards at work, particularly the high thresholds that must be satisfied prior to removal of a high-ranking government official for serious misconduct in office.

I hasten to stress that, while the scope of impeachable offenses is not limited strictly to indictable offenses, this does not mean that, when it comes to impeachment, anything goes. That is simply not the case. Nor has it ever been. As the bipartisan staff of the House's impeachment inquiry against President Nixon noted in its report, the language "'High misdemeanors' referred to a category of offenses that subverted the system of government." The ensuing discussion tracks this same theme when characterizing the "category of offenses" comprising permissible grounds for impeachment as including breaches of duties and the public trust and undermining "constitutional government" and its integrity.[10]

I gather from prior proceedings that at least some House members believe that the constitutional standard for impeachment should not be restricted to instances in which an official, who is potentially subject to impeachment, has a bad intent or is acting in bad faith. They believe, instead, grounds for impeachment may include gross negligence or gross incompetence. Respectfully, I disagree. I believe that lowering the constitutional standard for impeachment – a critical, indispensable threshold (which, like other constitutional standards, is fixed) -- is fraught with problems. To begin with, I believe the Framers' rejection of "maladministration" as a basis for impeachment was, in effect, a rejection of a standard that allowed for too broad a basis for impeachment and lacked prerequisites such as bad faith as elements. Every example of permissible impeachment given during the constitutional convention and ratification conventions included bad faith, or something akin to it, as an element of an impeachable offense. Moreover, such a standard would, as you know, make

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[10] "Constitutional Grounds for Presidential Impeachment," Report by the Staff of the Impeachment Inquiry," Committee on the Judiciary, U.S. House of Representatives, 98rd Congress, 2nd Session, at 23-25 (February 1974).

impeachment much easier than it has ever been in our constitutional system, which was purposely designed to make impeachment and removal difficult.

The instant circumstances demonstrate the problems with lowering the constitutional standard for impeachment, as it would also allow the House to loosen the evidence or proof of an impeachable offense. Direct evidence of bad intent might not be easy to come by, but being relieved of having to demonstrate, through evidence, that an official acted with bad faith or malicious intent and committed a seriously bad act actually makes it easier to abuse the impeachment process. By deliberate design, impeachments are supposed to be difficult to achieve. In circumstances in which an official's misconduct does not rise to the level of being an impeachable offense, there are usually other means of recourse.

In concluding, I hope you will allow me to share a few final thoughts. First, the critical burdens of proof and persuasion rest on the House of Representatives and, if it becomes necessary, the Senate, not on the possible target of an impeachment proceeding. That is true here, as it is true in every other instance in which the House is considering the impeachment of an official. Satisfying those burdens requires more than rhetoric. Satisfying them requires more than suspicion or skepticism or distrust. None of those displace or satisfy the need to find credible proof or evidence of both bad faith and a seriously bad act in order for an impeachable official to have been found of committing an offense for which he may be both properly impeached and removed from office.

Second, I understand from news reports that there is some interest in the House's consideration of a censure resolution against the IRS Commissioner. Though many other scholars do not agree with my analysis, I have long been on record as believing that censure is constitutionally permissible, as long as it takes the form a resolution that does nothing more than merely express an attitude or opinion about something.[11] The challenge is to ensure that the resolution does nothing more than express a sentiment. If it does anything more than that and seeks to impose any kind of sanction or tangible punishment on an individual, it ceases to be a harmless resolution and becomes a bill of attainder, which the Constitution expressly prohibits.[12]

Third, an important question to consider before you ever undertake a serious action, such as impeachment, is what kind of precedent are we setting? We all know, as I have said, that it is unprecedented for the House to be considering the impeachment of a sub-cabinet level official, and such officials are usually held accountable through other means. Even so, it is a dangerous precedent for the House to adopt a lower standard of impeachment than the Founders intended and the House has ever used before.

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[11] *See, e.g.*, Michael J. Gerhardt, "The Constitutionality of Censure," 33 U. of Richmond L. Rev. 33 (1999).
[12] *See* U.S. Const., Art. I, sections 9 & 10.

It is worth remembering that we are all subject to the same scrutiny, and I do not mean just by the American people. In the words of the song from the Pulitzer and Tony award winning musical Hamilton, "History has its eyes on you."

Mr. GOODLATTE. Thank you, Mr. Gerhardt. Mr. Garvey, welcome.

TESTIMONY OF TODD GARVEY, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, LIBRARY OF CONGRESS

Mr. GARVEY. Thank you, Mr. Chairman. Chairman Goodlatte, Mr. Nadler, and Members of the Committee, the Constitution establishes a general framework governing the execution of impeachment. Unlike the law-making function, the impeachment power is given wholly to Congress, with the house exercising the sole power of impeachment, and the Senate the sole power to try those impeachments.

But the Constitution also establishes a number of limitations and safeguards on the use of the impeachment power. Among the limitations are that the officials eligible for impeachment are limited to the President, Vice-President, and those who qualify as civil officers, and that the offenses for which an eligible official may be impeached and removed are limited to treason, bribery or other high crimes and misdemeanors.

Among the safeguards are the requirement that the two-thirds of the Senate concur in any impeachment conviction, and that the consequences of conviction shall not extend further than removal from office and disqualification from holding a future Federal office.

In a historical sense, Congress has formally exercised its impeachment power on a limited number of occasions. The House has impeached 19 government officials. The vast majority of those impeachments, 15 of the 19, have been Federal judges. The other four impeachments consist of two Presidents, Andrew Johnson and William Clinton, one Senator, William Blunt, and one Cabinet official, Secretary of War William Belknap. Eight of the 19 officials who have been impeached by the House have been convicted by the Senate, all of whom were Federal judges.

It would appear that the general impeachment framework leaves room for interpretative decisions by Members of both the House and the Senate in the exercise of their constitutionally accorded powers. Among the uncertainties in that framework is the question of which offenses constitute the type of high crimes and misdemeanors that establish grounds for an impeachment.

In considering that question, then-Congressman Gerald Ford famously stated that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history. While there may be some practical truth in that statement, the House's views of what constitutes an impeachable offense, both current and historical, carry great weight.

This proposition finds support in both the Constitution and its vesting of the sole power of impeachment in the House, and the Supreme Court's statement in *Nixon v. United States* that the judiciary was, "not chosen to have any role in impeachments."

For these reasons, it would appear that the House and Senate precedents likely form a prudent body of authority for interpreting the scope of the impeachment power. The impeachment precedents, however, do not establish fixed standards for the actions that constitute an impeachable offense.

It is, therefore, difficult to make general assertions based on past practice as to the type of conduct that satisfies the constitutional

requirement. For example, House precedents do not appear to speak directly to allegations of misconduct in the context of a Congressional investigation. Perhaps the closest analogue is the article of impeachment approved by the House against Judge Thomas Porteous in 2010 for false statements made to the Senate during consideration of his judicial nomination. The House has also previously approved articles of impeachment against various Federal judges for false or perjurious statements, but generally when those statements have been made during a criminal proceeding or before a grand jury.

In addition, it should be noted that this Committee approved an article of impeachment against then-President Nixon, alleging that he had withheld information subpoenaed by a congressional Committee. He resigned, however, before the House voted on the Committee's recommendations.

Finally, during the Clinton impeachment, the House, though approving articles of impeachment alleging perjury and obstruction of justice, rejected an article of impeachment approved by this Committee relating to allegations that the President gave misleading responses to congressional inquiries.

In closing, I would note that censure may be a tool available to the House as either an alternative to or supplement for impeachment of an executive branch official. A censure resolution can be in the form of a one-house or concurrent resolution, and may include a formal reprimand of the executive branch official, or express the House's opinion that the official should resign or be removed by the President.

A censure resolution is not legally binding, but may be significant for its symbolic impact. Although censure has a long-standing history, the House and Senate have adopted only a handful of these resolutions. To highlight one pertinent example, in 1886, the Senate censured the sitting Attorney General based on his refusal to provide certain records to the Senate.

This concludes my prepared statement. Thank you for the opportunity to appear before the Committee, and I will be happy to answer any questions you may have.

[The prepared statement of Mr. Garvey follows:]

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Impeachment and Removal

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October 29, 2015

Congressional Research Service
7-5700
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R44260

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The impeachment process provides a mechanism for removal of the President, Vice President, and other "civil Officers of the United States" found to have engaged in "treason, bribery, or other high crimes and misdemeanors." The Constitution places the responsibility and authority to determine whether to impeach an individual in the hands of the House of Representatives. Should a simple majority of the House approve articles of impeachment specifying the grounds upon which the impeachment is based, the matter is then presented to the Senate, to which the Constitution provides the sole power to try an impeachment. A conviction on any one of the articles of impeachment requires the support of a two-thirds majority of the Senators present.

Should a conviction occur, the Senate retains limited authority to determine the appropriate punishment. Under the Constitution, the penalty for conviction on an impeachable offense is limited to either removal from office, or removal *and* prohibition against holding any future offices of "honor, Trust or Profit under the United States." Although removal from office would appear to flow automatically from conviction on an article of impeachment, a separate vote is necessary should the Senate deem it appropriate to disqualify the individual convicted from holding future federal offices of public trust. Approval of such a measure requires only the support of a simple majority.

Key Takeaways of This Report

- The Constitution gives Congress the authority to impeach and remove the President, Vice President, and other federal "civil officers" upon a determination that such officers have engaged in treason, bribery, or other high crimes and misdemeanors.
- A simple majority of the House is necessary to approve articles of impeachment.
- If the Senate, by vote of a two-thirds majority, convicts the official on any article of impeachment, the result is removal from office and, at the Senate's discretion, disqualification from holding future office.
- The Constitution does not articulate who qualifies as a "civil officer." Most impeachments have applied to federal judges. With regard to the executive branch, lesser functionaries—such as federal employees who belong to the civil service, do not exercise "significant authority," and are not appointed by the President or an agency head—do not appear to be subject to impeachment. At the opposite end of the spectrum, it would appear that any official who qualifies as a principal officer, including a head of an agency such as a Secretary, Administrator, or Commissioner, is likely subject to impeachment.
- Impeachable conduct does not appear to be limited to criminal behavior. Congress has identified three general types of conduct that constitute grounds for impeachment, although these categories should not be understood as exhaustive: (1) improperly exceeding or abusing the powers of the office; (2) behavior incompatible with the function and purpose of the office; and (3) misusing the office for an improper purpose or for personal gain.
- The House has impeached 19 individuals: 15 federal judges, one Senator, one Cabinet member, and two Presidents. The Senate has conducted 16 full impeachment trials. Of these, eight individuals—all federal judges—were convicted by the Senate.

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Introduction

The Constitution gives Congress the authority to impeach and remove the President, Vice President, and other federal "civil officers"[1] upon a determination that such officers have engaged in treason, bribery, or other high crimes and misdemeanors. Impeachment is one of the various checks and balances created by the Constitution, and is a crucial tool for potentially holding government officers accountable for violations of the law and abuse of power. Rooted in various constitutional provisions, impeachment is largely immune from judicial review.[2] When considering impeachment matters, Members of Congress have historically examined the language of the Constitution; past precedents; the debates at the Constitutional Convention; the debates at the ratifying conventions; English common law and practice; state impeachment practices; analogous case law; and historical commentaries.

Although the term "impeachment" is commonly used to refer to the removal of a government official from office, the impeachment process, as described in the Constitution, entails two distinct proceedings carried out by the separate houses of Congress. First, a simple majority of the House *impeaches*—or formally approves allegations of wrongdoing amounting to an impeachable offense, known as articles of impeachment. The articles of impeachment are then forwarded to the Senate where the second proceeding takes place: an impeachment trial. If the Senate, by vote of a two-thirds majority, convicts the official of the alleged offenses, the result is *removal* from office of those still in office, and, at the Senate's discretion, disqualification from holding future office.

The House has impeached 19 individuals: 15 federal judges, one Senator, one Cabinet member, and two Presidents.[3] The Senate has conducted 16[4] full impeachment trials.[5] Of these, eight individuals—all federal judges—were convicted by the Senate.[6]

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[1] *See infra* "Who May Be Impeached and Removed?"

[2] *See infra* "Judicial Review."

[3] *See* Brown, W., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* ch. 27 §1 (2011) [hereinafter *House Practice*]. Due to a variety of factors, the impeachment process has been initiated in the House of Representatives a number of times without articles of impeachment being voted against the subjects of those inquiries. *See* Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 296 (1998).

[4] Three individuals were impeached, but resigned before completion of the resulting Senate trial.

[5] *See Report of the Impeachment Trial Committee On the Articles Against Judge G. Thomas Porteous, Jr.* 1 n.1, S.Rept. 111-347 (2010) [hereinafter *Porteous Impeachment*]. Impeachment trials were conducted for William Blount, United States Senator from Tennessee (impeachment proceedings from 1797-1799); John Pickering, District Judge for the United States District Court for the District of New Hampshire (1803-1804); Samuel Chase, Associate Justice of the United States Supreme Court (1804-1805); James H. Peck, District Judge for the United States District Court for the District of Missouri (1826-1831); West H. Humphreys, District Judge for the United States District Court for the District of Tennessee (1862); Andrew Johnson, President of the United States (1867-1868); William W. Belknap, Secretary of War (1876); Charles Swayne, District Judge for the United States District Court for the Northern District of Florida (1903-1905); Robert W. Archbald, Circuit Judge for the United States Court of Appeals for the Third Circuit, serving as Associate Judge for the United States Commerce Court (1912-1913); Harold Louderback, District Judge for the United States District Court for the Northern District of California (1932-1933); Halsted Ritter, District Judge for the United States District Court for the Southern District of Florida (1936); Harry E. Claiborne, District Judge for the United States District Court for the District of Nevada (1986); Alcee Hastings, United States District Judge for the Southern District of Florida (1988-1989); Walter L. Nixon, Jr., United States District Judge for the Southern District of Mississippi (1988-1989); William Jefferson Clinton, President of the United States (1998); and G. Thomas Porteous, United States District Judge for the Eastern District of Louisiana (2010).

[6] John Pickering (1804); West H. Humphreys (1862); Robert W. Archbald (1913); Halsted Ritter (1936); Harry E. Claiborne (1986); Alcee Hastings (1989); Walter L. Nixon, Jr. (1989); G. Thomas Porteous (2010). *See Porteous Impeachment, supra note* 5, at 1 n.1.

This report briefly surveys the constitutional provisions governing the impeachment power, examines which individuals are subject to impeachment, and explores the potential grounds for impeachment. In addition, it provides a short overview of impeachment procedures in the House and Senate and concludes with a discussion of the limited nature of judicial review for impeachment procedures.

Constitutional Provisions

> *The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.*
>
> —Article I, Section 2
>
> *The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*
>
> —Article II, Section 4
>
> *The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.*
>
> *Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.*
>
> —Article I, Section 3

The Constitution provides that impeachment applies only to the "President, Vice President, and all civil Officers of the United States," and that the grounds for impeachment are limited to "Treason, Bribery, or other high Crimes and Misdemeanors."[7] The decision to impeach an individual rests solely with the House of Representatives.[8] The House thus has discretion over *whether* to impeach an individual and *what* articles of impeachment will be presented to the Senate. The Senate, in turn, has the sole power to *try* impeachments.[9] Conviction of an individual requires a two-thirds majority of the present Senators on one of the articles brought by the House.[10] When conducting the trial, Senators must be "on oath or affirmation,"[11] and the right to a jury trial does not extend to impeachment proceedings.[12] As President of the United States Senate, the Vice President usually presides at impeachment trials; however, if the President is impeached and tried in the Senate, the Chief Justice of the Supreme Court presides at the trial.[13]

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[7] U.S. CONST. art. II, §4.

[8] U.S. CONST. art. I, §2, cl. 5.

[9] U.S. CONST. art. I, §3, cl. 6, 7.

[10] U.S. CONST. art. I, §3, cl. 6, 7.

[11] Under Senate rules, the Presiding Officer administers the oath to all Senators present before proceeding to consideration of any articles of impeachment. *See* Senate Manual, Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, at III, 113th Cong. (2014).

[12] U.S. CONST. art. I, §3, cl. 6, 7.

[13] U.S. CONST. art. I, §3, cl. 6, 7. There is some debate about who would preside if the Vice President were impeached. *Compare* Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849, 850 (2000) *with* Michael Stokes Paulsen, *Someone Should Have Told Spiro* (continued...)

The immediate effect of conviction upon an article of impeachment is removal from office,[14] although the Senate may subsequently vote on whether the official shall be disqualified from again holding an office of public trust under the United States.[15] If this option is pursued, a simple majority vote is required.[16] Convicted individuals are still subject to criminal prosecutions for the same factual situations, and individuals who have already been convicted of crimes may be impeached for the same underlying behavior later. Finally, the Constitution bars the President from using the pardon power to shield individuals from impeachment or removal from office.[17]

In considering the use of the impeachment power, Congress confronts at least two preliminary legal questions bearing on whether an impeachment inquiry against a given official is constitutionally appropriate: first, whether the individual whose conduct is under scrutiny holds an office that is subject to impeachment and removal, and second, whether the conduct for which the official is accused constitutes an impeachable offense.

Who May Be Impeached and Removed?

The Constitution explicitly makes "[t]he President, Vice President and all civil Officers of the United States" subject to impeachment and removal.[18] Which officials are to be considered "civil Officers of the United States" for purposes of impeachment is a significant constitutional question that remains mostly unresolved. In the past, Congress has seemingly shown a willingness to impeach Presidents, federal judges,[19] and Cabinet-level executive branch officials,[20] but a reluctance to impeach private individuals[21] and Members of Congress.[22] A question which

(...continued)

Agnew, 14 CONST. COMMENT. 245 (1997).

[14] U.S. CONST. art. II, §4.

[15] *See* III *Hinds' Precedents of the House of Representatives*, §2397 (1907) [hereinafter *Hinds'*]; VI *Cannon's Precedents of the House of Representatives* §512 (1936) [hereinafter *Cannon's*].

[16] *See* VI *Cannon's* §512. *See, e.g.*, 49 CONG. REC. 1447-1448 (January 13, 1913) (vote to disqualify Judge Robert W. Archbald, 39 yeas, 35 nays).

[17] U.S. CONST. art. II, §2, cl. 1.

[18] U.S. CONST. art. II, §4.

[19] Federal judges—appointed by the President, confirmed by the Senate, and enjoying tenure and salary protection—have consistently been considered civil officers; in fact, the vast majority of impeached individuals have been federal judges. *See Porteous Impeachment, supra* note 5; United States v. Claiborne, 727 F.2d 842, 845 n.3 (9th Cir. 1984) (observing that "[f]ederal judges are 'civil officers' within the meaning of Art. II sec 4").

[20] In 1876, the House impeached Secretary of War William W. Belknap on charges of corruption. Staff of H. Comm. on the Judiciary, 93d Cong., *Constitutional Grounds for Presidential Impeachment* 20 (Comm. Print 1974) [hereinafter *Constitutional Grounds*]; III *Hinds'* §§2444-2468. A House committee concluded that a Commissioner of the District of Columbia was not a civil officer for impeachment purposes because he was not a federal official, but a municipal officer. *See* VI *Cannon's* §548.

[21] III *Hinds'* §§2007, 2315. This limitation marks a clear departure from the historical British system, in which Parliament's impeachment power extended to any individual, other than a member of the royal family. See, Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 St. Louis L.J. 905, 908-09 (1999).

[22] It appears that Members of Congress are not civil officers within the meaning of the Constitution's impeachment provisions. In 1797, the House of Representatives voted to impeach Senator William Blount. III *Hinds'* §§2300, 2301, 2302. Two years later, the Senate concluded that the Senator was not a civil officer subject to impeachment and voted to dismiss the articles as the Senate lacked jurisdiction over the matter. III *Hinds'* §2318. This determination seems to be accepted by most authorities, and since then, the House has not voted to impeach a Member of Congress. *See House Practice* ch. 27 §2; Committee on the Judiciary, 93d Cong., *Impeachment—Selected Material* 692 (Comm. Print 1973) [hereinafter *Impeachment—Selected Materials*]; Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1373 (Fed. Cir. 2006) ("This principle has been accepted since 1799, when the Senate, presented with articles of impeachment against (continued...)

precedent has not thus far addressed is whether Congress may impeach and remove subordinate, non-Cabinet level executive branch officials.

The Constitution does not define "civil Officers of the United States." Nor do the debates at the Constitutional Convention provide significant evidence of which individuals (beyond the President and Vice President) the Founders intended to be impeachable.[23] Impeachment precedents in both the House and Senate are equally unhelpful with respect to subordinate executive officials. In all of American history, only three members of the executive branch have been impeached: two Presidents and a Secretary of War.[24] Thus, while it seems that executive officials of the highest levels are "civil Officers," historical precedent provides no examples of the impeachment power being used against lower-level executive officials. One must, therefore, look to other sources for aid in determining precisely how far down the federal bureaucracy the impeachment power might reach.

The general purposes of impeachment may assist in interpreting the proper scope of "civil Officers of the United States." The congressional power of impeachment constitutes an important aspect of the various checks and balances that were built into the Constitution to preserve the separation of powers. It is a tool, entrusted to the House and Senate alone, to remove government officials in the other branches of government, who either abuse their power or engage in conduct that warrants their dismissal from an office of public trust. At least one commentator has suggested that the Framers recognized, particularly with respect to executive branch officials, that there would be instances in which it may not be in the President's interest to remove a "favorite" from office, even when that individual has violated the public trust.[25] As such, the Framers "dwelt repeatedly on the need of power to oust corrupt or oppressive ministers whom the President might seek to shelter."[26] If the impeachment power were meant to ensure that Congress has the ability to impeach and remove corrupt officials that the President was unwilling to dismiss, it would seem arguable that the power should extend to officers exercising a degree of authority, the abuse of which would be harmful to the separation of powers and good government.

The writings of early constitutional commentators also arguably suggest a broad interpretation of "civil Officers of the United States." Joseph Story addressed the reach of the impeachment power in his influential *Commentaries on the Constitution*, asserting that "*all* officers of the United states [] who hold their appointments under the national government, whether their duties are executive or judicial, *in the highest or in the lowest departments of the government*, with the exception of officers in the army and navy, are properly civil officers within the meaning of the

(...continued)

Senator William Blount, concluded after four days of debate that a Senator was not a civil officer ... for purposes of the Impeachment Clause."). Joseph Story has also suggested that "civil officers" was not intended to cover military officers. See Joseph Story, II COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §789, at 550 (1833) (concluding that "[t]he sense, in which [civil] is used in the Constitution, seems to be in contradistinction to military, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government.").

[23] *See* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 10-19 (1989). For discussion of the impeachment clauses at the Constitutional Convention see 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION 53-54, 64-66, 550-563 (1937).

[24] Andrew Johnson, President of the United States (1867-1868); William W. Belknap, Secretary of War (1876); William Jefferson Clinton, President of the United States (1998).

[25] Raoul Berger, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 101 (Harvard U. Press, 1973) (citing statement of James Madison, 1 Ann. Cong. 372 (1789)).

[26] Berger, *supra* note 25, at 228-230.

constitution, and liable to impeachment."[27] Similarly, William Rawle reasoned that "civil Officers" included "[*a*]*ll* executive and judicial officers, *from the President downwards*, from the judges of the Supreme Court to those of the most inferior tribunals ..."[28] Consistent with the text of the Constitution, these early interpretations suggest the impeachment power was arguably intended to extend to "all" executive officers, and not just Cabinet level officials and other executive officials at the highest levels.

But who is an officer? The most thorough elucidation of the definition of "Officers of the United States" can be found in judicial interpretations of the Appointments Clause. That provision, which establishes the methods by which "Officers of the United States" may be appointed, has generally been viewed as a useful guidepost in establishing the definition of "civil Officers" for purposes of impeachment.[29]

The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[30]

In interpreting the Appointments Clause, the Court has made clear distinctions between "Officers of the United States," whose appointment is subject to the requirements of the Clause, and non-officers, also known as employees, whose appointment is not.[31] The amount of authority that an individual exercises will generally determine his classification as either an officer or employee. As established in *Buckley v. Valeo*, an officer is "any appointee exercising *significant authority* pursuant to the laws of the United States," whereas employees are viewed as "lesser functionaries subordinate to the officers of the United States," who do not exercise "significant authority."[32]

The Supreme Court has further subdivided "officers" into two categories: principal officers, whom may be appointed only by the President with the advice and consent of the Senate; and inferior officers, whose appointment Congress may vest "in the President alone, in the Courts of Law, or in the Heads of Departments."[33]

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[27] Joseph Story, II COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §790 (1833) (emphasis added).

[28] William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 214 (1829) (emphasis added).

[29] U.S. CONST. art. II, §2, cl. 2. It appears that the traditional understanding of who is a "civil Officer" for purposes of impeachment is analogous to the term "Officer" under the Appointments Clause, *see, e.g.*, Department of Justice, Office of Legal Counsel (OLC), *Officers of the United States Within the Meaning of the Appointments Clause* (Apr. 16, 2007), available at http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v031-p0083.pdf; Akhil Reed Amar, *On Impeaching Presidents*, 28 Hofstra L. Rev. 291, 303 (1999); Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMMENT. 479 (1998).

[30] U.S. CONST. art. II, §2, cl. 2.

[31] *See, e.g.*, Edmond v. United States, 520 U.S. 651, 663 (1997) (declaring that the exercise of "'significant authority pursuant to the laws of the United States' marks ... the line between officer and non-officer."). The Department of Justice, Office of Legal Counsel has argued that an office is subject to the Appointments Clause "if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is 'continuing.'" *Officers of the United States Within the Meaning of the Appointments Clause* (Apr. 16, 2007).

[32] 424 U.S. 1, 126 (1976); *Id.* at n.162.

[33] U.S. CONST. art. II, §2, cl. 2.

The Court has acknowledged that its "cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes."[34] The clearest statement of the proper standard to be applied in differentiating between the two types of officers appears to have been made in *Edmond v. United States*.[35] In *Edmond*, the Court noted that "[g]enerally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President ... [and] whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate."[36] Thus, in analyzing whether one may be properly characterized as either an inferior or principal officer, the Court's decisions appear to focus on the extent of the officer's discretion to make autonomous policy choices and the authority of other officials to supervise and to remove the officer.

Applying the principles established in the Court's Appointments Clause jurisprudence to define the scope of "civil Officers" for purposes of impeachment, it would appear that employees, as non-officers, are not subject to impeachment. Therefore lesser functionaries—such as federal employees who belong to the civil service, do not exercise "significant authority," and are not appointed by the President or an agency head—would *not* be subject to impeachment. At the opposite end of the spectrum, it would seem that any official who qualifies as a principal officer, including a head of an agency such as a Secretary, Administrator, or Commissioner, *would be* impeachable.

The remaining question is whether inferior officers, or those officers who exercise significant authority under the supervision of a principal officer, are subject to impeachment and removal. As previously noted, it would appear that an argument can be made from the text and purpose of the impeachment clauses, as well as early constitutional interpretations, that the impeachment power was intended to extend to "*all*" officers of the United States, and not just those in the highest levels of government. Any official exercising "significant authority" including both principal and inferior officers, would therefore qualify as a "civil Officer" subject to impeachment. This view would permit Congress to impeach and remove any executive branch "officer," including many deputy political appointees and certain administrative judges.[37]

There is some historical evidence, however, to suggest that inferior officers were not meant to be subject to impeachment.[38] For example, a delegate at the North Carolina ratifying convention asserted that "[i]t appears to me ... the most horrid ignorance to suppose that every officer, however trifling his office, is to be impeached for every petty offense ... I hope every gentleman ... must see plainly that impeachments cannot extend to inferior officers of the United States."[39] Additionally, Governeur Morris, member of the Pennsylvania delegation to the Constitutional Convention, arguably implied that inferior officers would not be subject to impeachment in

[34] Edmond, 520 U.S. at 661.

[35] *Id.* at 659.

[36] *Id.* at 662-63.

[37] For additional examples of inferior officers see, Ex parte Hennen, 38 U.S. (13 Pet.) 225, 258 (1839) (a district court clerk); Ex parte Siebold, 100 U.S. 371, 397-98 (1880) (election supervisor); United States v. Eaton, 169 U.S. 331, 343 (1898) (vice consul charged temporarily with the duties of the consul); Go-Bart Importing Co. v. United States, 282 U.S. 344, 252-54 (1931) (United States Commissioner in district court proceedings); Morrison v. Olson, 487 U.S. 654 (1988) (independent counsel).

[38] *See* Raoul Berger, *Impeachment of Judges and Good Behavior Tenure*, 79 YALE L. J. 1475 (1970) (asserting that impeachment was not intended to extend to inferior officers in either the executive or judicial branches.).

[39] *Id.* at 1510 (statement of Archibald Maclaine).

stating that "certain *great* officers of State; a minister of finance, of war, of foreign affairs, etc. ... will be amenable by impeachment to the public justice."[40]

Notwithstanding this ongoing debate, the authority to resolve any ambiguity in the scope of "civil Officers" for purposes of impeachment lays initially with the House, in adopting articles of impeachment, and with the Senate, in trying the officer.[41]

Impeachment Grounds

Is Impeachment Limited to Criminal Acts?

The Constitution describes the grounds of impeachment as "treason, bribery, or other high Crimes and Misdemeanors."[42] While treason[43] and bribery[44] are relatively well-defined terms, the meaning of "high Crimes and Misdemeanors" is not defined in the Constitution or in statute and remains somewhat opaque. It was adopted from the English practice of parliamentary impeachments, which appears to have been directed against individuals accused of crimes against the state and encompassed offenses beyond traditional criminal law.[45]

Some have argued that only criminal acts are impeachable offenses under the United States Constitution; impeachment is therefore inappropriate for non-criminal activity.[46] In support of this assertion, one might note that the debate on impeachable offenses during the Constitutional Convention in 1787 indicates that criminal conduct was encompassed in the "high crimes and misdemeanors" standard.[47]

The notion that *only* criminal conduct can constitute sufficient grounds for impeachment does not, however, comport with historical practice.[48] Alexander Hamilton, in justifying placement of the power to try impeachments in the Senate, described impeachable offenses as arising from "the misconduct of public men, or in other words from the abuse or violation of some public trust."[49]

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[40] *Id.* at n.176 (citing 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION 53-54 (1937)).

[41] Although many decisions made by the House and Senate in the course of the impeachment process are not subject to judicial review, it is unclear whether a federal court would be willing to review whether an individual is a "civil Officer" subject to impeachment. *See generally* "Judicial Review" *supra.*

[42] U.S. CONST. art. II §4.

[43] See U.S. CONST. art. III, §3, cl. 1; 18 U.S.C. §2381. See generally CRS Report 98-882, *Impeachment Grounds: A Collection of Selected Materials*, by Charles Doyle; IV BLACKSTONE, WM., COMMENTARIES ON THE LAWS OF ENGLAND, ch. 6 (1769).

[44] *See* 18 U.S.C. §201; IV BLACKSTONE, WM., COMMENTARIES ON THE LAWS OF ENGLAND 139 (1769).

[45] *See Impeachment of Judge Alcee L. Hastings* 6, H.Rept. 100-810 (1988); *Constitutional Grounds*, *supra* note 20, at 4-7.

[46] *See, e.g.*, *Impeachment of Richard M. Nixon, Minority Views* 362-372, H.Rept. 93-1305 (1974); III *Deschler's Precedents of the House of Representatives* ch. 14 §3.8 at 438-45 (1974) [hereinafter *Deschler's*]. *See also Constitutional Grounds*, *supra* note 20, at 22.

[47] *See Impeachment of Richard M. Nixon* 362-372, H.Rept. 93-1305 (1974) (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 64-70 (M. Farrand ed., 1911)). For a discussion of presidential impeachment grounds, *see* III *Deschler's* §3.8, at 434-45.

[48] *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 53 (2000) (pointing to the impeachments and convictions of Judge Pickering, 2 Annals of Congress 319-22 (1804), Judge West. H. Humphreys, Congressional Globe, 37th Cong. 2d sess., 2949-50 (1862), Judge Robert Archbald, 48 Cong. Rec. 8910 (1912), and Judge Halsted Ritter 80 Cong. Rec. 5606 (1936)); CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 33-36 (1974); RAOUL BERGER, IMPEACHMENT 55-59 (1973).

[49] THE FEDERALIST No. 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Such offenses were "*political*, as they relate chiefly to injuries done immediately to the society itself."[50] According to this reasoning, impeachable conduct could include behavior that violates an official's duty to the country, even if such conduct is not necessarily a prosecutable offense. Indeed, in the past both houses of Congress have given the phrase "high Crimes and Misdemeanors" a broad reading, "finding that impeachable offenses need not be limited to criminal conduct."[51]

A variety of congressional materials support this reading. For example, committee reports on potential grounds for impeachment have described the history of English impeachment as including non-criminal conduct and noted that this tradition was adopted by the Framers.[52] In accordance with the understanding of "high" offenses in the English tradition, impeachable offenses are "constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself."[53] "[O]ther high crimes and misdemeanor[s]" are not limited to indictable offenses, but apply to "serious violations of the public trust."[54] Congressional materials indicate that the term "Misdemeanor ... does not mean a minor criminal offense as the term is generally employed in the criminal law," but refers instead to the behavior of public officials.[55] "[H]igh Crimes and Misdemeanors" are thus best characterized as "misconduct that damages the state and the operations of government institutions."[56]

Similarly, the judiciary subcommittee charged with investigating Associate Justice Douglas of the Supreme Court concluded that, at least with regard to federal judges, impeachment was appropriate in several circumstances.[57] First, if the conduct was connected with the judicial office or the exercise of judicial power, then both criminal conduct and conduct constituting a serious dereliction of public duty were grounds for impeachment. Second, if the conduct was not connected to the duties of judicial office, then criminal conduct could constitute grounds for impeachment. The committee left unresolved whether non-criminal conduct outside of the judicial function could support an impeachment charge.[58]

The purposes underlying the impeachment process also indicate that non-criminal activity may constitute sufficient grounds for impeachment. The purpose of impeachment is not to inflict personal punishment for criminal activity. In fact, the Constitution explicitly makes clear that impeached individuals are not immunized from criminal liability once they are impeached for particular activity.[59] Instead, impeachment is a "remedial" tool; it serves to effectively "maintain constitutional government" by removing individuals unfit for office.[60] Grounds for impeachment include abuse of the particular powers of government office or a violation of the "public trust"[61]—conduct that is unlikely to be barred via statute.[62]

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[50] *Id.* (emphasis in small caps in original).

[51] *Impeachment of Walter L. Nixon, Jr.*, H.Rept. 101-36 at 5 (1989).

[52] *See Constitutional Grounds*, *supra* note 20, at 22-24.

[53] *Id.* at 26.

[54] *Impeachment of Walter L. Nixon*, Jr., H.Rept. 101-36 at 5 (1989).

[55] *Id.*

[56] *Impeachment of Judge Alcee L. Hastings*, H.Rept. 100-810 at 6 (1988).

[57] *Associate Justice William O. Douglas, Final Report by the Special Subcommittee On H. Res. 920 of the Committee on the Judiciary, House of Representatives* 31-39, 91st Cong. (Comm. Print 1970).

[58] *See id.*

[59] U.S. CONST. art. I, §3, cl. 6, 7.

[60] *See Constitutional Grounds*, *supra* note 20, at 22-24.

[61] *Impeachment of Walter L. Nixon, Jr.*, H.Rept. 101-36 at 5 (1989).

Congressional practice also appears to support this notion. Many of the impeachments approved by the House of Representatives have included conduct that did not involve criminal activity.[63] Less than a third have specifically invoked a criminal statute or used the term "crime."[64] For example, in 1803, Judge John Pickering was impeached and convicted for, among other things, appearing on the bench "in a state of total intoxication."[65] In 1912, Judge Robert W. Archbald was impeached and convicted for abusing his position as a judge by inducing parties before him to enter financial transactions with him.[66] In 1936, Judge Halstead Ritter was impeached and convicted for conduct that "br[ought] his court into disrepute, to the prejudice of said court and public confidence in the administration of justice ... and to the prejudice of public respect for and confidence in the federal judiciary."[67] And a number of judges were impeached for misusing their position for personal profit.[68]

Are the Standards for Impeachable Offenses the Same for Judges and Executive Branch Officials?

Some have suggested that the standard for impeaching a federal judge differs from an executive branch official.[69] While Article II, Section 1, of the Constitution specifies the grounds for the impeachment of civil officers as "treason, bribery, and other high Crimes and Misdemeanors," Article III, Section 1, provides that federal judges "hold their Offices during good behaviour."[70] One argument posits that these clauses should be read in conjunction, meaning that judges can be impeached and removed from office if they fail to exhibit good behavior *or* if they are guilty of "treason, bribery, and other high Crimes and Misdemeanors."[71]

However, while one might find some support for the notion that the "good behavior" clause constitutes an additional ground for impeachment in early twentieth century practice,[72] the "modern view" of Congress appears to be that the phrase "good behavior" simply designates judicial tenure.[73] Under this reasoning, rather than functioning as a ground for impeachment, the "good behavior" phrase simply makes clear that federal judges retain their office for life unless they are removed via a proper constitutional mechanism. For example, a 1973 discussion of

(...continued)

[62] *See Constitutional Grounds*, *supra* note 20, at 22-25.

[63] *Impeachment of Judge Alcee L. Hastings*, H.Rept. 100-810 at 6 (1988).

[64] *House Practice* ch. 27 §4.

[65] *See Constitutional Grounds*, *supra* note 20, at 43. Judge Pickering did not appear himself or by counsel. In the Senate trial, a written petition offered by Judge Pickering's son, through Robert G. Harper, indicated that the Judge had been under treatment for mental illness for over two years without success. III HINDS' §§2333-2335, at 697-704.

[66] *Id.* at 51-52. At the time this was not a prosecutable offense. *See* GERHARDT, *supra note* 48 at 53 (citing 48 CONG. REC. 8910 (1912)).

[67] *Proceedings of the U.S. Senate in the Trial of Impeachment of Halsted L. Ritter*, S. Doc. No. 74-200, at 637-38 (1936).

[68] *See House Practice* 598 ("The use of office for direct or indirect personal monetary gain was also involved in the impeachments of Judges Charles Swayne (1903), Robert Archbald (1912), George English (1926), Harold Louderback (1932), Halsted Ritter (1936), Samuel Kent (2009), and Thomas Porteous (2010)").

[69] *See* 3 DESCHLER'S ch. 14 §3.9; MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 106-07 (2000).

[70] U.S. CONST. art. II, §4; art. III, §1.

[71] *See House Practice* 596.

[72] *See Impeachment—Selected Materials*, *supra* note 22, at 666.

[73] *House Practice* ch. 27 §4.

impeachment grounds released by the House Judiciary Committee reviewed the history of the phrase and concluded that the "Constitutional Convention ... quite clearly rejected" a "dual standard" for judges and civil officers.[74] The "treason, bribery, and high Crimes and Misdemeanors" clause thus serves as the sole standard for impeachable conduct for both executive branch officials and federal judges.[75] The next year, the House Judiciary Committee's Impeachment Inquiry asked whether the "good behavior" clause provides an additional ground for impeachment of judges and concluded that "[i]t does not."[76] It emphasized that the House's impeachment of judges was "consistent" with impeachment of "non-judicial officers."[77] Finally, the House Report on the Impeachment of President Clinton affirmed this reading of the Constitution, stating that impeachable conduct for judges mirrored impeachable conduct for other civil officers in the government.[78]

Nevertheless, even if the "good behavior" clause does not delineate a standard for impeachment and removal for federal judges, as a practical matter, one might argue that the range of impeachable conduct differs between judges and executive branch officials due to the differing nature of each office. For example, one might argue that a federal judge could be impeached for perjury or fraud because of the importance of trustworthiness and impartiality to the judiciary, while the same behavior might not constitute impeachable conduct for an executive branch official. However, given the wide variety of factors at issue—including political calculations, the relative paucity of impeachments of non-judicial officers compared to judges, and the fact that a non-judicial officer has never been convicted by the Senate—it is uncertain if conduct meriting impeachment and conviction for a judge would fail to qualify for a non-judicial officer.

The impeachment and acquittal of President Clinton illustrates this difficulty. The House of Representatives impeached President Clinton for (1) providing perjurious and misleading testimony to a federal grand jury and (2) obstruction of justice in regards to a civil rights action against him.[79] The House Judiciary Committee report that recommended articles of impeachment argued that perjury by the President was an impeachable offense, even if committed with regard to matters outside his official duties.[80] The report rejected the notion that conduct such as perjury was "more detrimental when committed by judges and therefore only impeachable when committed by judges."[81] The report pointed to the impeachment of Judge Claiborne, who was impeached and convicted for falsifying his income tax returns—an act which "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary."[82] While it is "devastating" for the judiciary when judges are perceived as dishonest, the report argued, perjury by the President was "just as devastating to our system of government."[83] In addition, the report continued, both Judge Claiborne and Judge Nixon were impeached and convicted for perjury and false statements in matters distinct from their official

[74] *See Impeachment—Selected Materials*, *supra* note 22, at 666.

[75] *Id.*

[76] *See Constitutional Grounds*, *supra* note 20, at 17.

[77] *Id.*

[78] *Impeachment of William Jefferson Clinton*, H.Rept. 105-830 at 110-18 (1998).

[79] *See id.* at 108, 119.

[80] *See id.* at 108.

[81] *Id.* at 112.

[82] *Id.* (quoting 132 CONG. REC. S15, 760-62 (daily ed. Oct. 9, 1986)) (quotation marks omitted).

[83] *Id.* at 113.

duties.[84] Likewise, the report noted the President's perjurious conduct, though seemingly falling outside of his official duties as President, nonetheless constituted grounds for impeachment.

In contrast, the minority views from the report opposing impeachment reasoned that "not all impeachable offenses are crimes and not all crimes are impeachable offenses."[85] The minority emphasized that the President was not impeachable for all potential crimes, no matter how minor; impeachment was reserved for "conduct that constitutes an egregious abuse or subversion of the powers of the executive office."[86] Examining the impeachment of President Andrew Johnson and the articles of impeachment drawn up for President Richard Nixon, the minority concluded that both were accused of committing "public misconduct" integral to their "official duties."[87] The minority noted that the Judiciary Committee had rejected an article of impeachment against President Nixon alleging that he committed tax fraud, primarily because that "related to the President's private conduct, not to an abuse of his authority as President."[88]

The minority did not explicitly claim that the grounds for impeachment might be different between federal judges and executive branch officials, but its reasoning at least hints in that direction. Its rejection of nonpublic behavior as sufficient grounds for impeachment for the President—including its example of tax fraud as nonpublic behavior that does not qualify—appears to conflict with the past impeachment and conviction of federal judges on just this basis.[89] One reading of the minority's position is that certain behavior might be impeachable conduct for a federal judge, but not for the President.

While two articles of impeachment were approved by the House, the Senate acquitted President Clinton on both charges. However, generating firm conclusions from this result is quite difficult as there may have been varying motivations for these votes. One possibility is that the acquittal occurred because some Senators—though agreeing that such conduct merited impeachment—thought the House Managers failed to prove their case. Another is that certain Senators disagreed that such behavior was impeachable at all. Yet another possibility is that neither ideological stance was considered, and voting was conducted solely according to political calculations.

Categories of Impeachment Grounds

Congressional materials have cautioned that the grounds for impeachment "do not all fit neatly and logically into categories" because the remedy of impeachment is intended to "reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office."[90] Nonetheless, congressional precedents reflect three broad types of conduct thought to constitute grounds for impeachment, although they should not be understood as exhaustive or binding: (1) improperly exceeding or abusing the powers of the office; (2) behavior incompatible with the function and purpose of the office; and (3) misusing the office for an improper purpose or for personal gain.[91]

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[84] *Id.* at 118.

[85] *Id.* at 204 (minority views).

[86] *Id.*

[87] *Id.* at 207.

[88] *Id.*

[89] *See, e.g.*, Impeachment of Judge Harry E. Claiborne, 132 CONG. REC 29877-872 (1986).

[90] *See Constitutional Grounds, supra* note 20, at 17.

[91] *See id.* at 18-21; *House Practice* Ch. 27 §4. The circumstances in the individual cases that make up these categories are such that it is not clear that impeachment and conviction would have followed in the absence of allegations of (continued...)

Exceeding or Abusing the Powers of the Office

The House has impeached several individuals for abusing or exceeding the powers of their office. For example, in 1868, amidst a struggle over Reconstruction policy, the House impeached President Andrew Johnson on allegations that he violated the Tenure of Office Act, which restricted the power of the President to remove members of the Cabinet without Senate approval.[92] Considering the statute unconstitutional, President Johnson removed Secretary of War Edwin M. Stanton and was impeached shortly thereafter on nine articles relating to his actions.[93] Two more articles were brought the next day, alleging that he had made "harangues" criticizing the Congress and questioning its legislative authority that brought the presidency "into contempt, ridicule, and disgrace" and attempted to prevent the execution of the Tenure in Office Act and an army appropriations act by conspiring to remove Stanton.[94] President Johnson was acquitted by a margin of one vote in the Senate.[95]

In 1974, the House Judiciary Committee recommended articles of impeachment against President Richard Nixon on the theory that he abused the powers of his office. First, the articles alleged that the President, "using the powers of his high office," attempted to obstruct the investigation of the Watergate Hotel break-in, conceal and protect the perpetrators, and conceal the existence of other illegal activity.[96] Second, that he used the power of the office of the Presidency to violate citizens' constitutional rights, "impair||" lawful investigations, and "contravene||" laws applicable to executive branch agencies.[97] Third, that he refused to cooperate with congressional subpoenas.[98] President Nixon resigned before the House voted on the articles.

One of the articles of impeachment recommended by the House Judiciary Committee against President Clinton also alleged abuse of the powers of his office, although the House rejected this article.[99] That article alleged that the President refused to comply with certain congressional requests for information and provided false and misleading information in response to others.[100] The committee report argued that such conduct "showed contempt for the legislative branch and impeded Congress's exercise of its Constitutional responsibility" of impeachment.[101]

Behavior Incompatible with the Function and Purpose of the Office

A number of individuals have also been impeached for behavior incompatible with the nature of the office they hold. For example, Judge Harry Claiborne was impeached for providing false information on federal income tax forms, an offense for which he had previously been convicted for in a criminal case. The first two articles of impeachment against Judge Claiborne simply laid

(...continued)

criminal misconduct.

[92] *See* Act of March 2, 1867, ch. 154, §6, 14 Stat. 430. Incidentally, such tenure protections were later invalidated as unconstitutional by the Supreme Court. *See* Myers v. United States, 272 U.S. 52 (1926).

[93] *Constitutional Grounds*, *supra* note 20, at 18-19.

[94] *See Impeachment of President Andrew Johnson*, in *Impeachment—Selected Materials*, *supra* note 22, at 154-61.

[95] III *Hinds'* §2443.

[96] *Impeachment of Richard. M. Nixon*, H.Rept. 93-1305, at 1-3 (1974).

[97] *Id.* at 3-4.

[98] *Id.* at 4.

[99] *See House Practice* ch. 27 §4.

[100] *Impeachment of William Jefferson Clinton*, H.Rept. 105-830, at 121 (1998).

[101] *Id.* at 123.

out the underlying behavior. The third article "rest[ed] entirely on the conviction itself" and stood for the principle that "by conviction alone he is guilty of 'high crimes' in office."[102] The fourth alleged that Judge Claiborne's actions brought the "judiciary into disrepute, thereby undermining public confidence in the integrity and impartiality of the administration of justice" which amounted to a "misdemeanor."[103] The Senate voted to convict Judge Claiborne on the first, second, and fourth articles.[104]

Two judges were impeached for appearing on the bench in a state of intoxication. Judge John Pickering was impeached and convicted in 1803 for, among other things, appearing in court "in a state of intoxication and using profane language."[105] Judge Mark H. Delahay was impeached in 1873 for his "personal habits," including being intoxicated on and off the bench.[106] He resigned before a trial in the Senate.[107]

Various other activities incompatible with the nature of an office have merited impeachment procedures. In 1862, Judge West H. Humphrey was impeached and convicted for neglecting his duties as a judge and joining the Confederacy.[108] In 1926 Judge George English was impeached for showing judicial favoritism which eroded the public's confidence in the court.[109] And in 2009, Judge Samuel B. Kent was impeached for allegedly sexually assaulting two court employees, obstructing the judicial investigation of this behavior, and making false and misleading statements to agents of the Federal Bureau of Investigation about the activity.[110] Judge Kent resigned before the Senate trial was completed.[111]

Finally, one might classify some of the articles of impeachment brought against President Clinton as grounded on alleged behavior considered incompatible with the nature of the office of the Presidency. Both the first article, for allegedly lying to a grand jury, and the second, for allegedly obstructing justice by concealing evidence in a federal civil rights action brought against him,[112] noted that by doing this, "William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States."[113]

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[102] *Impeachment of Judge Harry E. Claiborne*, H.Rept. 99-688 at 22 (1986).

[103] *Id.* at 23.

[104] Impeachment of Judge Harry E. Claiborne, 132 CONG. REC. 29870-872 (1986).

[105] *House Practice* ch. 27 §4; III *Hinds'* §§2319-2341.

[106] *House Practice* ch. 27 §4; III *Hinds'* §§2504-2505.

[107] *House Practice* ch. 27 §4.

[108] III *Hinds'* §§2385-2397.

[109] *House Practice* ch. 27 §4; VI *Cannon's* §§544-547.

[110] *Impeachment of Judge Samuel B. Kent*, H.Rept. 111-159, at 2-3 (2009). Judge Kent pled guilty and was imprisoned for obstruction of justice based on false statements he made in the judicial investigation. *Id.*

[111] *House Practice* ch. 27 §4.

[112] At the time, making a false statement to a federal grand jury; obstructing justice in relation to a federal judicial proceeding; and witness tampering were all federal crimes. 18 U.S.C. 1623, 1503, 1512 (1994 ed.). Of the four articles of impeachment voted on by the House, only the first and third articles, relating to false statements to the grand jury and witness tampering, respectively, were approved and sent to the Senate for trial. 144 CONG. REC. 28110-111 (1998).

[113] *Impeachment of William Jefferson Clinton*, H.Rept. 105-830, at 2, 4 (1998).

Misuse of Office for Improper Purpose or for Personal Gain

A number of individuals have been impeached for official conduct for an improper purpose. The first type of behavior involves vindictive use of the office. For example, in 1826, Judge James Peck was impeached for charging a lawyer with contempt, imprisoning him, and ordering his disbarment for criticizing one of the judge's decisions.[114] Judge Peck was acquitted by the Senate.[115] In 1904, Judge Charles Swayne was also impeached by the House and acquitted by the Senate. Among the articles of impeachment was the allegation that he had unlawfully imprisoned several individuals on false charges of contempt.[116]

The second type of behavior involves misuse of the office for personal gain. Secretary of War William W. Belknap was impeached in 1876 for allegedly receiving payments in return for appointing an individual to maintain a trading post in Indian Territory.[117] Belknap resigned two hours before the House impeached him,[118] but the Senate nevertheless conducted a trial in which Belknap was acquitted.[119] In 1912, Judge Robert W. Archbald was impeached and convicted for using the office to acquire business favors from both litigants in his court and potential litigants.[120] And the impeachments of Judges English,[121] Louderback,[122] and Ritter[123] all involved "misusing their power to appoint and set the fees of bankruptcy receivers for personal profit."[124]

Similarly, Judge Alcee L. Hastings was impeached by the House on 16 articles, including involvement in a conspiracy to accept bribes in return for lenient sentences for defendants, lying about the underlying events at his criminal trial, and fabricating false documents and submitting them as evidence at his criminal trial.[125] Judge Hastings was convicted by the Senate on eight articles.[126]

In addition, Judge Walter L. Nixon Jr. was convicted in a criminal case on two counts of perjury to a grand jury concerning his relationship with a man whose son was being prosecuted. He was subsequently impeached in 1989 for his behavior, including making false statements to the grand jury about whether he had discussed a criminal case with the prosecutor and attempted to influence the case, as well as for concealing such matters from federal investigators.[127] The Senate convicted Judge Nixon on two of three articles.[128]

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[114] *See Constitutional Grounds*, *supra* note 20, at 20; III *Hinds'* §§2364-2366.

[115] *House Practice* ch. 27 §4.

[116] III *Hinds'* §§2469-2485. Another ground for impeachment was falsifying certain expense accounts, which seems to involve misusing using the office for personal gain. *Id.*

[117] *See Constitutional Grounds*, *supra* note 20, at 20; III *Hinds'* §§2444-2468.

[118] Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment As A Madisonian Device*, 49 DUKE L.J. 1, 53 (1999).

[119] III *Hinds'* §§2444-2468.

[120] *Constitutional Grounds*, *supra* note 20, at 20; VI *Cannon's* §§500-512.

[121] VI *Cannon's* §§545-574. Judge English resigned before trial in the Senate.

[122] *See* VI *Cannon's* §§514-524. Judge Louderback was acquitted by the Senate.

[123] III *Deschler's* ch. 14 §3.2. The Senate convicted Judge Ritter on one count which seems to have incorporated the remaining articles.

[124] *Constitutional Grounds*, *supra* note 20, at 20.

[125] *Impeachment of Alcee L. Hastings*, H.Rept. 100-810, at 1-5 (1988).

[126] *House Practice* ch. 27 §4.

[127] *Impeachment of Walter L. Nixon, Jr.*, H.Rept. 101-136, at 1-2 (1989).

[128] *House Practice* ch. 27 §4.

Finally, in 2010, Judge G. Thomas Porteous Jr. was impeached for participating in a corrupt financial relationship with attorneys in a case before him, and engaging in a corrupt relationship with bail bondsmen whereby he received things of value in return for helping bondsman develop corrupt relationships with state court judges.[129] Judge Porteous was convicted by the Senate on all the articles brought against him.[130]

Impeachment for Behavior Prior to Assuming Office

Most impeachments have concerned behavior occurring while an individual is in a federal office. However, some have addressed, at least in part, conduct before individuals assumed their positions. For example, in 1912, a resolution[131] impeaching Judge Robert W. Archbald and setting forth 13 articles of impeachment was reported out of the House Judiciary Committee and agreed to by the House.[132] The Senate convicted Judge Archbald in January the following year. At the time that Judge Archbald was impeached by the House and tried by the Senate in the 62nd Congress, he was U.S. Circuit Judge for the Third Circuit and a designated judge of the U.S. Commerce Court. The articles of impeachment brought against him alleged misconduct in those positions as well as in his previous position as U.S. District Court Judge of the Middle District of Pennsylvania.[133] Judge Archbald was convicted on four articles alleging misconduct in his then-current positions as a circuit judge and Commerce Court judge, and on a fifth article that alleged misuse of his office both in his then current positions and in his previous position as U.S. District Judge.[134]

While Judge Archbald was impeached and convicted in part for behavior occurring before he assumed his then-current position, the underlying behavior occurred while he held a prior federal office. Judge G. Thomas Porteous, in contrast, is the first individual to be impeached by the House[135] and convicted by the Senate based in part upon conduct occurring before he began his tenure in federal office. Articles I and II each alleged misconduct beginning while he was a state court judge as well as misconduct while he was a federal judge. Article IV alleged that Judge Porteous made false statements to the Senate and FBI in connection with his nomination and confirmation to the U.S. District Court for the Eastern District of Louisiana. On December 8, 2010, he was convicted on all four articles, removed from office, and disqualified from holding future federal offices.[136]

On the other hand, it does not appear that any President, Vice President, or other civil officer of the United States has been impeached by the House *solely* on the basis of conduct occurring

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[129] *Report of the Impeachment Trial Committee on the Articles Against Judge G. Thomas Porteous, Jr.*, S.Rept. 111-347, at 1-2 (2010).

[130] *House Practice* ch. 27 §4.

[131] In response to H.Res. 511 (62d Congress), *see* 48 Cong. Rec. 5242 (April 23, 1912), President William Howard Taft transmitted to the House Judiciary Committee information related to an investigation by the U.S. Department of Justice of charges of improper conduct by Judge Robert W. Archbald, which had been brought to the President's attention by the Commissioner of the Interstate Commerce Commission. VI *Cannon's* §§498, 499, at 684-686.

[132] *Id.* at §500, at 686-87.

[133] H. Res. 622, 62nd Cong. (1912).

[134] Thirteen articles of impeachment were brought against Judge Archbald. He was convicted on articles I, III, IV, V, and XIII, acquitted on the remaining articles, removed from office, and disqualified from holding further offices of honor, trust, or profit under the United States. VI *Cannon's*, §§499, 512, at 686, 705-708.

[135] 156 Cong. Rec. 3155-157 (2010).

[136] 156 Cong. Rec. 19134-136 (2010).

before he began his tenure in the office held at the time of the impeachment investigation, although the House has, on occasion, investigated such allegations.[137]

Impeachment After an Individual Leaves Office

It appears that federal officials who have resigned have nonetheless been thought to be susceptible to impeachment and a ban on holding future office.[138] Secretary of War William W. Belknap resigned two hours before the House impeached him,[139] but the Senate nevertheless conducted a trial in which Belknap was acquitted.[140] However, during the trial, upon objection by Belknap's counsel that the Senate lacked jurisdiction because Belknap was now a private citizen, the Senate voted in favor of jurisdiction.[141]

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[137] For example, in 1826, the House of Representatives responded to a letter from Vice President John C. Calhoun requesting an impeachment investigation into whether his prior conduct as Secretary of War constituted an impeachable offense by referring the matter to a select committee. After an extensive investigation, the select committee reported back, recommending that the House take no action. The House laid the measure on the table. III *Hinds'* §1736, at 97-99.

Several decades later, the House declined to pursue impeachment charges against Vice President Schuyler Colfax for activity occurring while he was Speaker of the House. Pursuant to a resolution agreed to on December 2, 1872, the Speaker *pro tempore* of the House appointed a special committee "to investigate and ascertain whether any member of this House was bribed by Oakes Ames or any other person in any matter touching his legislative duty." 46 CONG. GLOBE, 42nd Cong., 3d Sess. 11 (1872). Allegations had been made during the preceding presidential campaign suggesting that Representative Oakes Ames of Massachusetts had bribed several Members of the House to perform certain legislative acts for the benefit of the Union Pacific Railroad Company by giving them presents of stock in a corporation known as the "Credit Mobilier of America" or by presents derived therefrom. *Id.* at 11-12 (1872). On February 20, 1873—apparently at Vice President Schuyler Colfax's request, who was Speaker of the House of Representatives prior to becoming Vice President—the House agreed to a resolution directing that the testimony taken by the special committee be referred to the House Judiciary Committee "to inquire whether anything in such testimony warrants impeachment of any officer of the United States not a Member of this House, or makes it proper that further investigation be ordered in this case." 46 CONG. GLOBE, 42nd Cong., 3d Sess. 1545 (1873). III *Deschler's* ch.14, §5.14. After a review of past federal, state, and British impeachment precedents, the House Judiciary Committee stated that, in light of the pertinent U.S. constitutional language and the remedial nature of impeachment, impeachment "should only be applied to high crimes and misdemeanors committed while in office, and which alone affect the officer in discharge of his duties as such, whatever may have been their effect upon him as a man, for impeachment touches the office only and qualifications for the office, and not the man himself." 46 CONG. GLOBE, 42nd Cong., 3d Sess. 1652 (February 24, 1873). *See also* III *Hinds'* §2510, at 1017-19. The committee's report was made in the House on February 24, 1873, briefly debated, and then postponed to February 26, 1873. *Id.* at 1655-57. However, it does not appear to have been taken up again. III *Hinds'* §2510, at 1019.

Finally, in the 93rd Congress, then-Vice President Spiro Agnew wrote a letter to the House seeking an impeachment investigation of allegations against him concerning his conduct while Governor of Maryland. The Speaker declined to take up the matter because it was pending before the courts. The House took no substantive action on seven related resolutions, seemingly because of concerns regarding the matter's pendency in the courts and regarding the fact that the conduct involved occurred before Agnew began his tenure as Vice President. III *Deschler's* ch.14, §5.14.

[138] *See House Practice* ch. 27 §2. ("The House and Senate have the power to impeach and try an accused official who has resigned."); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 79 (noting "surprising consensus among commentators that resignation does not necessarily preclude impeachment and disqualification"); Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex. Rev. L. & Pol. 13, 18 (2001); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 210 (1970) (2d ed. 1829). *But see* II JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 271 (1833); Note, *Defining High Crimes and Misdemeanors: A Call for Stare Decisis*, 15 J.L. & Pol. 309, 358 (1999).

[139] Turley, *supra* note *118 at 53.*

[140] III *Hinds'* §§2444-2468.

[141] III *Hinds'* §§2459-60. As mentioned above, Belknap was acquitted of the charges against him in the articles of impeachment. This acquittal seems to have reflected, in part, a residual level of concern on the part of some of the (continued...)

That said, the resignation of an official under investigation for impeachment often ends impeachment proceedings. For example, no impeachment vote was taken following President Richard Nixon's resignation after the House Judiciary Committee decided to report articles of impeachment to the House.[142] And proceedings were ended following the resignation of Judges English,[143] Delahay,[144] and Kent.[145]

Overview of Impeachment Procedures

The Constitution sets forth the general principles which control the procedural aspects of impeachment, vesting the power to impeach in the House of Representatives, while imbuing the Senate with the power to try impeachments. Both the Senate and the House have designed procedures to implement these general principles in dealing with a wide range of impeachment issues. This section provides a brief overview of the impeachment process, reflecting the roles of both the House and the Senate during the course of an impeachment inquiry and trial.

The House of Representatives: Sole Impeachment Power

Initiation

Impeachment proceedings may be commenced in the House of Representatives by a Member declaring a charge of impeachment on his or her own initiative,[146] by a Member presenting a memorial listing charges under oath,[147] or by a Member depositing a resolution in the hopper, which is then referred to the appropriate committee.[148] The impeachment process may be triggered by non-Members, such as when the Judicial Conference of the United States suggests that the House may wish to consider impeachment of a federal judge,[149] where an independent counsel advises the House of any substantial and credible information which he or she believes might constitute grounds for impeachment,[150] by message from the President,[151] by a charge from a state or territorial legislature or grand jury,[152] or by petition.[153]

(...continued)

Senators as to the wisdom of trying an impeachment of a person no longer in office. Two of the 37 voting "guilty" and 22 of the 25 voting "not guilty" stated that they believed the Senate lacked jurisdiction in the case. III *Hinds'* §2467, at 945-46.

[142] *See House Practice* ch. 27 §2.

[143] VI *Cannon's* §547.

[144] *House Practice* ch. 27 §4; III *Hinds'* §§2504-2505.

[145] *House Practice* ch. 27 §4.

[146] III *Hinds'*, §§2342, 2400, 2469 (1907).

[147] III *Hinds'* §§2364, 2486, 2491, 2494, 2496, 2499, 2515.

[148] 116 Cong. Rec. 11941-942 (1970); 119 Cong. Rec.74873 (1974); *see also House Practice*, ch. 27 §6.

[149] 28 U.S.C. §355(b); *see. e.g.*, Certification That Impeachment of District Judge Mark. E. Fuller (M.D. Ala.) May Be Warranted, From James C. Duff, Secretary of the Judicial Conference of the United States, to Speaker John Boehner (Sept. 11, 2015) *available at* https://assets.documentcloud.org/documents/2426931/judicial-conference-letter-mark-fuller.pdf.

[150] 28 U.S.C. §595(c). The "independent counsel" provisions of federal law expired after June 30, 1999, except for ongoing investigations. *See* 28 U.S.C. §599 ("[t]his chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1994, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed.").

Resolutions regarding impeachment may be of two types. A resolution impeaching a particular individual, who is within the category of impeachable officers under Article II, Section 4 of the Constitution, is usually referred directly to the House Committee on the Judiciary.[154] A resolution to authorize an investigation as to whether grounds exist for the House to exercise its impeachment power is referred to the House Committee on Rules.[155] Generally, such a resolution is then referred to the House Judiciary Committee.[156] During the House impeachment investigation of President Richard M. Nixon, a resolution reported out of the House Judiciary Committee, H.Res. 803,[157] was called up for immediate consideration as a privileged matter. The resolution authorized the House Judiciary Committee to investigate fully whether sufficient grounds existed for the House to impeach President Nixon, specified powers which the Committee could exercise in conducting this investigation, and addressed funding for that purpose. The resolution was agreed to by the House.[158]

While the House Judiciary Committee usually conducts impeachment investigations, such matters have occasionally been referred to other committees, such as the House Committee on Reconstruction in the impeachment of President Andrew Johnson, or to a special or select committee.[159] In addition, an impeachment investigation may be referred by the House Judiciary Committee to one of its subcommittees or to a specially created subcommittee.[160]

Investigation

In all prior impeachment proceedings, the House has examined the charges prior to entertaining any vote.[161] Usually an initial investigation is conducted by the Judiciary Committee, to which investigating and reporting duties are delegated by resolution after charges have been presented. However, it is possible that this investigation could be carried out by a select or special committee.[162] If authorized by the House, the Judiciary Committee may designate a subcommittee or task force to investigate whether an individual should be impeached. For example, in 2009, the

(...continued)

[151] III *Hinds'* §§2294, 2319.

[152] III *Hinds'* §§2469, 2487.

[153] III *Hinds'* §3020.

[154] *See, e.g.*, H.Res. 461 (impeaching Judge Harry Claiborne for high crimes and misdemeanors, first introduced June 3, 1986, and referred to the House Judiciary Committee; as later amended, this resolution was received in the House on August 6, 1986, from the committee; it impeached Judge Claiborne for high crimes and misdemeanors and set forth articles of impeachment against him); H.Res. 625 (impeaching President Richard M. Nixon for high crimes and misdemeanors); H.Res. 638 (impeaching President Richard M. Nixon for high crimes and misdemeanors).

[155] *House Practice* §6; *see, e.g.*, H.Res. 304 (directing the House Committee on the Judiciary to undertake an inquiry into whether grounds exist to impeach President William Jefferson Clinton, to report its findings, and, if the committee so determines, a resolution of impeachment; referred to House Committee on Rules November 5, 1997); H.Res. 627 (directing the Committee on the Judiciary to investigate whether there are grounds for impeachment of Richard M. Nixon, referred to the House Committee on Rules, and then to the House Judiciary Committee); H.Res. 636 (seeking an inquiry into whether grounds exist for impeachment of President Richard M. Nixon).

[156] III *Deschler's*, ch. 14, §§5.10-5.11, 15.

[157] *Investigatory Powers of Committee on the Judiciary with Respect to its Impeachment Inquiry*, H.Rept. 93-774 (1974).

[158] 120 Cong. Rec. 1549 (1974); 120 Cong. Rec. 2005 (1974); 120 Cong. Rec. 2350-2363 (1974).

[159] *See* 6 Cannon's §467.

[160] *See* III *Deschler's* ch. 14 §6.11.

[161] III *Hinds'* §§2294, 2487, 2501.

[162] III *Hinds'* §§2342, 2487, 2494, 2400, 2409.

House passed a resolution authorizing the Judiciary Committee or a designated subcommittee or task force to investigate whether Judge Porteous should be impeached.[163] The resolution also authorized the taking of depositions, the issuance of subpoenas, the disbursement of funds, and the hiring of staff.[164]

The focus of the impeachment inquiry is to determine whether the person involved has engaged in treason, bribery, or other high crimes and misdemeanors. If a subcommittee or task force is charged with investigating a possible impeachment, the Members can vote to recommend articles of impeachment to the full committee.[165] If the full committee, by majority vote, determines that grounds for impeachment exist, a resolution impeaching the individual in question and setting forth specific allegations of misconduct, in one or more articles of impeachment, will be reported to the full House.[166]

House Action Subsequent to Receipt of Committee Report

At the conclusion of debate, the House may consider the resolution as a whole, or may vote on each article separately.[167] In addition, "as is the usual practice, the committee's recommendations as reported in the resolution are in no way binding on the House."[168] The House may vote to impeach even if the House Judiciary Committee does not recommend impeachment.[169] Pursuant to Article I of the Constitution, a vote to impeach by the House requires a simple majority of those present and voting, upon satisfaction of quorum requirements.[170] If the House votes to impeach, managers are then selected to present the matter to the Senate.[171] In recent practice, managers have been appointed by resolution, although historically they occasionally have been elected or appointed by the Speaker of the House pursuant to a resolution conferring such authority upon him.[172]

Notification by the House and Senate Response

The House will also adopt a resolution in order to notify the Senate of its action.[173] The Senate, after receiving such notification, will then adopt an order informing the House that it is ready to receive the managers.[174] Subsequently, the appointed managers will appear before the bar of the Senate to impeach the individual involved and exhibit the articles against him or her.[175] After this procedure, the managers would return and make a verbal report to the House.[176]

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[163] H.Res. 15 (2009).

[164] *Id.*

[165] See Impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, H.Rept. 111-427, at 12 (2010).

[166] *See* III *Deschler's* ch. 14 §§7.1 & 7.2.

[167] III *Hinds'* §§2367, 2412; VI *Cannon's* §§500, 514.

[168] *House Practice* ch. 27 §8.

[169] *House Practice* ch. 27 §8.

[170] *House Practice* ch. 27 §8.

[171] *House Practice* ch. 27 §8.

[172] VI *Cannon's* §§499, 500, 514, 517.

[173] III *Hinds'* §§2413, 2446.

[174] III *Hinds'* §§2078, 2235, 2345.

[175] III *Hinds'* §§2303, 2370, 2390, 2420, 2449.

[176] III *Hinds'* §§2423, 2451; VI *Cannon's* §501.

The Senate: Sole Power to Try Impeachments

Trial Preparation in the Senate

Impeachment proceedings in the Senate are governed now by the Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials.[177] After presentation of the articles and organization of the Senate to consider the impeachment, the Senate will issue a writ of summons to the respondent, informing him or her of the date on which appearance and answer should be made.[178] On the date established by the Senate, the respondent may appear in person or by counsel.[179] The respondent may also choose not to appear.[180] In the latter event, the proceedings progress as though a "not guilty" plea were entered.[181] The respondent may demur, arguing that he or she is not a civil official subject to impeachment, or that the charges listed do not constitute sufficient grounds for impeachment.[182] The respondent may also choose to answer the articles brought against him or her. The House has traditionally filed a replication to the respondent's answer, and the pleadings may continue with a rejoinder, surrejoinder, and similiter.[183]

Trial Procedure in the Senate

When pleadings have concluded, the Senate will set a date for trial.[184] Upon establishing this date, the Senate will order the House managers or their counsel to supply the Sergeant at Arms of the Senate with information regarding witnesses who are to be subpoenaed, and will further indicate that additional witnesses may be subpoenaed by application to the Presiding Officer.[185] Under Article I, Section 3, clause 6 of the Constitution, the Chief Justice presides over the Senate impeachment trial if the President is being tried.

In impeachment trials, the full Senate may receive evidence and take testimony, or may order the Presiding Officer to appoint a committee of Senators to serve this purpose.[186] If the latter option is employed, the committee will present a certified transcript of the proceedings to the full Senate. The Senate will determine questions of competency, relevancy, and materiality.[187] The Senate may also take further testimony in an open Senate, or may order that the entire trial be before the full Senate.[188]

At the beginning of the trial, House managers and counsel for the respondent present opening arguments outlining the charges to be established and controverted.[189] The managers for the

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[177] *See* "Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials," *Senate Manual*, S. Doc. 113-1, §§170-95, at 223-231 [hereinafter *Senate Manual: Impeachment Rules*].

[178] III *Hinds'* §§2423, 2451.

[179] III *Hinds'* §§2127, 2349, 2424.

[180] III *Hinds'* §§2307, 2333, 2393.

[181] III *Hinds'* §2308.

[182] III *Hinds'* §§2310, 2453.

[183] III *Hinds'* §2455.

[184] VI *Cannon's* §508.

[185] VI *Cannon's* §508.

[186] *Senate Manual: Impeachment Rules*, Rule XI.

[187] *Senate Manual: Impeachment Rules*, Rule XI.

[188] *Senate Manual: Impeachment Rules*, Rule XI.

[189] *House Practice* ch. 27 §9; VI *Cannon's* §§511; 524; III *Deschler's* ch. 14 §12.

House present the first argument.[190] During the course of the trial evidence is presented, and witnesses may be examined and cross-examined.[191]

The Senate has not adopted standard rules of evidence to be used during an impeachment trial. The Presiding Officer possesses authority to rule on all evidentiary questions.[192] However, the Presiding Officer may choose to put any such issue to a vote before the Senate.[193] Furthermore, any Senator may request that a formal vote be taken on a particular question.[194] Final arguments in the trial will be presented by each side, with the managers for the House of Representatives opening and closing.[195]

Judgment of the Senate

When the presentation of evidence and argument by the managers and counsel for the respondent has concluded, the Senate as a whole meets in closed session to deliberate.[196] Voting on whether to convict on the articles of impeachment commences upon return to open session, with yeas and nays being tallied as to each article separately.[197] A conviction on an article of impeachment requires a two-thirds vote of those Senators present.[198] If the respondent is convicted on one or more of the articles against him or her, the Presiding Officer will pronounce the judgment of conviction and removal. No formal vote is required for removal, as it is a necessary effect of the conviction.[199] The Senate has not always voted on every article of impeachment before it; for example, when the Senate did not convict President Andrew Johnson in the votes on three of the articles of impeachment against him, the Senate did not vote on the remaining articles.[200]

The Senate may subsequently vote on whether the impeached official shall be disqualified from again holding an office of public trust under the United States.[201] If this option is pursued, a simple majority vote is required.[202]

Judicial Review

Impeachment proceedings have been challenged in federal court on a number of occasions. Perhaps most significantly, the Supreme Court has ruled that a challenge to the Senate's use of a trial committee to take evidence posed a nonjusticiable political question.[203] In *Nixon v. United States*, Judge Walter L. Nixon had been convicted in a criminal trial on two counts of making

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[190] *Senate Manual: Impeachment Rules*, Rule XXII.

[191] III *Deschler's* ch. 14 §12.

[192] *Senate Manual: Impeachment Rules*, Rule VII.

[193] *Senate Manual: Impeachment Rules*, Rule VII.

[194] *Senate Manual: Impeachment Rules*, Rule VII.

[195] *Senate Manual: Impeachment Rules*, Rule XII.

[196] *Senate Manual: Impeachment Rules*, Rule XX; III *Deschler's* ch. 14 §13.1.

[197] III *Hinds'* §§2098, 2339.

[198] U.S. CONST. art. I, §3, cl. 6, 7.

[199] III *Deschler's* ch. 14 §13.9.

[200] *Impeachment Materials*, *supra note* 22 at 369-70.

[201] III *Hinds'* §2397; VI *Cannon's* §512.

[202] VI *Cannon's* §512.

[203] Nixon v. United States, 506 U.S. 224, 237-38 (1993). For more on the political question doctrine, see CRS Report R43834, *The Political Question Doctrine: Justiciability and the Separation of Powers*, by Jared P. Cole.

false statements before a grand jury and was sent to prison.[204] He refused, however, to resign and continued to receive his salary as a judge while in prison. The House of Representatives adopted articles of impeachment against the judge and presented the Senate with the articles.[205] The Senate invoked Impeachment Rule XI, a Senate procedural rule which permits a committee to take evidence and testimony. After the committee completed its proceedings, it presented the full Senate with a transcript and report. Both sides then presented briefs to the full Senate and delivered arguments, and the Senate then voted to convict and remove him from office.[206] The judge thereafter brought a suit arguing that the use of a committee to take evidence violated the Constitution's provision that the Senate "try" all impeachments.[207]

The Supreme Court noted that the Constitution grants "the sole Power"[208] to try impeachments "in the Senate and nowhere else";[209] and the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions."[210] This constitutional grant of sole authority, the Court reasoned, meant that the "Senate alone shall have authority to determine whether an individual should be acquitted or convicted."[211] In addition, because impeachment functions as the "*only* check on the Judicial Branch by the Legislature,"[212] the Court noted the important separation of powers concerns that would be implicated if the "final reviewing authority with respect to impeachments [was placed] in the hands of the same body that the impeachment process is meant to regulate."[213] Further, the Court explained that certain prudential considerations—"the lack of finality and the difficulty of fashioning relief"—weighed against adjudication of the case.[214] Judicial review of impeachments could create considerable political uncertainty, if, for example, an impeached President sued for judicial review.[215]

The Court was careful to distinguish the situation from *Powell v. McCormack*, a case also involving congressional procedure where the Court declined to apply the political question doctrine.[216] That case involved a challenge brought by a Member-elect of the House of Representatives, who had been excluded from his seat pursuant to a House Resolution.[217] The precise issue in *Powell* was whether the judiciary could review a congressional decision that the plaintiff was "unqualified" to take his seat.[218] That determination had turned, the Court explained, "on whether the Constitution committed authority to the House to judge its Members' qualifications, and if so, the extent of that commitment."[219] The Court noted that while Article I,

[204] *Nixon*, 506 U.S. at 226-227 (1993).
[205] *Id.*
[206] *Id.* at 227-28.
[207] *Id.* at 228.
[208] U.S. CONST. art. I. §3, cl. 6.
[209] *Nixon*, 506 U.S. at 229.
[210] *Id.*
[211] *Id.* at 231.
[212] *Id.* at 235 (italics in original).
[213] *Id.*
[214] *Id.* at 236.
[215] *Id.*
[216] *Id.* at 236-38 (discussing Powell v. McCormack, 395 U.S. 486 (1969)).
[217] *See* Powell v. McCormack, 395 U.S. 486, 489-495 (1969).
[218] *Nixon*, 506 U.S. at 236-237 (discussing *Powell*).
[219] *Id.* at 237.

Section 5, does provide that Congress shall determine the qualifications of its Members,[220] Article I, Section 2, delineates the three requirements for House membership—Representatives must be at least 25 years of age, have been U.S. citizens for at least seven years, and inhabit the states they represent.[221] Therefore, the *Powell* Court concluded, the House's claim that it possessed unreviewable authority to determine the qualifications of its Members "was defeated by this separate provision specifying the only qualifications which might be imposed for House membership."[222] In other words, finding that the House had unreviewable authority to decide its Members' qualifications would violate another provision of the Constitution. The Court therefore concluded in *Powell* that whether the three requirements in the Constitution were satisfied was textually committed to the House, "but the decision as to what these qualifications consisted of was not."[223] Applying the logic of *Powell* to the case at hand, the *Nixon* Court noted that here, in contrast, leaving the interpretation of the word "try" with the Senate did not violate any "separate provision" of the Constitution.[224]

In addition, several other aspects of the impeachment process have been challenged. Judge G. Thomas Porteous brought a suit seeking to bar counsel for the Impeachment Task Force of the House Judiciary Committee from using sworn testimony the judge had provided pursuant to a grant of immunity.[225] The impeachment proceedings were initiated after a judicial investigation of Judge Porteous for alleged corruption on the bench. During that investigation, Judge Porteous testified under oath to the Special Investigatory Committee under an order granting him immunity from that information being used against him in a criminal case.[226] Before the U.S. District Court for the District of Columbia, Judge Porteous argued that the use of his immunized testimony during an impeachment proceeding violated his Fifth Amendment right not to be compelled to serve as a witness against himself.[227] The court rejected his challenge, reasoning that because the use of such testimony for an impeachment proceeding fell within the legislative sphere, the Speech or Debate Clause prevented the court from ordering the committee staff members to refrain from using the testimony.[228]

Similarly, Judge Alcee L. Hastings sought to prevent the House Judiciary Committee from obtaining the records of a grand jury inquiry during the Committee's impeachment investigation.[229] Prior to the impeachment proceedings, although ultimately acquitted, Judge

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[220] *Id. See* U.S. CONST. art. I. §5.

[221] *Nixon*, 506 U.S. at 236-37. *See* U.S. CONST. art. I. §2.

[222] *Id.*

[223] *Nixon*, 506 U.S. at 236-37 (discussing *Powell*).

[224] *Id.* Justice White, joined by Justice Blackmun, concurred in the judgment but argued that while the Senate's use of an impeachment committee was appropriate in this situation, questions concerning the impeachment power did not necessarily pose nonjusticiable political questions. *Id.* at 239-252 (White, J., concurring). In addition, Justice Souter concurred in the judgment and claimed that this case presented a nonjusticiable political question, but noted that "different and unusual circumstances … might justify a more searching review." If the Senate were to convict on the basis of a coin flip, for example, or "a summary determination that an officer of the United States was simply 'a bad guy,'" (quotation marks removed) (quoting *id.* at 239) (White, J., concurring), then judicial review might be appropriate. *Id.* at 253-54 (Souter, J., concurring).

[225] Porteous v. Baron, 729 F.Supp.2d 158, 160-61 (D.D.C. 2010).

[226] *Id.* at 160.

[227] *Id.* at 161-62.

[228] *Id.* at 165-67. For additional information on the Speech or Debate Clause, see CRS Report R42648, *The Speech or Debate Clause: Constitutional Background and Recent Developments*, by Alissa M. Dolan and Todd Garvey.

[229] *In re* Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami, 833 F.2d 1438, 1439-40 (11th Cir. 1987).

Hastings had been indicted by a federal grand jury for a conspiracy to commit bribery.[230] Judge Hastings' argument was grounded in the separation of powers: he claimed that permitting disclosure of grand jury records for an impeachment investigation risked improperly allowing the executive and judicial branches to participate in the impeachment process—a tool reserved for the legislature.[231] The U.S. Court of Appeals for the Eleventh Circuit, however, rejected this "absolutist" concept of the separation of powers and held that "a merely generalized assertion of secrecy in grand jury materials must yield to a demonstrated, specific need for evidence in a pending impeachment investigation."[232]

The U.S. District Court for the District of Columbia initially threw out Judge Hastings' Senate impeachment conviction, because the Senate had tried his impeachment before a committee rather than the full Senate.[233] The decision was vacated on appeal and remanded for reconsideration in light of *Nixon v. United States*.[234] The district court then dismissed the suit because it presented a nonjusticiable political question.[235]

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[230] *See id.* at 1439.

[231] *See id.* at 1442.

[232] *Id.* at 1444.

[233] Hastings v. United States, 802 F.Supp. 490, 505 (D.D.C. 1992).

[234] Hastings v. United States, 988 F.2d 1280 (D.C. Cir. 1993).

[235] Hastings v. United States, 837 F.Supp. 3, 5-6 (D.D.C. 1993).

Mr. GOODLATTE. Thank you, Mr. Garvey. We will now begin questioning of the witnesses under the 5-minute rule, and I will begin by recognizing myself.

Mr. Turley, welcome back before this Committee. In your opinion, if the Senate will not remove an impeached official from official—in other words the House had taken action, the Senate now has before it—what are the most practical options for the House, in advance of reaching that point, in addressing officials who may have committed misconduct?

Mr. TURLEY. Thank you, Mr. Chairman. As my written testimony discusses, the most obvious response to alleged false statements or obstruction of an investigation was traditionally a contempt sanction, and I talk in my testimony at length about how the executive branch has effectively gutted that option for Congress, something that I believe Congress should serious look at in terms of its inability to get contempt prosecutions because of obstruction by the Justice Department.

I also talk about the possibility of financial penalties, from fines to pensions. That creates some different issues, depending on whether they are vested interests, whether they are based in statutory authority, or implied congressional authority.

Another obvious choice would be censure. I disagree with some people who have said that censure is not constitutional for this body to consider. I find that completely meritless. It is clear in my view that this body can censure an executive official. In fact I find it rather bizarre to suggest that this body can condemn actions of countries, agencies, but not individuals. I do not see how you can read that into the Constitution. But I believe that——

Mr. GOODLATTE. Let me interrupt. I will come back to that, but I first want to ask another question of Mr. McCarthy. Mr. McCarthy, you state in your written testimony that the Framers were deeply worried about maladministration, including overreach, lawlessness, and incompetence; that they could inflate the constitutionally limited executive into an authoritarian rogue who undermines our constitutional order.

Professor Gerhardt, on the other hand, writes in his written testimony—and he also stated it in his oral testimony—that the Founders considered but rejected making certain high-ranking officials impeachable on broader grounds such as maladministration. Who is right on that point? Did the Framers consider maladministration an impeachable offense, or not?

Mr. MCCARTHY. I think, Mr. Chairman, that it is more fitting, perhaps, to say that one answer is more complete than the other. Certainly the Framers considered maladministration, but they rejected it as the standard. And that is part of why they settled on high crimes and misdemeanors. They were concerned of the promiscuous tendency of a standard like maladministration to be applied in trifling circumstances rather than really serious ones.

On the other hand, I think it is interesting that Professor Gerhardt cited to Justice Storey, and yet did not quote to you what Justice Storey actually said, in saying that gross neglect did not qualify. Here is what Justice Storey actually says—"Impeachment applies to political offenses growing out of personal misconduct or

gross neglect, or usurpation or habitual disregard of the public interests, various in their character, et cetera."

Mr. GOODLATTE. Let me interrupt you there, since I have a limited amount of time, and ask Mr. Gerhardt if he wants to respond to that.

Mr. GERHARDT. Sure, thank you. I think I probably have quoted Justice Storey in a number of different respects, including the book I wrote on impeachment. But more pertinent to this, I think, is that the critical thing I think to keep in mind here is that the notion of high crimes and misdemeanors was not fixed or precisely defined at the time of the ratification.

And over time, as I said in my oral testimony, I think in my written, too, that in effect, I think what the Framers expected was the evolution of a kind of body of common law. Your decisions over time would become important. So I think you cannot point to one particular time in the past, and say, "Oh, here is where the meaning got fixed." It is going to evolve over time. I believe, it is my belief, that over time that language in the Constitution comes to mean you need both bad intent and a bad act. But I think that is how I construe the common law.

Mr. GOODLATTE. Let me interrupt you, because I want to ask a question of Mr. Garvey, and my time is running down. Mr. Garvey, Mr. Turley mentioned a censure, in his belief that that is an appropriate remedy for Congress to use. What do you believe about censure? Is it a remedy that is available to Congress in instances such as these? And I will go back to everyone else and ask them to respond to that as well.

Mr. GARVEY. Thank you, Mr. Chairman. Yes, it seems so long as it is in the form of a one-house resolution or a concurrent resolution that is nonbinding that would be consistent with the Constitution. We have a number of examples in history in which either the House or Senate have censured executive branch officials, including two Presidents.

Mr. GOODLATTE. And including sub-Cabinet level employees of the executive branch, is that not correct?

Mr. GARVEY. That is right. A sitting Attorney General, and as I recall——

Mr. GOODLATTE. Attorney General would be a Cabinet-level appointee. But I believe in recent times there had been a censure of a sub-Cabinet level employee.

Mr. GARVEY. My understanding of the situation is that the last censure resolution approved by either the House or Senate was during the Teapot Dome Scandal in the 1920's. I am not sure of an approved censure resolution after that.

Mr. GOODLATTE. Okay, thank you. Mr. Turley, I think you have answered already, but quickly, if you have anything to add.

Mr. TURLEY. The only thing I would add is that in terms of censure, I think one thing that should be avoid is I do not believe that censure is a creature of the impeachment provisions. And I believe that creates some uncertainty. I think that Congress has the inherent authority to censure. So one of the things that I encourage the body to consider is if you are going to create a censure resolution, it should be in regular order. It is not part of an impeachment

process. I do not think you want to say that your power to censure is derived from the impeachment provisions.

Mr. GOODLATTE. Mr. McCarthy?

Mr. MCCARTHY. I agree with Professor Turley about Congress' power to censure. But to my mind, it is almost beside the point, because censure is a two-way street. Impeachment is a two-way street. The question is not just how much misconduct has been committed by the executive branch; it is whether this branch is up to its responsibility to check executive overreach. So if you censure somebody who deserves to be impeached—and I do not have a view on this particular case, because I have not investigated it—but it is just as censurable to my mind for Congress to fail in its duty as it is for the official who has committed the conduct meriting censure.

Mr. GOODLATTE. Mr. Gerhardt?

Mr. GERHARDT. On the censure question, I think we need to be clear about a couple things. The first is what we mean, of course, by censure. I believe what we are all saying, and this is at least what I would say, is that censure, in our conversation, is referring to a nonbinding resolution. As such, of course, you approve such things all the time. Having said that, I would caution this Committee to be very careful in the way it words its censure resolution, and what it intends for that resolution to be or to do.

The critical thing to keep in mind is there is not much distance between a censure resolution, as we have just defined it, and a bill of attainder. A bill of attainder would be a decision by this body, in lieu of a trial, to exact or impose a sanction on an official. I do not believe the House Judiciary Committee, for that matter the House or Senate, has that authority. So, the thing to be careful about is the point at which a resolution that says something might be bad, or you are expressing disapproval, and your effort to impose a sanction, which I think would be struck down as a bill of attainder.

Mr. GOODLATTE. Thank you. My time has expired. The Chair recognizes the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Professor Gerhardt, can you walk us through the process of impeachment rapidly? That is the rapidly walk, not rapidly impeach, in the House of Representatives? What are the obligations of the House Judiciary Committee? Are we obligated to independently investigate the allegations, do our own fact-finding, conduct interviews and depositions?

Mr. GERHARDT. You are certainly entitled to do that. Yes, sir.

Mr. NADLER. Are we obligated to do that? Or can we rely on somebody else?

Mr. GERHARDT. I think whether you are obligated or not is going to be subject to some interpretation. But I think, when the House Judiciary Committee does not do its own fact finding, it undermines the credibility of what it has done.

Mr. NADLER. Thank you. And what due process considerations do they owe to the accused official? Does he have a right to counsel before this Committee, opening statements and hearings, right to question witnesses, the right to introduce witnesses?

Mr. GERHARDT. I certainly think that would all be true. Yes, sir.

Mr. NADLER. That would all be appropriate?

Mr. GERHARDT. Oh, it would be quite appropriate.

Mr. NADLER. And what would be the consequences should an impeachment proceeding that failed to honor this due process for the accused?

Mr. GERHARDT. Well, if you do not honor the due process rights of the accused, or give the target of an impeachment some opportunity to defend himself, or herself, I think what the House Committee ends up doing, again, is seriously undermining what it is attempting to do.

Mr. NADLER. And, given what you just said, and your understanding of the process, do you think it is reasonably possible for this Committee to undergo a successful independent review of the accusations against Commissioner Koskinen in the remaining weeks of this Congress?

Mr. GERHARDT. Well, you are in a better position than I to say that. But, with time growing short, it is very difficult to do. Let me just emphasize two quick things. Impeachment is supposed to be a last resort. It is supposed to be something you do after you have explored all the other options. And the other thing is, I think, of course, it should be undertaken carefully and deliberately, and thoughtfully.

Mr. NADLER. Thank you. Now you have written that what kinds of acts constitute high crimes, and misdemeanors, an extensive literature on that. We went through that in 1974, in 1998. Basically, political acts that threaten liberty, separation of powers, the structure of the state, essentially?

Mr. GERHARDT. They might include some indictable crimes. But, of course, they also include things that are not indictable.

Mr. NADLER. Right.

Mr. GERHARDT. Some of things you just mentioned—political acts which undermine the integrity, undermine the constitutional system. To quote from the conventions themselves, "acts that would subvert the Constitution." I would just note that all the examples that were mentioned in the constitutional and ratification conventions had to do with serious political acts that were subverting the Constitution.

Mr. NADLER. And does Commissioner Koskinen's alleged conduct rise to this level?

Mr. GERHARDT. I think the fact finding that has been undertaken so far, at best, shows perhaps, as my friend Charlie Jay at Indiana Bloomington described in one newspaper article I read, maybe that he might be—the subject of impeachment could be slow and stupid, but that does not mean it makes the person impeachable. In other words, you can make mistakes. You can even have bad judgement. But those things are not——

Mr. NADLER. You can even be grossly negligent.

Mr. GERHARDT. You can even be grossly negligent. That does not rise, at least in my opinion, to an impeachable offense. Keep in mind, some things could be misconduct. That falls short of being an impeachable offense.

Mr. NADLER. Okay. Now, in your written testimony, you state, "A principal concern among the Framers was to distinguish the Federal impeachment process from the English one, in which anyone

could be impeached for any reason." How did the framers make that distinction?

Mr. GERHARDT. Well, they made that distinction because they were quite familiar with the British system of course. And they had it in front of themselves to some extent as lawyers, and as they entered into the process of the Constitutional Convention, and they did not want their American system to be like the British system. They, actually, were trying to narrow who would be subject to impeachment, narrow the sanctions that would be available, and narrow the grounds on which it would be possible.

Mr. NADLER. And has the House ever impeached anyone on the theory of gross negligence?

Mr. GERHARDT. No, sir.

Mr. NADLER. What would be the consequences for setting that precedent?

Mr. GERHARDT. The House has never impeached anyone for gross negligence, or I think, anything akin to it. And I think opening the door to that actually, I think, is going to present all sorts of serious problems. The impeachment process was not meant to be a kind of roaming commission that would then cover all kinds of mistakes or misconduct. It is for the most serious things.

Mr. NADLER. Now, House Resolution 737 was introduced to censure the commissioner, and expresses the sense of the House that the commissioner should give up his government pension, and any other benefits. Does this resolution carry with it the force of law? And, if it did, would it not be obviously and totally a bill of attainder?

Mr. GERHARDT. As you described it, that would be a bill of attainder.

Mr. NADLER. Because we have a 1954, I think, Supreme Court decision that—a provision in an appropriations bill, that said no funds here appropriations should be used to pay the salaries of two named individuals. That was a bill of attainder, was it not?

Mr. GERHARDT. Right. Yes, sir.

Mr. NADLER. So, this is clearly a bill of attainder to the extent that it has any force of law?

Mr. GERHARDT. Yes, sir.

Mr. NADLER. Does anyone disagree with that? No. My time is expired. I just want to make one historical correction, because I hear this all the time and it really bothers me. Mr. McCarthy said the Constitution was enacted to limit government power and provide for liberty. No. The Articles of the Confederation were enacted for that. The Bill of Rights was enacted for that.

The Constitution was enacted to strengthen government power to enable the central government to lay taxes, and to function effectively. We put limits on that through the Bill of Rights, but the Constitution was enacted for the opposite purpose. Just a historical note. Thank you. I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman, and recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I thank the witnesses for testifying here today. It is some pretty fascinating perspectives that I am hearing. I go first to Mr. Garvey. And I want to make sure that I was listening carefully. You spoke of the impeachment of

President Clinton. Was that your assertion that the Senate rejected the House impeachment resolution?

Mr. GARVEY. Sorry. What I was saying, Congressman, was that this Committee approved four articles of impeachment against President Clinton, perjury before the Grand Jury, perjury in a civil deposition, obstruction of justice, and providing false and misleading statements to a congressional Committee. The House, as a whole, approved only two out of those four articles.

Mr. KING. And the Senate? Did you speak to the Senate's conclusion?

Mr. GARVEY. I did not speak to the Senate's conclusion.

Mr. KING. Okay. I am glad I clarified that, because I wanted to make that point. And it happens to go back to an earlier conversation I had before this hearing began with Professor Turley. And, just to be able to put it into the record that, when we got a vote in the United States Senate on those charges that they took up and determined to try President Clinton on, all of those questions that came before the Senate were wrapped up into one question, which was, "Is he guilty of these various charges?

And, if so, is it in your judgement that it is worthy to remove him from office, if he is guilty?" And it allowed every senator to cloak themselves in whatever argument suited them politically. And the American people never got a verdict from the United States Senate. And that is a big disappointment to me, that one of the highest constitutional duties that can be served up to the United States Senate did not have history record a verdict after a trial in the Senate. So, I bring that point up for that reason.

Mr. CHABOT. Would the gentleman yield? Would the gentleman yield for a moment?

Mr. KING. Yes, I would.

Mr. CHABOT. I thank the gentleman for yielding, and I will be very quick. Also, to add to the record, I might note, having been one of the House managers in the impeachment of President Clinton, the House managers were limited to just three witnesses. And those all had to be done by video tape. So, our hands were, to a great extent—we were handcuffed. I thank the gentleman.

Mr. KING. I thank you. And reclaiming my time, I wish I had more time. I will yield to the gentleman from New York.

Mr. NADLER. I am just curious about what you just said. You said the Senate never reached a verdict. The Senate voted down the Articles of Impeachment. Is not that a verdict?

Mr. KING. No. And I am reclaiming my time. I am happy to take that up at another time. I would be very interested to do so. And Mr. Nadler knows I mean that. So, I turn instead to Mr. Gerhardt. And I will make this assertion, that, as an employer—and I have been since 1975—our employees are at will employees. Now, we can dispatch them, or fire them, remove them, from their office for any reason or no reason at all, provided we are not violating a specific law.

And I would put this Congress in that kind of a concept with regard to the executive branch employees who are going outside the bounds of their job violating the Constitution. And your position was, I believe, that there needs to be malicious intent, and they have to be serious bad conduct.

I would assert, instead, that Congress gets to decide what that is. And we can be as specific as we like, or as vague as we like. But I would submit that, if Congress decided to impeach perhaps the director of the IRS, that we could do so for any reason or no reason at all. And it comes back to the political foundation of what would the consequences be if Congress just said, "We decided to have a closed hearing, and we are going to impeach the director of the IRS," to get this over with and send a message to the President and the American people we are not going to mess with this kind of persecution against, especially, conservatives. What do you think the consequences would be if Congress took that position?

Mr. GERHARDT. Well, sir, so two quick thoughts. The first is in the corporate world, in the corporate example, board of directors are not able to fire CEOs for gross negligence or gross incompetence. There has to be at least deliberate indifference. In other words, there has to be some bad faith.

The second point is that all powers, including the impeachment power, are limited. The Constitution limits every governmental authority. And so, again, you cannot impeach, at least——

Mr. KING. What would the consequences be, if Congress decided to impeach without making a public case, and just simply said, "We have our reasons, and we have impeached?" What would the consequences be to Congress for such an act, presuming that the Senate removed from office?

Mr. GERHARDT. I am sorry, presuming the Senate actually removed somebody after that?

Mr. KING. Yes.

Mr. GERHARDT. Well, I think the consequences are comprised, in part, by what the Senate does. But if the House simply impeaches, and does not have evidence, and does not back it up, the consequences, actually, are political. Not like a court could strike that down, I do not believe. And you take the political heat in a sense, the political consequences for that. But, also, one consequence is how the Senate treats what you do.

Mr. KING. Watching as my time has expired, I would just submit that I appreciate that answer, because in the end of this, it is a political question before this United States Congress, the House, and the Senate. And, when the other branches of government violate the Constitution, it falls back to us to make the political decision. And that is one of the very few ways that we can enforce.

And, if I had more time, I would pose a question as to what would happen if Congress would expand its powers into the executive and the judicial branch, in the fashion that the judicial and the executive branch are expanding their powers into our legislative branch. But I will leave that as a rhetorical question, and yield back the balance of my time. Thank you, Mr. Chairman.

Mr. GOODLATTE. The Chair recognizes the gentlewoman from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman. You know, as I was listening, I was thinking this question of impeachment is something that, oddly enough, my career has intersected several times, starting in on the Nixon impeachment, when I was a young staffer working for Congressman Don Edwards.

And, at the time, the Judiciary Committee published, really, quite an excellent report on the history of impeachment going back to its use in Great Britain, the Constitutional Convention. And I use that as a guide. I thought it was so thoughtful. And I wonder, if it is possible, Mr. Chairman, to ask unanimous consent to put that—oh, you already put that into the record.

You know, we started this Congress reading the Constitution. And here is the guiding provision of the Constitution, Article II, section 4, "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." Now, those words have a meaning.

And, if we look back into the history of our country, I think it is correct—and Mr. Gerhardt, correct me if I am wrong—I do not think we have ever impeached a person, a civil officer below the Cabinet level. And I do not think we have impeached a Cabinet-level official since 1876. Is that correct?

Mr. GERHARDT. That is true.

Ms. LOFGREN. And the meaning, as evidenced in the historical record, of the words, "high crimes and misdemeanors," is basically some activity that is so severely wrong that it undercuts the capacity of the structure of government. It is that serious. Is not that correct?

Mr. GERHARDT. Yes, ma'am. It is like attacking the constitutional government.

Ms. LOFGREN. Yeah. It would really destroy the three branches.

Mr. GERHARDT. Right.

Ms. LOFGREN. And I look at the whole history of our country, our ups and downs, the last time this was used for a Cabinet level official, 1876, and I am going, "If we were"—and I think the gentleman from Iowa is right. I mean, the Congress can do whatever it wants when we have a vote, but we should be mindful of the impact. If we depart from our history, and from our Constitution as determined and interpreted by our history, then we chart a different kind of America than we have had in the past.

And so, I guess, my question is if we were to utilize, in a very radical way, the tool of impeachment to basically start removing civil officers through impeachment, could that not have the impact, Mr. Gerhardt, of really changing the balance of power between Congress and the executive, so that the executive would become less able to act, and really be a departure for the last couple hundred years of our history?

Mr. GERHARDT. I think the answer, of course, would be yes. That is one interpretation of what happened when the Congress tried to impeach and remove President Johnson. That episode is largely understood as an attempt to sort of take out a policy difference between Congress and the President through the impeachment process, which I think history has treated as inappropriate.

One important check, I think, on this body, as everybody here knows, is history, the historical judgement. It is one reason why I took the liberty of ending my written statement with a quote from the musical Hamilton, saying, "History has its eyes on you." It is not just lyrical. I think it is actually true. It has its eyes on all of us. It holds all of us accountable. So, if the House or anybody else

missteps, history is a cold hearted judge in giving you a grade or a sanction on whatever it is.

Mr. GOODLATTE. Will the gentlewoman yield?

Ms. LOFGREN. I am almost out of time. I would just like to close, since I know I just have less than a minute left, by indicating that, you know, I think it would be—when looking back on the Nixon impeachment, it ended up being bipartisan, because there was a judgement, not just on one party versus another, that there had been a serious problem here that was undercutting the actual structure of government.

And I guess, if you look at the history, when you have a partisan action in a civil officer, I think it is an alert that there is a problem, that it is maybe based in a political difference, not in a serious effort to protect the integrity of the constitutional system. And, with that, I see my red light is on, and I yield back, Mr. Chairman.

Mr. GOODLATTE. The Chair thanks the gentlewoman and recognizes the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman. And I could not agree with friend from California more. And that is why, in a previous hearing in this room, I pointed out that, when we found out from the IG Inspector and the Department of Justice that there could have been thousands of abuses of the national security letter, I called the White House, talked to the Chief of Staff, and said, "This is outrageous. We are not going to defend this. You need a new Attorney General."

And I am waiting for a Democrat to stand up and say, "We have been lied to in Congress, things have been obfuscated, hidden, and we are not going to stand for this either." But it has become so partisan that one of my other friends in Congress has pointed out, if Republicans had rallied around Richard Nixon the way Democrats have rallied around abusers in this Administration, Nixon would have finished out his term, Republicans would have kept control that they lost, so many of the liberal accommodations that came through legislation in the aftermath of Watergate would not have occurred, we would not have had Jimmy Carter, and history would be different.

But, fortunately, most of us believe right is right, wrong is wrong, you are not supposed to lie. But Mr. McCarthy, you taught me a great deal from your book "Faithless Execution." I know this a lot to ask, but in a nutshell could you give us the premise of your book? And I know you have touched on it in your written and oral testimony, but just the book itself, the nutshell lesson to take away.

Mr. MCCARTHY. Congressman Gohmert, it would be that impeachment is an indispensable ingredient of the governing framework that the Constitution provides for us, which requires, if it is to work, that the branches can hold each other in check.

And, if you get to a point where the major checks that Congress has given on executive overreach, the power of the purse, and impeachment being the main ones—if you get to a point where you basically say, "We cannot use the power of the purse because that will shut down the government, and we can never impeach anyone," then you are greenlighting misconduct, because those are ba-

sically the only ways that you have, as a practical matter, to hold the executive branch in check.

And the point is not just, again, the misconduct of the official, because every time misconduct of an executive branch official comes up, and a proceeding like this comes up, you are on trial as much as the official you are inquiring into is on trial.

The question is whether this body can perform its constitutional function of keeping the executive branch in check. If it does not, we no longer have the same system of government. You know, there was some dialogue back and forth a moment ago about whether using impeachment in certain instances would shift our balance of power. The balance of power is already shifted. You have executive overreach to a fair thee well.

And, essentially, nothing is done about it, because the thought on the Hill appears to be that the remedies that you would have to use to check the President are not worth invoking. And, as a result, you encourage and have more and more lawlessness.

So, impeachment is a political remedy, not a legal one. And what that essentially means is you have to give as much process in a proceeding like this as is necessary to keep the proceeding politically viable, that it will have integrity that the public will respect the outcome of it. But what that also means, as I argue in the book, is that you can have 1,000 high crimes and misdemeanors. If you do not have public consensus that the official should be removed, then the official will not be removed.

Mr. GOHMERT. We have seen that.

Mr. MCCARTHY. But it is really up to you to highlight for the public why the misconduct at issue threatens our constitutional order.

Mr. GOHMERT. Well, Professor Turley, it seemed like most of my career you were testifying the positions that were more favorably accepted by my Democratic colleagues. But the great thing I have appreciated about you is that you are a man of integrity, you step forward and say what you believe no matter who is offended, or who does not like what you say. And I think that if we do not take some steps here to protect our jurisdiction, I am afraid we lose the ability to do what you have done. But my time expired, so I cannot yield back what I do not have.

Mr. GOODLATTE. The Chair thanks the gentleman and recognizes the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you. Thank you all for appearing today to testify in this hearing, which I liken to a dog chasing its tail. I mean, you know, a dog has got a flea on its tail, or a tick or something, and it gets so exasperated and wound up that it just starts chasing its tail around. And that is what this hearing kind of reminds me about, because it is not really—this is not an impeachment hearing, is it, Professor Turley?

Mr. TURLEY. No. It is not an impeachment hearing.

Mr. JOHNSON. Yeah. And there is some obligations that the Judiciary Committee must fulfill in terms of actually instituting an impeachment proceeding against someone. Is not that correct?

Mr. TURLEY. As far as I understand, this is not part of a formal impeachment procedure.

Mr. JOHNSON. Yeah. I mean, we have got an obligation to independently investigate the allegations against the accused official in this Committee if it were an impeachment process. Is that not correct?

Mr. TURLEY. The House is given that responsibility to determine if there is a basis for impeachment.

Mr. JOHNSON. The Judiciary Committee of the House of Representatives is given that responsibility, is that not correct?

Mr. TURLEY. That is my understanding. Yes.

Mr. JOHNSON. And what due process considerations would we owe an accused official in a House Judiciary impeachment proceeding? We would have to afford that individual the right to counsel, is that not correct?

Mr. TURLEY. Well, the question of due process is a little tougher in the sense that——

Mr. JOHNSON. My question is just we would have to give that individual the focus of our impeachment inquiry an opportunity to be represented by counsel, is that not correct?

Mr. TURLEY. I am not too sure, because the Constitution itself does not specify that you have that right.

Mr. JOHNSON. Well, it has been our custom.

Mr. TURLEY. It has been our custom. We were on opposite sides in the Porteous impeachment.

Mr. JOHNSON. Yes. And that——

Mr. TURLEY. You certainly did afford that opportunity to my client.

Mr. JOHNSON. And it is only correct that we would do that. We would have the obligation that target a right to opening statement. Right?

Mr. TURLEY. In the past there has been due process given to the accused.

Mr. JOHNSON. And we would give the accused the right to cross-examine any witnesses against him or her, is that not correct?

Mr. TURLEY. That is a decision of the Committee. But, in the past, that has occurred.

Mr. JOHNSON. And that person would have a right to present their own witnesses in an impeachment proceeding, is that not correct?

Mr. TURLEY. Once again, if the Committee allows it, and it certainly has happened in the past.

Mr. JOHNSON. Well, you could not impeach somebody without giving them the right to have an attorney, and the right to confront the witnesses against them through cross examination. Is that not a fact?

Mr. TURLEY. Well, if you are asking as a constitutional matter whether you have to give that right to an accused, my answer is probably no, that the Constitution is not part of——

Mr. JOHNSON. Well, I am sure, Professor Turley, that if you were representing the accused, as you were with the Porteous impeachment process, you would insist on those basic notions of due process.

Mr. TURLEY. I would indeed.

Mr. JOHNSON. I know that you would. And so, what we are doing here, has no relationship to an impeachment proceeding. We should

not give the public the false impression that this is about impeachment. This is about the dog chasing its tail.

Now, how long have we been chasing the tail on this case? It was back in, what, March of 2015—well, October of 2015, when the Department of Justice declared that no criminal charges should issue out of the original investigation. Is that not correct, Professor Gerhardt?

Mr. GERHARDT. Yes, sir.

Mr. JOHNSON. And, since then, Congress has been chasing its tail round and round——

Mr. FRANKS. Will the gentleman yield?

Mr. JOHNSON. No, I will not. And here we are, while we have had one mass shooting after another in this country since October of 2015, we have had Congress, instead of holding hearings on what we can do to protect the public from gun violence, what kind of gun reform legislation we can even have a hearing on and consider why would it be that an individual who has been on a Federal terrorism watch list twice would be in a position of purchasing a firearm no questions asked—not one hearing on that. But here we continue to chase our tail on the IRS so-called scandal. With that, Mr. Chairman, I will yield back in exasperated frustration.

Mr. GOODLATTE. The Chair recognizes the gentleman from Arizona, Mr. Franks, for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman. Thank you all for being here. Mr. McCarthy, if it is all right, I will start out with you. You state in your written testimony that the framers were deeply worried that "maladministration—including overreach, lawlessness, or incompetence—could inflate the constitutionally-limited executive into an authoritarian rogue," I think is the quote you used, "who undermines our constitutional order."

Professor Gerhardt, on the other hand, he writes in his written testimony that the founders considered but rejected making certain high ranking officials impeachable on broader grounds, such as maladministration. Who do you suggest is right on that point? Did the Framers consider maladministration an impeachable offense or not?

Mr. MCCARTHY. Congressman, I will just repeat what I said earlier. The framers considered maladministration and then adopted high crimes and misdemeanors. Their fear was that a standard like maladministration could be promiscuous and could be applied to trifling misconduct, or incompetence. High crimes and misdemeanors was more of a term of art.

They had the example of the Hastings impeachment and Edmund Burke's conduct of it as a fairly fresh example at the time. So, I believe that is why maladministration was not the term that they settled on, even though it was the concept they were driving at.

Mr. FRANKS. Yeah. Professor Turley, do you have any perspective on that?

Mr. TURLEY. Certainly. Actually, Madison referred later to maladministration, in talking about the standard. There is a difference between what you use as the formal standard. And there was a concern of putting maladministration into the language, because it tended to be too broad. But Madison also talked about incapacity,

negligence, and perfidy as examples of things upon which you could be removed. Alexander Hamilton referred to abuse or violation of the public trust.

The point is that this is a standard that has room at the elbows. It has room for the House to hold officials accountable for actions of misconduct. And a lot of the debate over language sort of misses the primary point. I will give you an example. The idea that gross negligence cannot be an impeachable offense.

As I state in my written testimony, it depends on how you use those terms. For example, in the criminal arena, as many of you are aware, recklessness is viewed as a basis for criminal prosecution. So is deliberate indifference. Those are terms that take what would be normally a case of gross negligence, but it is criminal in the sense that it requires a level of action that itself is considered knowing for the scienter purposes.

So, at some point, the use of these terms outside the context of impeachment loses their meaning. At the end of the day, Members have to look at whether what the official did was a betrayal of the public trust, whether it rose to the level of an impeachable offense. And so, I do not think you get very far by saying, "Well, you cannot have gross negligence," without looking at what that actually means in this context.

Mr. FRANKS. I might just follow up on that. You know, treason and bribery are relatively well-defined terms. But the meaning of high crimes and misdemeanors, you know, is not defined in the Constitution or in statute, and it sort of remains somewhat opaque. But, in keeping with what you just said, in your view, is impeachment limited ultimately to criminal acts, even if it was criminal negligence?

Mr. TURLEY. No, it is not. And that is something that drives me to distraction. I testified in the Clinton impeachment hearings. And I was surprised by some of my colleagues who did not think that lying under oath would constitute an impeachable offense. So, there is obviously great variety of views of what that means. I did not find that a particularly close question. But it does not have to be an indictable offense.

I think that the whole point of the language, when you hear the framers talk about violations of the public trust, is it is presumed, obviously, if a President commits crimes in office that is something upon which the President can be removed. But, in addition to those types of crimes, there are violations of the public trust that the framers expressly stated could be bases for removal.

Mr. FRANKS. Mr. Garvey, do you have a last word on that yourself, related to whether or not it, in your view, is impeachment limited to criminal acts?

Mr. GARVEY. I think, first off, I would say that is a decision that is committed by the Constitution to the Members of the House, I think, if you look at history. In practice, however, there are examples in which a criminal act was not required.

Mr. FRANKS. Yeah. Thank you, Mr. Chairman. I thank all of you.

Mr. GOODLATTE. The Chair recognizes the gentleman from New York, Mr. Jeffries, for 5 minutes.

Mr. JEFFRIES. I thank you, Mr. Chairman. And I want to thank all the witnesses for your testimony, and for your presence. Mr.

McCarthy, do you think that impeachment is an ordinary remedy, or an extraordinary remedy?

Mr. MCCARTHY. It is an extraordinary remedy.

Mr. JEFFRIES. Okay. Now, you wrote a book called "Faithless Execution." Is that correct?

Mr. MCCARTHY. Yes, sir.

Mr. JEFFRIES. And, in that book, you called for the impeachment of President Barack Obama. Correct?

Mr. MCCARTHY. No, sir.

Mr. JEFFRIES. You did not? Do you think that Barack Obama should be impeached or should not be impeached?

Mr. MCCARTHY. I believe he has committed impeachable offenses. I do not believe that there is a public consensus for his removal. And, as I argue in the book, if you proceed with impeachment when there is not a public consensus for removal, it is actually counterproductive, because you encourage more lawlessness.

Mr. JEFFRIES. Okay. So, you believe that Barack Obama has committed impeachable offenses. You also believe, in that book, that Attorney General Eric Holder committed impeachable offenses, correct?

Mr. MCCARTHY. Yeah. I think that, certainly, what he was held in contempt for amounted to impeachable offenses.

Mr. JEFFRIES. That was a partisan contempt vote, correct?

Mr. MCCARTHY. I cannot argue to what the vote was. I know that Congress held him in contempt.

Mr. JEFFRIES. Okay.

Mr. MCCARTHY. I did not get to vote.

Mr. JEFFRIES. You also argued in that book that the Secretary of State committed impeachable offenses, is that right?

Mr. MCCARTHY. I do. I believe Benghazi, they are profound impeachable offenses, just to take that one transaction.

Mr. JEFFRIES. Okay. By my count, for this extraordinary remedy, we are at one President, and two Cabinet secretaries. Let's keep going.

Mr. MCCARTHY. Who I recommended not to impeach because there is not a public consensus for it.

Mr. JEFFRIES. I understand. The American people are reasonable. You also argued that the Secretary of Health and Human Services committed impeachable offense. Is that right?

Mr. MCCARTHY. I do not recall that. I mean, I would have to look at that. I did argue that the President had overstepped his executive authority by unilaterally amending, or changing statutes, and that certain subordinates in the executive branch had actually carried out that lawlessness.

Mr. JEFFRIES. Okay. So, at one President, and three Cabinet secretaries, am I leaving anyone else out?

Mr. .MCCARTHY. Man. I seem to think there were a lot more than that.

Mr. JEFFRIES. Okay. Let us move on to Mr. Turley. I think we understand the perspective that you are bringing to this objective hearing. Now, Mr. Turley, in the Constitution, you have got treason, bribery, and other high crimes and misdemeanors as the standard laid out by the Framers. Is that right?

Mr. TURLEY. That is correct. Yes, sir.

Mr. JEFFRIES. And that is a high bar, extraordinary remedy. Is that right?

Mr. TURLEY. Yes. I think it is.

Mr. JEFFRIES. And I think you testified that Congress has a variety of options at its disposal in order to sanction, you know, an official or a judge. Is that right? Beyond impeachment?

Mr. TURLEY. Yes.

Mr. JEFFRIES. And I think you laid out impeachment, contempt, censure, and fines. Is that right?

Mr. TURLEY. I believe so. Yes.

Mr. JEFFRIES. And, along that spectrum, would you say that impeachment is the most severe remedy available to the Congress to, you know, express an adversarial position as it relates to the conduct of an official or a judge?

Mr. TURLEY. Yes. But I would say that impeachment is not a means to express your adverse positions. It is not there for cathartic expression by Congress. But it certainly is the most extreme of those options.

Mr. JEFFRIES. Right. So, it is not there to really express opposition or vent frustration at an Administration that you disagree with, notwithstanding the fact they were elected by the American people, not once but twice in overwhelming Electoral College fashion. It is this extraordinary remedy, with the bar set—high crimes, other misdemeanors, treason, bribery. Now, I think obstruction of justice presumably falls in that spectrum of an impeachable offense. Is that right?

Mr. TURLEY. I think it does. Yes.

Mr. JEFFRIES. Other forms of official corruption fall in that spectrum of an impeachable offense?

Mr. TURLEY. Yes.

Mr. JEFFRIES. Perjury would fall in that spectrum of an impeachable offense. Is that right?

Mr. TURLEY. Yes, sir.

Mr. JEFFRIES. Now, negligence, or incompetence, mistake—along that spectrum which we are starting with treason and bribery, and we are winding up working our way through corruption and obstruction of justice, perjury—would you say that this extraordinary remedy, the most severe one available to the Congress is an appropriate remedy for a mistake, even if that is a mistake that results in gross administrative negligence from someone who was not even a Cabinet-level secretary, let alone a President?

Mr. TURLEY. Well, certainly, if you are speaking of simple negligence then my answer is, well, no, it is not an impeachable offence. But this is where we end up on that spectrum, which—and you are also familiar with the criminal code as we see in many criminal cases. And it does not have to be a crime, but it is a good source to look at. There are some forms of negligence that rise to the level of criminal conduct, recklessness, deliberate indifference.

And so when you look at a negligence question, a lot of my writings in this area says that it really does get down to the context. Was this reckless action? Was it a deliberate indifference or something less?

Mr. JEFFRIES. Right, but there is a difference between manslaughter, criminally negligent homicide and negligence in an administrative context, I think. I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman, recognizes the gentleman from Ohio, Mr. Jordan, for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chairman. Mr. McCarthy, just to be clear for the record here, you believe you do not have to show criminal intent in an impeachment proceeding?

Mr. MCCARTHY. You do not have to show criminal intent.

Mr. JORDAN. The standard is gross negligence, gross negligence, or breach of public trust, dereliction of duty could be the very appropriate standard?

Mr. MCCARTHY. It certainly takes into account conduct that threatens the constitutional framework, but is not criminal and therefore, would not require criminal intent.

Mr. JORDAN. And, Mr. Turley, you would agree with most of that, based on your testimony? You have talked about reckless, and you just did that with questions from the last Member.

Mr. TURLEY. Ultimately, you decide as a Member of this body as to what warrants impeachment and certain forms of gross negligence, in my—if you want to use that term——

Mr. JORDAN. Yep.

Mr. TURLEY [continuing]. In my view, could become impeachable offenses if you are talking about recklessness or deliberate indifference.

Mr. JORDAN. Right.

Mr. TURLEY. And that is a matter this body has to weigh very carefully.

Mr. JORDAN. Okay, Mr. McCarthy, back to you. I am reading from your written testimony, and you said—it was later, page 14. Comparing the articles that were actually filed against President Nixon, you quote this—the articles read, "Had endeavored to use the Internal Revenue Service to violate the rights of American citizens," they also read that, "the President was making false or misleading statements and withholding relevant and material evidence or information." That was from the articles filed against the President, back—against President Nixon.

Here is a testimony from Mr. Koskinen. He said, "If you told me that Tom Kane," Chief Deputy Counsel at that Internal Revenue Service, his Chief Deputy Counsel, "said that on February 1st—that he knew on February 1st that there were problems with Lerner's hard drive and they were missing emails.

If you tell me he knew on February 1st, I would henceforth say that the IRS knew in February." So, just the facts, Mr. Koskinen's IRS Chief Deputy Counsel is on notice of problems with Lerner's hard drive and server lost emails, and Mr. Koskinen waits 4 months to tell us. Would that be withholding relevant information, material information from our investigation, do you believe?

Mr. MCCARTHY. Where I come from, and again, not having personally investigated this, myself——

Mr. JORDAN. Let me frame it this way. You are a former prosecutor. You find out important information. Maybe you did not find out directly, but one of your other lawyers in your office finds out

and is working on the case, and you guys wait 4 months to tell the judge. Would you be in trouble?

Mr. MCCARTHY. No, I can tell you, in nearly 20 years as a prosecutor, you screw up a lot of times. When you make a mistake, you are obliged to get to the court and correct the record, not to be called on and to correct it. There may some rhythm involved in the equation to make sure that you have the facts right when you go to report it to the court, but if it is a matter of great gravity—for example, if I had gotten a court to incarcerate someone without bail on the basis of facts that I find out not to be true, my obligation, no matter how silly it makes me look, is to get to the judge and correct the record.

Mr. JORDAN. Correct the record?

Mr. MCCARTHY. Right.

Mr. JORDAN. All right. Four months. It is also interesting, in that 4-month timeframe, that is actually the time when they destroyed the backup tape. So they knew they were in trouble with the main computer that had the emails, and they did not tell us for 4 months, but in that interval they also destroyed the backup tapes that would have given us information. And they did that with three preservation orders and two subpoenas in place.

I also like what you said here from the article, "Endeavor to use the IRS to violate the rights of American citizens." Now, it is interesting that you use the word endeavor. Because in this case that we are talking about, they did not endeavor, they did it. Four hundred and twenty-six groups were targeted systematically and for a sustained period of time by the Internal Revenue Service.

I always remind folks, never forget the underlying offense here. The IRS targeted people for their political beliefs. They got caught. Ms. Lerner lied about it when she first went public May 10, 2013 and said, "It was not us, it was folks in Cincinnati."

Then she comes in front of the Oversight Committee, sits right where you are sitting and takes the Fifth Amendment. When you have that fact pattern, it puts a premium on the documents, the evidence, the material, the emails and they waited to tell us that they had problems, and then they destroyed the backup tapes that contained the information we needed for our investigation. Ridiculous.

Let me ask you this here. Mr. Gerhardt said this should be a last resort. The House has voted to reduce the IRS budget, the Treasury's budget. We have called for the resignation of Mr. Koskinen, we have voted for a special prosecutor to look into this, we voted last week in the Oversight Committee to censure. Last resort, we are there.

There is nothing we can do to reassert, as Mr. Turley said, the rights of the legislative branch which have been trampled on by this executive branch. So, I would just say this, Mr. Chairman. You do not have to show bad intent, criminal intent. Legislative Branch rights have been trampled—and Mr. Turley pointed a great fact. Judicial Watch can get more information on the IRS targeting scandal, on Benghazi, on the Clinton email, on anything that is going, they get more information than Congress gets.

The underlying offense here was the most egregious thing you can do—going after peoples' political free speech rights, the right

to speak in a political fashion. And John Koskinen, as head of the agency, brought in to clean it up, in the President's word, and restore confidence, in the President's word, allowed 422 backup tapes to be destroyed with three preservation orders and two subpoenas in place. If that does not warrant, all that does not warrant us taking this action, I do not know what does. With that, I would yield back.

Mr. GOODLATTE. The Chair thanks the gentleman and recognizes the gentleman from Utah, Mr. Chaffetz, for 5 minutes.

Mr. CHAFFETZ. Mr. Chairman, thank you, and thank you sincerely for holding this hearing. But I got to tell you, the frustration it is very frustrating. But let's remember why we are here. We are here because he had two duly-issued subpoenas to the Commissioner of the IRS, and they did not fulfill those subpoenas. In fact, they destroyed that evidence.

The IRS, which issues on average 66,000 subpoenas and summons a year, they know how to dish it out, but they do not know how to take it. Imagine if you came back to the IRS and said, "I had those documents, but you know what? I went ahead and destroyed them." Do you think that you would go to court or not go to court? Would you be in jail or not be in jail? We are talking about removing somebody from office.

The duplicity and inconsistency from Mr. Nadler is stunning. He complains about censure and yet he cosponsors resolutions of censorship on George W. Bush, he does censures on Mr. Cheney, but heaven forbid we get rid of somebody who lied to Congress. When you provide false testimony to Congress, is that or is that not a crime? Is that or is that not against the law? Does anyone of you think that providing false testimony to Congress is not against the law?

Mr. MCCARTHY. It really depends on whether it is intentionally false, if you are talking about the criminal law.

Mr. CHAFFETZ. But it does not rise to that level, does it? In terms of, if you provide false testimony to Congress, is that an impeachable offense?

Mr. MCCARTHY. I would say that in the Senate Judiciary proceedings, with respect to Attorney General Gonzales, the senior Members of the Committee of both parties said that the issue was that the Committee had lost confidence in the ability of the Attorney General.

Mr. CHAFFETZ. So, let me read. Let me read a couple things Mr. Nadler cited in the 1974. He cited as the leading authority on this. This is from the 1974 Judiciary Committee Report, "Impeachment in criminal law serve fundamentally different purposes. Impeachment is the first step in the remedial process, removal from office and possible disqualification from holding future office." The purpose of impeachment is not personal punishment. This goes from the conclusion.

The emphasis has been on the significant effects of the conduct, undermining the integrity of the office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government.

Clearly, these effects can be brought about in a way not intended by the criminal law. And the other one I would highlight is Mr.

Madison. James Madison of Virginia argued in favor of impeachment, stating that some provision was "indispensable" to defend the community against "the incapacity, negligence, or perfidy of the chief magistrate."

So, the reason that we are here is because we had two duly-issued subpoenas that were not abided by; in fact, they destroyed the evidence under his watch, and then provided false statements to the United States Congress. Do not pretend that this is just some accident that happened over on the side, and certainly I think that Mr. Koskinen had a duty and obligation to inform the Congress when he do because, what did he do? They informed the White House, they informed the Department of Treasury, but they did not inform the Congress. And I have a problem with that.

Now, Mr. Gerhardt, you argued that the CRS report would say that Mr. Koskinen maybe does not rise to the level of somebody who is impeachable. Do you believe or not believe that the Commissioner of the IRS does qualify as a civil officer?

Mr. GERHARDT. I am sorry, I am not sure I understood the first part, what you said, but I think he has enough responsibility, as I said in my opening statement. I think he exercises a substantial enough authority where he qualifies as a——

Mr. CHAFFETZ. Does anybody believe that the Commissioner of the IRS is not of a significant high enough level to be qualified for impeachment? Very good. Let me also highlight something about this range of offenses. Mr. Gerhardt, in 1999, you wrote a law review article that seems to be in direct contradiction to what you said here today. Today, your testimony is, "Indeed, the Founders considered, but rejected making certain high ranking officials impeachable on broad ground such as maladministration."

But in 1999 you wrote, "Mason therefore withdrew his motion and substituted other high crimes and misdemeanors against the state, which Mason apparently understood as including maladministration." So, which one was right? Were you wrong in 1999, or are you wrong today?

Mr. GERHARDT. I am describing George Mason in the one you just quoted from that in fact, what he understood, it was not necessarily attributable to the entire body. In fact, they adopted the phrase at the convention. They specifically adopted the phrase, "high crimes or misdemeanors" to distinguish it from maladministration, so, number one.

Number two, over time, I think other crimes or misdemeanors have grown to be understood as requiring both bad faith and a bad act.

Mr. CHAFFETZ. And clearly, Mr. Chairman, I think there were more than just that. Providing false testimony, not complying with the subpoena, in fact, destroying—that is destruction of evidence does qualify, in my opinion. Yield back.

Mr. GOODLATTE. The Chair thanks the gentleman and recognizes the gentleman from Florida, Mr. DeSantis, for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman. Thanks to the witnesses. I appreciate everyone's testimony. I have heard, just as we have gotten into this from some of the colleagues on the other side, that Congress just cannot handle an impeachment, take a year and all this. It is a 1-day case. We will present the case in 1 day. The

facts are really the facts. There are subpoenas issued, the tapes were destroyed, the emails were destroyed, there were statements made that are demonstrably false, there was a lack of effort on the IRS to even look for in obvious places. So either you are good with that or you are not.

So, I think that this idea, this is going to take, it is like climbing Mount Everest to simply put on this case, it is just not true. We absolutely could do it, and I think we need to do it.

High crimes and misdemeanors—in your book, Mr. McCarthy, you talked about some of the historical understandings of this, and when the Framers were devising the high crimes and misdemeanors provision, the biggest example was India, the Governor of India who had been impeached, Hastings.

Mr. MCCARTHY. Right.

Mr. DESANTIS. And they specifically looked at whether you needed criminal intent, and I notice in the debates they said, well, no, you cannot say you can only have treason or crime because Hastings was not necessarily guilty of that. He was more guilty of breaching his duties that he owed to the crown, correct?

Mr. MCCARTHY. Yeah, I think it is very clear that a criminal offense is not required. I also think it is worth pointing out that the Constitution explicitly provides that somebody who has been impeached is still subject to trial. So, the Framers obviously understood that this was not the analogue of a criminal proceeding because if it were, you would raise profound double jeopardy questions if you were to prosecute somebody afterwards.

It is pretty clear from the way the Constitution is laid out and from the arguments that were made at the time that it was adopted that this is not required a criminal trial in the procedural sense and it does not call for a criminal offense in the substantive sense.

Mr. DESANTIS. And I liked your reference, and I am a Navy guy, so dereliction of duty and conduct unbecoming an officer and a gentleman; those are actionable offenses under the Uniform Code of Military Justice. Now, those are criminal under the Uniform Code of Military Justice. They would not be considered criminal, necessarily, those acts in civilian society, but that provides an interesting analogue that if you are just so grossly negligent, you are not doing any of your duties, that there is a mechanism to be able to hold you accountable.

So, you agree that if somebody is just grossly negligent, if their conduct is just simply not becoming an officer, that that could potentially be actionable for an impeachment?

Mr. MCCARTHY. I think it could potentially be, but I also think the ingredients involved here are the nature of the wrong, how much does it threaten our constitutional framework, the culpability of the actor, and the necessity that Congress check the executive branch? And I think the difficulty in fixing apodictically on a standard is that that is situational. It will be different from instance to instance.

Mr. DESANTIS. And we sometimes will hear, "Well, Congress has not done this in a long time." Would you agree that right now Congress' power is really at its historical nadir in terms of the how the Founders conceived of the legislative branch?

Mr. MCCARTHY. Yeah, Madison thought impeachment was indispensable. The Framers expected it would be used more than it has been, and perhaps the reason that Congress is at this low ebb is precisely because it has not been used when it should have been.

Mr. DESANTIS. Or use the power of the purse. I mean there are certain tools that Congress has and they have given a lot of power to the bureaucracy over the years. So, here we are, and I appreciated Professor Turley, we send a subpoena and it is like nobody even cares about it. They did not need to follow any of this stuff. They made a decision that going in that direction, there would be no consequences. The contempt, no consequences.

And I just think if we keep allowing that, I think that we are inviting the executive branch to continue to trample over Congress' powers.

I think in this case, clearly, this is an example of checking the executive branch, because the underlying conduct was very serious. It struck at the heart of who we are as a country and our freedoms. And whatever you think of that, because I know there will be disagreements on the other side, clearly, Congress had the right to get this information and to conduct proper oversight over the executive branch. And this Commissioner, under his tutelage, the agency has thwarted our efforts at every step of the way.

I shudder to think what would happen to a taxpayer, a business owner who was audited, the IRS issues a summons for documents, and the response 2 months later is, "Well, we destroyed the documents. Sorry." The IRS would not accept that. You would face consequences.

Indeed, that is one of the cardinal sins with tax compliance, is to simply destroy documents that were under subpoena or under a summons. And so, I am glad we are having this hearing. I appreciate the range of views, and I yield back the balance of my time.

Mr. GOODLATTE. The Chair thanks the gentleman, recognizes the gentleman from Georgia, Mr. Collins, for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I think the interesting, you know, comment, because I personally believe I now served with others on the Oversight Committee and I have actually questioned the commissioner on many occasions. I have found sometimes, basically, getting more fruitful answers from the wall than I did from him, because he would basically just not answer questions. He would tell one story then you find out, you know, just a few days later it was not the right story then come back.

I think the groundwork has been laid by many of the questions of my, you know, fellow congressmen here, and well, that this is an issue that should be brought forward.

Mr. Turley, I want to go back to you and we have talked about this some, and Mr. McCarthy. I have heard the terms thrown around today, paper tiger, Congress has lost its authority. Let's deal with this. And it just came out, I think, Mr. McCarthy, you just said, "We probably should be using this more," the impeachment process.

I just want both of you to address that for a moment because we do have the power of the purse, you know, in the issues that we have now we are divided, I believe this Administration has played to the weakness, if there is, in the constitutional system. When you

had a Congress that has trouble passing issues, they have played right into that and they have exploited it, in a way. Is impeachment the best way for us to go about that in holding some of this accountable, and I will take from either one of you.

Mr. TURLEY. Well, my preference in these types of cases is first to start with contempt, and part of my testimony highlights the fact that this body used to exercise contempt authority, actual enforcement, directly, as a body and it agreed with the Department of Justice to the statutory process.

Mr. COLLINS. That is great you brought it up, and I want to talk about that. Here is another issue, though. When we have a Department of Justice that is being politically motivated and driven to not follow evidence—take that step, as well. We can hold in contempt, and we have done that, but yet we cannot get them to take up the case. Is there maybe another way that we can go about that, or tie it directly to the Department of Justice for not following the contempt orders that are issued for Congress?

Mr. TURLEY. Well, actually, for years I have testified in front of this Committee suggesting that you reexamine the deal you struck with the Department of Justice. I think the Justice Department is in clear flagrant violation of what it promised this body. It promised to be a neutral agent to take contempt referrals from this body. In 1982, it refused to submit Burford; 1982 again, refused to submit Bolton; 2008, refused to submit Meyers; 2012, refused to submit Holder or do a Grand Jury proceeding.

It was an agreement with this body, when you went to the statutory process that they would be an honest broker and they have not been when the person accused is a member of the Administration.

So, in my testimony I say it is really long overdue for the House to look at some of its original authority, the deal it struck; also to look at alternatives including fines, including financial penalties, which actually can be meted out for people who are censored or held in contempt.

In terms of impeachment, yes, it is an extraordinary remedy, but we are living in extraordinary times, that if you believe that the IRS Commissioner knowingly lied to this Committee, if you believe that there was obstruction of this Committee, I do not know of anyone who does not believe that can be an impeachable offense. It rests with your judgment as to the culpability of his actions.

But the problem is that this institution has allowed its powers to atrophy. And as a result, you have rational actors in the executive branch, and they balance detection against penalty, and if they see no penalty, they are going to conclude as rational actors that there is very little reason to cooperate with Congress when it could bear costs when not cooperating with Congress bears no costs.

Mr. COLLINS. Mr. McCarthy, you agree?

Mr. MCCARTHY. Yeah, I would just say that to my mind, the focus on contempt gets further away from what the purpose of impeachment was. The emphasis here is not on the venality of the actor; it is on the damage to the governing structure.

And if you have somebody who is abusing his authority in a way that threatens the governing structure, the public interest is in removing the power from the person. Whether that person is personally sanctioned in the judicial system or otherwise is a very inter-

esting question and a very important question, but it is beside the point of what this is about, which is protecting our governing framework.

Mr. COLLINS. And I think that is the part right there for all of us who, especially in the House, who as all of you said, is closest to people, we have to stand, not just coming off of election; we answer to our constituents on a smaller level as far as the Federal Government goes, and this is the part they do not understand. They do not understand how an executive branch makes that cost analysis decision, you know, penalty and gain. They do not understand it because they do not get it in their own workplaces.

If they do not do their job, if they do not follow through, if they do not get—if they do not follow even the IRS, which is the most egregious example, if they do not do what the IRS asks, they get put in jail, they get sanctioned. This is the part that concerns me.

Atrophied muscles hurt when you start to exercise them. And I think there will be pain as we begin this process, but if Congress does not start looking for ways, then I agree with your paper tiger comment, but I am not willing to be a paper tiger. I think this Congress has to do this and this is the perfect example, because if you have watched any of the hearings in OGR, in which I was a part of, and which the Chairman has continued and that other Members here have continued, this is an outrage. This man needs to go. With that, I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman, recognizes the gentleman from South Carolina, Mr. Gowdy, for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman. Professor Turley, when I see Chairman Chaffetz in his periwinkle trial suit, it gets me thinking a little bit towards, what if it actually went to trial? What would the mechanics of that trial be?

So, I am going to ask you a series of questions in hopes that you will give me more of a deposition answer than a law professor answer so I could get through all of the questions. What is the burden of proof? By what standard of proof does the House have to prove the allegations?

Mr. TURLEY. First of all, I like the suit.

Mr. GOWDY. The suit is an impeachable offense.

Mr. TURLEY. In terms of the standard, the standard is left to you. That is, it is not beyond a reasonable doubt. It is not a criminal proceeding. Members have to apply their own judgment as to whether there is sufficient evidence to support sending it to the Senate, and those two proceedings obviously have different sort of dynamics.

Your role is closer to a grand jury, in my view. You determine whether this is a matter for which this person should stand trial in the Senate. That means that you do not do necessarily as an exhaustive a job as a Senate trial would be. You have to do enough to satisfy yourself that this warrants an impeachment that should be before the Senate.

Mr. GOWDY. But then we have to walk across the Capitol to the jury, and we have to prove it. And maybe I am just a prisoner of my background. I am trying to figure out, is it preponderance; is it clear and convincing evidence; is it see if we can keep the Sen-

ators awake during the proceeding? What is the standard by which we have to prove whatever the allegation is?

Mr. TURLEY. Well, I think if you look at past trials, it probably comes closest in practicality to preponderance. As we tried the Porteous case together, on opposite sides, the—we often objected to the level of evidence against Judge Porteous, but we also acknowledged that the Senators had to make their own judgment as to whether the evidence was sufficient. If I was to peg which standard comes closest, I would probably say, historically, preponderance has come closest.

Mr. GOWDY. Do the rules of evidence apply? In other words, can I call a single witness who then uses hearsay to import, like, the Inspector General? Can I call the Inspector General and just use him to get all of the other evidence in, or do the rules of evidence apply?

Mr. TURLEY. Well, I am only laughing because the Chairman and I, remember, we had some heated moments late at night, around 12 at night, about witnesses and the rules of evidence. Technically, the rules of evidence do not apply. The rules that apply are the rules adopted by the Senate for those proceedings.

But I should also say, is we argued in the Porteous case that we—the Senate has tried to maintain those proceedings as close to the rules of evidence as possible. So as we tried that case, I would make evidentiary objections as I would in a Federal case, understanding that the Senators could override those determinations.

Mr. GOWDY. And I guess it is theoretically possible that the Senate could say, "Yes, there was a breach of duty or an offense was committed, but the punishment is not the punishment you are seeking." I guess they are both the finder of the fact and the ultimate censurer?

Mr. TURLEY. Yes, I mean, the Senators can decide that this does not warrant removal, and that is, of course, a different question from whether they believe the underlying conduct occurred.

Mr. GOWDY. Every now and again, senators will express their opinion on matters even before the trial has begun. I assume there is no remedy for removing jurors who have already expressed their——

Mr. TURLEY. No, I can say, with all due respect to the senator, it was the most difficult jury I ever appeared in front of. The fact is that senators are their own counsel as to the degree to which they speak to this.

And during the Clinton impeachment, we did have senators who, after signing the book and the initial entrance to remain neutral, actually went out and said they will not vote for impeachment before the trial started. That was not viewed as a violation, even though some Members did raise concerns about that.

Mr. GOWDY. All right. Last, kind of, nuts and bolts question—prosecutors have a tendency to think in terms of what defenses we may run into. The defense of some hybrid of selective prosecution that you are singling me out, even though other Administration officials have done exactly the same thing. I assume the Senate can factor that in if they want to, but you are not getting a jury instruction on selective prosecution, but if they want to use that as an argument, they could do so?

Mr. TURLEY. And in fact, was one of the arguments we raised in the Porteous trial before the Senate, is that his conduct was not easily distinguishable from other judges or even Members of Congress in some cases. But that was something to factor in. Obviously, the Senators did not find that persuasive.

Mr. GOWDY. My time is out. Mr. Chairman, I did want to ask, because I thought Jimmy asked a really, really good question which Professor Gerhardt—this incremental approach or the remedy of last resort. Walk me through what that incremental approach would look like. If it is the last resort, that necessarily means that we should try something before then. What have we not tried that we should try?

Mr. GERHARDT. Well, congressman, we have covered some of these, contempt and other possibilities. The other, frankly, is that this is an official who works within a hierarchy, and there are people within that hierarchy who obviously have, in some respects, supervisory authority. We have had other IRS Commissioners, for example, forced to resign if they have done something sort of inappropriate, so that is an option.

So, within the political circumstances in which this person functions, there are options. So, that is one of the challenges, I suppose, of dealing with a sub-Cabinet Official. Sub-Cabinet Official is, by definition, operating within a hierarchy. So the question becomes, to what extent can that official be held accountable within that hierarchy?

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. GOODLATTE. If the gentleman would yield. He failed——

Mr. GOWDY. Well, of course.

Mr. GOODLATTE [continuing]. He failed to ask Mr. Turley, who was the prevailing party in the impeachment

Mr. GOWDY. I just assumed anytime you went up against Professor Turley, we all knew you won.

Mr. TURLEY. Thank you for——

Mr. GOWDY. But that is all wrong.

Mr. TURLEY. It escapes my memory at the moment, Mr. Chairman.

Mr. GOODLATTE. The gentleman from Utah.

Mr. CHAFFETZ. I thank the Chairman. I would like to just note for the record that the Oversight Government Reform Committee took a——

Mr. GOODLATTE. The gentleman would state his request.

Mr. CHAFFETZ. I ask unanimous consent to ask 5 minutes' worth of questions.

Mr. GOODLATTE. Since I went over, Mr. Gowdy went over, I am not going to do a second round of questions, but I will be happy to recognize you for some brief additional questions, so keep it under that, that would be good, and I will do the same for the gentleman from Ohio.

Mr. CHAFFETZ. Will do. I thank the Chairman. I would note that the Oversight Government Reform Committee had the question about who would qualify as a civil officer. Counsel for the House came back and said that anybody—the standard should be they thought the most defensible would be somebody that was confirmed by the United States Senate. I was wondering if anybody would

disagree with that counsel we got, if there would be a different standard, but their definition of civil officer, most defensible was somebody confirmed by the United States Senate.

Mr. TURLEY. I have to say that that is the most logical line to draw. I am not entirely sure that I would say that is the exclusive measure of whether someone is impeachable. I can imagine a person who is not subject to confirmation having a very high position in the government, and indeed, I think part of the problem with those who say, "Look, this is unprecedented, you cannot go below the Cabinet," is it ignores the modern regulatory state.

You know, in the case of the commissioner, this is someone who has authority over 90,000 employees collecting $2.5 trillion from almost 250 million citizens. To suggest that that would not amount to a person subject to impeachment I think is facially ridiculous. But I could also imagine in our current regulatory state somebody who is not in a confirmable position who exercises that degree of authority.

Mr. CHAFFETZ. The other question I would say is, do you believe that providing false information to Congress is an impeachable offense?

Mr. TURLEY. From my point, standpoint, absolutely.

Mr. MCCARTHY. I do not think there is any question. It is.

Mr. GERHARDT. Of course, providing false testimony would be, but for me, it is not just the bad act. It would have to be the purposeful engagement in bad faith.

Mr. CHAFFETZ. Mr. Garvey?

Mr. GARVEY. Yeah, I would just point out that Judge Porteous was impeached and convicted for providing false statements to Congress. That was Article IV of his articles of impeachment.

Mr. CHAFFETZ. I thank you. And just finally, Mr. Chairman, I just ask you now to consent to enter into the record this Washington Post piece by George Will, October 7, 2015, Impeach the IRS Director.

Mr. GOODLATTE. Without objection, it will be made a part of the record.

[The information referred to follows:]

The Washington Post

Opinions

Impeach the IRS director

By George F. Will Opinion writer October 7, 2015

"Look," wrote Lois Lerner, echoing Horace Greeley, "my view is that Lincoln was our worst president not our best. He should [have] let the [S]outh go. We really do seem to have 2 totally different mindsets." Greeley, editor of the New York Tribune, was referring to Southern secessionist states when he urged President-elect Lincoln to "let the erring sisters go in peace."

Greeley favored separating the nation from certain mind-sets; Lerner favors suppressing certain mind-sets. At the Internal Revenue Service, she participated in delaying for up to five years — effectively denying — tax-exempt status for, and hence restricting political activity by, groups with conservative mind-sets. She retired after refusing to testify to congressional committees, invoking Fifth Amendment protection against self-incrimination.

As the IRS coverup of its and her malfeasance continues, the Republicans' new House leaders should exercise this constitutional power: "The House . . . shall have the sole power of impeachment." The current IRS director, John Koskinen, has earned this attention.

The Constitution's framers, knowing that executive officers might not monitor themselves, provided the impeachment recourse to bolster the separation of powers. Federal officials can be impeached for dereliction of duty (as in Koskinen's failure to disclose the disappearance of e-mails germane to a congressional investigation); for failure to comply (as in Koskinen's noncompliance with a preservation order pertaining to an investigation); and for breach of trust (as in Koskinen's refusal to testify accurately and keep promises made to Congress).

Rep. Jason Chaffetz (R-Utah), chairman of the Oversight and Government Reform Committee, says the IRS has "lied to Congress " and "destroyed documents under subpoena." He accuses Koskinen of "lies, obfuscation and deceit": "He assured us he would comply with a congressional subpoena seeking Lois Lerner's emails. Not only did he fail to keep that promise, we later learned he did not look in earnest for the information."

After Koskinen complained about the high cost in time and money involved in the search, employees at a West Virginia data center told a Treasury Department official that no one asked for backup tapes of Lerner's e-mails. Subpoenaed documents, including 422 tapes potentially containing 24,000 Lerner e-mails, were destroyed. For four months, Koskinen kept from Congress information about Lerner's elusive e-mails. He testified under oath that he had "confirmed" that none of the tapes could be recovered.

Lerner conducted government business using private e-mail, and when she was told that the IRS's instant messaging system was not archived, she replied: "Perfect." Koskinen's obfuscating testimonies have impeded investigation of unsavory practices, including the IRS's sharing, potentially in violation of tax privacy laws, up to 1.25 million pages of confidential tax documents. Tom Fitton of Judicial Watch, which has forced the IRS to disgorge documents, says some "prove that the agency used donor lists to audit supporters of organizations engaged in First Amendment-protected lawful political speech."

In July testimony, Koskinen consistently mischaracterized the Government Accountability Office report on IRS practices pertaining to IRS audits of tax-exempt status to groups. He wrongly testified that the report found "no examples of anyone who was improperly selected for an audit." He mischaracterized the report's criticism of IRS procedures for selecting exempt organizations for audits.

Contrary to his testimony, the report did not find that "individuals" were "automatically" selected for audit. The report did not investigate audits of individual taxpayers; it reviewed selection practices for audits of exempt organizations. The report noted, and Koskinen neglected to mention, that the IRS tracks information about high-net-worth individuals. Congress should investigate whether that tracking includes contributions to political committees and issue groups and whether the IRS then initiates audits of donors.

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Koskinen has testified that "there's no evidence that anybody outside the IRS had . . . any conversations with [Lerner] about [targeting conservative groups] or that she even had directives internally."

How could he assert the absence of evidence that he had not sought? He had testified that he had conducted no investigation of the targeting.

Even if, as Koskinen says, he did not intentionally mislead Congress, he did not subsequently do his legal duty to correct the record in a timely manner. Even if he has not committed a crime such as perjury, he has a duty higher than merely avoiding criminality.

If the House votes to impeach, the Senate trial will not produce a two-thirds majority needed for conviction: Democrats are not ingrates. Impeachment would, however, test the mainstream media's ability to continue ignoring this five-year-old scandal and would demonstrate to dissatisfied Republican voters that control of Congress can have gratifying consequences.

Read more from George F. Will's archive or follow him on Facebook.

To read more on this topic:

Josh Hicks: Issa and Lerner contempt proceedings

Joel Achenbach: In defense of Lois Lerner

Philip Bump: How the IRS lost e-mails

George F. Will writes a twice-weekly column on politics and domestic and foreign affairs. He began his column with The Post in 1974, and he received the Pulitzer Prize for Commentary in 1977. He is also a contributor to FOX News' daytime and primetime programming. Follow @georgewill

Mr. GOODLATTE. The gentleman from Ohio, for what purpose——

Mr. JORDAN. I thank the Chairman for to ask this short second—I want to make a couple points.

Mr. GOODLATTE. The gentleman is recognized.

Mr. JORDAN. I was going right where Chairman Chaffetz was at with this idea of the low Cabinet level. Mr. Turley, you are right, it does ignore the modern regulatory state, and we are not just talking about any old agency. This is probably the one agency that the American people have to deal with more than any other. This is the Internal Revenue Service. So, yeah, I think that just misses the fundamental fact of the world we live in today.

I just want to finish with this and maybe ask Mr. McCarthy—I cannot remember which of you on the panel said this—but I think they said there were three basic elements—the gravity of the offense, the culpability of the person that we are looking into, and then the duty of Congress. When you look at those three elements, the gravity of the offense, I always come back to this. They went after peoples' First Amendment, free speech, political speech, political—when the Founders put together the First Amendment, I think they were mostly focused on your ability to speak in a political nature, and not be harassed and targeted for doing so. That was the underlying offense.

Then we have Mr. Koskinen who allows documents to be destroyed and gives false and misleading testimony to the Congress. So, when I think about the gravity of both of those offenses, the culpability—allowed documents to be destroyed that were central to the investigation—would you, Mr. Turley and Mr. McCarthy, think those two elements then warrant the action we are seeking to take?

Mr. TURLEY. Well, what I would suggest is that first of all, the underlying allegation created a legitimate investigation for this Committee. If you are suggesting that the IRS was effectively weaponized against political opponents; that is an exceptionally dangerous type of precedent. Even President Obama acknowledged that. Did this Committee have absolute right to the documents that it sought? Clearly. Was the refusal of those documents to the Committee a basis to investigate for obstruction? Clearly.

If this Committee believes that a witness came in and lied to it and obstructed its investigation, then those have the gravity required for impeachment. It turns a lot on what you believe to be the nature of his actions. Was it just simple negligence, or was it intentional, or was it an act of willful blindness or deliberate indifference? All of those are——

Mr. JORDAN. Sure, it sure seems willful, anyway—it is 4 months to tell us that they cannot get us the information we ask for and that was under subpoena.

Mr. TURLEY. Well, that certainly helps the House because nothing concentrates the mind so much as a subpoena. And normally, you do not get a sort of passive-aggressive response. You have to comply with the subpoena.

Mr. JORDAN. Mr. McCarthy?

Mr. MCCARTHY. Yeah, I would just say that the third element plays in here, and that is that you have an obligation, constitutionally. Because, really, nobody else can. To check executive abuse

of power, overreach. And if you allow a situation where an agency like the IRS is weaponized against political opponents of the Administration, and you allow a situation where when you ask for relevant information that you are entitled to have from the executive branch, they either provide you with false information or they obstruct justice, you either have to act or you are basically greenlighting that conduct.

You know, people like me in the peanut gallery can rant and rave and do whatever. But we are not in a position to be a counterweight to the executive branch. It is a great power that Congress has, but it is also a profound responsibility because what hangs in the balance is whether our framework of government works.

Mr. JORDAN. Well said. I am going to thank the panel, and thank you, Mr. Chairman.

Mr. GOODLATTE. The Chair thanks the gentleman, and Mr. Garvey, I had asked you about instances of censure of sub-Cabinet level employees of the executive branch, and I want to ask a unanimous consent to submit for the record two instances that my research has found: one, of Assistant Secretary of the Army, Sara E. Lister in 1998, and the second, earlier, the Ambassador Thomas F. Bayard in 1896. So, we will submit the documentation regarding those censures.

[The information referred to follows:]

- Attorney General A.H. Garland (1886): The Senate adopted a resolution in 1886 in which it expressed its "condemnation" of President Cleveland's Attorney General A.H. Garland concerning his refusal to provide certain records and papers to the Senate. The papers related to his dismissal of a U.S. attorney from the southern district of Alabama. Garland was also thought to have had improper financial interests in a new telephone company.

- Ambassador Thomas F. Bayard (1896): In 1896, the House adopted a resolution where it found that a United States Ambassador, by his speech and conduct "has committed an offense against diplomatic propriety and an abuse of the privileges of his exalted position," and therefore, "as the immediate representatives of the American people, and in their names, we condemn and censure the said utterances of Thomas F. Bayard."

- Secretary of State Dean Acheson (1949-1952): In the 81st and 82nd Congresses, six resolutions were submitted containing demands for the resignation of Secretary of State Dean Acheson. In 1950, the House passed a vote of no confidence with respect to Secretary Acheson, who they said had not done enough to combat the spread of Communism. Nevertheless, Acheson was able to serve until the end of the Truman administration.

- President Richard Nixon (1973-1974): President Nixon was the subject of two censure resolutions in 1973 and 1974, both of which were overtaken by moves to impeach. On November 7, 1973, a resolution was introduced in the House that expressed the sense of Congress that Richard M. Nixon should resign from the Office of President of the United States. It was referred to the Judiciary Committee and no further action was taken. On August 2, 1974, the House passed a resolution that stated President Richard M. Nixon is censured for moral insensitivity, negligence, and maladministration. The resolution was assigned to the Judiciary Committee. It was never considered by the full House.

- Assistant Secretary of the Army Sara E. Lister (1998): On October 26, 1997, at a public conference held in Baltimore, Lister stated that "The Marines are extremists." A resolution was introduced in the House that called on the President to remove Lister if she would not resign from office. The resolution was referred to the Committee on Armed Services. The House adopted the resolution on November 13, 1997 by voice vote under suspension of the rules.

- President William J. Clinton (1998): Censure resolutions were introduced in the House and the Senate related to President Clinton's conduct in office. In the House, a group of moderate Republicans opposed to impeachment assembled a censure proposal that condemned Clinton's conduct, required him to acknowledge that he had deceived the American people, and imposed a fine. The authors described it as a way, short of impeachment, to express Congress's disapproval and prevent the President from escaping punishment.

Mr. GOODLATTE. And this has been a very good hearing, and I thank all of the witnesses for their contribution to it. I thank the Members of the Committee for their participation as well, and without objection all Members will have 5 legislative days to submit additional written questions for the witnesses, which we would ask that you answer promptly and without the necessity of a subpoena, or additional materials for the record.

And with that, this hearing is adjourned.

[Whereupon, at 12:15 p.m., the Committee adjourned subject to the call of the Chair.]