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BACKGROUND AND HISTORY OF IMPEACHMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

NOVEMBER 9, 1998

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BACKGROUND AND HISTORY OF IMPEACHMENT

MONDAY, NOVEMBER 9, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2141, Rayburn House Office Building, Hon. Charles T. Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles T. Canady, Henry J. Hyde, Bob Inglis, Ed Bryant, Bill Jenkins, Bob Goodlatte, Bob Barr, Asa Hutchinson, Robert C. Scott, Maxine Waters, John Conyers, Jr., Jerrold Nadler, and Melvin L. Watt.

Also present: Representatives Bill McCollum, Stephen E. Buyer, James E. Rogan, George W. Gekas, Howard Coble, Lamar S. Smith, Elton Gallegly, Steve Chabot, Edward A. Pease, Christopher B. Cannon, Mary Bono, Lindsey O. Graham, Barney Frank, Zoe Lofgren, Sheila Jackson-Lee, Martin T. Meehan, William D. Delahunt, Robert Wexler, and Steven R. Rothman.

Staff present: John H. Ladd, chief counsel, Subcommittee on the Constitution; Cathleen Cleaver, counsel, Subcommittee on the Constitution; Sharee Freeman, counsel, Committee on the Judiciary; Tom Mooney, general counsel, Committee on the Judiciary; Daniel Freeman, counsel and parliamentarian, Committee on the Judiciary; Susana Gutierrez, clerk, Subcommittee on the Constitution; Brian Woolfolk, minority counsel, Committee on the Judiciary; Perry Apelbaum, minority general counsel, Committee on the Judiciary; Julian Epstein, minority chief counsel and staff director, Committee on the Judiciary; Stephanie Peters, minority counsel, Committee on the Judiciary; and Samara Ryder, minority counsel, Committee on the Judiciary.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The Subcommittee on the Constitution will come to order.

The purpose of today's hearing is to receive testimony from legal and constitutional scholars on the background and history of impeachment. It is the intention of the Chair to recognize himself and the Ranking Minority Members for 10 minutes for opening statements, and then to recognize each member of the Subcommittee on the Constitution for 5 minutes for each opening statement.

The Chair will now recognize himself for an opening statement for 10 minutes.

Today this subcommittee meets to receive testimony on the important subject of the "Background and History of Impeachment." We will hear from two panels of distinguished witnesses on this grave subject. I am hopeful that the testimony we hear today, diverse as it most certainly will be, will provide the members of the Judiciary Committee with information that will help us reach an informed and considered judgment on the ultimate issues that are raised in the impeachment inquiry which was authorized by the House on October 8th.

At the outset, it should be understood by everyone that the purpose of today's hearing is not to establish a fixed definition of impeachable offenses under the Constitution. The House has never, in any impeachment inquiry or proceeding, adopted either a comprehensive definition of "high Crimes and Misdemeanors" or a catalog of offenses that are impeachable. Instead, the House has dealt with the misconduct of Federal officials on a case-by-case basis. The House has determined whether impeachable offenses were committed by officials accused of wrongdoing on the basis of a full understanding of the facts of each individual case. That is a model that has been consistently followed throughout the more than 200-year history of impeachment in the United States, and that is a model which the Judiciary Committee is now following in the inquiry with respect to President Clinton.

Although we will search in vain for any simple or clear-cut definitions, there are certain general principles which do emerge from the background and history of impeachment.

The Constitution grants the House the "sole power of impeachment." But that does not mean that the House exercises unfettered discretion. Contrary to the assertion of Gerald Ford that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history," the power of the House to impeach is not an arbitrary power. Impeachment must not be a raw exercise of political power in which the House impeaches whoever it wishes, for any reason it deems sufficient. Indeed, it is the solemn duty of all of the Members of the House in any impeachment case to exercise their judgment faithfully within the confines established by our Constitution. When an impeachment is at issue, all partisan considerations must be put aside, and Members must be guided first and last by their oath to support the Constitution.

As we will hear in today's testimony, various issues are hotly contested. The committee will have an opportunity to hear from some of the country's most articulate advocates of competing perspectives on the crucial issue of the scope of "high Crimes and Misdemeanors." All of the members of the committee have, I know, already given considerable thought to this question. All of us are mindful of the work done by the Judiciary Committee in 1974 in the impeachment inquiry with respect to President Nixon, and we look to that work for guidance in our present task.

There has been much discussion recently concerning the report on "Constitutional Grounds for Presidential Impeachment" prepared by the staff of the Nixon impeachment inquiry. Unfortunately, bits and pieces of that report have been pulled out of con-

text, creating a false impression concerning the fundamental principles set forth in the report.

We should consider carefully what the report actually says. In discussing the nature of impeachable offenses, the report concludes, and I quote:

"The emphasis has been on the significant effects of the conduct—undermining the integrity of office, disregard of constitutional duties and oath of office, arrogation of power, abuse of governmental process, adverse impact on the system of government."

The report goes on to state, and I quote again:

"Because impeachment of a President is a grave step for the Nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government, or the proper duties of the presidential office."

The references to "undermining the integrity of office, disregard of constitutional duties and oath of office, adverse impact on the system of government, and conduct seriously incompatible with the proper duties of the presidential office" in the inquiry staff report are echoed in another study of impeachment that was prepared at about the same time. The report on "The Law of Presidential Impeachment" prepared by the Association of the Bar of the City of New York in January of 1974 states, and I quote:

"We believe that acts which undermine the integrity of government are appropriate grounds whether or not they happen to constitute offenses under the general criminal law. In our view, the essential nexus to damaging the integrity of government may be found in acts which constitute corruption in, or flagrant abuse of the powers of, official position. It may also be found in acts which, without directly affecting governmental processes, undermine that degree of public confidence in the probity of executive and judicial officers that is essential to the effectiveness of government in a free society. . . ."

Both the report of the Nixon impeachment inquiry staff and the report of the Association of the Bar of the City of New York contain a thoughtful distillation of the general principles that emerge from the background and history of the impeachment process which can help guide our further deliberation concerning the charges against President Clinton. It is important to understand that this distillation of principles was made long ago without any reference to the controversy that now is before us. By any reasonable interpretation, the evidence presented to the House by the Independent Counsel, if it remains unrebutted, establishes that the President is guilty of impeachable offenses under these principles.

The evidence before us clearly supports the conclusion that the President is guilty of multiple acts of lying under oath, obstruction of justice, and other offenses. If the allegations of the Independent Counsel are ultimately determined to be true: First, the President, through obstruction of justice and false statements under oath, sought to conceal the truth in a sexual harassment case. Then the President engaged in a seven-month cover-up of those earlier offenses, a cover-up which culminated in the giving of false testimony by the President to the grand jury on August 17.

It is important to understand the context of the President's initial false statements under oath that are shown in this evidence.

This is not a case in which the President was surprised by a question about Ms. Lewinsky. On the contrary, the President knew that Ms. Lewinsky might very well be the subject of questions at the deposition conducted in January of this year. The evidence overwhelmingly points to the conclusion that the President went to that deposition with a calculated plan to lie and that at the deposition, after having taken an oath to tell the truth, the whole truth, and nothing but the truth, the President made multiple false statements.

Among other things, the evidence also overwhelmingly supports the conclusion that the President corruptly sought to influence the testimony of potential witnesses before a Federal grand jury in an effort to interfere with the due administration of justice.

The President's lawyers and some of the witnesses who will testify today contend that such conduct by a President of the United States is not impeachable under our Constitution. I am constrained to disagree.

Such conduct is indeed "seriously incompatible with the proper performance of constitutional duties of the presidential office," namely, the preeminent presidential duty to "take care that the laws be faithfully executed." No one can offer a satisfactory explanation of how multiple acts of lying under oath and obstruction of justice are compatible with the constitutional duties of the President or of his oath of office.

Moreover, no one can explain why the conduct charged against the President does not "undermine the integrity of office." The President's misconduct falls directly within the category of acts which may not directly involve the affirmative misuse of official power, but which nevertheless "undermine that degree of public confidence and the probity of executive and judicial officers that is essential to the effectiveness of government in a free society."

Obstruction of justice and lying under oath by a President inevitably subvert the respect for law which is essential to the well-being of our constitutional system. Such misconduct by the President sets an example of lawlessness and corruption, an example that cannot fail to have an "adverse impact on the system of government." A President who is guilty of such acts, acts involving calculated and sustained criminal conduct, steps outside the role assigned to him by the Constitution as the chief defender of the rule of law. He turns his back on the unique place he occupies in our system of government and takes on the role of one who by his own conduct directly attacks the rule of law, and consequently stands as a disgraceful and pernicious example before the whole Nation.

If the President is guilty of the offenses charged against him, he must be called to account under the Constitution for the commission of "high Crimes and Misdemeanors." He must be called to account for putting his selfish personal interests ahead of his oath of office and his constitutional duty. He must be called to account for the undermining of the integrity of the high office entrusted to him by the people of the United States. He must be called to account for setting a dangerous example of lawlessness and corruption. He must be called to account for subverting the respect for law which is the foundation of our Constitution.

[The prepared statement of Mr. Canady follows:]

PREPARED STATEMENT OF CHARLES T. CANADY, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION, AND A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA,

Today the Subcommittee meets to receive testimony on the "Background and History of Impeachment." We will hear from two panels of distinguished witnesses on this important subject. I am hopeful that the testimony we hear today—diverse as it most certainly will be—will provide the members of the Judiciary Committee with information that will help us reach an informed and considered judgment on the ultimate issues that are raised in the impeachment inquiry which was authorized by the House on October 8th.

At the outset, it should be understood by everyone that the purpose of today's hearings is not to establish a fixed definition of impeachable offenses under Article II of our Constitution. The House has never in any impeachment inquiry or proceeding adopted either a comprehensive definition of "high Crimes and Misdemeanors" or a catalog of offenses that are impeachable. Instead, the House has dealt with the misconduct of federal officials on a case-by-case basis. The House has determined whether impeachable offenses were committed by officials accused of wrongdoing on the basis of a full understanding of the facts of each individual case. That is the model that has been consistently followed throughout the more than 200-year history of impeachment in the United States. And that is the model which the Judiciary Committee is now following in the inquiry with respect to President Clinton.

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Alexander Hamilton, writing not long after the Constitution was adopted, well expressed the harm that would come to our Republic from those who by their example undermine respect for the law. In a statement that bears repeating, Hamilton wrote:

> "If it were to be asked, What is the most sacred duty and the greatest source of security in a Republic? the answer would be, an inviolable respect for the Constitution and Laws—the first growing out of the last. . . . Those, therefore, who . . . set examples, which undermine or subvert the

> authority of the laws, lead us from freedom to slavery; they incapacitate us for a government of laws. . . .

If the President is guilty of the offenses charged against him, he must be called to account under the Constitution for the commission of "high Crimes and Misdemeanors." He must be called to account for putting his selfish, personal interests ahead of his oath of office and his constitutional duty. He must be called to account for undermining the integrity of the high office entrusted to him by the people of the United Sates. He must be called to account for setting a dangerous example of lawlessness and corruption. He must be called to account for subverting the respect for law which is the foundation of our Constitution.

Mr. Scott, you are recognized for 10 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. I want to thank you, Chairman Hyde, and Ranking Member Conyers for convening this historic meeting, and I also want to thank the witnesses who will testify before us today.

As a Member of the House Judiciary Committee and the Ranking Member of this subcommittee, I share the responsibility with my colleagues in ensuring that these proceedings will be fair and consistent with our responsibility to the Constitution, as we consider impeachment. Of tantamount importance to this sobering responsibility is our obligation to maintain the proper perspective, and that no matter what we think of Bill Clinton and his tawdry escapades with an intern, what we do during these proceedings will affect the future strength and independence of the presidency as an institution.

Since the issuance of the Starr report, I and a number of my colleagues on the Judiciary Committee have called for this hearing on the constitutional implications of impeachment in order that the committee members could be well informed in the actions we take, to avoid making mistakes that may endanger our constitutional form of government.

One of the very first orders of business after the House decided to begin the Watergate inquiry was to review the history of impeachment and development of standards. An elaborate memorandum was issued by the committee days after the inquiry vote and months before any potentially damaging information was dumped into the public or any evidence was reviewed. This exercise was conducted despite the gravity of the allegations brought against President Nixon and the overwhelming historical precedents which supported the position that those allegations fell well within the definition of impeachable offenses.

The situation before us today is very different from Watergate. We are not contemplating impeaching a President because he has had the IRS harassing his political enemies by conducting audits on their taxes or because he misused the CIA by having them attempt to undermine a congressional investigation into other abuses of his power. Instead, we are investigating whether a President's alleged lying about details of a sexual affair warrants his removal from office. Moreover, we have been warned repeatedly that these allegations are nowhere near what is necessary to overturn a national election.

Despite these warnings, this committee has turned a deaf ear to hundreds of years of precedents and to the Constitution that has kept this country strong and unified. Instead, this committee has plunged this country into an impeachment inquiry without ever de-

termining what impeachment is and which if any of the allegations, even if true, might constitute impeachable offenses.

The National Law Journal conducted a survey of 12 nationally prominent constitutional law professors and found that 10 of the 12 conclude that, based on historic precedents of impeachment, not one of Ken Starr's allegations is an impeachable offense. Furthermore, most of the scholars said the question wasn't even close. Two weeks ago, over 400 of the country's most prominent historians wrote a letter saying that the Starr allegations are not impeachable offenses, and I would like to direct the committee's attention to a blowup of this letter over here.

In addition, this past Friday we heard from the Nation's constitutional law professors. Over 400 have signed letters saying that not only are Starr's allegations not impeachable, but also that the continued pursuit of an impeachment inquiry is threatening our constitutional form of government. While the strong and dire warnings from over 400 historians and 400 law professors cannot serve as a substitute to our constitutional obligations to determine if any of the alleged offenses are impeachable offenses, they definitely reflect the importance of this hearing today in applying the available scholarship to our proceedings.

The pleas of the scholars should inspire the committee to engage in a logical analysis of how this inquiry should proceed. A determination of whether any of the allegations alleged, even if true, are impeachable is the first step in a rational process. In conducting this analysis, a number of issues must be addressed and questions answered.

What is impeachment? Why is it included in the Constitution? What effect does an offense have to have on the constitutional form of government to warrant impeachment? What actions have been worthy of impeachment before, and what actions were not deemed worthy of impeachment? Without this hearing, there would be no logical manner to outline the parameters of what is impeachable. All of the precedence directs us to ask those questions and to proceed accordingly.

Even a cursory review of impeachments reveals that there is no constitutional authority to forcibly remove the President simply because we dislike him, or because we don't respect him, or because we disapprove of his actions when those actions do not constitute "Treason, Bribery, or other high Crimes and Misdemeanors." In fact, the scholars have told us that by proceeding with an inquiry based on allegations that do not meet these standards, we risk doing irreparable harm to our system of government by establishing a dangerous and partisan impeach-at-will precedent that will forever weaken the institution of the presidency.

The presidency was intended to be free from subversion by the legislature. Three separate and co-equal branches were envisioned by the drafters of our Constitution, and it is for this reason that impeachment is limited to the constitutionally explicit "Treason, Bribery, or other high Crimes and Misdemeanors." Maladministration was rejected as an impeachable offense because the term was considered to be too broad and, therefore, a threat to the independence of the executive branch, and because it would make it too easy for Congress to impeach a President with whom it did not agree.

Impeachment, it is clear, is intended to be a mechanism to protect against a rogue President threatening the constitutional form of government. According to constitutional scholars, it was never intended to be a crafty way for Congress to be able to remove or harass a President whenever it pleased.

Constitutional scholars have stressed the importance of the nexus between the offense and the effect the offense has had on the officeholder's official duties. In defining the limits of which types of actions constitute "other high Crimes and Misdemeanors," Congress has generally applied what has best been described as a fiduciary standard. In other words, officeholders are either elected or appointed to an office and are delegated powers of that office for which they owe a duty of care, and the officeholder is authorized to act only within the bounds of authority granted to him by that office. Any substantial misuse, abuse, or neglect of this authority is limited by removal through the impeachment process.

However, actions unrelated to duties of the officeholders are considered not worthy of impeachment unless they are so exceptional in nature that they destroy the officeholder's ability to continue to fulfill his or her duties. Clearly, no such offense has been alleged here, and in fact the public opinion of the President's performance is at an all-time high for this President and among the highest levels for all Presidents.

Furthermore, the scholars have refuted attempts by impeachment supporters to argue that the last three impeachments support lowering the standard. The fact is that all of these impeachments involved judges and allegations that their actions and circumstances affected their offices. Two of the judges, in fact, were incarcerated on criminal convictions during their impeachment trials. Obviously, a judge who is sentenced to prison for crimes is unable to perform his duties as a judge either during or after incarceration.

Duties of a judge and duties of a President, and the context of potential abuses of their offices, are very different. The ability of judges to execute their official duties is based on impartiality and lack of bias, while the job of a President is inherently partisan. I look forward to the witnesses addressing the Majority's attempts to make impeachment of judges the same as impeachment of a President, despite the clear distinctions both in their positions and in the history and precedents for both.

Today, we will hear from roughly an equal number of witnesses on different sides of this issue, but the American public should not be fooled by the hearing's illusion that the constitutional experts are equally divided on whether Starr's allegations are impeachable. Make no mistake about it, the overwhelming majority of scholars have said loudly and clearly that the Starr allegations are not impeachable offenses and that Congress is endangering the future of our constitutional form of government by treading down this dangerous path.

Finally, I would like to thank our witnesses today for agreeing to appear and for the time that they have spent preparing their testimony. This hearing is like no other that most of us have ever experienced. The record of this hearing will influence our democracy for hundreds of years after we have all departed. Your places

in history will be established, and I hope that we will all be remembered as courageous statesmen who were able to rise above the politics of faction in order to save the future of our constitutional form of government. The task at hand deserves nothing less.

After this hearing, Mr. Chairman, I will ask Chairman Hyde and Ranking Member Conyers to convene a full Committee on the Judiciary to meet and deliberate on the information we have learned at this hearing. The American people deserve an opportunity to have their Judiciary Committee meet and determine the question of whether any of Ken Starr's allegations, even if assumed to be true, rise to the level of impeachable offenses.

If the members of the committee listen closely to today's witnesses, to the 400 historians and 400 law professors, for the history and precedents of impeachment, I believe that we will conclude that the allegations outlined in the Starr report do not meet the constitutional standards for impeachment and we will be able to bring this inquiry to a close. Further, Mr. Chairman, I believe that the American people have now clearly told us that it is time to move on. So I look forward to the testimony and thank you for convening the hearing.

Mr. CANADY. Thank you, Mr. Scott.

Mr. Hyde is recognized.

Chairman HYDE. Mr. Chairman, I yield my 5 minutes to the distinguished gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. I thank the gentleman for yielding.

Mr. Chairman, on July 24th and 25th, 1974, the 38 members of this Committee on the Judiciary delivered their individual opening statements prior to the debate on the articles of impeachment against Richard Nixon. Our predecessors are the only people in this century, prior to members of this committee, who have considered an impeachment of a President and the many questions that such a process raises. For my opening statement, here are some of the pertinent thoughts in their own bipartisan words.

[Videotape shown.]

[Transcript of video follows:]

TRANSCRIPT OF VIDEO

Here in their own words are some of those thoughts direct from the July 24–25, 1974 Rodino Committee debate on articles of impeachment.

CHAIRMAN PETER RODINO

". . . The Founding Fathers with their recent experience of monarchy and their determination that government be accountable and lawful, wrote into the Constitution a special oath that the President, and only the President must take at his inauguration. In that oath, the President swears that he will take care that the laws be faithfully executed. . . .

"The great wisdom of our founders entrusted this process to the collective wisdom of many men. Each of those chosen to toil for the people at the great forge of democracy—the House of Representatives—has a responsibility to exercise independent judgment. I pray that we will each act with the wisdom that compels us in the end to be but decent men who seek only the truth. . . .

DEMOCRAT HAROLD D. DONOHUE

". . . Now, in truth, there were and there are no positive material instruments available to us such as those by which we can measure a precise distance or pronounce the exact time of day to guarantee the errorless performance of our duty. The human means through which we must try to make the right measurement of

conduct that is required in this historical task exists only in the individual minds and consciences of each of the committee members. . . ."

REPUBLICAN ROBERT MCCLORY

". . . Preserving our Republican Party to my mind does not imply that we must preserve and justify a man in office who would deliberately and arbitrarily defy the legal processes of the Congress, nor can our party be enhanced if we as Republican members of the U.S. House of Representatives, tolerate the flouting of our laws by a President who is constitutionally charged with seeing that the laws are faithfully executed as provided in article 2.

We will enhance our Republican Party and assure a viable two party system only if we are courageous enough and wise enough to reject such conduct even if attributed to a Republican President. The second question we must answer is not what is best for our party, but what is best for our Nation. . . ."

DEMOCRAT ROBERT W. KASTENMEIER

". . . Impeachment is one way in which the American people can say to themselves that they care enough about their institutions, their own freedom and their own claim to self-government, their own national honor, to purge from the Presidency anyone who has dishonored that office. This power of impeachment is not intended to obstruct or weaken the office of the Presidency. It is intended as a final remedy against executive excess, not to protect the Congress against the President, but to protect the people against the abuse of power by a Chief Executive. And it is the obligation of the Congress to defend a democratic society against a Chief Executive who might be corrupt.

Justice Brandeis warned Americans of the dangers of illegality of official conduct. 'In a government of laws,' he wrote, 'the existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If government becomes a law breaker, it breeds contempt for the law. It invites every man to become a law unto himself. It invites anarchy. . . ."

REPUBLICAN TOM RAILSBACK

". . . Some of my friends from Illinois—I received all kinds of mail; some of my people say that the country cannot afford to impeach a President. Let me say to these people, many of whom are good supporters and friends, I have spoken to countless others including many, many young people, and if the young people in this country think that we are not going to handle this thing fairly, if we are not going to really try to get to the truth, you are going to see the most frustrated people, the most turned-off people, the most disillusioned people, and it is going to make the period of LBJ in 1968, 1967, look tame. So I hope that we just keep our eye on trying to get to the truth. . . ."

DEMOCRAT WALTER FLOWERS

". . . You know, the power of the Presidency is a public trust, just lye our office. And the people must be able to believe and rely on their President. Yet, there is some evidence before us that shows that the President has given solemn public assurances to the people involving the truth and the faith of his powerful office when those assurances were not true, but were designed to deceive the people and mislead the agencies of government who were investigating the charges against Mr. Nixon's men. If the trust of the people and in the world of the man, or men, or women, to whom they have given their highest honor, or any public trust is betrayed, if the people, cannot know that their President is candid and truthful with them, then I say the very basis of our government is undermined. . . ."

DEMOCRAT BARBARA JORDAN

". . . 'Who can so properly be the inquisitors for the nation as the representatives of the nation themselves?' (Federalist 65) The subject of its jurisdiction are those offenses which proceed from the misconduct of public men. That is what we are talking about. In other words, the jurisdiction comes from the abuse of some violation of public trust. It is wrong, I suggest, it is a misreading of the Constitution for any member here to assert that for a member to vote for an Article of Impeachment means that the member must be convinced that the President should be removed from office. The Constitution doesn't say that. The powers relating to impeachment are an essential check in the hands of this body, the legislature, against and upon the encroachment of the Executive. In establishing the division between the two

branches of the legislature, the House and the Senate, assigning to the one the right to accuse and to the other the right to judge, the Framers of the Constitution were very astute. They did not make the accusers and the judges the same person. . . ."

REPUBLICAN LAWRENCE J. HOGAN

". . . Now, the first responsibility facing members of this committee was to try and define what an impeachable offense is. The Constitution does not define it. The precedents which are sparse do not give us any real guidance as to what constitutes an impeachable offense. So each of us in our own conscience, in our own mind, in our own heart, after much study, had to decide for ourselves what constitutes an impeachable offense. Obviously, it must be something so grievous that it warrants the removal of the President of the United States from office. I do not agree with those that say that an impeachable offense is anything that Congress wants it to be and I do not agree with those who say that it must be an indictable criminal offense. But somewhere in between is the standard against which we must measure the President's conduct. . . ."

DEMOCRAT JAMES R. MANN

". . . Do yet in the United States the people still govern? Do they govern through elected representatives? In this era of power that our governmental system has brought us to in the world where our involvement in foreign trade and foreign affairs puts the President in front as the symbol of our national pride and as the bearer of our flag, and here we have in the House of Representatives 435 voices speaking on behalf of different constituencies with no public relations man employed by the House of Representatives, and I wonder if the people still do want their elected Representatives to fulfill their oath to preserve, protect, and defend the Constitution of the United States. Do you want us to exercise the duty and responsibility of the power of impeachment, whether that means conviction or exculpation?

You know, some of the things that cause me to wonder are the phrases that keep coming back to me, 'oh, it is just politics,' or, 'let him who is without sin cast the first stone.'

Are we so morally bankrupt that we would accept a past course of wrongdoing or that we would decide that the system that we have is incapable of sustaining a system of law because we aren't perfect? . . ."

Mr. INGLIS. Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Inglis.

The gentlewoman from California, Ms. Waters, is recognized.

Instead, the gentleman from Michigan, Mr. Conyers, will be recognized.

Mr. CONYERS. Thank you, Mr. Chairman, members of the committee, and to the very distinguished legal scholars and former members and judges, and my former Judiciary member colleague, Father Drinan, who joins us here this morning.

On two separate occasions, the President of the United States has been chosen, and it was William Jefferson Clinton. He was elected to that office. Now, to proceed to nullify a presidential election on the basis of authoritarian privacy-invading questions about sex, questions the government does not have the legal power to ask, is producing irreparable harm to our Nation and to its Constitution. There is no crime of perjury arising out of questions the government doesn't have the legal authority to ask. We must stop at the earliest moment this terrible carnival, this confusing, anguishing, national experience that is before us.

Electing a President under our Constitution is the most important expression of the political sovereignty of the whole of the American people. To diminish, countermand, or nullify the legitimacy of a presidential election for behavior rooted in personal private conduct, diminishes and debases and abuses our Constitution, our Nation, the office of the Presidency, and the rule of law itself. The purpose of the Constitution is to unify the Nation in opposition

to autocracy and to abuses of constitutional authority, and that is being dangerously undermined and diminished by the presently invoked processes of a political and unconstitutional impeachment. Perjury and sublimations that are rooted and based exclusively upon an illegal invasion of personal privacy like sex is not treason, bribery, high crimes, or misdemeanors.

So I join those of another era who said that when we created the Independent Counsel Act, we never dreamed that a special prosecutor could use these enormous powers to investigate accusations of the private sexual conduct of a President. The office of Independent Counsel is manufacturing the circumstances in which criminal conduct may occur.

So I am here to hope and pray that all of us will remember that there have only been 15 impeachments in the 209 years of our Nation's history. There has never been an impeachment on personal misconduct of the kind that is brought forward here. It doesn't exist. And so what we are doing here is creating a huge and perhaps lasting damage to the office of the presidency, and we are now turning the impeachment process, article II, section 4 on its head, to become a political instrument to be used at the will of a headstrong Congress.

I beg and implore my colleagues on this committee to listen carefully to all of the testimony and then ask yourselves at the conclusion of this hearing, has anything in the narrative submitted by Mr. Starr reached a level that would sustain and warrant an article of impeachment? And if the answer is no, then we have a duty, a responsibility, to bring this to the earliest conclusion that we can. Thank you, Mr. Chairman.

Mr. CANADY. Thank you.

The gentleman from Tennessee, Mr. Bryant, is recognized.

Mr. BRYANT. Thank you, Mr. Chairman.

In part, today I am reminded of the story where a businessman, notorious for a lack of integrity, announced to Mark Twain that before this businessman died, he intended to make the pilgrimage to the Holy Land, climb Mount Sinai, and read the Ten Commandments aloud at the top.

Twain replied, "I have a better idea. You could just stay home in Boston and keep them."

Let there be no doubt that but for the conduct of this President, his own Attorney General's invocation of the Independent Counsel statute, and the United States Constitution itself, none of us would be here today.

I am pleased to have such a distinguished panel of witnesses, eminently qualified, and I suspect that most if not all of them will say today that Congress alone has the constitutional duty of defining an impeachable act. As such, Professor Tribe succinctly writes, we must get it right. I agree.

Well, what is right? We will not reach an accord today, I suspect, among all of our 19 experts, on what is right, though undoubtedly we will hear history and impeachment precedents discussed; we will hear how some would distinguish official conduct from private conduct and personal actions which don't damage or abuse the government as a whole.

Maybe we will hear about bribery, not in the context of receiving, but in giving; why the public policy against the bribing of a witness is any less important than when one tampers with that witness.

Or perhaps we will hear, would the President, if he were to have to give sworn impeachment testimony before the Senate, would he be obligated to tell the truth there?

Or maybe we will today find somewhere in our great Constitution the congressional power we have been missing over the past two centuries to reprimand or censure the President. Now, that will come in handy the next time he vetoes the partial-birth abortion ban.

But at the end of the day, Congress will stand alone in its duty to uphold the Constitution and judge whether, if proven, the President of the United States, the chief law enforcement officer of the land, who appoints the Attorney General of the United States and her 93 United States Attorneys who enforce the Federal law across this country, the President who himself has a constitutional duty under Article II, section 3, to see that our laws are faithfully executed, and the President who himself takes an oath to faithfully execute this office and defend the Constitution, we have that decision alone to judge whether he has committed several Federal criminal law violations with the effect of abusing the office of the presidency and working grave injury to the entire government, and specifically the judicial branch of the government.

I will close, Mr. Chairman, and thank you for convening these hearings, and remind all here, as Edmund Burke said in 1795, "All that is necessary for evil to triumph is for good men to do nothing." And I thank the Chair.

Mr. CANADY. Thank you.

The gentlewoman from California, Ms. Waters, is now recognized.

Ms. WATERS. Thank you very much, Mr. Chairman, and Ranking Member.

Last month the Judiciary Committee decided to proceed with an inquiry to impeach the President of the United States without ever holding a single hearing to determine what may or may not constitute an impeachable offense. At that time, I warned this body that increasingly Americans were becoming more suspicious of their government and our ability to be fair. Confirming my warning, last Tuesday the voters sent us a clear message: Americans want fairness first.

For months, Democrats asked Republicans to hold hearings to discuss the constitutional standards for impeachment. We argued that the power to impeach a President should not be casually used to remove a President or overturn an election simply because we don't like him or his policies. Indeed, Alexander Hamilton warned, quote, "There will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstration of innocence or guilt."

Impeachment is a constitutional matter of the highest importance and should be addressed with the utmost care and deliberations. Today's long-awaited hearing is more than a platform for learned scholars to pontificate about the Constitution. It is the Ju-

diciary Committee's first real discussion about the history of impeachment and the standard for impeaching Presidents.

Had my colleagues on the other side of the aisle adopted the Democratic fairness plan, this committee would have already discussed the constitutional standards for impeaching a President. We would have already heard from our distinguished panelists, assessed the standards for high crimes and misdemeanors, and analyzed the allegations raised by the Independent Counsel under these standards. The entire impeachment process could have already been completed if this committee had listened to the wisdom of over 400 historians, over 400 legal scholars, 10 out of 12 of the Nation's most respected legal minds, and the American people.

Our constitutional history and common sense tells us that in order for a President to be impeached, there must be a nexus between the office of the presidency and the abuse of power. Reasonable minds agree that looking at the Constitution should have been our first priority. As Members of Congress, we have the responsibility to determine what constitutes impeachable offenses. We cannot rely on an Independent Counsel who failed to identify what standard of impeachment be applied in his 445 page referral, even after spending over $118,000 in fees for a constitutional expert and over $40 million of the taxpayers' dollars, $118,400 in fees for a constitutional expert and over $40 million of the taxpayers' dollars. I am happy that today's panel of scholars are providing their services for free.

The Democratic witnesses before us today were chosen not because of their ideology but because they are among the most respected in their fields. I am pleased to point out that all of our witnesses are constitutional experts. We have two Pulitzer prize winners and a legal scholar who has argued 28 cases before the Supreme Court. I highlight their credentials because it is important that the public understands that we have summoned the Nation's most respected minds to participate in our crucial decision.

The outcome of today's hearings will have great impact on future impeachment proceedings. We must remember that the standard for impeachment was set sufficiently high because the framers did not want the legislative branch to remove a President on a whim. Today's scholars will debate many issues, among which is whether the standard to impeach a Federal judge is the same for a presidential impeachment.

Let me say, in the words of George Mason, the man who proposed the high crimes and misdemeanors language adopted by the framers, Impeachment should be reserved for actions that are "great and dangerous offenses," "attempts to subvert the Constitution," and for only "the most extensive injustice."

In the final analysis, the real question is whether or not the American Constitution will be upheld. Is this remarkable document strong enough to survive a highly charged, politically partisan environment where the passions run high and the hatred is evident? Will we be able to put aside partisan politics in the interest of honoring the true meaning and intent of the Constitution?

Reasonable minded voters and esteemed scholars agree, a lie about a consensual sexual affair does not constitute an impeachable offense. As Chair of the Congressional Black Caucus, I have

insisted on making fairness our top priority. From the moment the Office of the Independent Counsel delivered the referral to this committee, the members of the Congressional Black Caucus have assigned ourselves the role of fairness cop because our history demands we ensure that this process recognizes the rights of everyone involved.

The American people are indeed watching us. They sent us a clear and simple message last Tuesday: Move on with the people's business. Let us not step on our constitutional legacy or violate fundamental fairness to appease the appetites of extremists.

I look forward to hearing the views of the panelists on the constitutional standard for impeachment, and to what I hope will be the first true bipartisan effort of this committee. Thank you, Mr. Chairman.

Mr. CANADY. The gentleman from Tennessee, Mr. Jenkins, is recognized.

Mr. JENKINS. Well, thank you, Mr. Chairman, and thanks to the committee for holding this hearing and for bringing this distinguished panel of witnesses here to help us in doing the duty that has been thrust upon us, and thanks to all of the witnesses for devoting your valuable time and talents to helping us fulfill our responsibilities here today.

It is apparent from studying all of the material that has been made available to us that opinions have varied. Opinions varied among the Founding Fathers, and opinions have varied among all of those who have considered the subject of impeachment, about what acts constitute an impeachable offense. And I suspect that at the end of this day, that those opinions will still be varied.

Well, what is coming in clear focus as we progress in this process is that each impeachment case is pretty much like a fingerprint, it has its own unique characteristics; and that every citizen must have some private life that is not open to constant scrutiny, and that includes the President of the United States; that we cannot turn our heads from serious offenses of the law by any citizen, and that giving false testimony under oath, whether it be in a deposition or whether it be before a grand jury, is so detrimental to our system of justice that it absolutely cannot be ignored.

I will listen carefully and respectfully to what every participant has to say here today, and I will give every witness's testimony earnest consideration. The opinions we hear today will be important, but in the end the committee will be left with the responsibility to apply the Constitution, the laws, in light of all of the precedents and opinions that we have in a fair, impartial and nonpartisan manner.

If we do this, we will be fulfilling our responsibility and obligations to do what is best for this Nation and for all of its citizens. I thank you, Mr. Chairman.

Mr. CANADY. The gentleman from New York, Mr. Nadler, is recognized.

Mr. NADLER. Thank you, Mr. Chairman.

Today, after months grandstanding and accusations, this committee will finally get around to examining what is, and has been, the mandate of the Constitution on the question of presidential impeachment.

I assume that my colleagues in the majority who pride themselves on being strict constructionists will agree that a standard of impeachment is not something that we can just pull out of the air to seize the political moment. The standard is embodied in the language of the Constitution and in centuries of precedent, up to and including the vote of this committee in 1974 to report articles of impeachment against President Nixon.

We have an obligation to the Constitution and to the American people to be fair and to accord due process to every individual involved in this matter, including the President. I would remind my colleagues that while the President is not above the law, neither is he below the law. He is entitled to the same fairness and due process as every other citizen.

What does due process mean? It means, among other things, the right to be informed of the law, of the charges against you, the right to confront the witnesses against you, to call your own witnesses, and to have the assistance of counsel.

The purpose of today's hearing is to help define the law. What is an impeachable offense? How do the accusations against the President, if proven, compare with that standard?

After we conclude this hearing, what will this committee do? Will we consider the allegations against the President to determine whether any of them, if proven true, meet the standard of an impeachment offense?

Clearly, if we determine that none of the allegations, if proven, are impeachable offenses, that would be the end of the matter and no evidentiary hearing would be necessary. And if we determine that some of the allegations, if proven, would be impeachable offenses, then we could narrow the scope and length of the evidentiary hearing.

In a criminal trial, a motion to dismiss for failure to state a crime is considered first before the evidence is presented. This is the only way we can deal with this matter both expeditiously and fairly.

Unfortunately, the unilateral approach being pursued by the Republican leadership does not follow such a procedure. Instead of providing due process, we are presented with a procedure more fitting to the 17th century Court of Star Chamber or to a Moscow show trial of the 1930s. The Chairman has asked the President to answer yes or no to a set of 81 questions. The President is being asked to do what no American should ever have to do, to prove his innocence without ever even knowing what charges he will ultimately face.

In America everyone, even the President, is presumed innocent until proven guilty, and everyone, even the President, has the right to know the precise charges against him and to have the opportunity to confront his accusers.

The Chairman has suggested that we should simply accept the testimony of the Grand Jury witnesses because they were, after all, under oath. If we follow the Chairman's advice, we will conclude the inquiry expeditiously, but not fairly, and not without trashing the Constitution and every principle of due process and fundamental fairness that we have held sacred since the Magna Carta.

If the Majority really wants to pursue some or all of the accusations which have emerged from the Starr Chamber, then the Majority will have to drag before us the many private individuals whose lives and privacy have already been invaded and subject them to questioning and cross-examination to determine the truth. There is really no other way to find out the truth, unless the Majority expects this committee to act as a rubber stamp to Mr. Starr's jihad.

I do not believe that the American people want to see private citizens have their privacy invaded even more than it already has been by being dragged before a congressional committee and interrogated in a partisan witch hunt. If the majority is determined to move forward with this inquest, it will ultimately have to choose between rubber stamping Ken Starr's findings or moving forward with the inquisition and calling all of the relevant witnesses for examination and cross-examination.

We do have an alternative which would be both fair and reasonable, which would reflect the finest values embodied in our Constitution, and which I believe would spare us and the Nation the necessity of a lengthy evidentiary hearing. We could decide not to place the cart before the horse. We could make this hearing something more than an academic seminar. We could review the constitutional standard of impeachment, determine whether any of the charges, if proven, would actually meet that standard, and vote on them, up or down.

I do not personally believe any of the allegations meet the standard. I believe if we followed up the hearing with votes on whether the allegations define impeachable offenses, we would avoid the necessity of a further inquisition. That would be both expeditious and fair.

I urge my colleagues to weigh this issue carefully, keeping in mind that what we do today will effect not just this President, not just the private lives of people invaded by this matter, but future Presidents of both parties. We are deciding these issues for future generations as well as for the present, and we need to move with caution and with care.

Thank you, Mr. Chairman.

Mr. CANADY. The gentleman from Virginia, Mr. Goodlatte, is recognized.

Mr. GOODLATTE. Mr. Chairman, thank you for convening this hearing to study the background and history of impeachment. And that is precisely what this hearing is about, an examination of previous impeachment cases and other historical precedents, including the statements of our Founding Fathers.

As we hear from and question the witnesses before us today, I would like to caution my colleagues that the purpose of this hearing is not to determine the standard for impeachment. It would be truly ironic for this subcommittee to use a hearing on the historical impeachment precedents as a means of setting a fixed standard for impeachment, since there is no historical precedent for setting a fixed standard.

The Watergate inquiry staff was exactly right when they wrote in their work, Constitutional Grounds for Presidential Impeachment, that "The House does not engage in abstract, advisory or hy-

pothetical debates about the precise nature of conduct that calls for the exercise of its constitutional powers; rather, it must await full development of the facts and understanding of events to which those facts relate." Just as a court cannot define the principles of due process of law or equal protection of the laws without a case or controversy before it, the House cannot define impeachment without a complete examination of the facts.

The Constitution describes impeachment in terms of "Treason, Bribery, and other high Crimes and Misdemeanors." However, the Constitution does not define the meaning of those terms. For guidance we must look to historical precedents and the statements of our Founding Fathers, but as the Watergate inquiry report found, "the framers did not write a fixed standard. Instead, they adopted from English history a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee."

While the framers did not set a fixed standard, we are not completely without guidance in understanding the purpose and scope of impeachment. Throughout the impeachment debates at the Constitutional Convention and later at the State ratifying conventions, one theme is clear: The framers intended impeachment to be a constitutional safeguard of the public trust. From North and South Carolina to New York, Pennsylvania and Virginia, all understood that impeachment was designed as a remedy against Presidents who violate the public trust.

Nowhere in the law is there a code of impeachable offenses. As Members of Congress, our allegiance is to the Constitution of the United States, and our responsibility is to follow the truth wherever it leads. So even if this subcommittee devised a standard for impeachable offenses, as some have called for, it would not be binding on the conscience of any Member of the House who disagreed with that definition. This committee simply cannot tell the House what is or is not an impeachable offense.

In determining whether particular actions should lead to impeachment, they should be examined upon the principles of public policy and duty. This is the model that has been followed throughout our Nation's history, including the judicial impeachments of the 1980s. And it is the model that we should follow to determine whether, in light of the documented allegations of perjury and obstruction of justice, the President has violated his constitutional duty to take care that the laws be faithfully executed. The President has denied those allegations, and he has the opportunity to present evidence to the contrary.

Mr. Chairman, I would like to close with an admonition from former Supreme Court Justice Louis Brandeis which is particularly appropriate in light of the task before us: "In a government of laws, the existence of the government will be imperiled if it fails to observe the law scrupulously. For good or for ill, it teaches the whole people by its example. If government becomes a law breaker, it breeds contempt for the law. It invites every man to become a law unto himself."

I look forward to hearing from the witnesses before us today. Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Goodlatte.

The gentleman from North Carolina, Mr. Watt, is now recognized.

Mr. WATT. Thank you, Mr. Chairman. I will try to be brief and not use the entire 5 minutes because I would like to hear the witnesses at some point today.

I am just delighted that we have finally arrived at this point. Many of us on the committee and outside the committee have been saying that this should have been the starting point for this process, and I have firmly believed that from the very beginning, that if we were truly going to undertake a bipartisan process and if we were truly going to take this out of a political realm and put it into a constitutional realm, we needed to define for our committee and for the American people the constitutional standard that is applicable to what we are going to do. And so it has been my firm belief from day one that we couldn't advance this process in a bipartisan way without having a hearing of this type.

Now, I would have to say that I am disappointed that before we even had the hearing today, several days ago I received a memorandum from the Chairman of the committee which is printed here as if we were all parties to it, and as if it were a bipartisan product with all of the names of the committee members and the official stamp and status of the committee on it, a report by the "Staff of the Impeachment Inquiry" on the "Constitutional Grounds for Presidential Impeachment," that is the *Majority* staff, which was published before we even had any hearings of this kind; a further indication, I would submit to my colleagues and to the American people, that we are engaged here and have been engaged in a partisan witch hunt rather than in an effort to pursue a bipartisan resolution and determination of this issue.

So I am so overjoyed that we are finally here today. I wish I had some confidence that what we were doing today in listening to these witnesses was more than an academic exercise, that it was really going to have some impact on this partisan process and the level of partisanship that exists in this committee. But if nothing else, we hope that the American people will finally have a standard other than their personal opinion or their political opinion about the President against which to evaluate any conduct that the President engaged in.

So I thank the Chairman and the Ranking Member for finally having this hearing, and I yield back the balance of my time.

Mr. CANADY. The gentleman from Georgia, Mr. Barr, is now recognized.

Mr. BARR. Thank you, Mr. Chairman. Mr. Chairman, before I go into my opening comments, I would like to let everybody know here at least in the Supreme Court the rule of law still prevails. The court has ruled this morning that presidential confidant Bruce Lindsey and other White House lawyers cannot refuse to answer a Federal Grand Jury's questions about possible criminal conduct by government officials.

Mr. Chairman, as Members of Congress, many of our decisions we face are relatively easy: balancing the Federal budgets, requiring welfare recipients to work if they are able. However, many of our other choices are not quite so easy. The process we are discussing today is the most serious constitutional action a Congress can

take short of declaring war, and none of us should take this process lightly.

All but the President's ardent apologists agree that he lied to the American people, lied to the court in the Paula Jones case, and lied to a Federal Grand Jury probing his conduct. It is just as evident that he worked to obstruct judicial proceedings by tampering with key witnesses and evidence.

No amount of willful ignorance or rationalization will make these facts go away. We may not like these facts. They may make us sick to our stomachs. They may cause us to question some of our basic presumptions about the President and the presidency, but we must confront them. To do otherwise would be to knowingly treat the President different from the rest of us.

Many of my colleagues on this committee have devoted their lives to fighting inequality and insuring equal justice for all. This is one of the highest causes a Member of Congress can champion. For this reason, I am saddened to see these same members of our committee working tirelessly to return inequality and special treatment to our law in order to protect a President they favor.

Make no mistake about it, the precedents we set in this matter will remain part and parcel of our legal system for years to come, damaging or benefiting us regardless of the political party to which we belong.

All of us who attended church growing up are familiar with the story of Abraham and Isaac. When God demanded that Abraham sacrifice his only son, Abraham was willing to do so because he realized there are truly principles that rise above the life of any one person, no matter how great a love we have for that individual. This is the highest form of devotion, and it is exactly the choice we face today.

If impeaching Bill Clinton is necessary to protect our Constitution and preserve the rule of law, do we have the courage to do it? I hope and pray that the answer is yes. If any other citizen, for example, one Kenneth Starr had perjured himself, even for the best of reasons, I have no doubt that all of us, especially those on the other side of the aisle, would urge his prosecution.

Indeed, the President's own Department of Justice has prosecuted and does prosecute numerous cases of perjury, including one recent case in which a Federal employee lied about sex in a civil suit. As a Federal prosecutor appointed by President Reagan, I convicted and jailed a sitting Republican Member of Congress, of this committee, for perjury. Perjury and obstruction of justice are not partisan issues. They are grave offenses that strike at the heart of our legal system. The principle that all who participate in our court proceedings must tell the truth is the most fundamental underpinning of our society.

At best, today's hearing will cast a dim light around the edges of a term the Founding Fathers intentionally left up to future Congresses to define. Trying to arrive in advance of the evidence at a precise definition of "high Crimes and Misdemeanors" is the intellectual equivalent of debating how many angels can fit on the head of a pin, or whether a tree falling in the forest with nobody present makes noise. It may be interesting to engage in such talk around

a coffee table or in an Ivy League ivory tower, but it bears no relationship to the real world of legal or governmental proceedings.

Ultimately the choice of whether or not to vote articles of impeachment rests not with legal scholars or historians, no matter how distinguished their pedigrees or how many ads they take out. The choice is ours, and sooner or later we are going to have to make it or else future generations, families, teachers and prosecutors, will have to pay the price over and over as they cope with generations of liars and perjurers.

In the final analysis, I don't think there are many Members of Congress who can say directly with a straight face that a President can commit numerous felonies and stay in office. Either all the lofty phrases we eagerly repeat mean something or they don't. Either all Americans are equal under the law or some, a new royalty, deserve special treatment.

Let us take this unique opportunity to shape this debate, define the issues and lead the process, rather than continue as so many have to react, respond, pontificate and run out the clock. Our constitutional clock, now a mere 211 years old, must be kept running. You cannot restart it once it dies. Our colleagues 25 years ago and their impeachment staff, including Hillary Rodham, recognized the importance of this and so must we.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you.

The gentleman from Arkansas, Mr. Hutchinson, is recognized.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Any impeachment inquiry is difficult, as it should be, but it is particularly challenging when an election intervenes, resulting in attempts to spin the facts and to treat lightly the serious responsibilities upon us. For that reason this hearing is extraordinarily important to sharpen our focus and to remind us of the principles of our Founding Fathers and of the unavoidable judgment of history.

Let me express my personal concerns about the present difficulty for our Nation.

One of my distinguished Democratic colleagues said on the House floor, "The President's acts, if proven true, may be crimes calling for prosecution or other punishment, but not impeachment." Others have already indicated they believe that the President lied under oath but that, even so, such action does not rise to an impeachable offense.

That simple but traumatic conclusion would have a profound and long-reaching impact on our country.

If this committee ignores an act of perjury by the President, what impact will that have on the next generation, on our rule of law and our justice system? I would not be on this committee if I did not have a love for the law and a belief that any citizen can seek justice with complete confidence that intentional falsehoods under oath are not acceptable. If we conclude that perjury was committed but we take no action, what will a future jury do when asked to uphold the law and find someone guilty of lying under oath?

My second concern is that some of those who say "Do not impeach even if the facts show perjury," are also calling for the President to be punished. This is wrong. My reading of the Constitution

tells me this process is not about punishment, but rather protecting the public trust.

There are some who say that alternative punishments, such as censure or fine have public appeal as a way out, but there is a growing consensus of scholars who agree that such alternatives have no constitutional basis and would violate the separation of powers, setting a dangerous precedent for future proceedings. For those on the other side of the aisle who call for punishment, I would ask, how and under what authority?

A third concern is on the question of what constitutes an impeachable offense. For those who call for a definition, I would ask, what specific definition would you propose as an improvement upon that of our Founding Fathers? And going beyond the abstract, what definition are you willing to set as a precedent for future unknown cases?

As I have received my education in public service, I have always been instructed by the people that there should be a higher standard for those in public office. In fact, our Federal sentencing guidelines impose additional penalties for those who abuse a position of public trust.

Some conclude that perjury is an impeachable offense for a Federal judge but not a President because there should be a higher standard for impeaching the President of the United States. If that reasoning were adopted, we would in effect be setting a lower standard for the President than any other office in the land. Is that the right policy? Is that the right message for our country?

In addition, for those who advance the argument that perjury is not an impeachable offense, how do they address the tougher question on obstruction of justice? If one witness is to believed, the President of the United States orchestrated his White House staff to conceal evidence pursuant to a lawful subpoena. Now this may seem a trivial matter to some, but as an attorney who has represented plaintiffs in a civil rights litigation, I am concerned about tipping the scales of justice in favor of the wealthy and the powerful.

My final concern deals with the question of punishment. There are some who concede that alternative punishments are not within the power of the legislative branch. They then argue that impeachment should not be pursued because the President can be held accountable for any criminal offenses after he leaves office. That would mean that if this committee finds criminal conduct, we would simply refer it back to the Independent Counsel for prosecution in the year 2001. Is that really getting this ordeal behind us? Is that really moving on? It would appear that such a delay would be harmful to our nation and harmful to the office of the presidency.

I hope that the witnesses today will address the concerns I have expressed. Please be assured that though I view these charges as profoundly serious, I have not concluded the outcome of this endeavor. I do not believe that the unpleasantness of the present circumstances justifies playing fast and loose with the Constitution for the sake of expediency. To do so would be to imperil the very system of justice upon which our great Nation was built.

I thank the Chair.

Mr. CANADY. Thank you, Mr. Hutchinson.

Without objection, the written statements of other members of the Judiciary Committee will be inserted in the record of this hearing.

[The prepared statement of Mr. Gallegly follows:]

PREPARED STATEMENT OF ELTON GALLEGLY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

As you know Mr. Chairman, I am not a member of this subcommittee. However, I believe this is an important hearing for all members of the Judiciary Committee. In fact, every member of Congress should carefully listen to today's witnesses—for the matters discussed today will help to improve our understanding of what is an impeachable offense, not only with regard to the current inquiry, but for Presidential wrongdoing for many years to come.

Make no mistake about it, a standard for impeachment already exists. It is found in Article II, Section 4 of the Constitution and it provides for impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors." However, like many other provisions in the Constitution, such as "freedom of speech" or "due process," one must carefully examine the historical precedents of the impeachment clause in order to gain a clearer understanding of its meaning.

Without this historical perspective, the impeachment process risks becoming a tool in the hands of those whose ever-changing views on what constitutes an impeachable offense will be shaped by political calculation and polls. This cannot be allowed to happen.

Politics will always be a part of the impeachment process. This is inevitable. However, impeachment questions—whether one argues for or against impeachment in a specific case—should never become *only* about politics.

Ultimately, the decision on impeachment rests in the conscience of each member of Congress. However, this decision must be an informed one, grounded in facts and precedents instead of spin and sound bites.

Lastly, developing a better understanding of the history of impeachment and what constitutes an impeachable offense will help this committee to conclude this inquiry in short order. If the President and his advisors cooperate fully, it is my hope that we will finish even before our year-end deadline. Congress can then once again focus on improving education for our children, reducing crime and the other important day-to-day problems confronting our country.

Thank you, Mr. Chairman. I yield back the balance of my time.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF LAMAR S. SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

In light of the subject of today's hearing, I think it is important that we hear from the legal experts. But there are two experts who are not here who have made insightful observations about what constitutes "high Crimes and Misdemeanors" and who have unique perspectives.

Barbara Jordan, a distinguished member of this Judiciary Committee during the Nixon impeachment proceedings, made this statement:

> The South Carolina ratification convention impeachment criteria: those are impeachable "who behave amiss or betray their public trust."
>
> Beginning shortly after the Watergate break-in and continuing to the present time, the president engaged in a series of public statements and actions designed to thwart the lawful investigation by government prosecutors. Moreover, the president has made public announcements and assertions bearing on the Watergate case which the evidence will show he knew to be false.
>
> These assertions, false assertions, impeachable, those who misbehave. Those who "behave amiss or betray their public trust."
>
> James Madison again at the Constitutional Convention: "A president is impeachable if he attempts to subvert the Constitution."
>
> The Constitution charges the president with the task of taking care that the laws be faithfully executed, and yet the president has counseled his aides to commit perjury. . . .

Leon Jaworski, the special prosecutor during the Nixon impeachment proceedings, wrote a book titled, *The Right and the Power* about his experience. This is what he said:

> No government office, not even the highest office in the land, carries with it the right to ignore the law's command, any more than the orders of a superior can be used by government officers to justify illegal behavior. . . .
>
> The President—a lawyer—coached Haldeman on how to testify untruthfully and yet not commit perjury. It amounted to subornation of perjury. For the number-one law enforcement officer of the country it was in my opinion, as demeaning an act as could be imagined.
>
> President: Just be damned sure you say I don't remember. I can't recall. I can't give any honest . . . an answer that I can recall. But that's it.
>
> There was evidence that the President conspired with others to violate 18 U.S.C. 1623—perjury—which included the President's direct and personal efforts to encourage and facilitate the giving of misleading and false testimony by aides.
>
> In the end, Nixon was forced to resign because the people had lost confidence in him. He had lied too often. The members of the House Judiciary Committee realized this, and that is why they concluded unanimously that he had been guilty of obstructing justice.

As we hear from our witnesses today, I think it would also be interesting to know whether they agree with Bill Clinton's definition of "high Crimes and Misdemeanors" when he was a law professor. He said then:

> I think that the definition should include any criminal acts plus a willful failure of the president to fulfill his duty to uphold and execute the laws of the United States. [Another] factor that I think constitutes an impeachable offense would be willful, reckless behavior in office. . . .

President Clinton's conduct in office raises several grave questions. Did the president lie under oath in a court of law? Did he stand in the way of the judicial process? Did he abuse the powers of his public office? Did the president violate his public trust? Did he violate the Constitution and his oath of office? These are the questions that go to the heart of a government of laws, not persons.

My constituents often remind me that if any business executive, military officer, professional educator, or anyone in a position of authority had acted as President Clinton may have, their career would be over. So a question that needs to be addressed today is, Should the president be held to a lesser standard?

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF CHRISTOPHER B. CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. Chairman, as a member of the Full Committee, I am honored to have the chance to participate in this critical hearing today.

For most of this year our nation has struggled with fashioning a proper response to President Clinton's improper conduct with Monica Lewinsky and the actions spawned by that relationship. With the launching of an impeachment inquiry by the House, we are now faced with determining whether or not Mr. Clinton's conduct is impeachable. Today's hearing is an important step towards resolving that question.

On review of the testimony put forth by today's distinguished panel, it is clear that our panelists span the range of views concerning the meaning and application of the Constitution's critical term of "Treason, Bribery, or other high Crimes and Misdemeanors."

My own views, going into today's hearing, are close to those of Professor Presser in that I believe the Founders saw impeachment as a tool to protect the fundamental integrity of our political system. In the current instance, I believe that President Clinton's moral authority has been crippled. We, as a Congress, have a duty to either restore his moral authority by some form of vindication or to remove him from office. Maintaining the public integrity of our political system will tolerate no less.

But, today, I am willing to set my personal views aside (perhaps not totally) and listen.

Thank you, Mr. Chairman.

Mr. CANADY. We will now go to our first panel of witnesses. You have been waiting patiently.

The first witness on our first panel will be Gary L. McDowell, who is director of the Institute for United States Studies at the University of London. He is a Royal Historical Society Fellow and a Royal Society of Arts Fellow. Dr. McDowell teaches in the areas of American constitutional law and the judicial process and Amer-

ican government. Dr. McDowell has published numerous works on the Constitution and American government, including the books, *Friends of the Constitution; Writings of the "Other" Federalists and Our Peculiar Security; Essays on the Written Constitution.*

Next we will hear from Michael J. Gerhardt, who currently teaches at the College of William & Mary School of Law. Professor Gerhardt was the Dean of Case Western Reserve University Law School from 1996 to 1997, and also taught at Cornell Law School from 1994 to 1995. He has published numerous works on the Constitution and impeachment, including a book entitled *The Federal Impeachment Process: A Constitutional and Historical Analysis.*

We will also hear from Matthew Holden, Jr., who is the Henry L. and Grace M. Doherty Professor of Government and Foreign Affairs at the University of Virginia. He is the author of such books as *The Divisible Republic; Varieties of Political Conservatism;* and *Continuity and Disruptions: Essays in Public Administration.*

Next we hear from John C. Harrison, who is associate professor of law at the University of Virginia Law School. Professor Harrison started his tenure at the University of Virginia in 1993 after working as Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel. Professor Harrison currently teaches in the areas of administrative law, constitutional law and Federal courts. He was appointed by President Bush to the National Commission on Judicial Discipline and Removal.

Next we hear from Cass Sunstein, who is Karl Llewellyn Professor of Jurisprudence at the University of Chicago School of Law. He is the author of *After the Rights Revolution; Reconceiving the Regulatory State: The Partial Constitution Democracy and the Problem of Free Speech;* and co-author of *Constitution Law: Cases and Commentary.* Professor Sunstein has served as the vice chair of the American Bar Association Committee on Separation of Powers and Government Organizations.

Next we hear from Richard D. Parker, who is Williams Professor of Law at Harvard University Law School. Professor Parker has published numerous works on the Constitution, including the law review article, "The Past of Constitutional Theory and Its Future," and the book, *Here the People Rule: A Constitutional Populist Manifesto.* Professor Parker's current research involves the politics of the contemporary practice of argument about constitutional law.

Next we hear from the distinguished historian Arthur M. Schlesinger, Jr., professor of history at the City University of New York. Professor Schlesinger worked as an aide in the Kennedy administration and has written numerous books on race relations and gender issues in the United States. Professor Schlesinger has also written extensively on the Constitution and American Government. His works include, *Coming of the New Deal; The Cycles of American History; Robert Kennedy and His Times;* and *The Disuniting of America: Reflections on a Multicultural Society.*

Next we hear from John O. McGinnis, professor at Yeshiva University Cardozo School of Law, who has been at Cardozo since 1991. In 1987, Professor McGinnis was appointed Deputy Assistant Attorney General at the Department of Justice's Office of Legal Counsel. Professor McGinnis has written numerous law review articles on a wide array of subjects, and has previously testified be-

fore the Senate Judiciary Committee regarding the impeachment of Federal judges.

Father Robert Drinan is our next witness. Father Drinan is a professor of law at Georgetown University Law Center. He served in the United States Congress as a Representative from Massachusetts, where he was Chair of the Subcommittee on Criminal Justice of the House Judiciary Committee during the Watergate impeachment inquiry. He currently teaches courses in the areas of constitutional law, civil liberties and legislation.

The final witness on our first panel will be Stephen B. Presser, who is the Raoul Berger Professor of Legal History at the Northwestern University School of Law. Professor Presser holds a joint appointment with the J.L. Kellogg Graduate School of Management and also teaches in Northwestern's Department of History. Professor Presser has published numerous books on the area of constitutional law, including: *Law and Jurisprudence in American History: Cases and Materials; Recapturing the Constitution: Race, Religion and Abortion Reconsidered;* and *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Jurisprudence.*

Without objection, the full written statements of each of the witnesses will be made a part of the record. Each witness on this panel will be recognized for 10 minutes. I would ask that in light of our time constraints today, that you please observe the light. I hope everyone can see the light. When the yellow light is illuminated, that means that you have only a minute left, so you should begin concluding your remarks.

It is the custom of the subcommittee to ordinarily recognize the witnesses for 5 minutes. We have expanded that to 10 minutes, but we will ask you to confine yourself to the 10 minutes allotted, and I will note that the use of the full 10 minutes is not mandatory.

Ms. JACKSON LEE. Mr. Chairman?

Mr. CANADY. The gentlelady from Texas is recognized. The gentlelady is not a member of the subcommittee. This is a subcommittee hearing.

Ms. JACKSON LEE. I thank you for your indulgence. It is just a point of information. I do recognize that, and I want to thank the Chairman and the Ranking Member for allowing us to be present, and I assume that you indicated our statements would be included for the record. Will there be an opportunity for the nonmembers of this subcommittee to ask questions?

Mr. CANADY. I thank the gentlelady, and she has anticipated the statement that I was about to make.

At the conclusion of the testimony by the witnesses on this panel, each member of the subcommittee will be recognized for 10 minutes for the purpose of asking questions. During that period, members of the subcommittee may yield a portion or all of their time to other members of the Judiciary Committee who wish to ask questions. This is a procedure that we have, as you know, followed in the past in the subcommittee. It has been our consistent procedure when other members of the Judiciary Committee wished to participate in the proceedings.

We believe that the arrangements that we have set forth for today will give everyone the flexibility that we need so that we can

move forward with the hearing expeditiously. Mr. Scott has been informed about the intentions of the Chair in this regard.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Mr. CANADY. With that, we will now begin the testimony of this panel with Professor McDowell.

STATEMENT OF GARY L. McDOWELL, DIRECTOR, INSTITUTE FOR UNITED STATES STUDIES, UNIVERSITY OF LONDON

Mr. MCDOWELL. Mr. Chairman, Ranking Member, members of the subcommittee, it is a privilege to be with you today to discuss the important issues raised by the background and history of impeachment.

I begin by stating the obvious: Under the logic of our written Constitution of enumerated and limited powers, it is inconceivable that the sole power of impeachment is given to the House of Representatives without restraint. As a result, the most important question to this committee is the meaning of "high Crimes and Misdemeanors." Those words were not mindlessly crafted or chosen because they could be endlessly manipulated. Rather, they constituted one of "those expressions that were most easy to be understood and least equivocal in their meaning." Their constant use in numerous impeachments stretches back to 1386.

Thus, there is an obligation to determine exactly what "high Crimes and Misdemeanors" meant to those who framed and ratified our Constitution because the ascertainable content of that phrase, as Raoul Berger has pointed out, furnishes the boundaries of power. What was clear to the Founders has become less so to the current generation.

This confusion was best expressed by Gerald Ford's insistence that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment to history." This is simply not true. To adopt such an understanding, as Joseph Story said, would be to grant Congress an arbitrary discretion incompatible with the genius of our institutions. It would create an absolute despotism of opinion and practice which might make that a crime at one time or in one person which would be deemed innocent at another time.

Impeachment is not to be initiated simply for any reason that might occur to this distinguished House, but only for "Treason, Bribery or other high Crimes and Misdemeanors." It is important to remember that the word "high" in "high Crimes and Misdemeanors" was used to emphasize that it was a crime or misdemeanor against the commonwealth. The objects of impeachment, Alexander Hamilton explained, "are those offenses 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 the injuries done immediately to society itself."

The problem is that such political offenses are of too various and complex a character to admit of a simple list. But rather than mere arbitrary discretion, the Founders assumed that the common law would be used to determine if particular political abuses might rise to the level of "high Crimes and Misdemeanors." In their view, the common law did not create new powers not granted by the Con-

stitution, but it was an indispensable "guide and check and expositor in the administration of the rights, duties and jurisdiction conferred by the Constitution and law."

A survey of the common law authorities to whom the Founders looked for guidance, such as Sir William Blackstone, indicates that such crimes against public justice as "obstructing the execution of lawful process" and "willful and corrupt perjury" would have been understood by the Founders as constituting "high Crimes and Misdemeanors" as that phrase was used in the Constitution. Of all of the major common law writers, they saw perjury as one of the most serious offenses against the commonwealth.

It is widely cited. In *A Treatise on the Pleas of the Crown* of 1716, William Hawkins included perjury and subornation of perjury among those offenses that were, in his words, "infamous and grossly scandalous, proceeding from principles of downright dishonesty, malice or faction." Indeed, "perjury," he said "is of all crimes whatsoever the most infamous and detestable."

Samuel Pufendorf, another authority for the founding generation, put it even more strikingly. "Perjury," he says, "appears to be a most monsterous sin, inasmuch as by it the foresworn wretch shows that he at the same time condemns the divine and yet is afraid of human punishment; that he is a daring villain towards God, and a sneaking coward towards men."

William Paley, another influential writer, took a similar view, seeing the issue of oaths and perjury as one of morality as well as law. In his view, the entire question of perjury rested on the definition of a lie. "A lie," said Paley, "is a breach of promise: for whoever seriously addresses his discourse to another, tacitly promises to speak the truth, because he knows that the truth is expected."

Because a witness swears that he will "speak the truth, the whole truth and nothing but the truth," a person under oath cannot cleverly lie and not commit perjury. If the witness conceals any truth, Paley writes, that relates to the matter in adjudication, that "is as much a violation of the oath, as to testify a positive falsehood." It is no excuse for the witness to say he was not forthcoming "because it was never asked of me." An oath obliges to tell all one knows, whether asked or not.

Nor, said Paley, can a witness be excused on "a point of honor, of delicacy, or of reputation" that might make him reluctant to disclose some circumstance with which he is acquainted. Shame or embarrassment cannot "justify his concealment of truth, unless it could be shown, that the law which imposes the oath, intended to allow this indulgence to such motives."

Similarly, linguistic contortions with the words used cannot legitimately conceal a lie or, if under oath, perjury. Said Paley, "As there may be falsehoods which are not lies, so there may be lies without literal or direct falsehood. An opening is always left for this species of prevarication, when the literal and grammatically signification of a sentence is different from the popular and customary meanings. It is the willful deceit that makes the lie; and we willfully deceive, where our expressions are not true in the sense in which we believe the hearer apprehends them. Besides," he concluded, "it is absurd to contend for any sense of words, in

opposition to usage, for all senses of words are founded upon usage, and upon nothing else."

The moral and legal inheritance of the founding generation saw the violation of an oath, in Algernon Sidney's words, "as nothing less than treachery." Based on a review of the historical record, the expressed intent of the framers, the voting of the Constitution, the writings of the principal legal authorities known to the framers, and the common law, the conclusion is inescapable that perjury and subornation of perjury must certainly be included as "high Crimes and Misdemeanors" and thus impeachable offenses under the United States Constitution.

Further, the record fails to support the claim that impeachable offenses are limited to only those abuses that occur in the official exercise of executive power. As seen in the authorities, impeachable offenses, in both English and American history, have been understood to extend to, and I quote, "personal misconduct, violations of trust, and immorality and imbecility," among other charges of a more private nature. Thus, perjury to conceal private misconduct is still perjury.

The Founders' success in creating the impeachment power to be both politically effective and safe to republican government is reflected in the few instances of its use. Lord Bryce described the power of impeachment over a century ago as "the heaviest piece of artillery in the congressional arsenal," and thus "unfit for ordinary use." The constitutional provisions for impeachment were designed to prevent the President from being driven from office for mere partisan reasons. To get rid of a president, or to try to, Congress has to have good cause. As Bryce said, one does not use impeachment for light and transient reasons, "as one does not use steam hammers to crack nuts."

In light of the Founders' concern that the President not be subjected to political molestation by Congress, it cannot be emphasized too strongly that impeachment is the only means granted to Congress to censure the President. It is either impeachment or nothing. Thus, the current suggestion that Congress might censure the President is to assume a power not given by our Constitution.

The only precedent for a presidential censure came during the administration of Andrew Jackson. Jackson rejected the idea out of hand as "wholly unauthorized by the Constitution and in derogation of its entire spirit." Censure, he said, would be "subversive of that distribution of the powers of government which the Constitution has ordained and established, and destructive of the checks and safeguards by which those powers were intended on the one hand to be controlled and on the other to be protected."

Jackson's logic was, as Arthur Schlesinger has rightly noted, simply unassailable. In short, censure would be a coward's way out, both for those in Congress who might suggest it and any President who would accept it. Impeachment is the only legitimate constitutional punishment available, and neither the President nor the American people should accept anything else.

You gather here to consider whether to exercise what Hamilton called the "awful discretion" of the impeachment process. In the end, the determination of whether presidential misconduct rises to

the level of "high Crimes and Misdemeanors" is left to the discretion and deliberation of this distinguished House.

No small part of that deliberation, guided as it must be by the history and meaning of "high Crimes and Misdemeanors," must weigh what effect the exercise of this extraordinary constitutional sanction would have on the health of the Republic, as against the necessity of making clear that in America no one, not even a popular President, is above the law. In the end, that is what matters most, and that is what must bear most heavily on the Members of this House as you consider what you must do in the weeks ahead. What you decide here, one way or the other, will echo through our history.

Thank you, Mr. Chairman.

[The prepared statement of Mr. McDowell follows:]

PREPARED STATEMENT OF GARY L. MCDOWELL, DIRECTOR, INSTITUTE FOR UNITED STATES STUDIES, UNIVERSITY OF LONDON

"'HIGH CRIMES AND MISDEMEANORS'": RECOVERING THE INTENTIONS OF THE FOUNDERS

Introduction

The most interesting and important question involved in the constitutional process of impeachment is the meaning of high Crimes and Misdemeanors" as that was understood by those who framed and ratified the Constitution. What follows is an effort to shed some light on that original meaning and thereby to provide some guidance to those who must determine if, in the instant case, the president of the United States has committed impeachable offences as that phrase might have been understood by the founders.

The importance of attempting to answer this question of the founders' original intention in creating the impeachment provisions as they did has been underscored by the recent open letter from a scholarly coalition calling itself "Historians in Defense of the Constitution." In that letter the historians correctly point out that the impeachment of any president is "a grave and momentous step"; but they also insist that the current inquiry is not simply grave and momentous but "ominous"—an effort to remove this president by a "novel" and "unprecedented" theory of impeachment.

The threat posed by this "dangerous new theory of impeachment," the signatories to the open letter insist, is that it will undermine the basic constitutional principle of separated powers and its attendant system of checks and balances that truly is our "chief safeguard against abuses of public powers." This new view of the impeachment power, they argue, is the result of abandoning the intentions of the founders who "explicitly reserved [impeachment] for high crimes and misdemeanors in the exercise of executive power." The crux of the argument is this: "Impeachment for anything else would, according to James Madison, leave the president to serve 'during pleasure of the Senate.'"[1]

Such serious charges by so many distinguished historians demand a careful consideration of what the founders meant by "high Crimes and Misdemeanors": Were they only indictable crimes or did they include what one of the framers called "political crimes and misdemeanors"? Were they offences that would be committed by a president only in "the exercise of executive power" or would they also include malfeasance committed by a president in his private capacity? Were they subject to a reasonably fixed meaning or were they to be determined simply by the exercise of the "awful discretion" of those in Congress called upon to impeach and to try impeachments? If it is true that this new theory of impeachment will indeed "leave

[1] It is not at all clear that the historians have given an accurate glimpse of Madison's view on this matter. His fear that the president could find himself reduced to serving merely "during pleasure of the Senate" derived from the fact that he thought George Mason's suggested term "maladministration" was too "vague." It does not follow from that concern that Madison demanded that impeachment be "explicitly reserved . . . for high crimes and misdemeanors in the exercise of executive power." Madison never spoke to this issue and none of his statements on impeachment and the standards for impeachability seem to suggest that he was inclined to limit impeachment to simply abuses in the exercise of executive power. See Max Farrand, ed., *Records of the Federal Convention of 1787,* 4 vols. (New Haven: Yale University Press, 1936), II:550.

the presidency permanently disfigured and diminished [and] at the mercy as never before of the caprices of any Congress," then a return to the proper understanding of the founders' intentions will avert nothing less than a constitutional catastrophe.[2]

Impeachment and Republican Government

The Constitution's grant to the House of Representatives of "the sole power of impeachment" was understood by those who framed and ratified that fundamental law to be one of enormous significance for the republican form of government they were creating.[3] They knew that some means of "displacing an unfit magistrate [was] rendered indispensable by the fallibility of those who choose, as well as the corruptibility of the man chosen." On the other hand, they were keenly aware of the danger of any process that would make the president "the mere creature of the legislature." Such an arrangement would constitute nothing less than "a violation of the fundamental principle of good government."[4]

It was essential that the arrangements for impeachment be able to resist, as far as possible, introducing the "malignity of party" into this most serious of constitutional processes.[5] The dangers were so severe that Thomas Jefferson remained convinced that impeachment constituted "the most formidable weapon for the purposes of dominant faction that ever was contrived."[6] The deepest problems facing those who undertook to create within the Constitution the means of dealing with delinquency in high office stemmed from the very nature of impeachment. As James Wil-

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[2] Philip B. Kurland, writing in the constitutional shadows cast by Watergate, argued that in seeking to "rely on the words of the Constitution, their purpose and function, and their history, both before and after their inclusion in the basic document" it is essential that "we look not merely to the words of the document, but to what those words meant to those who wrote them, to the function that they were intended to serve, to the history of their use before, during, and after the composition." *Watergate and the Constitution* (Chicago: University of Chicago Press, 1978), pp.105; 107–108.

[3] Article I, sec. 2, c. 5. It cannot be emphasized too strongly that impeachment is the *only* means granted to the Congress to censure or to punish what Arthur M. Schlesinger, Jr. has called "presidential delinquency."

The current suggestion that Congress might opt for a censure of the president is to grant to this body a power not given by the Constitution. Moreover, a mere declaration of censure would be nothing more than a "slap-on-the-wrist approach" to the problem. See Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin Co., 1973), pp. 411–412. A motion of censure that would seek more, such as a fine as punishment, would be strictly unconstitutional because it would be a "bill of attainder," a legislative power to punish that is clearly prohibited by the Constitution, Article I, Sec. 9.

The only precedent for a presidential censure from Congress came during the administration of Andrew Jackson in the midst of a political battle over the Bank of the United States. The argument was a classic separation of powers conflict with Congress asserting that it had the power to control the Secretary of the Treasury when it came to administering the bank and Jackson insisting that under the constitutional design for a unitary executive such powers were exclusively those of the president. In a fit of pique Congress voted to "censure" Jackson; he responded with a "protest" defending his theory of the office.

The censure was nothing more than a resolution of congressional displeasure with no real effect. Jackson stood up to his political foes in his protest arguing that the resolution voted by the Senate was "wholly unauthorized by the Constitution and in derogation of its entire spirit." Should a president submit to such an action, the power of the presidency would be undermined and, in effect, transferred to the Senate. The very idea of a censure was "subversive of that distribution of the powers of government which [the Constitution] has ordained and established, [and] destructive of the checks and safeguards by which those powers were intended on the one hand to be controlled and on the other to be protected." As reprinted in James M. Smith and Paul L. Murphy, eds., *Liberty and Justice*, 2 vols. (New York: Knopf, 1965), I:153–55.

This notion of "censure as a halfway house on the road to impeachment" was by Jackson shown to make "little sense, constitutional or otherwise." Jackson's logic was "unassailable". As Professor Schlesinger put it: "The continuation of a lawbreaker as chief magistrate would be a strange way to exemplify law and order at home or to demonstrate American probity before the world." When it comes to serious presidential wrongdoing, it is either impeachment or nothing. Schlesinger, *The Imperial Presidency,* pp. 33; 412.

[4] George Mason, 2 June 1787, in Farrand, ed., *Records,* I:86. James Wilson summed up the problem best in his law lectures: "The doctrine of impeachments is of high import in the constitutions of free states. On the one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. No one should be secure while he violates the constitution and the laws: everyone should be secure while he observes them." Robert Green McCloskey, *The Works of James Wilson,* 2 vols. (Cambridge: Harvard University Press, 1967), I:425.

[5] James Iredell, in Jonathan Elliot, ed., *Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia,* 5 vols., (Philadelphia: J.B. Lippincott & Co., 1876), IV:127.

[6] Thomas Jefferson to James Madison, 8 February 1798, in *The Writings of Thomas Jefferson,* Andrew A. Lipscomb and Albert E. Bergh, eds., 20 vols. (Washington, D.C.: Thomas Jefferson Memorial Association, 1904–1905), IX:440.

son would later put it, in the United States "impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments."[7]

Because impeachment is designed to address "the misconduct of public men" and their possible "abuse or violation of some public trust" it is inevitable that any impeachment proceeding, especially one that involves the president of the United States, will suffer the propensity to degenerate into the lowest impulses of party and faction. Such proceedings, said Alexander Hamilton, "will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused." As a result, there will always be the danger that "the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt."[8]

The primary way in which the founders sought to tame the unruly political passions that would likely be unleashed by an impeachment was to divide the process between the two great houses of the legislature, so that as the House was given the sole power to impeach, the Senate was given "the sole power to try all impeachments."[9] It was deemed by the founders that the Senate, constituted as it was, would be the safest repository for the "awful discretion" that would have to be exercised by the court trying impeachments, the power "to doom to honor or to infamy the most confidential and the most distinguished characters of the community."[10]

There was no doubt, however, that the House, in exercising its power to impeach, would be called upon to exercise a discretion no less awful than that consigned to the Senate in trying an impeachment. For to be impeached by the House, even if not convicted and removed by the Senate, would constitute an "indelible reproach" on the character of the person in question, and doom him to "infamy" if not to "perpetual ostracism from the esteem and confidence, and honors and emoluments of his country."[11] Thus was the terrible power to impeach not given without the restrictions deemed necessary to reconcile it with the demands of the separation of powers and the republican form of government.

There is no doubt that when the Americans turned their attention to fashioning procedures for impeachment that they had the history of Great Britain in mind.[12] Yet in the instance of impeachment as in so many other things, the founders often saw such historical examples as furnishing "no other light than that of beacons, which give warning of the course to be shunned, without pointing out that which ought to be pursued."[13] While they were willing to borrow from Britain the notion that the lower house ought to "prefer the impeachment" while the upper house would "decide upon it," there was little else from British experience that made its way into the provisions in the Constitution. The reason was, as Jefferson noted, that "history shows that in England impeachment has been an engine more of passion than of justice."[14] The one other exception, as will be seen below, was the adoption of the phrase "high Crimes and Misdemeanors" in setting a standard for impeachable offences.

Unlike impeachment in Britain, the Americans restricted the reach of the power to "civil officers" thus excluding private citizens; made clear it would not be a criminal process but a political one that did not demand a trial by jury or permit a presidential pardon; emphasized that impeachment was no bar to further prosecutions in the ordinary courts for criminal actions; and established that punishment would extend no further than removal from office and disqualification from holding office again. By the time of the Federal Convention it was clear that American thinking about impeachment had shifted "from the orbit of English precedent to a native republican course." The provisions that finally were adopted "reflected indigenous experience and revolutionary tenets instead of English tradition."[15] Impeachment was rendered, to borrow a phrase from James Madison, "a Republican remedy for the diseases most incident to Republican Government."[16]

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[7] McCloskey, ed., *The Works of James Wilson,* I:426.

[8] *The Federalist, No. 65,* in Jacob E. Cook, ed., *The Federalist* (Middletown: Wesleyan University Press, 1961), pp. 439–40.

[9] Article I, sec. 3, c. 6.

[10] *The Federalist, No. 65,* pp. 441–42.

[11] *The Federalist, No. 63,* p. 425; *The Federalist, No. 65,* p. 442.

[12] Alexander Hamilton is explicit in stating the debt to England in *The Federalist, No. 65,* p. 440. See also Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge: Harvard University Press, 1974), *passim.*

[13] *The Federalist, No. 37,* p. 233.

[14] As quoted in Berger, *Impeachment,* p. 79, n. 130.

[15] Peter Charles Hoffer and N. E. H. Hull, *Impeachment in America, 1635–1805* (New Haven: Yale University Press, 1984), p. xi.

[16] *The Federalist, No. 10,* p. 65.

The most important restriction placed on the power to impeach was the catalogue of the offences listed in the Constitution: "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."[17] These words were not mindlessly crafted or chosen because the founders thought they were vague and open to endless interpretation. Rather in this, as in all the other provisions of the Constitution, the founders sought to be precise and limiting in the powers granted. As Rufus King recalled, "it was the intention and honest desire of the Convention to use those expressions that were most easy to be understood and least equivocal in their meaning."[18] The reason for this was rooted in the founding generation's firm belief that a written constitution was essential to free, republican government.

The Necessity of Recurring to the Interactions of the Founders

Early in the Revolutionary period a consensus began to emerge among American political leaders that "in all free States the Constitution is fixed" and that "vague and uncertain laws, and more especially constitutions, are the very instruments of slavery."[19] Experience had taught the colonists the harsh lesson that governors without restraint could make "mere humour and caprice" the most fundamental "rule and measure" of the administration of political power. Protection lay in maintaining the "essential distinction" between a "civil constitution," which was fundamental, and the form of government and the exercise of its powers, which was not.[20]

As Americans moved closer to the call for Independence, their thinking about constitutions hardened. A constitution to be deemed fundamental had to be able to "survive the rude storms of time" and to remain constant, "however . . . circumstances may vary."[21] The most likely way to achieve such permanence was to embody the constitution in a "written charter."[22] And for such charters to serve as a brake on government, it was further necessary that they be "plain and intelligible—such as common capacities are able to comprehend, and determine when and how far they are, at any time departed from."[23] Constitution draftsmen should take care that not a single point . . . be subject to the least ambiguity."[24] Such a "fixt" constitution was the only means whereby the people could safely make their way between "the arbitrary claims of rulers, on one hand," and their own "lawless license, on the other.[25]

In 1787, the framers thus sought to craft the new constitution carefully, pulling their words from sources they believed clear and common. They endeavored "to form a fundamental constitution, to commit it to writing, and place it among their archives, where everyone could be free to appeal to its text." They understood that language is the essence of law and that law is the essence of liberty. At the most basic level, there would be neither place nor need in such a constitution, as Joseph

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[17] Article II, Sec. 4.

[18] Rufus King in the Massachusetts Convention, 24 January 1788, in Farrand, ed. *Records,* III:268.

[19] This section draws upon Gary L. McDowell, "The Language of Law and the Foundations of American Constitutionalism," *The William and Mary Quarterly* (July 1998).

[20] 20 Samuel Adams, "Massachusetts House of Representatives to the Speakers of Other Houses of Representatives, February 11, 1768," in Henry Alonzo Cushing, ed., *The Writings of Samuel Adams,* 4 vols. (New York: G. P. Putnam's Sons,1904–1908), I:185; Jonathan Mayhew, *A Discourse Concerning Unlimited Submission and Nonresistance to the Higher Powers* (Boston, 1750), reprinted in Bernard Bailyn, ed., *Pamphlets of the American Revolution,* (Cambridge: Harvard University Press, 1965), 241; 242; *Berkshire's Grievances* (Pittsfield, 1778), in Charles S. Hyneman and Donald S. Lutz, eds., *American Political Writing during the Founding Era,* 1760–1805, 2 vols. (Indianapolis: Liberty Fund, 1983), I:455461, 457; Daniel Shute, *An Election Sermon (Boston, 1768), in American Political Writing,* I:109–136, p.117. In the same collection, see also *Four Letters on Interesting Subjects,* I:368–389, 385; and Philodemus [Thomas Tudor Tucker], *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice* (Charleston, 1784), 1:606–630, 627.

[21] [Theophilus Parsons], *The Essex Result* (Newburyport, 1778), *American Political Writing,* I:480–522, 491. See also *Rudiments of Law and Government Deduced from the Law of Nature* (Charleston, 1783), *American Political Writing,* I:565–605, 567.

[22] *Four Letters on Interesting Subjects, American Political Writing,* I:382.

[23] Gad Hitchcock, *An Election Sermon* (Boston, 1774), *American Political Writing,* I:281–304, 294. This same point was stressed repeatedly. See *Rudiments of Law and Government Deduced from the Law of Nature* (Charleston, 1784), *American Political Writing,* I:588–89; and John Tucker, *An Election Sermon* (Boston, 1771), *American Political Writing,* I:158–174, p. 164.

[24] Thomas Jefferson, "Albemarle County Instructions Concerning the Virginia Constitution," *The Papers of Thomas Jefferson,* Julian P. Boyd, ed., 25 vols. to date (Princeton: Princeton University Press, 1950 -), VI:286.

[25] Tucker, *Election Sermon, American Political Writing,* I:168; 169.

Story would later point out, for "metaphysical or logical subtleties."[26] A written and ratified constitution of enumerated and limited powers was to be understood to be the "fundamental law," the embodiment of "the intention of the people."[27]

John Marshall spoke the sense of his generation of founders when he insisted that a written constitution was nothing less than "the greatest improvement on political institutions." Those who framed such constitutions took them seriously as "the fundamental and paramount law of the nation," the foundation of all governmental powers delegated by the people by which those powers would be "defined and limited." Constitutions are written, Marshall argued, so "that those limits may not be mistaken, or forgotten."[28] Such was the logic of his generation that Marshall could presume that anything the people intended to include in their Constitution "they would have declared . . . in plain and intelligible language."[29] Thus was the logic of the founders that the most fundamental rule of interpretation was to determine the intention of the lawgiver.[30]

The evolution in the Federal Convention of the constitutional text that would eventually mark out what would constitute impeachable offences began at the outset when the Virginia Plan was presented on May 29 by Edmund Randolph and included the proposal that a national judiciary be empowered, among other things, to deal with "impeachments of any national officers."[31] The issue was considered again on June 2 when John Dickinson proposed that "the Executive be made removable by the National Legislature on the request of a majority of the Legislatures of individual States."[32] After some discussion, Hugh Williamson of North Carolina moved that there be inserted in the emerging text the provision that the chief magistrate "be removable on impeachment & conviction of mal-practice or neglect of duty."[33] On June 18 Alexander Hamilton added to the discussion his view that "the Governour [,] Senators and all officers of the United States [should] be liable to impeachment for mal- and corrupt conduct; and upon conviction to be removed from office & disqualified for holding any place of trust or profit."[34] The most substantive discussions on impeachment occurred on July 19 and 20. By this time the mix of possible impeachable offences had come to include "corruption," schemes of "peculation or oppression," "loss of capacity," "malversation," "bribery," "treachery," "corrupting his electors," "negligence," and "perfidy." The resolution that "the Executive be removable on impeachments" carried eight votes to two.[35] Through all the discussion the primary concern was where to lodge the power to try impeachments; there seemed a general sense of what would constitute impeachable offences.

By the time the issue returned to the floor of the convention on August 27, the power to impeach had been lodged in the House of Representatives for "treason, bribery, or corruption" with the trial to be conducted by the Supreme Court. But further consideration of the clause was postponed.[36] By September 4 the language was changed to provide for the removal of the president "on impeachment by the House of Representatives and conviction by the Senate, for Treason, or bribery."[37] On September 8 the convention returned to the problem of impeachment and this time the debate focused on what were properly impeachable offences. George Mason thought it imprudent that the provision be "restrained to Treason & bribery only" and suggested that the power be expanded to include "maladministration." His con-

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[26] Thomas Jefferson to John Cartwright, 5 June 1824, in Lipscomb and Bergh, eds., *The Writings of Thomas Jefferson,* XVI:45–46; Joseph Story, *Commentaries on the Constitution of the United States,* 3 vols., (Boston: Hilliard, Gray and Co., 1833), Sec. 451, I:436.

[27] *The Federalist, No. 78,* p. 525.

[28] As he sketched it: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric had been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent." *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803), 178; 176; 176–77.

[29] *Barron* v. *Baltimore,* 32 U.S. (7 Peters) 243 (1833), 250.

[30] In his pseudonymous defense of his opinion in *McCulloch* v. *Maryland,* Marshall was blunt: "The object of language is to communicate the intention of him who speaks, and the great duty of a judge who construes an instrument, is to find the intention of its makers." Gerald Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland* (Stanford: Stanford University Press, 1969), pp. 168–69.

[31] Farrand, ed., *Records,* I:22.

[32] Ibid., I:85.

[33] Ibid., I:88.

[34] Ibid., I:292.

[35] Ibid., II:51–70.

[36] Ibid., II:427.

[37] Ibid., II:499.

cern was that treason and bribery were insufficient to reach such political offences as the subversion of the Constitution. Madison insisted that "maladministration" was so "vague" a term as to have the effect of reducing the term of the president "to a tenure during pleasure of the Senate." At this point Mason willingly moved to withdraw the suggested "maladministration" and substituted "other high crimes & misdemeanors." That was accepted by a vote of eight to three.[38]

It may well be worth noting that Mason's original proposal for this new standard of impeachable offences was for "other high crimes & misdemeanors against the State." This was quickly amended by striking out "State" after the word "against" and substituting "United States" "in order to remove ambiguity."[39] When the draft from the Committee on Style was laid before the convention all references to "high crimes and misdemeanors against the United States" was dropped in favor of what would become the version that today appears in the Constitution: "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."[40] Thus as finally adopted, the standard of "high Crimes and Misdemeanors" seems to have a broader, less restricted meaning than merely crimes against the government narrowly understood. This seems to reflect the general sense of the convention that impeachment was intended to reach to political abuses, such as maladministration or malversation, as well as to indictable crimes. Moreover, it also seems to undermine the claim that impeachment is limited only to what one might call official duties and does not reach what Joseph Story will later call simply "personal misconduct."[41]

What is most striking about the inclusion of "high Crimes and Misdemeanors" is how little discussion it caused; there was virtually no debate at all. One searches in vain in the rest of the records of the Federal Convention, in the ratifying conventions of the several states, in such obvious writings during the ratification struggle as *The Federalist* and the essays written by the leading Anti-Federalists and "other" Federalist penmen, and in the correspondence between the founders written at the time. The conclusion to which one can only be drawn is that the phrase was indeed one of those expressions, as Rufus King said, that the convention adopted because they "were most easy to be understood and least equivocal in their meaning."[42]

What was obviously clear and unequivocal to the founders has been to subsequent generations a matter of some confusion.[43] Nowhere has that confusion been more clearly expressed—or the implicit dangers of departing from the original meaning of the Constitution more powerfully exposed—than in the argument by then-Congressman Gerald Ford in 1970 during his quest to impeach Justice William O. Douglas. In Ford's view (one which, unfortunately, he continues to espouse) "an impeachable offence is whatever a majority of the House of Representatives considers it to be at a given moment in history." The reason, said the Republican Congressman, is that "there are few fixed principles among the handful of precedents."[44] To assume that is true would be to render unlimited precisely what the founders sought to limit. The idea that the question of impeachable offences should be left simply to the "arbitrary discretion" of those in Congress, Joseph Story observed, "is so incompatible with the genius of our institutions, that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice, which might make that a crime at one time, or in one person, which would be deemed innocent at another time or in another person."[45]

Impeachments are not to be carried out for any reason that may occur to the House of Representatives; they can only be pursued for "Treason, Bribery or other high Crimes and Misdemeanors." Thus is there an obligation to determine exactly

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[38] Ibid., II:550.

[39] Ibid.

[40] Ibid., II:600.

[41] Story, *Commentaries on the Constitution,* Sec. 762, II:234. George Ticknor Curtis observed that the purpose of impeachment is simply "to ascertain whether cause exists for removing a public officer from office. Such cause may be found in the fact that, either in the discharge of his office, or aside from its functions, he has violated a law, or committed what is technically denominated a crime. But a cause for removal from office may exist where no offence against positive law has been committed, as where the individual has, from immorality or imbecility or maladministration, become unfit to exercise the office." *History of the Origin, Formation, and Adoption of the Constitution of the United States,* 2 vols. (New York: Harper and Bros., 1858), II:260–61.

[42] Farrand, ed., *Records,* III.268.

[43] Hoffer and Hull, *Impeachment in America,* p. 117.

[44] As quoted in Berger, *Impeachment,* p. 53, n. 1. More recently, in an essay in the *New York Times* on October 5, 1998, Ford continues to insist that Congress is left to fill in the blanks in what he sees as "those deliberately imprecise words, 'high crimes and misdemeanors.'"

[45] Story, *Commentaries on the Constitution,* Sec. 795, II:264.

what "high Crimes and Misdemeanors" meant to those who framed and ratified the Constitution. For, as Raoul Berger has shown, if that phrase did indeed have "an ascertainable content at the time the Constitution was adopted, that content furnishes the boundaries of the power."[46]

English Antecedents

It is helpful in trying to determine the original meaning of "high Crimes and Misdemeanors" to consider the impeachment provisions of the Constitution in the context of those other powers either granted or denied by the founders that had been associated with impeachment in the English tradition. It will be recalled that in England impeachment had been both a political and a criminal process; that it was often used to prosecute high treason; and was not far removed from bills of attainder and the corruption of blood as punishments. One of the most significant departures by the founders from the English way of doing things was to limit rather severely what would constitute treason and to restrict Congress in what punishments it could devise.

In England, treason was a wide ranging offence that was intended to put a protective ring around the monarchy.[47] In the Constitution of the United States, the founders reduced the scope of what Blackstone had called "the highest civil crime, which (considered as a member of the community) any man can possibly commit" to this: "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them Aid and Comfort."[48] They were too aware of how malleable a crime treason could become in the hands of a legislature prone to punish political enemies. So, too, did they establish a constitutional standard for determining guilt in order to convict someone of treason: "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[49]

When it came to punishing treason, the Constitution also provides that there could never be passed by Congress the old English punishment of an "Attainder of Treason" that would have the effect of inflicting a "Corruption of Blood or Forfeiture except during the Life of the person attained."[50] This restriction was motivated by the founders' desire to keep political passions from leading to charges of crime and severe punishments imposed by the legislature. The logic of limited power here was the same as that which led the founders to prohibit both bills of attainder generally, and ex post facto laws.[51]

These concerns were also present in the decisions made by the founders regarding the process of impeachment. As indicated above, it was essential to their way of thinking to make clear that impeachment was a political process dealing with political wrongdoing and not a part of the criminal justice process. Thus they made clear that punishment for impeachment could 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 they emphasized that impeachment was not a bar to prosecuting criminal acts that may have been committed by the person impeached by noting that "the Party convicted [of impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[52] Thus while an indictable crime may be deemed an impeachable offence, impeachable offences are not simply limited to indictable crimes.

To underscore the inherently political nature of impeachment, the founders went further and provided that the right to a jury trial was to be secured for "all Crimes, except in cases of Impeachment."[53] When it came to the president, they sought to limit his power to interfere with impeachments in the same way he could interfere with ordinary crimes. His "Power to grant Reprieves and Pardons for Offences against the United States" was granted broadly "except in Cases of Impeachment."[54]

By the restrictions they devised, the founders made clear that the process under the new Constitution was based more on the problems they had seen operating in English impeachments than on institutional arrangements they thought they should adopt. "Impeachments, and offences and offenders impeachable," James Wilson lec-

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[46] Berger, *Impeachment.* p. 87.
[47] See William Blackstone, *Commentaries on the Laws of England,* 4 vols. (Oxford: Clarendon Press, 1778), IV:74–94.
[48] Article III, Sec. 3.
[49] Ibid.
[50] Ibid.
[51] Article I, Sec. 9.
[52] Article II, Sec. 3.
[53] Article III, Sec. 2.
[54] Article II, Sec. 2.

tured his students, "come not, in those descriptions within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects."[55] And it is in light of this understanding that sense can be made of the founders' adoption of the term "high Crimes and Misdemeanors" from their English forebears.

Although there is some disagreement as to when the first impeachment occurred in English history, it seems reasonably clear that the first one along recognizably modern lines of procedure was against Michael de la Pole, Earl of Suffolk, in 1386.[56] In any event, the phrase "high Crimes and Misdemeanors" makes its first appearance in the 1386 impeachment of the Earl of Suffolk, with its next use occurring in the 1450 impeachment of William de la Pole, Duke of Suffolk and a descendant of the earlier Michael de la Pole. The charges of "high Crimes and Misdemeanors" against Michael de la Pole in 1386 included common law offences as well as other charges that were more clearly political in their nature. William de la Pole's charge of "high Crimes and Misdemeanors" was in addition several charges of high treason. The "high Crimes and Misdemeanors" included "advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of the laws," "procuring offices for persons who were unfit, and unworthy of them," and "squandering away the public treasure."[57] From those earliest cases through the impeachment of Warren Hastings that was occurring at the same time as the Federal Convention, "high Crimes and Misdemeanors" continued to be a common charge in the impeachments that were brought.[58]

In the mid-seventeenth century the notion of what constituted "high Crimes and Misdemeanors" was expanded to include such things as negligence and improprieties while in office. Chief Justice William Scroggs, for example, was impeached in 1680 for, among other things, browbeating witnesses, cursing and drinking to excess, and generally bringing "the highest scandal on the public justice of the kingdom."[59] By the eighteenth century it was clear that impeachable offences under the rubric "high Crimes and Misdemeanors" were not limited to indictable crimes in common law but reached more purely political offences. In 1701 the Earl of Oxford was charged with "violation of his duty and trust."[60] And Warren Hastings was charged with maladministration, corruption in office, and cruelty towards the people of India.[61] By the time of the Federal Convention, English law on impeachments was clear that such "misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust are the most proper, and have been the most usual grounds for this kind of prosecution."[62]

In all of the English cases the political nature of the offences charged in impeachments was revealed by the use of the word "high" to modify both "crimes" and "misdemeanors." The use of the word in "high Crimes and Misdemeanors" did not refer to the substantive nature of the offence, that it was a particularly serious offence, but to the fact that it was a "crime or misdemeanor" carried out against the commonwealth itself. This use of "high" to distinguish crimes and misdemeanors against the society as a whole derived from its use in distinguishing "high" treason from "petit" treason.[63] This understanding of "high Crimes and Misdemeanors" as adopted by the Federal Convention was summed up in Alexander Hamilton's explanation of the impeachment process as created by the Constitution. The object of impeachment, he noted, "are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are

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[55] McCloskey, ed, *Works,* I:324.

[56] The other dates suggested include 1283 and 1376. See William S. Holdsworth, *History of English Law,* 17 vols. (London: Metheun, 1903–1966), I:380; Alex Simpson, *A Treatise on Federal Impeachments,* (Philadelphia: Law Association of Philadelphia, 1916), p. 5. See generally Berger, *Impeachment,* pp. 53–73.

[57] John Hastell, *Precedents of Proceedings in the House of Commons,* 11 vols. (London, 1796), IV:67, n. 10.

[58] For a complete listing of the English impeachments see Simpson, *Treatise on Federal Impeachments,* pp. 81–190; and Berger, *Impeachment,* pp.67–73.

[59] *Howell's State Trials,* 35 vols. (London: R. Bagshaw, 1809–1826), VIII:197, 200.

[60] Simpson, *Treatise on Federal Impeachments,* p.144, n.6.

[61] Ibid., pp. 168–70, n.6.

[62] Richard Wooddeson, *A Systematical View of the Laws of England,* 2 vols. (Dublin: E. Lynch, 1792), II:601. Wooddeson, Blackstone's successor as Vinerian Professor Law at Oxford University, made the obvious point: "It is certain that magistrates and officers intrusted with the administration of public affairs may abuse their delegated powers to the extensive detriment of the community, and at the same time in a manner not properly cognizable before the ordinary tribunals." Ibid., II:596.

[63] Blackstone, *Commentaries,* IV:75; 203.

of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[64]

During the Federal Convention Gouverneur Morris suggested that those offences that were to be deemed impeachable "ought to be enumerated and defined."[65] In a sense, Mason's move to include the phrase "high Crimes and Misdemeanors" was an attempt to achieve some sense of definition when it came to those offences for which the president, vice president and all civil officers under the new Constitution might be impeached. All the founders understood the political perils involved should the Congress be left with a "dangerous latitude of discretion" in so important a power.[66] Yet short of a clear list of impeachable offences there had to be some method to ascertain what, exactly, "high Crimes and Misdemeanors" might be. The answer was to be found in the common law itself.[67]

As has been seen, the phrase "high Crimes and Misdemeanors" was one in common usage in English impeachments for four centuries leading up to the Federal Convention. It had become a term of legal art, a technical term. In approaching such terms, John Marshall had occasion to note in considering another such phrase, the interpretive process is simple: "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."[68] The case for the common law construction of "high Crimes and Misdemeanors" was best made by Joseph Story in his *Commentaries on the Constitution of the United States.*

In Story's view the necessity of recourse to the common law to shed light on the meaning of "high Crimes and Misdemeanors" stemmed from the nature of impeachment which has an

> . . . enlarged operation, and reaches what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard for the public interests, in the discharge of the duties of political office. These are so 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.[69]

When it came to the details spelled out in the Constitution, it was clear that there was no need to turn to the common law for a definition of treason; whatever it may have meant in the common law, that meaning was superseded by the definition the founders spelled out in the Constitution itself. But in the case of the other named offence, bribery, which the Constitution does not define, said Story, it is clear that "resort was naturally and necessarily had to the common law . . . [which] as the common basis of our jurisprudence, can alone furnish the proper exposition of the

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[64] *The Federalist, No. 65,* p. 439. Holdsworth has argued that "the greatest services rendered by this procedure [of impeachment] to the cause of constitutional government have been, firstly, the establishment of the doctrine of ministerial responsibility to the law, secondly, its application to all ministers of the crown, and thirdly and consequently the maintenance of the supremacy of the law over all." *History of English Law,* I:382.

[65] Farrand, ed., *Records,* II:65.

[66] Timothy Bloodworth in the North Carolina ratifying convention, Elliot, ed., *Debates,* IV:50.

[67] "Impeachments are . . . introduced as a known definite term, and we must have recourse to the *common law of England* for the definition of them." William Rawle, *A View of the Constitution of the United States* (2nd ed.; Philadelphia: P.H. Nicklin, 1829), p. 210.

[68] *United States* v. *Burr,* 25 Fed. Cas. 1, 159 (No. 14, 693) (C.C.D. Va. 1807). This view of the relationship between the common law and those common law terms that were explicitly adopted by the founders has continued to inform the jurisprudence of the Supreme Court of the United States. The provisions of the Constitution "are framed in the language of the English common law and are to be read in light of that history." *Smith* v. *Alabama,* 124 U.S. 465, 478 (1888); the Constitution "must be interpreted in light of the common law, the principles and history of which were familiarly known to the Framers of the Constitution." *United States* v. *Wong Kim Ark,* 169 U.S. 649, 654 (1898); "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the Thirteen States, were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary . . . they expressed [their conclusions] in terms of the common law, confident that they could be shortly and easily understood." *Ex Parte Grossman* 267 U.S. 87, 108 (1925). I am much indebted for these citations to Berger, *Impeachment,* p. 203, n. 51.

[69] Story, *Commentaries on the Constitution,* Sec. 762, II:234.

nature and limits of this offence."[70] As with "bribery" so also with "high Crimes and Misdemeanors."

It is because such political offences "are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it." The choice, short of a legislative list, was either to resort to "parliamentary practice, and the common law" or be doomed to the "arbitrary discretion" of Congress. To Story, there was no question how to proceed: "The only safe guide in such cases must be the common law, which is the guardian at once of private rights and public liberties."[71] Like Marshall, Story did not suggest that the common law was a source of "a jurisdiction not given by the Constitution and the laws" but was simply the "great basis of American jurisprudence." As a result, it was not only prudent but appropriate to use the common law "as a guide, and check, and expositor in the administration of the rights, duties, and jurisdiction conferred by the Constitution and Laws."[72]

The most basic sources of the common law included the great treatises upon which the early Americans had depended for their legal learning. Thus did that generation of founders move easily amongst such authorities as Sir Edward Coke's *Institutes* (1628; 1642; 1644) and *Reports* (1600–15); Sir Thomas Wood's *Institute of the Laws of England* (1720); Richard Wooddeson's *A Systematical View of the Laws of England* (1795); William Hawkins's *A Treatise on the Pleas of the Crown* (1716); and a variety of other tracts such as John Selden's *On the Judicature in Parliaments* (1681), Giles Jacob's *New Law Dictionary* (1729), and William Paley's *Principles of Moral and Political Philosophy* (1785). But of them all the most dominant source of authority on the common law for those who wrote and ratified the Constitution was Sir William Blackstone and his justly celebrated *Commentaries on the Laws of England* (1765–69). That was a work that was described by Madison in the Virginia ratifying convention as nothing less than "a book which is in every man's hand."[73]

Blackstone made clear that of the "high misdemeanors" under English law, the "first and principal one is the *mal-administration* of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability."[74] Although Blackstone does not speak of "high Crimes and Misdemeanors" in any thorough fashion, he does devote a considerable section of the *Commentaries* to "Public Wrongs", in which he defines public wrongs simply as "crimes and misdemeanors."[75] And his definition bears a striking resemblance to Hamilton's discussion of impeachable offences in *The Federalist:*

> [P]ublic wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity . . . crimes . . . besides the injury done to individuals, strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.[76]

Of greatest interest for trying to understand how these grave offences against the commonwealth might be included within the phrase "high Crimes and Misdemeanors" is Blackstone's chapter entitled "Of Offences against Public Justice."[77]

In that chapter Blackstone explains that "of offences against public justice, some . . . [are] felonious, whose punishment may extend to death; others only misdemeanors." He then sets out to catalogue those offences against public justice by beginning "with those that are most penal and descend[ing] gradually to such as are of less malignity."[78] All of these offences fall short of treason, "the highest civil crime . . . any man can possibly commit," but share with that most serious offence the fact that each constitutes an assault on the "commonwealth or public polity of the kingdom."[79] Included in Blackstone's catalogue are offences against public justice that may shed some light on the questions currently confronting the House of

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[70] Ibid., Sec. 794, II:263.
[71] Ibid., Sec. 795, II:264.
[72] Ibid., Sec. 796, II:266; Sec. 797, II:267; Sec. 796, II:266.
[73] Elliot, ed., *Debates,* III:501.
[74] Blackstone, *Commentaries,* IV:121.
[75] Ibid., IV:1.
[76] Ibid. IV:5.
[77] Ibid., IV: 127–141.
[78] Ibid., IV:128.
[79] Ibid., IV:75; 127.

Representatives as to the nature and extent of any impeachable offences committed by the president in the present inquiry.

There are two offences of special relevance in determining if there have indeed been "high Crimes and Misdemeanors" committed. The third item in Blackstone's list is "*obstructing* the execution of lawful process." This, says the author, "is at all times an offence of a very high and presumptuous nature."[80] Such obstructions of public justice, he argues, can be of both "the civil and criminal kind." Although his primary example is of obstruction of an arrest upon a criminal process, the offence is clearly not limited to that and seems to include any effort to keep the processes of the law from functioning properly.[81]

The second offence of some significance to the matter at hand is "the crime of willful and corrupt *perjury*" which is defined by Sir Edward Coke, to be a crime committed where a "*lawful* oath is administered, in some *judicial* proceeding, to a person who swears *willfully, absolutely,* and *falsely,* in a matter *material* to the issue or point in question."[82] Materiality lies in whether the false testimony is essential to the determination of the issue at hand or merely related to "some trifling, collateral circumstance to which no regard is paid."[83] Closely related in Blackstone's account to perjury proper is the "*Subornation* of perjury [which] is the offence of procuring another to take such a false oath, as constitutes perjury in the principal."[84] Blackstone finds perjury and subornation of perjury to be crimes both odious and "detestable", although far from being capital offences. Although at one point such offences were punishable by death, it had by the time of the *Commentaries* come to be "punished with six months imprisonment, perpetual infamy, and a . . . fine, or to have both ears nailed to the pillory." In attempting to understand where perjury comes in the descending order Blackstone sets up, and how it might thus fit into an understanding of "high Crimes and Misdemeanors" based upon the common law, it is striking that perjury is *followed* immediately by the crime of bribery.[85] The possibility that perjury by a high civil officer might indeed be an impeachable offence under "high Crimes and Misdemeanors" merits a more thorough consideration.

Oaths and Perjury

The use of oaths in legal proceedings in which evidence is given is an ancient part of the common law. Sir Edward Coke noted that the "word oath is derived from the Saxon word *eoth.*" The oath is nothing less, said Coke, than "an affirmation or deniall by any Christian of anything lawfull and honest, before one or more, that have the authority to give the same for advancement of truth and right, calling Almighty God to witness that his testimony is true."[86] Yet there is evidence that the use of oaths extends back to Roman times where the law of the Twelve Tables provides that "Whoever gives false evidence must be thrown from the Tarpeian rock."[87] And Cicero in *De Officiis* argues that "in taking an oath it is our duty to consider not what we may have to fear in case of violation but wherein its obligation lies: an oath is an assurance backed by religious sanctity; and a solemn promise given, as before God as one's witness, is to be sacredly kept."[88] As Samuel Pufendorf emphasized, oaths were not simply the preserve of Christians:

> An *oath* the very *Heathens* look'd on as a thing of so great force, and of so sacred authority, that they believed the sin of perjury to be punished with the severest vengeance; such as extended itself to the posterity of the

[80] Ibid., IV:129.
[81] Ibid.
[82] Ibid., IV:137.
[83] Ibid.
[84] Ibid., IV:137–38.
[85] Ibid., IV:139.
[86] *Third Institute,* p. 165. This view has been expanded upon by John Wigmore in his treatise on evidence in which he notes that the idea of an oath came from Germanic law: "The employment of oaths takes our history back to the origins of Germanic law and custom when, as in all early civilizations, the appeal to the supernatural plays an important part in the administration of justice." John Henry Wigmore, *Evidence in Trials at Common Law,* ed. J.H. Chadbourn, 10 vols. (Boston: Little Brown and Co., 1976), Sec. 1815, V:380. James Bradley Thayer observed that the "Normans . . . found that much of what they brought [to England] was there already; for the Anglo-Saxons were their cousins of the Germanic race, and had, in a great degree, the same legal conceptions and methods only less worked out." This extended to the use of oaths. James Bradley Thayer, "The Older Modes of Trial," *Harvard Law Review* 5(1891):45, 58.
[87] James Fitzjames Stephens, *A History of the Criminal Law of England,* 3 vols. (London: Macmillan and Co., 1883), I:11.
[88] *De Officiis,* (Cambridge: Harvard University Press, DATE), III.104, p. 383.

> offender, and such as might be incurr'd by the bare thought and inclination without the act.[89]

The significance of the oath in courts of law was explained by James Wilson in his law lectures:[90]

> The courts of justice, in almost every age, and in almost every country, have had recourse to oaths, or appeals to heaven, as the most universal and the most powerful means to engage men to declare the truth. By the common law, before the testimony of a witness can be received, he is obliged to swear, that it shall be the truth, the whole truth, and nothing but the truth.

The purpose, Wilson concluded, is to secure truthful evidence:

> Belief is the end proposed by evidence of every kind. Belief in testimony is produced by the supposed veracity of him who declares it. The opinion of his veracity . . . is shaken, either when, in former instances, we have known him to deliver testimony which has been false; or when, in the present instance, we discover some strong inducement which may prevail on him to deceive.

Wilson took his moral and historical bearings on the necessity of oaths to getting at the truth from William Paley whose *Principles of Moral and Political Philosophy* was an influential work of considerable prominence among the early Americans.[91] Wilson praised Paley as an authority of "high reputation," a "sensible and ingenious writer" who was "no undiscerning judge of the subject" of the administration of justice.[92] Joseph Story was similarly impressed with Paley as a writer of "practical sense" whose analyses of political institutions displayed "great skill and ingenuity of reasoning. Throughout his celebrated *Commentaries on the Constitution of the United States,* Story relies often on the "excellent writings" of Paley.[93]

For Paley, the issue of oaths and perjury was one of morality as well as of law; he expressed views not unlike that of Cicero who warned that "people overturn the fundamental principles established by nature, when they divorce expediency from moral rectitude."[94] In Paley's view, the entire question of perjury rested on the definition of a lie: "A lie is a breach of promise: for whoever seriously addresses his discourse to another, tacitly promises to speak the truth, because he knows that the truth is expected."[95] And the effects of lying are not simply private; they are public in the deepest and most important sense:

> [T]he direct ill consequences of lying . . . consist, either in some specific injury to particular individuals, or the destruction of that confidence, which is essential to the intercourse of human life: for which latter reason, a lie may be pernicious in its general tendency, and therefore criminal, though it produce no particular visible mischief to anyone.[96]

Given this public aspect to the damages that come from lying, it is necessary that oaths never be made "cheap in the minds of the people." Since "mankind must trust to one another" there is no more efficacious means than through the use of oaths: "Hence legal adjudications, which govern and affect every right and interest on this side of the grave, of necessity proceed and depend upon oaths." As a result, lying under oath is far more serious than merely lying; perjury is, Paley notes, "a sin of greater deliberation," an act that "violates a superior confidence."[97]

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[89] Samuel Pufendorf, *Of the Law of Nature and Nations,* trans. Basil Kennet (London: R. Sare, 1717), IV. II. 1, p.117

[90] McCloskey, ed, *Works,* II:703–704. Wilson was not alone in his view of the importance of oaths. For example, Justice Jacob Rush, the brother of Benjamin Rush, expressed views much like those of Wilson in a pamphlet published in 1796, *The Nature and Importance of an Oath—the Charge to a Jury* (Rutland, Vermont): "An oath is a very serious transaction . . . the nature [of which] . . . is the solemn appeal to God—it is engaging to speak the truth, and calling upon Him to witness our sincerity, that constitute the oath and obligation." Thus is it important that civil society maintain a due attention to "the religious sentiment upon which an oath is founded;" to allow that sentiment to relax will be "injurious to society." Hyneman and Lutz, eds., *American Political Writing,* II:1015–1017; 1018.

[91] Paley, *The Principles of Moral and Political Philosophy,* 2 vols. (London: R. Faulder, 1788).

[92] McCloskey, ed., *Works,* I:310; 240; 325.

[93] Story, *Commentaries on the Constitution,* Sec. 587, II:69; Sec. 584, II:65; Sec. 1603, III:467. See also, for examples, Sec. 522, 547, 558, 572, 575, 579, 581, 584, 587, and 1338.

[94] *De Officiis,* III.101, p. 379.

[95] Paley, *Principles,* I:184.

[96] Ibid.

[97] Ibid., I:193; 197.

Because a witness swears that he will "speak the truth, the whole truth, and nothing but the truth, touching the matter in question," there is no place where a person under oath can cleverly lie and not commit perjury. The witness cannot legitimately conceal "any truth, which relates to the matter in adjudication" because to so conceal "is as much a violation of the oath, as to testify a positive falsehood; and this whether the witness be interrogated to that particular point or not." It is not enough, Paley observed, for the witness afterward to say that he was not forthcoming "'because it was never asked of me'"; an oath obliges to tell all one knows whether asked or not. As Paley notes, "the law intends . . . to require of the witness, that he give a complete and unreserved account of what he knows of the subject of the trial, whether the questions proposed to him reach the extent of his knowledge or not."[98]

Nor is it sufficient an excuse that "a point of honor, of delicacy, or of reputation, may make a witness backward to disclose some circumstance with which he is acquainted." Such a sense of shame or embarrassment cannot "justify his concealment of the truth, unless it could be shown, that the law which imposes the oath, intended to allow this indulgence to such motives."[99]

Similarly, linguistic contortions with the words used cannot legitimately conceal a lie or, if under oath, perjury. Paley's argument on this point merits a complete hearing:

> As there may be falsehoods which are not lies, so there may be lies without literal or direct falsehood. An opening is always left for this species of prevarication, when the literal and the grammatical signification of a sentence is different from the popular and customary meanings. It is the willful deceit that makes the lie; and we willfully deceive, where our expressions are not true in the sense in which we believe the hearer apprehends them. Besides, it is absurd to contend for any sense of words, in opposition to usage, for all senses of words are founded upon usage, and upon nothing else.[100]

Thus the most common terms of oaths sworn include a promise not only to tell the truth, but the broader promise to tell the whole truth and nothing but the truth. Willful deceit is the key to whether a witness commits perjury or not, whatever the means chosen.[101] The moral and legal inheritance of the founding generation included the belief that the violation of an oath was nothing less than "treachery."[102]

None of the major writers with whom the founders were intimately conversant saw perjury as anything but one of the most serious offences against the commonwealth.[103] In his widely cited *Treatise on the Pleas of the Crown,* for example, William Hawkins explained that there were certain kinds of offences that were "infamous, and grossly scandalous, proceeding from principles of down right dishonesty, malice or faction;" and it was under this rubric that he included "perjury and subornation of perjury." Indeed he went further arguing that "perjury . . . is of all crimes whatsoever the most infamous and detestable."[104]

Perjury was, in the first instance, tied to jurors who might give a false verdict and "for several centuries no trace is to be found of the punishment of witnesses for perjury."[105] And even after it originated in the Star Chamber, it was only by "slow degrees [that] the conclusion that all perjury in a judicial proceeding is a crime was arrived at."[106] In 1562–63 there came the first statute providing pen-

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[98] Ibid., I:200; 201.

[99] Ibid., I:201.

[100] Ibid., I:188–89. Pufendorf was of a similar mind: Witnesses, he said, should not have "an opportunity by insidious or equivocal expressions to evade the force of their obligations." Should they so break their oath they will discover the truth that God is the "avenger of perjury." *On the Law of Nature and Nations,* IV. II. III, pp. 121; 119.

[101] As Thomas Wood put it, "it cannot be presumed that one would commit perjury without design." *A New Institute of the Imperial or Civil Law* (London, 1730), III. 10. xiv, pp. 288–89.

[102] Algernon Sidney, *Discourses Concerning Government,* ed. Thomas West (Indianapolis: Liberty Fund, 1990), p. 225.

[103] For a helpful compilation of many of the common law sources on "oaths" and "perjury" see under those heads in Giles Jacob, *A New Law Dictionary,* (9th. ed.; London: Strahan and Woodfall, 1772).

[104] *A Treatise on the Pleas of the Crown,* I:318; 319. Pufendorf put it even more strikingly: "Perjury appears to be a most monstrous sin, in as much as by it the forsworn wretch shews that he at the same time condemns the divine and yet is afraid of human punishment; that he is a daring villain towards God, and a sneaking coward towards men." *Of the Law of Nature and Nations,* IV. II. II., p. 118.

[105] Stephens, *History of the Criminal Law,* III:241.

[106] Ibid., III:247.

alties for those who committed both perjury and subornation of perjury.[107] Thus were human punishments made to augment the fear of divine vengeance for lying under oath.[108] This was, in Pufendorf's view, absolutely essential, as he noted by quoting Demosthenes:

> Those who escape your justice, leave to the vengeance of the gods; but those on whom you can lay hands, never consign over to Providence without punishing them yourselves.[109]

It was by this joint power of the sacred and the secular that men could put their faith in oaths as a means of securing truthful testimony from those sworn to give it. And by such oaths and the punishments to be meted out for perjury, the commonwealth could secure the proper administration of justice within the courts of law. Perjury was no longer just a sin; it was a crime.

Based on the foregoing analysis and review of the historical record, the conclusion seems inescapable, based on the expressed intent of the framers, the wording of the Constitution, the writings of the principal legal authorities known to the framers, and the common law, that perjury would certainly be included as a "high Crime and Misdemeanor" in an impeachment trial under the United States Constitution. Further, the record fails to support the claim that impeachable offences are limited to only those abuses that occur in the official exercise of executive power. As seen in the authorities, impeachable offences, in both English and American history, have been understood to extend to "personal misconduct," "violation of . . . trust," and "immorality or imbecility," among other charges.[110]

Conclusion

There is no power granted to the House of Representatives more formidable than "the sole power of impeachment." Knowing as they did the dangers of subjecting those in high office to the mere passion and caprice of the moment, the founders sought to create a power to impeach that would be capable of "displacing an unfit magistrate" but within the confines of a written and ratified Constitution of enumerated and limited powers. Thus did they limit the reasons for which an impeachment could be undertaken to "Treason, Bribery, or other High Crimes and Misdemeanors."

The success of the founders in creating the impeachment power to be both politically effective and safe to the demands of republican government is seen most clearly in how few have been the instances of its use. Lord Bryce described the power of impeachment over a century ago as "the heaviest piece of artillery in the congressional arsenal" and thus "unfit for ordinary use." The process seeking to remove a president, he said, "is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at."[111] The constitutional provisions for impeachment were intended, in part, to secure the chief executive from being driven from office for mere partisan reasons. To get rid of a president—or to try to—Congress has to have good cause. As Bryce said, one does not use impeachment for light and transient causes, "as one does not use steam hammers to crack nuts."[112]

In the end, the determination of whether presidential misconduct rises to the level of "high Crimes and Misdemeanors," as used by the framers, is left to the discretion and deliberation of the House of Representatives. No small part of that deliberation, guided as it must be by the history and meaning of "high Crimes and Misdemeanors," must address what effect the exercise of this extraordinary constitutional sanction would have on the health of the republic, as weighed against the necessity of making clear that in America no one is above the law. In the end, that is what matters most and must bear most heavily on the members of the House of Representatives as they consider what they must do in the weeks ahead.

Mr. CANADY. Thank you, Professor McDowell.

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[107] Holdsworth, *History of English Law,* IV:515–18.

[108] "The two expedients of the oath and the perjury penalty are similar in their operation; that is, they influence the witness subjectively against conscious falsification, the one by reminding him of ultimate punishment by a supernatural power, the other by reminding him of speedy punishment by a temporal power." Wigmore, *Evidence,* Sec. 1831, V:432.

[109] *Of the Law of Nature and Nations,* IV. II. II., p. 118.

[110] Story, *Commentaries on the Constitution,* II:274; Simpson, *Treatise on Federal Impeachments,* p. 144, n. 6; Curtis, *History of the Origin, Formation, and Adoption of the Constitution,* II:260.

[111] James Bryce, *The American Commonwealth,* 2 vols. (Indianapolis: Liberty Fund, 1997), I:190.

[112] Ibid.

Professor Gerhardt.

MICHAEL J. GERHARDT, PROFESSOR OF LAW, COLLEGE OF WILLIAM & MARY SCHOOL OF LAW

Mr. GERHARDT. Thank you, Mr. Chairman. I want to thank the Chair and Representative Scott for the opportunity to be a shared witness. It is a privilege to be a part of this and the other distinguished panel.

There are, I think, at least three lessons to draw from the history of impeachment that might be useful for the subcommittee to keep in mind. First, the most common examples of impeachable offenses cited in the Constitutional and Ratifying Conventions were for great or dangerous offenses causing some serious injury to the Republic and/or reaching the special trust held by virtue of the office held. The framers also emphasized that the ultimate purpose of impeachment was not to punish but to protect and preserve the public trust. The framers did not try to exhaust the list of potential impeachable offenses. Instead, they left it to subsequent generations, particularly to subsequent Congresses, to decide on a case-by-case basis.

The second lesson relates to what we can learn from what Congress has found and not found constitutes an impeachable offense. Here I think there are two relevant sets. The first consists of attempted formal inquiries into presidential impeachments, and the second consists of attempted judicial impeachments.

The first set is awfully small, perhaps too small to suggest very much. We have had two examples from the 19th century and one dramatic example from the 20th century. The two formal attempted presidential impeachments from the 19th century include the House's decision not to initiate a formal impeachment inquiry against President John Tyler and the Senate's refusal by a single vote to convict Andrew Johnson.

These cases have some telling things in common. First, both men became President by means other than election, the deaths of the Presidents who had selected them as Vice Presidents. Second, neither was a member of the President's party. Third, neither was a member of the majority party in Congress. And perhaps most importantly, fourth, both were very aggressive in their efforts to frustrate congressional supremacy in national policy-making.

The House's failure to impeach or even to authorize an impeachment inquiry against Tyler, and the Senate's failure to convict Johnson, confirm one of the most often repeated pronouncements of the framers, that impeachment is not designed to address policy differences or opinion.

The Nixon episode in the 1970s has come to symbolize appropriate use of impeachment. We all assumed that President Nixon would have been impeached and removed. Like President Grant's Secretary of War William Belknap, President Nixon resigned when his impeachment and removal seemed inevitable. In the popular and scholarly mind, Nixon's impeachment represents the appropriate use of the impeachment process to address true abuse of power or the use of presidential power abusively.

The other set of relevant precedents are judicial. As we all know, all seven of the people impeached or removed from office have been

Federal judges. The common features of these cases are the nexus that exists between the conduct alleged and the special trust or responsibilities of the judicial officers impeached or removed in those cases.

Of course, the critical question that remains is whether the same constitutional standard applies to judicial and presidential impeachment. Interestingly, Representative Ford himself answered that question "yes." After having said that he thought what would constitute an impeachable offense rested with whatever a majority of the House thought. He went on to add at the end of his statement that of course it is different when one talks about Presidents; they may only be impeached for great offenses.

My answer is that the same standard applies to all impeachments. The constitutional language, after all, is uniform. The same standard applies to all impeachments, while the context to which the standard is applied is often different.

The factors taken into account by the House, and particularly by the Senate in the case of deciding whether any given misconduct constitutes an impeachable offense, include the following: the official duties; the degree of nexus between the misconduct alleged and the official duties; the magnitude of the offense and the magnitude of its harm to the Nation; and, lastly, other conceivable means of redress.

A final lesson, in my opinion, is that in deciding whether certain misconduct constitutes an impeachable offense, Members of Congress at some point feel justifiably the pressure to make a judgment that will withstand the test of time.

Alexander Hamilton warned that all impeachments begin in a partisan atmosphere. The critical question is whether impeachments can be conducted and reach resolution on a nonpartisan basis. The critical test is whether the judgments reached can withstand the test of time.

Near the end of the Johnson impeachment trial, Senator William Fessenden said that the burden is on Congress. In that case obviously on the Senate, as it is in every impeachment, to reach a judgment about what constitutes an impeachable offense on which, as he put it, all right-thinking people would agree. James Iredell said very much the same thing in the North Carolina ratifying convention. Twenty-five years ago the House Judiciary Committee, to its everlasting credit, created such a model. Today the subcommittee takes a step undoubtedly to create a similar model, but whatever happens today or tomorrow, the critical factor to keep in mind is that the ultimate judge is history.

Thank you.

[The prepared statement of Mr. Gerhardt follows:]

PREPARED STATEMENT OF MICHAEL J. GERHARDT, PROFESSOR OF LAW, THE COLLEGE OF WILLIAM AND MARY

INTRODUCTION

I am enormously grateful for the honor and privilege to share with you some of my thoughts about the background and history of the federal impeachment power. Over the past decade, I have had several occasions to review in detail the topic of today's hearing. In order to be of assistance to the Committee, I have organized my testimony in three parts, with an eye toward illuminating to the fullest possible extent and consistent with the weight of authority the historical issue of greatest con-

temporary concern relating to impeachment—the scope of impeachable offenses. As background, Part I identifies the ways in which the founders purposely tried to distinguish the federal impeachment process from its British counterpart. One of the most important of these features was the founders' desire to narrow or restrict the range of impeachable offenses. Part II examines the likeliest meaning of the terms of art "other high crimes and misdemeanors" that provide the bases for federal impeachment. I believe that the weight of authority, as most other scholars and commentators have found, that these words constitute technical terms of art that refer to political crimes. For the most part, the founders did not regard political crimes to be the functional equivalent of indictable crimes; rather, they considered political crimes to consist of serious abuses of official power or serious breaches of the public trust, which might also but not necessarily be punishable in the courts. Given that the founders expected that the scope of impeachable officials would work itself out over time on a case-by-case basis, I turn in Part III to consider the possible lessons that might be derived from trends or patterns in the Congress' past impeachment practices. Three are especially noteworthy. The first is that criminal conviction or prosecution of an individual prior to impeachment dramatically increases the likelihood of impeachment. The second is the relatively widespread recognition of the paradigmatic case for impeachment as being based on the abuse of power. The three articles of impeachment approved by the House Judiciary Committee against President Richard Nixon have come to symbolize this paradigm. The great majority of impeachments if not all of the impeachments brought by the House and convictions by the Senate approximate this paradigmatic case, for most if not all of these cases involve the serious misuse of office or official power. There is a third conceivable trend based on the recognition of some legitimate impeachment actions falling outside of the first category (or paradigmatic case). The latter cases, best symbolized by the Claiborne decision, is that there may be some kinds of misconduct in which an impeachable official might engage that are so outrageous and thoroughly incompatible with an official's status or responsibilities that Congress has no choice but to impeach and remove an official who has engaged in such misconduct.

I.

The discussions of the delegates to the constitutional convention and state ratifying conventions provide some background for appreciating the distinctive features of the federal impeachment process. The founders wanted to distinguish the impeachment power set forth in the U.S. Constitution from the British practice in eight important ways. First, the founders limited impeachment only to "[t]he President and all civil officers of the United States,"[1] whereas at the time of the founding of the Republic anyone (except for a member of the royal family) could be impeached in England. Second, the delegates to the constitutional convention tried to narrow the range of impeachable offense for public officeholders to "treason, bribery, and other high crimes or misdemeanors,"[2] while the English Parliament had always refused to constrain its jurisdiction over impeachments by restrictively defining impeachable offenses. Third, whereas the English House of Lords could convict upon a bare majority, the delegates to the constitutional convention agreed that in an impeachment trial held in the Senate "no Person shall be convicted [and removed from office] without the Concurrence of two thirds of the Members present."[3] Fourth, the House of Lords could order any punishment upon conviction, but the delegates limited the punishments in the federal impeachment process "to removal from Office, and disqualification to hold and enjoy any Office or honor, Trust or Profit under the United States . . ."[4] Fifth, the King could pardon any person after an impeachment conviction, but the delegates expressly prohibited the President from exercising such power in the Constitution.[5] Sixth, the founders provided that the President could be impeached,[6] whereas the King of England could not be impeached. Seventh, impeachment proceedings in England were considered to be criminal, while the Constitution separates criminal and impeachment proceedings.[7] Lastly, the British pro-

[1] U.S. Const., art. II, section 4.
[2] *Id.*
[3] *Id.,* art. I, section 3, clause 6.
[4] *Id.,* art. I, section 3, clause 7.
[5] *Id.,* art. II, section 2, clause 1.
[6] *Id.,* art. II, section 4.
[7] See generally Michael J. Gerhardt, *The Constitutional Limits to Impeachment and its Alternatives,* 68 Texas L. Rev. 1, 23 (1989).

vided for the removal of their judges by several means, whereas the Constitution provides impeachment as the sole political means of judicial removal.[8]

Of these distinctive features, the one of greatest contemporary concern is the founders' choice of the words—"treason, bribery, and other high crimes or misdemeanors"—for the purpose of narrowing the scope of the federal impeachment process. The founders did not discuss the meaning of "other high crimes or misdemeanors" extensively, certainly not in any way that definitively resolves the precise meanings of those terms. Nevertheless, the context and content of the founders' principal discussions about the phrase "other high crimes or misdemeanors" provide an important backdrop to contemporary efforts to understand the meaning of the phrase.

Throughout the early debates in the constitutional convention on the scope of impeachable offenses, every speaker agreed that certain high-ranking officials of the new national government should not have immunity from prosecution for common law crimes, such as treason and murder. Many delegates also envisioned a body of offenses for which these federal officials could be impeached. Early in the convention's proceedings, they referred to "mal-" and "corrupt administration," "neglect of duty," and "misconduct in office" as the only impeachable offenses and maintained that common law crimes such as treason and bribery were to be heard in the courts of law. Several delegates, notably William Paterson, Edmund Randolph, James Wilson, and George Mason, argued that the federal impeachment process should apply to misuse of official power in accordance with their respective state constitutions and experiences. As late as August 20, 1787, the Committee of Detail reported that federal officials "shall be liable to impeachment and removal from office for neglect of duty, malversation, or corruption."

Yet, in its report on September 4, the Committee of Eleven proposed that the grounds for conviction and removal of the President should be limited to "treason or bribery." On September 8, George Mason opened the convention's discussion on this latter proposal by questioning the wisdom of limiting impeachment to those two offenses. He argued that "[t]reason as defined in the Constitution [would] not reach many great and dangerous offences." He used as an example of such subversion the contemporaneous English impeachment of Governor Warren Hastings of the East India Company, whose trial was based in part not upon specific criminal acts but rather upon the dangers presented to the government by his wielding of virtually absolute power within the Indian colony. Mason was concerned that "[a]ttempts to subvert the Constitution may not be Treason as . . . defined," and that, since "bills of attainder . . . are forbidden, . . . it is the more necessary to extend the power of impeachments." Mason therefore moved to add the term "maladministration" to permit impeachment upon less conventionally defined common law offenses. Elbridge Gerry seconded the motion. James Madison, without taking issue with either the appropriateness of including such subversion or the need to expand the standard to include such potentially noncriminal wrongs, responded that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate." Recalling an earlier debate on June 20 in which he had asked for more "enumerated and defined" impeachable offenses, Governor Morris agreed with Madison. Mason thereupon withdrew his motion and substituted "bribery and other high crimes or misdemeanors against the States," which Mason apparently understood as including maladministration. Without further comment, the motion was approved by a vote of eight to three.

The convention, again without discussion, later agreed to replace the word "State" with the words "United States." The Committee of Style and Arrangement, which was responsible for reworking the resolutions without substantive change, eliminated the phrase "against the United States," presumably because it was thought to be redundant or superfluous. The convention accepted the shortened phrase without any further debate on its meaning.

Subsequently, the most substantial discussions of the scope of impeachable offenses, besides those in The Federalist Papers (discussed in the section below), occurred in the ratification conventions in North Carolina and Virginia. For instance, in the North Carolina ratifying convention, James Iredell, who would later serve as an Associate Justice on the Supreme Court, called attention to the complexity, if not impossibility, of defining the scope of impeachable offenses any more precisely than to acknowledge that they would involve serious injustices to the federal government. He understood impeachment as having been "calculated to bring [great offenders] to punishment for crime which it is not easy to describe, but which every one must be convinced is a high crime and misdemeanor against government. [T]he occasion

[8] See generally Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 82–102 (1996).

for its exercise will arise from acts of great injury to the community." As examples of impeachable offenses, he suggested that the "president must certainly be punishable for giving false information to the Senate" and that "the president would be liable to impeachments [if] he had received a bribe or had acted from some corrupt motive or other." He warned, though, that the purpose of impeachment was not to punish a president for "want of judgment" but rather to hold him responsible for being a "villain" and "willfully abusing his trust." Governor Johnston, who would later become North Carolina's first U.S. senator, agreed that "impeachment . . . is a mode of trial pointed out for great misdemeanors against the public."

In the Virginia convention, several speakers argued that impeachable offenses were not limited to indictable crimes. For instance, James Madison argued that, if the president were to summon only a small number of states in order to try to secure ratification of a treaty that hurt the interests of the other unrepresented states, "he would be impeached and convicted, as a majority of the states would be affected by his misdemeanor." Madison suggested further that, "if the president be connected, in any suspicious manner with any person, and there be grounds to believe that he will shelter him," the president may be impeached. George Nicholas agreed that a president could be impeached for a nonindictable offense. John Randolph explained that "[i]n England, those subjects which produce impeachments are not opinions . . . It would be impossible to discover whether the error of the opinion resulted from a willful mistake of the heart, or an involuntary fault of the head." He stressed that only the former constituted an impeachable offense. Edmund Randolph agreed that no one should be impeached for "an opinion."

In the decade following ratification, the federal impeachment process remained a subject of some debate and concern. For instance, in the First Congress, then-Representative James Madison tried to calm the fears of some of his colleagues about possible presidential abuse of authority to remove executive officials by suggesting that the President "will be impeachable by the House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from [office]." Although one could construe Madison's comment as meretricious because it supported a position he had taken in a partisan debate rather than as a framer (and because it arguably conflicted with his objection in the constitutional convention to making "maladministration" a basis for impeachment), Madison's comment is consistent with the stance he took in the Virginia ratifying convention to support presidential impeachment for nonindictable abuses of power.

Immediately following his appointment to the Supreme Court in 1790, James Wilson gave a series of lectures as a professor of law at the College of Philadelphia to clarify the foundations of the American Constitution. In these talks, given in 1790–91 but published posthumously, Justice Wilson described the essential character of impeachments as "proceedings of a political nature . . . confined to political characters, to political crimes and misdemeanors, and to political punishments." He emphasized that the founders believed that "[i]mpeachments, and offenses impeachable, [did not] come . . . within the scope of ordinary jurisprudence. They are founded on different principles; are governed by different maxims; and are directed to different objects: for this reason, the trial and punishment of an offence on an impeachment, is no bar to a trial and punishment of the same offence at common law."

II.

The relatively few comments made about the meaning of "other high crimes and misdemeanors" by the founders in the constitutional and state ratifying conventions do not definitively clarify the scope of impeachable offenses. The reason that this is so is not just because the founders failed to discuss the topic extensively or to anticipate all of the likely issues or cases that would arise in this area. The reason is that in choosing to make "other high crimes or misdemeanors" the basis for impeachable offenses, the founders deliberately chose terms of art that referred to a general category of offenses, the specific contents of which have to be worked out over time on a case-by-case basis.

The great majority of commentators who have closely examined the likely meaning of the constitutional phrase "other high crimes or misdemeanors," including, among others, Justice James Wilson,[9] Justice Joseph Story,[10] Chief Justice Charles

[9] James Wilson, *Lectures on the Law, No. 11, Comparison of the Constitution of the United States with that of Great Britain,* 1 The Works of James Wilson 408.

[10] 2 Joseph Story, *Commentaries on the Constitution of the United States,* section 799, at 269–70 (rev. ed. 1991).

Evans Hughes,[11] Justice Arthur Goldberg,[12] Charles Black,[13] Raoul Berger,[14] George Curtis,[15] Arthur Bestor,[16] Paul Fenton,[17] Peter Hoffer and N.E.H. Hull,[18] John Feerick,[19] and John Labovitz (a former staff member of the House Judiciary Committee investigating President Nixon)[20] have reached the same conclusion—that the phrase "other high crimes and misdemeanors" consists of technical terms of art referring to "political crimes." They also have agreed that "political crimes" had a special meaning in the eighteenth century; "political crimes" were not necessarily indictable crimes. Instead, "political crimes" consisted of the kinds of abuses of power or injuries to the republic that could only be committed by public officials by virtue of the public offices they held. Although the concept of "political crimes" uses the term "crimes," it did not necessarily include all indictable offenses. Nor were all "political crimes" (or impeachable offenses) indictable crimes.

To appreciate what would constitute "political crimes," one needs to go back to the British impeachment practices from which the founders drew the language "other high crimes and misdemeanors" and thus the concept of "political crimes." In the English experience prior to the drafting and ratification of the Constitution, impeachment was primarily a political proceeding, and impeachable offenses were regarded as "political crimes." For instance, Raoul Berger observed in his influential study of the impeachment process that the English practice treated "[h]igh crimes and misdemeanors [as] a category of *political* crimes against the state."[21] Berger supported this observation with quotations from relevant periods in which the speakers use terms equivalent to "political" and "against the state" to identify the distinguishing characteristics of an impeachable event.[22] In England, the critical element of injury in an impeachable offense had been injury to the state.[23] The eminent legal historian, Blackstone, traced this peculiarity to the ancient law of treason, which distinguished "high" treason, which was disloyalty against some superior, from "petit" treason, which was disloyalty to an equal or an inferior.[24] The late Professor Arthur Bestor explained further that "[t]his element of injury to the commonwealth—that is, to the state and to its constitution—was historically the criterion for distinguishing a 'high' crime or misdemeanor from an ordinary one."[25] In summary, the English experience reveals that there was a "difference of degree, not a difference of kind, separat[ing] 'high' treason from other 'high' crimes and misdemeanors [and that] [t]he common element in [English impeachment proceedings] was [the] injury done to the state and its constitution, whereas among the particular offenses producing such injury some might rank as treasons, some as felonies and some as misdemeanors, among which might be included various offenses that in other contexts would fall short of actual criminality."[26]

In addition, those delegates in the constitutional and state ratifying conventions who supported the federal Constitution seemed to have a shared understanding of

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[11] Charles E. Hughes, The Supreme Court of the United States 19 (1928).

[12] Arthur J. Goldberg, *The Question of Impeachment,* 1 Hastings Const. L.Q. 5, 6 (1974).

[13] Charles L. Black, Impeachment: A Handbook 35, 39–40 (1974).

[14] Raoul Berger, Impeachment: The Constitutional Problems 58 (1974).

[15] George T. Curtis, Constitutional History of the United States 260–61 (rev. ed. 1974).

[16] See Arthur Bestor, *Impeachment* (reviewing Raoul Berger, Impeachment: The Constitutional Problems (1974)), 49 Wash. L. Rev. 255, 264–66 (1973).

[17] Paul S. Fenton, *The Scope of the Impeachment Power,* 65 Nw. U. L. Rev. 719, 726 (1971).

[18] Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805 101 (1984).

[19] John Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions,* 39 Fordham L. Rev. 1, 47–58 (1970).

[20] John Labovitz, Presidential Impeachment 26–89, 108–31 (1978).

[21] *Id.* at 61 (emphasis in original).

[22] *Id.* at 59–61.

[23] A. Bestor, *supra* note 16, at 264.

[24] See *id.* at 264 (quoting 4 W. Blackstone, Commentaries on The Laws of England 75 (1765–69). Blackstone commented that

> Treason . . . in its very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith . . . [T]reason is . . . a general appellation, made use of by the law, to denote . . . that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, . . . and the inferior . . . so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord. . . . [T]herefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance, of private and domestic faith, are denominated *petit* treasons. But when disloyalty so rears it's [sic] crest, as to attack even majesty itself, it is called by way of eminent distinction *high* treason, *alta proditio;* being equivalent to the *crimen laesae majestatis* of the Romans.

Id.

[25] Bestor, *supra* note 16, at 263–64 (citation omitted).

[26] Id. at 265.

impeachment as a political proceeding and impeachable offenses as essentially "political crimes."[27] The delegates at the constitutional convention were intimately familiar with impeachment in colonial America, which, like impeachment in England, had basically been a political proceeding. Although the debates in the convention primarily focused on the offenses for which the President could be impeached and removed, there was general agreement that the President could be impeached only for so-called "great" offenses.[28] Moreover, the majority of examples given throughout the convention debates about the scope of impeachable offenses, such as Madison's preference for the phrase "other high crimes and misdemeanors" because it encompassed attempts to subvert the Constitution, confirm that impeachable offenses primarily consisted of abuses of power that injured the state (and thus were not necessarily limited to indictable offenses). Neither the debates nor the relevant constitutional language eventually adopted, however, identifies the *specific* offenses that constitute impeachable abuses against the state.

The ratification campaign further supports the conclusion that "other high Crimes and Misdemeanors" were not limited to indictable offenses, but rather included great offenses against the federal government. For example, delegates to state ratification conventions often referred to impeachable offenses as "great" offenses (as opposed to common law crimes), and they frequently spoke of how impeachment should lie if the official "'deviates from his duty'"[29] or if he "'dare to abuse the powers vested in him by the people.'"[30]

In Federalist No. 65, Alexander Hamilton echoed such sentiments, observing that "[t]he subject [of the Senate's] jurisdiction [in an impeachment trial] are those offenses 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."[31] Believing it unwise to submit the impeachment decision to the Supreme Court because of "the nature of the proceeding,"[32] Hamilton argued the impeachment court could not be "tied down" by strict rules, "either in the delineation of the offense by the prosecutors [the House of Representatives] or in the construction of it by the judges [the Senate]."[33] In short, Hamilton too believed that impeachable offenses comprised a unique set of transgressions that defied neat delineation.

Both Justices James Wilson and Joseph Story expressed agreement with Hamilton's understanding of impeachable offenses as political crimes. In his lectures on the new Constitution given immediately after his appointment to the Supreme Court, Justice Wilson referred to impeachments as involving, *inter alia,* "political crimes and misdemeanors."[34] Justice Wilson understood the term "high" describing "Crimes and Misdemeanors" to mean "political," while the latter term referred to bad conduct against the state. Similarly, Justice Joseph Story recognized the unique political nature of impeachable offenses: "The jurisdiction is to be exercised over offences, which are committed by public men in violation of their public trust and duties. Those . . . duties are, in many cases, political. . . . Strictly speaking, then, the power partakes of a political character, as it respects injuries to the society in its political character."[35] Justice Story also viewed the penalties of removal and disqualification as "limiting the punishment to such modes of redress, as are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries."[36] Justice Story understood "political injuries" to be "[s]uch kind of misdeeds . . . as peculiarly injure the commonwealth by the abuse of high offices of trust."[37]

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[27] *See id.* at 266.

[28] *See R. Berger, supra* note 14, at 88 (observing that "James Iredell, later a Supreme Court Justice, told the North Carolina convention [during the ratification campaign] that the 'occasion for its exercise [impeachment] will arise from acts of great injury to the community'") (citation omitted).

[29] 4 The Debates in the Several States on the Adoption of the Federal Constitution 47 (J. Elliott ed. 1836) (A. MacLaine of South Carolina).

[30] 2 The Debates in the Several States on the Adoption of the Federal Constitution 47 (J. Elliott ed. 1836)(S. Stillman of Massachusetts).

[31] The Federalist No. 65 (A. Hamilton), The Federalist Papers, at 396 (C. Rossiter ed. 1961).

[32] *Id.* at 398.

[33] *Id.*

[34] 1 James Wilson, Works, at 426 (G. McClaskey ed. 1967).

[35] J. Story, Commentaries on the Constitution of the United States section 385, at 272–73 (R. Rotunda & J. Nowak eds. 1987).

[36] *Id.* at 290.

[37] Bestor, *supra* note 16, at 263 (quoting 2 J. Story, Commentaries on the Constitution § 788, at 256 (Boston 1833)).

In much the same manner as Hamilton, Justice Story understood that the framers proceeded as if there would be a federal common law on crimes from which future Congresses could draw the specific or particular offenses for which certain federal officials may be impeached and removed from office. Justice Story explained that "no previous statute is necessary to authorize an impeachment for any official misconduct."[38] Nor, in Justice Story's view, could such a statute ever be drafted because "political offenses are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."[39] The implicit understanding shared by both Hamilton and Justice Story was that subsequent generations would not have a federal common law of crimes to guide them in determining impeachable offenses but rather would have to define on a case-by-case basis the political crimes serving as contemporary impeachable offenses.

The remaining problem is how to identify the nonindictable offenses for which certain high-level government officials may be impeached. This task is critical for providing notice to impeachable officials as to the conditions of, and for narrowing in some meaningful fashion, the grounds for their removal. The likeliest places to look for guidance are to the framers' debates or authoritative commentary on the meaning of the relevant constitutional language (as reflected above) and historical practices. The latter do provide some insight into the answer to this challenge. First, it is noteworthy that of the sixteen men impeached by the House of Representatives, only four were impeached primarily or solely on grounds strictly constituting a criminal offense: Secretary of War William Belknap (charged with accepting bribes); Harry Claiborne (charged with wilfully making false tax statements)) Alcee Hastings (charged with conspiring to solicit a bribe and perjury), and Walter Nixon (charged with perjury). One of these four—Alcee Hastings—had been formally acquitted of bribery prior to his impeachment. The House's articles of impeachment against the other twelve include misuses of power that were not indictable federal offenses at least at the time they were approved.[40]

Of the seven men who have been convicted and removed from office by the Senate, four were convicted and removed from office on the basis of nonindictable offenses. These four officials included Judge Pickering (convicted and removed for public drunkenness and blasphemy),[41] Judge West H. Humphreys (convicted and removed by the Senate for having publicly advocated that Tennessee secede from the Union, organized armed rebellion against the United States, accepted a judicial commission from the Confederate Government, holding court pursuant to that commission, and failing to fulfill his duties as a U.S. District Judge),[42] Judge Robert Archbald (convicted, removed, and disqualified by the Senate for obtaining contracts for himself from persons appearing before his court and others and for adjudicating cases in which he had a financial interest or received payment—offenses for which, as the

[38] J. Story, *supra* note 35, section 405, at 288.

[39] *Id.* at 287 (citations omitted).

[40] These twelve include Senator William Blount (impeached in 1797 for encaging in a conspiracy to compromise the neutrality of the United States in disregard of the constitutional provisions for the conduct of foreign affairs and attempt to oust the President's lawful appointee as principal agent for Indian affairs, thereby intruding upon the President's supervision of the executive branch); Judge John Pickering (impeached in 1803 for making errors in conducting a trial in violation of his trust and duty and "being a man of loose morals and intemperate habits" who appeared on the bench drunk and used profane language); Associate Justice Samuel Chase (impeached in 1804 for allowing his partisan views to influence his conduct of two trials and for delivering "an intemperate and inflammatory political harangue" to a grand jury and thus conducting himself "in a manner highly arbitrary, oppressive, and unjust"); Judge James Peck (impeached in 1826 for vindictive use of power in charging with contempt, imprisoning, and disbarring a lawyer who had publicly criticized one of his decisions); Judge West W. Humphreys (impeached in 1862 for neglect of duty because he had joined the Confederacy without resigning his position as a federal judge); President Andrew Johnson (impeached in 1868 for violating the Tenure in Office Act by removing a member of his cabinet, interfering with execution of that act, and making inflammatory speeches that subjected the Congress to ridicule); Judge Mark Delahay (impeached in 1876 for intoxication both on and off the federal bench); Judge George W. English (impeached in 1926 for using his office for personal monetary gain as well as for threatening to jail a local newspaper editor for printing a critical editorial and summoning local officials into court under pretext to harangue them); Judge Charles Swayne (impeached in 1903 for maliciously and unlawfully imprisoning two lawyers and a litigant for contempt and for using his office for personal monetary gain); Judge Robert Archbald (impeached in 1912 for direct and indirect personal monetary gain); Judge Harold Louderback (impeached in 1932 for direct and indirect personal monetary gain); and Judge Halsted Ritter (impeached in 1936 for direct and indirect personal monetary gain and for engaging in behavior that brought the judiciary into disrepute).

[41] 2 Annals of Congress 319–22 (1804) [1804–1805].

[42] Cong. Globe, 37th Cong., 2d Sess. 2949–50 (1862).

Chairman of the House Impeachment Committee at the time conceded, no criminal charges could be brought),[43] and Judge Halsted Ritter (who was convicted and removed from office on the sole basis that he had brought "his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the federal judiciary[]").[44] Of the remaining three officials who were convicted and removed from office by the Senate, all three were convicted and removed from office on the basis of indictable crimes. These three officials included Harry Claiborne (income tax invasion), Alcee Hastings (bribery and perjury), and Walter Nixon (making false statements to a grand jury). Prior to their impeachments and removals from office, two of these judges—Claiborne and Nixon—had been indicted, convicted in federal court, and exhausted their criminal appeals.

Given that certain federal officials may be impeached and removed from office for committing serious abuses against the state and that these abuses have not always been nor necessarily should be confined to indictable offenses, the persistent challenge has been to find contemporary analogues to the abuses against the state that authorities such as Hamilton and Justices Wilson and Story viewed as suitable grounds for impeachment. On the one hand, these abuses may be reflected in certain statutory crimes. (The Constitution itself defines treason as "consist[ing] only in levying War against the [United States], or in adhering to their Enemies, giving them Aid and Comfort."[45]) At least one federal criminal statute—the bribery statute[46]—codifies an impeachable offense because bribery is expressly designated as such in the Constitution. Violations of other federal criminal statutes may also reflect abuses against the state sufficient to subject the perpetrator to impeachment, insofar as the offenses involved demonstrate willful misconduct and serious lack of judgment and respect for the law in the course of performing one's duties. In other words, it is conceivable there are certain statutory crimes that, if committed by public officials, reflect such lapses of judgment, abuses of the privileges of their offices, breaches of the public trust, disregard for the welfare of the state, and disrespect for the law and the office held that the occupant may be impeached and removed from office for lacking the minimal level of integrity and judgment sufficient to discharge the responsibilities of the office.

On the other hand, not all statutory crimes demonstrate complete unfitness for office. For example, a President's technical violation of a law making jay-walking or speeding a crime "obviously would not be an adequate basis for presidential impeachment and removal."[47] Moreover, it is equally obvious that some non-criminal activities may constitute impeachable offenses. As Professor Laurence Tribe observed, "[a] deliberate presidential decision to emasculate our national defenses or to conduct a private war in circumvention of the Constitution would probably violate no criminal code,"[48] but would probably constitute a nonindictable, impeachable offense. The full range of such political crimes defies further specification, because it rests on the circumstances under which the offenses have occurred (including the actor, the forum, the scope of the officer's official duties, and the nature and significance of the offensive act), and on the collective political judgment of Congress.[49]

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[43] 48 Cong. Rec. 8910 (1912).
[44] 80 Cong. Rec. 5606 (1936).
[45] U.S. Const., art. III, section 3, clause 1.
[46] 18 U.S.C. § 201 (1982).
[47] Laurence Tribe, American Constitutional Law 294 (ed. ed. 1988).
[48] *Id.*
[49] Constitutional safeguards apply to the impeachment process and should circumscribe congressional efforts to define political crimes. The Constitution includes several guarantees to ensure that Congress will deliberate carefully prior to making any judgments in an impeachment proceeding: (1) when the Senate sits as a court of impeachment, "they shall be on Oath or Affirmation," U.S. Const. art. 1, § 3, cl. 6; (2) at least two-thirds of the Senators present must favor conviction in order for the impeachment to be successful, *see id.;* and (3) in the special case of presidential removal, the Chief Justice must preside so that the Vice–President, who otherwise normally presides, is spared from having to oversee the impeachment trial of the one person who stands between him and the presidency. *See id.*

Two other safeguards are political in nature. First, members of Congress seeking reelection have a political incentive to avoid any abuse of the impeachment power. The knowledge that they may have to account to their constituency may lead them to deliberate cautiously on impeachment questions. Second, the cumbersome nature of the impeachment process makes it difficult for a faction guided by base political motives to impeach and remove someone from office. Thus, these structural and political safeguards help to ensure that, as a practical matter, serious abuse of power and serious injury to the Republic are the prerequisites for Congress' finding impeachable offenses.

III.

The founders considered that political crimes would be clarified over time on a case-by-case basis. Consequently, congressional practices are important, because they help to illuminate Congress' deliberate judgments over the past couple of centuries on what constitutes an impeachable offense. Given the likelihood that Congress' judgments on impeachment are largely if not wholly immune to judicial review, these judgments take on even more importance than typical legislative actions because the former are, for all practical purposes, the final word on the scope of the federal impeachment power.

When one surveys the sixteen formal impeachments brought by the House and the seven convictions and six acquittals rendered by the Senate, three noteworthy patterns emerge. The first is one to which I have already alluded—that the House has impeached and the Senate has removed people for offenses that have (at least technically) not constituted indictable crimes. There is, however, also a related tendency for the Senate to convict on the basis of indictable crimes or at least to find conviction easier to effect if an indictable offense were involved. Moreover, in the 1980s, the Senate convicted Judges Claiborne, Hastings, and Nixon on the basis of indictable offenses. The convictions of Claiborne and Nixon demonstrate that the Congress is especially likely to impeach and remove officials who have been previously convicted of felonies in court. Indeed, the criminal convictions of Claiborne and Nixon (and the Judicial Council's finding that Hastings had engaged in criminal misconduct) clearly put pressure on Congress to bring impeachment actions against these officials. That such convictions can bring such pressure is a matter of concern to many members of Congress and scholars, because it indicates that under certain circumstances criminal prosecutors can drive the impeachment process. Since the framers envisioned that criminal and impeachment proceedings are separate and that the discretions for initiating each belong to authorities in different branches, it is important for members of Congress to ensure that criminal prosecutors do not rob or unduly influence the former's constitutional discretion to initiate or conduct impeachment actions on the grounds that they think are appropriate.

The second major trend is the widespread recognition that there is a paradigmatic case for impeachment consisting of the abuse of power. In the paradigmatic case, there must be a nexus between the misconduct of an impeachable official and the latter's official duties. It is this paradigm that Hamilton captured so dramatically in his suggestion that impeachable offenses derive from "the abuse or violation of some public trust" and are "of a nature which may be peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[50] This paradigm is also implicit in the founders' many references to abuses of power as constituting political crimes or impeachable offenses. The paradigm here has become the three articles of impeachment approved by the House Judiciary Committee against Richard Nixon—charging obstruction of justice, abuse of powers, and unlawful refusal to supply material subpoenaed by the House of Representatives. These charges derived from Nixon's misuse of the powers and privileges of his office to facilitate his reelection and to hurt his political enemies as well as to frustrate or undermine inappropriately legitimate attempts to investigate the extent of his misconduct. Keeping Nixon in office would have demeaned the office irreparably.

Some of the House's decisions not to initiate impeachments or to approve impeachment articles as well as by the Senate not to convict are consistent with this paradigm. For example, the Senate failed to convict Associate Justice Samuel Chase in part because some members believed that the conduct on which the House's charges had been based did not rise to the level of impeachable offenses or could fairly be characterized as being the kinds of indiscretions or mistaken judgments that fall within the legitimate scope of a judge's authority. Similarly, the House voted 127–83 not to impeach President Tyler for abusing his powers based on his refusals to share with the House inside details on whom he was considering to nominate to various confirmable positions and his vetoing of a wide range of Whig-sponsored legislation. Tyler's attempts to protect and assert what he regarded as the prerogatives of his office were a function of his constitutional and policy judgments; they might have been wrong-headed or even poorly conceived (at least in the view of many Whigs in Congress), but they were not malicious efforts to abuse or expand his powers, as was true in Richard Nixon's case, for purely personal gain or aggrandizement. The Senate also refused to convict Andrew Johnson by the slimmest of margins, because a small but pivotal number of senators believed, among other things, that the charges brought by the House against him did not rise to the level of impeachable offenses and because Johnson's real crimes were mistaken or erro-

[50] The Federalist No. 65 (A. Hamilton), *supra* note 31, at 365.

neous judgment rather than malicious abuse of power. The outcomes of the efforts to try to oust Presidents Tyler and Johnson confirm the suggestion made by Professors Peter Hoffer and N.E.H. Hall in their excellent study of the history of impeachment in the United States, that "impeachable offenses are not simply political acts obnoxious to the government's ruling faction."[51] In this century, the House rejected then-Representative Gerald Ford's resolution to initiate an impeachment action against Justice William O. Douglas, at least in part because a majority of members were not persuaded that either Douglas' lifestyle or the substance or content of his decisionmaking was a relevant subject for an impeachment inquiry. Moreover, the House Judiciary Committee refused to bring an article of impeachment against President Nixon based on fraud in preparing his taxes, at least in part because it was not the kind of misconduct that could only have been committed by a president because of the special office or trust he held.

It is also fair to say that the vast majority of the impeachments that have been brought by the House and the convictions that have been rendered by the Senate follow the paradigmatic case. Most if not all of the officials impeached by the House[52] and the seven officials convicted and removed by the Senate were found to have misused their offices or their prerogatives or breached the special trusts that they held by virtue of holding their federal offices.[53] For example, in 1986, the House impeached and the Senate convicted and removed federal district judge Harry Claiborne from office based on income tax evasion. At first glance, it seems as if Claiborne's misconduct has no formal relationship to his official duties. Nevertheless, it is conceivable that Congress' judgment in impeaching and removing Claiborne was that integrity is an indispensable criterion for someone to continue to function as a federal judge. Moreover, commission of tax evasion robs a federal judge of the moral authority required to oversee trials of others for the very same offense. In other words, a federal judge must have integrity beyond reproach in order to perform the functions of his or her office. While integrity is obviously important for a president (or, for that matter, any public official), it is not necessarily a sine qua non, especially given all the checks that exist for scrutinizing political officials' actions.

A similar argument could be used to explain the House's impeachment and the Senate's conviction of Walter Nixon in 1989. Nixon was impeached and removed for making false statements to a grand jury. In a criminal trial, he had been convicted of making false statements to a grand jury about the efforts he had undertaken to influence a criminal prosecution of the son of a business partner. Clearly, the misconduct alleged did not strictly relate to Nixon's formal actions as a federal judge (i.e., he was not necessarily functioning as a federal judge when talking with the prosecutor about dropping the case). Nevertheless, whatever influence he had available to exercise on behalf of his business partner's son existed by virtue of the federal judgeship he held. Moreover, making false statements to a grand jury impugns a judge's integrity at least as much if not more than tax evasion (which involves the making of false statements under oath in a different setting). Again, Congress could have reasonably concluded that questionable integrity robs a federal judge of

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[51] P. Hoffer & N.E.H. Hull, supra note 18, at 101.

[52] These officials include the following: Senator William Blount (for engaging in conduct that not only undermined presidential authority and undermining the national government's relations with various Indian tributes but also acting in a manner "contrary to the duty of his trust, in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof"); Judge John Pickering (for making errors in conducting a trial in violation of his duty and trust and engaging in behavior on the bench unbecoming of a federal judge); Associate Justice Samuel Chase (for conducting himself on the bench "in a manner highly arbitrary, oppressive, and unjust"); Judge West Humphreys (for neglect of duty); President Andrew Johnson (for violating the Tenure in Office Act and exercising his authority to interfere with the proper execution of the law); Judge Mark Delahay (for intoxication both on and off the bench); Secretary of War Belknap (for receiving an illegal payment in exchange for making a military appointment); Judge George English (for using his office for personal monetary gain); Judge James Peck (for vindictive use of power); Judge Charles Swayne (for exercising his power maliciously and using his office for personal monetary gain); Secretary of War William Belknap (for receiving illegal payments in exchange for making an appointment); Judge Robert Archbald (for using his office for improper financial gain); Judge Harold Louderback (for using his office for improper financial gain); Judge Halsted Ritter (for engaging in behavior that brought disrepute to the judiciary); Harry Claiborne (for income tax evasion); Alcee Hastings (for bribery); and Walter Nixon (for making false statements to a grand jury). All seven convictions and removals made by the Senate have involved abuses of power and serious breaches of the public trust: Judge John Pickering (for drunkenness and senility); Judge Humphreys (for neglect of duty); Judge Archbald (for bribery); Judge Ritter (for engaging in misbehavior that brought the judiciary into disrepute); Judge Claiborne (tax evasion); Judge Hastings (conspiracy to solicit a bribe); and Judge Nixon (for making false statements to a grand jury).

[53] See *supra* notes 41–44 and accompanying text.

the most important commodity he must have in order to perform his constitutional function.

It is, however, conceivable that the Congress' impeachment decisions regarding Claiborne, if not those involving Nixon, might be better explained or understood as reflecting not an extension of the paradigm but rather the possible existence of a second category of impeachment cases in which the nexus between an official's misconduct and his or her official duties is not so clear. This second category consists of those cases in which the misconduct in which an impeachable official has engaged is so outrageous that it is plainly incompatible with their status or renders them so ineffective that Congress has no choice but to impeach and remove those officials from office. Congress could have decided that the misconduct for which it was impeaching Claiborne as well as Nixon was sufficiently outrageous or destructive of their capacities to function effectively as federal judges as to justify their removals from office. There is little doubt that Congress' perception that each judge had engaged in such outrageous misconduct had been reinforced by the facts that prior to both judges' impeachments they had been criminally prosecuted and convicted and imprisoned.

The possible existence of this second category of impeachable offenses helps to explain one of the most vexing hypotheticals repeatedly raised involving the impeachment process—whether a President may be impeached and removed from office for murder. The nexus between the President's misconduct—murder—and his official duties (taking care to enforce the laws faithfully) is not readily apparent, for it is not clear that the President's oath obligates the President in his private capacity to comply with every single law, even those that he does not have the formal authority to enforce. Nevertheless, impeachment, in all likelihood, is appropriate. The best explanation why this is so was made by Professor Charles Black in his magnificent study of the impeachment process: "Many common crimes—willful murder, for example—though not subversive of government or political order, might be so serious as to make a president simply unviable as a national leader. I cannot think that a president who had committed murder could not be removed by impeachment. But the underlying reason remains much the same; such crimes would so stain a president as to make his continuance in office dangerous to public order." [54]

CONCLUSION

My sense of the history of the federal impeachment process, as reflected in the debates in the constitutional and state ratifying conventions and Congress' subsequent exercises of its impeachment authority, is that "other high crimes or misdemeanors" are technical terms of art that refer to so-called political crimes. Political crimes are abuses of power or the kinds of misconduct that can only be committed by some public officials by virtue of the public offices or special trust that they hold. These political crimes are not necessarily indictable offenses. Not all political crimes are indictable offenses, and not all indictable offenses are political crimes.

Whether or not some misconduct by a public official is a political crime or rises to the level of an impeachable offense turns on a number of different factors. These factors are apparent from studying Congress' impeachment decisions and practices;

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[54] C. Black, *supra* note 13, at 39. It is noteworthy that Justice Story was uncertain about whether murder was an impeachable offense. He was not sure about the validity of William Rawle's assertion that the "legitimate causes of impeachment . . . have reference only to public character, and official duty. . . . In general, those offences, which may be committed equally by a private citizen, as a public officer, are not the subjects of impeachment. Murder, burglary, robbery, and indeed all offences not immediately connected with office [except treason and bribery] are left to the ordinary course of judicial proceeding." J. Story, *supra* note 35, section 799, at 269–70 (quoting William Rawle, A View of the Constitution of the United States of America 215 (2d. ed. 1829)). In other words, at least for Rawle, the impeachment process could only properly focus on those acts committed or performed by a president strictly in "his public character." 2 Jonathan Elliott, The Debate in the Several State Conventions on the Adoption of the Federal Constitution 480 (rev. ed. 1987) (quoting from remarks of James Wilson in Pennsylvania ratifying convention). That the distinction recognized by Justice Story between the public acts that provide appropriate bases for impeachment and the private conduct that does not is accepted by most impeachment scholars. The critical question has to do with what is the appropriate dividing line between the two. Congress tends to answer this question on a case-by-case basis. Even so, this distinction does help to explain further why the House Judiciary Committee decided not to charge Richard Nixon with income tax fraud, why the House decided not to approve an impeachment inquiry of Justice William O. Douglas based on his lifestyle or multiple marriages, and why Alexander Hamilton was never subjected to impeachment for having engaged (by his own admission) in an adulterous affair with a married woman (whose husband then blackmailed Hamilton to keep the liaison secret.). The fact that Harry Claiborne and Walter Nixon each were charged with impeachment for seemingly private actions turns on appreciating that integrity is indispensable for the performance of a judge's constitutional responsibilities.

these factors include but are not limited to the seriousness of the misconduct, its timing, the link between the misconduct and the official's official responsibilities or special trust held by virtue of the positions held by the officials, alternative means of redress, and the degree of injury caused to the republic by the misconduct in question.

Studying Congress' impeachment decisions also reveals some noteworthy patterns. Most if not all impeachments made by the House and convictions made by the Senate have followed or approximated the paradigm of an impeachment—the abuse of official power or privilege. The one or at most two impeachments that do not fit neatly into this first category—those of Harry Claiborne and Walter Nixon—might be explained either on the grounds of the special obligations of federal judges by virtue of their unique status and function or as signaling the possible existence of a second category of offenses consisting of the kinds of misconduct that are so outrageous that the officials who have committed them have been rendered completely ineffective and Congress has no choice but to impeach and remove those officials.

Mr. CANADY. Thank you, Professor Gerhardt.

Professor Holden.

STATEMENT OF MATTHEW HOLDEN, JR., DEPARTMENT OF GOVERNMENT AND FOREIGN AFFAIRS, UNIVERSITY OF VIRGINIA

Mr. HOLDEN. Thank you.

Mr. CANADY. Professor, you need to pull the microphone closer.

Mr. HOLDEN. Let me say, Mr. Chairman, I may be able to return some time to you indeed. As the full statement indicates, I appear here as a political scientist, not a lawyer. I am a layperson who has paid attention to these matters for some while, and in a certain sense I want to contribute to rescuing some of this from what can be an excessively refined discussion.

The long and short of it is, as I look at this matter, I have a conclusion which the committee may or may not welcome, but my formal statement says that the process has gone sufficiently far and indeed should be terminated. The reason I take that approach is that the essential question, as stated by Professor McDowell, although I think he and I might disagree with some of the implications, essentially the overriding question is where does this process fit into the continuing health of the political system? That is the key question. That is the overriding question.

For some time I have been saying that the question you have to ask is what is the purpose of the impeachment technique in the Constitution? And the purpose is, to broadly state it, and one speaks of such things as public trust, fundamentally the purpose of the technique has to be understood as following the logic of the Constitution as designed. That logic is a separation of powers logic, which means that having created an independent President, freestanding within our electorate and with wide powers. The one thing that is requisite is to have some means in the most extreme cases of protecting the rest of the polity against presidential encroachment. That is the central element.

If you think of this as in the position of "Lead, Kindly Light" when Cardinal Milan was at sea and needed the light, that focus is that which maintains the effective separation of powers, and ultimately, although I know the lawyers will disagree with me, ultimately that means that which maintains the authority of the Congress. Therefore, all actions must be regarding whether they encroach on the ultimate capacity of the Congress to act. When the political relationships, i.e. when there are enough votes to override,

will the ultimate capacity of the Congress be disarranged by whatever the President is said to have done? If the ultimate capacity is not disarranged, then you have to look to other means, whatever your dissatisfaction.

Let me go on to say that "high Crimes and Misdemeanors" should be understood in that light. We should not miss the powerful word "other" in Article II, section 4. "Other," as Justice Curtis who represented Johnson said, "other" of a status equal to treason or bribery, not "other" simply because we can find it. Furthermore, we should look to the question, I think we have been a little too broadly, high Crimes and Misdemeanors, there is experience.

If you walk through a document that Congress itself paid for called Elliot's Debates, and you read page after page, there is very little of the high-flown theorizing. There are practical discussions of what it involves, and that mainly involves severe presidential encroachment in the foreign policy area, bribery and other matters. And if you look there, you also find very practical illustrations of what people mean by high Crimes and Misdemeanors.

There is a reference that you may or may not have noticed to Hastings. Warren Hastings in the case of India had engaged in actions which, if done today, would get him on the State Department's list for human rights violations. If he would have done them today, they would be described as egregious torture and so on. Whether Hastings did those things, we do not know. That is what he was accused of in a trial that ran for seven years, a trial prosecuted by Edmund Burke, and Hastings ultimately was acquitted.

Another example, in the Virginia convention they debated what the President could do about calling sessions of treaties so rigged as to exclude people who opposed the treaties. And Madison jumped up and said, "oh, that wouldn't happen, and if it did, he would be impeached for his misdemeanor."

Just a few years before the convention met there was another case of a similar sort that I refer you to, involving the arrest of a governor out in India by his subordinates who put him in jail and he died in jail. Ultimately they were tried for a misdemeanor. They were fined.

If you look at real history in that light, you say that the things being called misdemeanors are of a gross scale, in no way comparable in no way to any of the things now being discussed. Let me go on to say if you look at that, there are some other issues that are worth noting, but I would make the further point that there is something that the Congress somehow should take account of, and that is that the change in technology and the change in public relations so changes the world that the hope of the Senate as an impartial tribunal is seriously jeopardized.

That is, people have been citing Federalist No. 65 to introduce Alexander Hamilton, but Federalist No. 65 is mostly about the function of the Senate. The rest of that language is useful language and is about Hayes trying to justify the Senate as a trial vehicle, and the question is how can the Senate function as an effective court? It is a very serious question here as to whether it can possibly do so, although I recognize it is a body you do not control.

Let me come, then, to the final point. The most important thing for the chairman to take account of is the political effect. I have

in another setting referred to impeachment as a caged lion, and I have said you should not let the lion out of the cage. I mean by that much the same thing that James J. Kilpatrick, with whom I am not normally expected to agree, said in a recent article in the Buckley magazine that he was not referring to impeachment, he was referring to a court's decision to allow the Paula Jones case to proceed while the President was in office. And he said with his directness that the court is wrong. He said it will open up trumped-up lawsuits against future Presidents.

If twice in this century, twice in 25 years we open up the impeachment process, we domesticate this weapon. We do not lead to successful impeachments, we lead to successful impeachment wars. All civil officers, Vice Presidents are susceptible, Cabinet officers are susceptible, and people who are deeply motivated—I am out of time, and I will stop. If you have a question, I will come back to it.

[The prepared statement of Mr. Holden follows:]

PREPARED STATEMENT OF MATTHEW HOLDEN, JR.,[1] DEPARTMENT OF GOVERNMENT AND FOREIGN AFFAIRS, UNIVERSITY OF VIRGINIA

Mr. Chairman, Members of the Committee: I am deeply appreciative of the invitation to put before you today my views in this critical hearing on "The Background and History of Impeachment." My statement today is elaborated and expanded from a version that served as the basis for my statement in the Congressional 'Town Hall' Briefing, on October 1, 1998. At that time, I had a skeptical view, but had reached no definitive conclusion as to the process. After much reflection in the next three weeks, I reach the conclusion stated in this paper. I should also make very clear that the views here are mine alone, and do not represent the views of any institution or organization with which I have any connection or responsibility. The impeachment of judges involves questions of a qualitatively different character. I do come somewhat in the spirit of John Milton, upon whose magisterial language I draw:

> They who to states and governors of the Commonwealth direct their speech, high court of parliament, or wanting such access in a private condition, write that which they foresee may advance the public good, I suppose at the beginning of no mean endeavor, not a little altered or moved inwardly in their minds; some with doubt of what will be the success, others with fear of what will be the censure, some with hope, others with confidence of what they have to speak.[2]

Let me start with what is common ground that we all know. Impeachment is the making of an accusation against a public official.[3] An impeachment is similar to any other accusation in one respect. It embarrasses the accused official. But it does not take away any authority. It may have little, if any, consequence until the accused has been found guilty in a trial. We are here discussing *Presidential* impeachment. With respect, from a deep concern for the political system, the process should now be terminated.

The issues have thus far been framed principally in legal terms. I do not claim legal competence, and leave those critical issues to others. I approach the impeachment issue as a political scientist. As one who has thought about governmental matters for some years, though admittedly without the benefit of a legal education, I express the view that Congress is *fundamentally* doing the wrong thing. Its focus is upon "what should be done about Bill Clinton?" based upon the predicate that at all cost, something must be done. Congress may have the ingenuity to craft some means, within its unchallenged powers under Article I, other than impeachment, of

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[2] From "Areopagitica," in Stephen Orgel and Jonathan Goldberg (Eds.), *John Milton,* New York: Oxford University Press, 1991, 237.

[3] Steven E. Gifis, *Law Dictionary,* Hauppage, NY: Barrons Educational Series, 1996, 236; and, *Black's Law Dictionary,* Sixth Edition, St. Paul: West Publishing Co., 1990, 753.

responding to the situation. But any further proceeding under the impeachment mode degrades the Constitution by seeking to squeeze from it authority that cannot be located there. Moreover, it sets the path for many years of intense political struggle in which all sorts of groups and interests seek to exploit this newly revived weapon.

The reported business transactions known as "Whitewater," as well as the reported inquiry into certain records of some Republican leaders, known as "Filegate," might in principle involve substantial issues about which citizens should rightly be concerned.[4] Various speculations have appeared for a long time as to the nature and direction of the Independent Counsel's inquiry. At one time, the speculation was that the First Lady had become the target of the investigation.[5]

When the public media reported that the office of Independent Counsel had begun to make inquiries into the President's social relationships with various women, I privately characterized it as 'peephole politics.' It seemed to me to indicate that there was little definitive to report as the important matters with which the investigation had begun. Within the past eleven months or so the original matters have been no part of any report of the Independent Counsel that is publicly known. As it happens, the secondary matters—various personal relationships between the President, Ms. Monica Lewinsky (and, assertedly, possibly others) have come to the forefront.

It is important, first of all, to state that the reported "outrage" and "disgust" with the things the President is reported to have done may be less than meets the eye. There is one cluster of critics whose attitudes are about the sexual relationships. The basic core, however is composed of those who so intensely dislike Bill Clinton, that there is nothing he could do that would satisfy them, except remove himself from American politics. In one case, there was the business executive whose house guest I was, described Clinton, on the basis of his pre-1992 history, in terms that even now I would not put into a document.

The question is whether a critic of that degree would ever fail to find any basis for impeachment. Then there are the critics whose formulations do come after Ms. Lewinsky appeared in the public consciousness. For some critics, adultery is the besetting ill, in that sex outside marriage is inherently bad.

Another set of critics seem similar to a business executive who thought it deceptive to discuss what was impeachable and what was not. The objection was President Clinton's having sex with a female young enough to be his daughter. He "turned her head" and "took advantage." Presumably, he did not have such strong objections or reactions to the fact of an extra-marital relationship in itself.

Still another set of critics is troubled by what they see as an essential mechanical relationship, and by sex that approaches the R-rated, if not X-rated, "kinky" type.

For some others, it may be less what happened than in its revelation, which "embarrassed us (Americans in general) in front of the world." Still others are troubled by the presumptive callousness that yielded such embarrassment to his wife and daughter, for whom the critics feel a certain sympathy. All this is about the sexual relationship itself. Some critics shift to the ethical or legal level in talking about the President's responses in attempting to cover up the relationship. Thus, the action that they find objectionable is "trying to get others to lie about it." This enters into the terrain that some find the most decisive, namely "lying to the grand jury."

For many people, thus, the experience since 1993 proves what they already knew. The person involved is no good, and should not be in office. Finally, at the political level, amongst those who identify with him politically, the injury consists in "causing us who supported him, admired him, or found our futures tied to him to be injured." Some of the same people overlap with others who assert the President's actions undermined good policy, by contributing to a situation in which sexual harassment would now be given less weight. Finally, there are those who worry about his own emotional state or interior world—"compulsive" is hard to overcome, no matter how good the persons's intentions or strong the sense of regret or sorrow for what has been done. All these attitudes, and perhaps others, appear somewhere in the decision-making process.

The question that many want to focus upon is "what should be done about Bill Clinton?" There are now those who urge impeachment of the President under present conditions. There are, of course, at least a few persons who have been urg-

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[4] (The matter designated "Travelgate" never seemed to be of any consequence, although I might stand to be corrected.)

[5] Rush Limbaugh, who has a certain standing amongst those who strongly disapprove of President Clinton, appeared to criticize the President for statements that Limbaugh said indicated the President had no confidence that his wife could withstand the charges that Limbaugh expected would be forthcoming.

ing impeachment since 1994,[6] or at various points since then. The President's most intense critics say that the answer is "impeach him, try him, convict him, remove him from office, and then indict him, try him, convict him, and sentence him" on criminal charges.

But the key that most people appear to accept that the criterion is in that in the Constitution. Presidents may be impeached, according to the formal language for "treason, bribery, or other high crimes and misdemeanors." No responsible person claims that treason or bribery are at stake in 1998, so the present issue will be governed by the ability to decide what the President did falls within or without the residual category of "high crimes or misdemeanors."

Even in asking if "these acts"—reported acts by the President—"are impeachable," which is the highest-ranking question so far, Congress has given inadequate attention to the fundamental question of the health of the political system. Some of those now urging impeachment, say that impeachable offenses are whatever the House wants to say they are. That may be true in the sense that, if a solid and undeterred majority shall want to do so, no one can prevent their doing so. *The question is whether the House should now exercise so awesome a power and resurrect this impeachment as a weapon. My answer now is that it should not. Any decision to impeach and remove a President should take into account the health of the political system, and should be reached only on the gravest conditions.*

Virtually everyone who has put views on the public record agrees that the actions by the President are not to be condoned, whether those actions be his relationship with Ms. Lewinsky or his lies in the legal process that followed. But Members of Congress, whose obligation is to uphold the Constitution, should approach the Presidential impeachment question with full seriousness about that Constitution itself. Chief Justice William H. Rehnquist has referred to the impeachment power as a "wild card" in the Constitution. If it had been used more, it would have reduced both the independence of the President from legislative control and the independence of the judiciary.[7]

The Constitution was not made by obvious agreement amongst people who had a consensus, nor by people who somehow got the right principles out of the middle of the air. Rather, it arose out of a set of political leaders who very much wanted to create a new arrangement, against another set of leaders who did not want this new arrangement, even when they did not know exactly what else they wanted. The viability of the constitutional system should not itself be taken for granted. In dealing with these 1998 manifestations, members of Congress today must recognize the complexity of the system within which they are placed, and of the delicacy of not disarranging the essential features.

Congress has both authority and responsibility to make prudent judgments as to what is consistent with the requirements of the political system. Indeed, the House, in particular, has both authority, and responsibility in the interest of protecting the constitutional system, precisely to exercise prosecutorial discretion. It is common, in the exercise of prosecutorial discretion, to make a judgment whether something should go forward, *even if there is a legal basis on which an argument for going forward can be made.*

I. THE HEALTH OF THE POLITICAL SYSTEM IS THE KEY ISSUE

The impeachment effort is leading us into actions that greatly imperil the political system. Now as some, including some members of Congress, will denounce "politics," I have to say a few words about the political system. "System" is not a bad word.[8] Everyone who has ever had a physical injury knows all the adjustments you have to make because one thing, that you never thought about before (such as your back) is not working properly. The body is a system. Some years ago I served on a corporate board with a banker, a remarkable man now deceased, who would say "you press down on something here, something else pops out over there." He was talking about the system in which decisions were made.

Now let us combine the word "politics" with the word "system."

"Politics" is not a bad word, nor necessarily a word about something bad. Walton Hamilton, a brilliant man, a lawyer who never went to law school, I am told, though he taught at one, defined politics in "the Aristotelian sense." He spoke of "the us-

[6] I have not taken the opportunity to go back and find the citation, but I take note of the magazine writer who, in 1994, expressed his forecast (and his hope from the view he held) that "he'll be gone by the end of the year." The "he" referred to was the President.

[7] William H. Rehnquist, "The Impeachment Clause: A Wild Card in the Constitution," 85 *Northwestern University Law Review* 4 (1991), 903–918.

[8] Robert Jervis, *System Effects: Complexity in Political and Social Life,* Princeton: Princeton University Press, 1997, 5–6 and, especially, 6, n. 10.

ages and traditions, the arrangements and practices, which human beings are governed, and by which human beings attempt to shape destiny." (Hamilton's actual text refers to "men," and I have substituted "human beings." Whenever I teach about half to three quarters of the undergraduates are women, and I have learned that contemporary usage often requires one to stop and make the formal statement that the term "men" really refers to "human beings." So I do it here as well.)[9] Some mean, when they speak of "political," something akin to infantry squad tactics, in which one side will get the other side, with no restraint shown. I know about "the televised soapbox and the wrangle for votes." Politics is how people organize to conduct their common affairs, whether in public government or, for that matter, in corporations, trade unions, churches, and all other human institutions.[10]

Whenever a purpose is chosen, there is a logic of action that follows. You cannot sustain the purpose and take actions that undermine what the initial action was intended to protect, or that facilitate actions that the initial action was designed to prevent. *More than anything else, the impeachment technique is designed to protect the separation of powers system and to prevent its being negated.* The political logic would have to be that if a strong executive were to be created, independent of the legislative body, and if the legislative body could not dismiss the executive, then it would have to have some other means of influence or control in the extreme cases where the fundamental authority of the legislative body would otherwise be negated. The offenses attributed to the President, or the actions attributed to the President, have virtually no relation to the reasons for having impeachment in the Constitution.

II. WHENCE CAME IMPEACHMENT?

The American impeachment is a modified version of English impeachment. To understand the modified version we need some idea of the original, especially as "six hundred years of history" is a term being heard more often. There are some rough benchmarks in time past: about six hundred years ago when the English began to use impeachment; a little under five hundred years ago when they let it alone; about three hundred and seventy years ago when they started using it again with a vengeance; two hundred years ago when the American constitution framers made provision for it; and a little under two hundred years ago when the English let it fall away again.

The English experience is relevant for three reasons.

1. It is the basis for what the framers knew in 1787, and we can best explain the decisions embodied in the language of the Constitution by starting with what the framers knew and when they knew it.
2. Lawyers rely upon the history as establishing a concept of the law.
3. Human beings change, in basic motivations and reactions, very little, although action changes because of circumstances and conditions. The kind of conflict involved in impeachments in the past are likely to show themselves in impeachments of the present.

Twentieth century Americans, in order to grasp what the framers decided, need to take account of what the framers knew. The American Framers in 1787 did not have any good models at hand as to how to make a new governmental system.[11] They more or less designed a system combining the elective Presidency, the bicameral Congress, and the separation of powers ("the regular distribution of power into distinct departments" as Hamilton calls it) and checks and balances.[12] They did not have experience with the type of system they were creating, though some, nota-

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[9] Walton Hamilton, *The Politics of Industry,* New York: A. A. Knopf, 1957, 6.

[10] Since, in these debates about the impeachment issue and the future of President Clinton, there will be a great many references to the framers of the Constitution, Congress, writers and commentators, and citizens in general would be well advised to take in account the views about human nature that the framers gave voice to repeatedly.

[11] Calvin Jillson, *Constitution Making: Conflict and Consensus in the Federal Convention of 1787,* New York: Agathon Press, Inc., 1988.

[12] The separation of powers was specifically described by Alexander Hamilton as an American improvement in "the science of politics." In *Federalist* No. 9, Hamilton to "the petty republics of Greece and Italy" and the pessimistic conclusions to be inferred. "The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients." The principles that he mentions have the separation of powers at the head of the list that also includes checks and balance "the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election; these are wholly new discoveries, or have made their principal progress towards perfection in modern times." *Federalist* No. 9 (Modern Library edition), 48.

bly James Madison, had done a good deal of preparatory work. (Madison had, indeed, gone in for what would now be a massive research project of the type that a private foundation or some governmental study commission would undertake.[13]) A few were widely read, and some had a good deal of experience, though this can be overstated since they were so young a group.[14] In any event, every member had lived under English government, bought and sold goods under English practices, lived under English law, and had some knowledge of English history. They did generally turn to English experience for inspiration—the young (30 year old)—Alexander Hamilton being the notable exception, and sometimes turned away from it on purpose. But absent turning, it was what they adopted more or less without thinking because it was too hard to act *de novo* on everything, and what sometimes they chose on purpose.

They had the English practice of impeachment before them and on purpose chose to continue it with some modifications. When, in the 1998 debates in the United States, people refer to the relevance of "six hundred years of history," they refer to the fact that Parliament had, in the past, been a court before it became a law-making body. As the court function declined, some fragments remained in the ability of the House of Lords to try members of the nobility. Then, simply summarized, in the 1300s (the fourteenth century), the House of Commons began to exercise a prosecutorial function of making accusations, and the House of Lords to exercise the judicial function of trying the cases. The first reported cases came in the late 1300s when Edward III was king.[15] The practice continued off and on until middle of the 1400s (15th century).[16] Though it can be seen as procedure, impeachment was primarily a factional weapon, and hardly, if ever, was a neutral means merely to handling disputes between persons. The English, having put it away, did not pick it up for one hundred and sixty-two years, when the ancient weapon was adapted to a new use in 1621. When impeachment came into use again, it was a very large weapon of political combat in a time of even more dangerous competition than it had been in the earlier period.[17] Sir William Holdsworth comments: "Never were impeachments so numerous as in the latter half of the seventeenth century: never were the criminal acts with which ministers were charged supported by such slender evidence.[18]

Tthe number of impeachments declined in the 18th century, the time that the Constitution framers knew personally. Yet the technique of impeachment still was being followed. The American framers adapted this technique about four hundred years (1787) after the English developed the basic device (1376). When they picked impeachment, they had a background to know what they were doing. The relevant facts of English practice probably were well known to the Framers, since the technology of their time allowed them to get information from England for anything up to about a month before, which was about the same as to get a letter from Georgia to Boston. As an example, George Mason made specific reference to "Hastings," while discussing impeachment in the Federal Convention of 1787. This was on September 8, 1787.[19] So Mason and others could have had a pretty good idea of everything up to June or July of 1787. In explaining why treason might exclude some actions that he wanted within the scope of impeachment, Mason said: "Hastings is not guilty of treason."[20]

What the framers did not seem to recognize, incidentally, was that impeachment was already falling away. They could not know that the trial of Warren Hastings, itself starting while ratification was starting, would be one of the last two English

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[13] William Lee Miller, *The Business of May Next,* Charlottesville: University Press of Virginia, 1994.

[14] Stanley Elkins and Eric McKitrick, "The Founding Fathers: Young Men of the Revolution," *Political Science Quarterly* LXXVI, No. 2 (196?), at 203–206.

[15] "MCP," (Michael C. Prestwick), John A. Cannon (Ed.), *The Oxford Companion to British History,* New York: Oxford University Press, 1997, 333 conveniently details the first impeachments in 1376.

[16] Frederick W. Maitland, *The Constitutional History of England,* Cambridge: University Press, 1920, 215 offers a thumb-nail sketch.

[17] Roger Lockyer, *Buckingham: The Life and Political Career of George Villiers, First Duke of Buckingham, 1592–1628,* New York: Longman, 1981, 90–93.

[18] Sir William Holdsworth, *A History of English Law,* Boston: Little. Brown and Company, 1924, 260.

[19] Elliot's *Debates,* Vol. V. 528.

[20] Elliot's *Debates,* Vol. V (September 8, 1787), 528.

cases,[21] or that a trial of Henry Dundas (who had become Lord Melville) would occur within twenty years and would be the last English impeachment trial.

IV. WHAT IS IMPEACHMENT OF THE PRESIDENT DESIGNED TO PREVENT OR TO PROTECT?

A. Protecting the Structure of Governments Means Primarily Guaranteeing the Authority of Congress

Insofar as controls upon the President is concerned, the chief purpose is to protect the fundamental power of Congress as a co-equal branch. The best interpretation is that the Presidential impeachment provision is designed to protect the constitutional system. The prime function is to counteract and correct any attempt by the President to abuse his powers so as to negate the authority of Congress. Congress has authority to pass laws, to conduct investigations, to have access to administrative agencies in its oversight functions, and so on.[22] If these functions can be performed, within the normal political controversies, and with due regard to the veto power, then both the President and Congress are operating in normal terrain. When the ability of Congress to function within its authority, and with the assumption that the Bill of Rights protections, including those that sustain the election process without which Congress could not function, is normal, all the rest is mere transitory political controversy.

Failure or refusal of a President to see to the execution of duly constituted statutes, in ways that Congress utilizing its legislative and appropriations powers, in all their manifold variations, could not address, if the votes to address them were within the two houses, should be seen in these terms.

That, in my view, is the framework within which the specification of something as being, in the 1998 circumstances, within which "other high crimes and misdemeanors" may rationally be interpreted. If the House wants to see if something is a "high crime" or a "high misdemeanor," then its best mode is start with the premise that virtually everything in the constitutional system depends on the interaction of President and Congress. These are the two branches of Government that exist on their own foundations, reinforced with the right to make appeals to the electorate.

As important as the United States Supreme Court is, not to mention the rest of the Article III courts, neither the Supreme Court nor the Article III courts have the same degree of completeness in their constitutionally guaranteed autonomy. Pragmatically, the Supreme Court needs Congress to take appropriate actions to allow it to exist and function, whereas Congress does not need the Supreme Court in the same manner. Other issues are presented in the history of the Judiciary Acts of 1801 and 1802. The Act of 1802 repealed the Act of 1801. In the Act of 1802, so doing, for explicitly partisan reasons, the Congressional supporters of President Jefferson terminated the functions of Article III judges who had been appointed and confirmed under the Act of 1801, by abolishing the very circuit courts to which they had been appointed.[23] The Supreme Court found a rationale on which to accede to this result.[24] Very few scholars in political science, history, or law pay much attention to the 1802 repeal act.

The framers of the American Constitution specifically excluded direct legislative control of the executive.[25] They did so only after some struggle, but their ultimate decision is not in doubt. They purposely divided the powers of government, so that all power would not fall into the same hands. That is why we have Article I vesting powers in Congress and Article II vesting "the executive power" in the President. The fact that the President receives the grant of "the executive power" under Article

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[21] Sir Thomas Erskine May, *The Constitutional History of England Since the Accession of George III, 1760–1860, With a New Supplementary Chapter, 1861–1871,* New York: A. C. Armstrong and Son, 1886, I, 435.

[22] In my opinion, what distinguishes the Congress of the United States from the legislatures of the world is it has far greater control over the initiation of legislation, and that it has continuous engagement in the administrative process.

[23] Bernard Schwartz, *A History of the Supreme Court,* New York: Oxford University Press, 1993, 30–31; Richard E. Ellis, *The Jeffersonian Crisis,* New York: Oxford University Press, 1971; and Charles Warren, *The Supreme Court in United States History,* Boston: Little, Brown and Company, 1926, I, 204–215.

[24] *Stuart* v. *Laird,* 1 Cranch 298 (1803). In this discussion I have been greatly helped by the Charles Warren book, cited in the preceding note, as well as the Bernard Schwartz and Richard Ellis items. I must also pay tribute to a superb undergraduate paper by Robert J. Tatum, "An Undeclared War: The Jeffersonians and the Judiciary," Submitted in Government and Foreign Affairs 424 Seminar on "Power and the Constitutional System, University of Virginia, February 1988.

[25] Jillson, op. cit., 104–120. It is also taken for granted, explicitly, in the article by Chief Justice Rehnquist.

II, that the President is independently elected, and that he has a fixed term, and that he has the veto power all work to the same end. There is no doubt about the constitutional fact that the Congress does not control the President, and, if we needed to invoke the "intention" of the framers, that Congress was never intended to have the open-ended removal power that would come by inserting into "other high crimes and misdemeanors" anything that it might wish.[26] The intention of the framers cannot be in doubt. Many Americans have since wished that the framers had done something different, so that we would have something more like the British system. (Often this wish is based upon the belief that Question Time produces better control over administration and policy implementation, but I do not believe the evidence supports this belief.)[27] Proposals to create such a system have been advanced from time to time, but none have been taken seriously at a political level. But the overriding fact is that the framers did not do something different.[28]

However, in providing a President standing independently on an electoral base and a fixed term, they had to have something that could be used to sustain the Congress as well. Otherwise, people feared the President would overrun Congress. In *ultimate* defense, they put in the impeachment procedure, giving Congress the power to remove a President from office.

When the framers came to deal with impeachment, which they obviously found it hard to craft, though they did not discuss it as deeply as they discussed some others, there were really three questions: whether to have impeachment or plenary legislative removal power; what actions would constitute impeachable offenses; and by whom the trial function should be exercised.

B. Choice I: Impeachment Instead of Plenary (Unlimited) Legislative Removal Power?

The impeachment idea was enough in ordinary political language that it could be found in the first draft put before the Convention of 1787, namely that by Mr. Charles Pinckney, a very young man from South Carolina. (He should not be confused with his cousin, General Charles Cotesworth Pinckney, who had little to say on this subject at Philadelphia,[29] but a good deal to say on others—namely the protection of South Carolina's interest in African slavery.) The younger Pinckney's draft, included the following provision regarding the President of the United States: "He shall be removed from his office on impeachment by the House of Delegates, and conviction, in the Supreme Court, of treason, bribery, or corruption."[30] The draft is relevant only to show an idea that was in common circulation, but for no other purpose, for Pinckney's draft was pushed aside because the debates soon focused on the Virginia Plan or the New Jersey Plan.

The alternative idea was that the legislature should choose and remove the President. Within the first week or so after the Convention got started, this idea was present. On 1 June 1787, Bedford (Delaware) raised objections to a seven year Presidential term of office by noting that if the President was incompetent or lost his faculties: "An impeachment," he said, "would be no cure for this evil, as an impeachment would reach malfeasance only, not incapacity."[31] The next day (2 June 1787) his colleague John Dickinson pushed the idea so much farther that no other state except his own adopted Delaware would support it. It was to have the President "removable by the national legislature upon request by a majority of the legislatures of the individual states." Only Delaware voted for this motion,[32] to make the President something analogous to what the Secretary General of the United Nations now is. Dickinson, in defense of his amendment, stated:

> [I]t was necessary to place the power of removing somewhere. He did not like the plan of impeaching the great officers of the state. He did not know

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[26] I should point out that, in saying this, I have sometimes thought the Federal judiciary in recent years looked too much for opportunities to vindicate Presidential power. Matthew Holden, Jr., *Continuity & Disruption: Essays in Public Administration, Pittsburgh:* University of Pittsburgh Press, 1996, Chapter 3 on "The Dogma and Theory of Executive Leadership: Brownlow, the Judges, and Operating Administration."

[27] There is no full public review on the point, though I have covered it in some detail in *The Mechanisms of Power,* a manuscript now in preparation.

[28] One political scientist, whose name I will forbear to mention here, said that he suspected a good share of the newspapers calling for "resignation" do not grasp the fundamental structural issue and wish we had something like a parliamentary system with votes of confidence.

[29] General Pinckney did discuss impeachment in the South Carolina ratifying convention on January 17, 1788. Below, , p. .

[30] Elliot's *Debates,* Vol. 1 p. 148.

[31] Elliot's *Debates,* Vol. 5 p. 143

[32] Elliot's *Debates,* Vol 1 p. 157

how provision could be made for the removal of them in a better mode than that which he had proposed.[33]

Roger Sherman (Connecticut) also argued for national legislative power to remove the executive at pleasure. George Mason, who ultimately produced the "high crimes and misdemeanors" language, said "some mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as by the corruptibility of the man chosen." Where Mason intended this to go is not so clear. In fact, it did not go anywhere. James Madison and James Wilson (Pennsylvania) observed, that it "would enable a minority of the people to prevent the removal of an officer who had rendered himself justly criminal in the eyes of a majority. . . ."[34] (We should keep in mind that Virginia then had twenty per cent of the population of the United States. We should also note that neither Wilson nor Madison ever seems to have used language such as "criminal" again, and it is by no means clear what they did mean. In any event, it is not what the Convention adopted, and casts an odd light on what the Convention might have meant ultimately.)

The matter was brought fairly sharply into focus by Paterson (New Jersey) whose proposals included that the executive could be "removable on impeachment and conviction for malpractices or neglect of duty, by Congress, on application by a majority of the executives of several states." But this should be considered in the light of the ongoing struggle over what kind of a government (how centralized and how broad a scope of authority) they would create.

All these resolutions were then proposed to be considered in a committee of the whole house.[35] At this stage, James Wilson contrasted the principal points of the two plans so far, pointed out that: "the executive to be removable on impeachment and conviction, in one plan; in the other, to be removable at the instance of a majority of the executives of the states."[36] When Hamilton submitted his conceptual "Plan of Government," (June 18, 1787), it included a far-reaching impeachment proviso, designated provision #9: "The governors, senators, and all officers of the United States to be liable to impeachment for mal and corrupt conduct; and, upon conviction, to be removed from office, and disqualified for holding any place of trust or profit."[37]

The Virginia proposals (which Edmund Randolph submitted [19 June 1787]) said the executive would "be removable on impeachment and conviction of malpractice, or neglect of duty."[38] By this time (middle of June), however, the impeachment concept probably had settled in the minds of the delegates. Later, one or two delegates, notably the younger Pinckney and Gouverneur Morris, would say that they did not like the impeachment idea, but they never seemed to get much support The matter does not seem to appear in the records for the next month, but "malpractice or neglect of duty" is back on 20 July 1787.

Madison detailed some of the debate over the above amendment. As such: Charles Pinckney and Governeur Morris moved to strike out impeachment, Pinckney observing that he (the President) shouldn't be impeached while in office. Though discussion was not clear, it is possible that this would have allowed impeachment after office holding had ended.

Davie (North Carolina) argued that if the president were not impeachable while in office, he would spare no effort or means to get himself re-elected. Thus, Davie therefore considered impeachment "as an essential security for the good behavior of the executive."

Benjamin Franklin, who did not speak much, being old and in poor health, did speak on this one. Essentially, he argued that the provision would work to the advantage, not to the disadvantage, of the executive.

History affords only one example of a first Magistrate being brought formally to public Justice. Everybody cried out against this as unconstitutional. What was the practice before in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in [which] he was deprived not only of his life but of the opportunity of vindicating his character.

Thus, Franklin was effectively making a safety valve argument to the Convention. "It would be best therefore to provide in the Constitution for the regular punishment of the Executive where his misconduct should deserve it, and for his honorable

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[33] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison,* (With an Introduction by Adrienne Koch), New York: W. W. Norton & Company, 1987, .

[34] Elliot's *Debates,* Vol. 5 p. 147–148.

[35] Elliot's *Debates,* Vol. 1 p. 176

[36] Elliot's *Debates,* Vol. 5 p. 195.

[37] Elliot's *Debates,* Vol. 1 p. 180

[38] Elliot's *Debates,* Vol. 1 p. 181.

acquittal when he should be unjustly accused."[39] Governeur Morris, like Franklin a Pennsylvanian, yielded a little. He said that "corruption, and some few other offences, . . . ought to be impeachable; but (he) thought the cases ought to be enumerated and defined." James Madison said he thought it indispensable that some provision should be made for defending the community against the "incapacity, negligence, or perfidy of the chief magistrate. . . . In the case of the executive magistracy . . . loss of capacity, or corruption, was more within the compass of probable events, and either of them might be fatal to the republic." We might suspect that Madison was keeping a line open to his fellow Virginian, Randolph. (Randolph was apparently getting uncertain, by then, and ultimately declined to endorse the Philadelphia report, and only came to support it in the Virginia convention, about a year later. Perhaps Madison, committed to the new government, even if it contained things he did not like, was trying to reassure Randolph).

This argument continued with some (Charles Pinckney) continuing to say that they saw no necessity for impeachment, while others continued to urge its necessity. Elbridge Gerry of Massachusetts:

> A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped the maxim would never be adopted where, that the chief magistrate could do no wrong.[40]

Six days later (July 26, 1787) the whole resolution on the executive passed, including the phrase: "to be removable on impeachment and conviction of malpractice or neglect of duty."[41] This was the state of the decision as it was referred to the Committee of Detail, consisting of Messrs. Rutledge (South Carolina), Randolph (Virginia), Gorham (New Hampshire), Ellsworth (Connecticut), and Wilson (Pennsylvania).[42] This was a very important committee. When its report came back the impeachment provision was included (this was on August 6).[43] Impeachment did not get any further floor action for another month. However, it must have been obvious that some type of impeachment provision was by now ordained.

C. Choice II: Impeachment for What, Or How The Convention Got to "Other High Crimes and Misdemeanors"

Though some still criticized the very idea of impeachment, most accepted this word. They still had to refine the word. What would be the grounds of impeachment? Congress in 1998 should take careful thought about how the Constitutional Convention got to "other high crimes and misdemeanors." Treason and bribery had always been in the ordinary language of the delegates. Obviously, they took for granted that such things might occur.

James Madison said that the limitation of the period of the executive terms of service was not a sufficient security. He might lose his capacity after his appointment.[44] He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers.

In the same debate, Benjamin Franklin, mentioned the case of the Prince of Orange, in a war when the French and Dutch fleets were to rendezvous. When the Dutch fleet did not appear, people suspected the stadtholder (the Dutch head of state) was at the bottom of the matter. Franklin indicated that the stadtholder could not be impeached, and there was no regular examination. The stadtholder remained in his office; strengthened his own party, while the antagonistic party also grew. The result, said Franklin, was "the most violent animosities and contentions."

"Malpractice" had been mentioned. "Corruption" had been mentioned. Some things had specifically been mentioned as "threats to the community". But the Committee of Detail had come back with the narrower language of "treason, bribery, and corruption." Now on another committee was chosen, August 31, ostensibly to deal with all matters that had been postponed or had not been acted upon.[45] (This committee had one member from each state.) This committee came back on September 4 with the language "treason or bribery," but it had no other grounds for its report. It even omitted "corruption."

It is apparent that the Convention had been able to accept impeachment, though there must have been those with residual doubts, and that everyone accepted that treason and bribery should be impeachable offenses. That had been true in late May

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[39] Madison's *Notes,* 332.
[40] Elliot's *Debates,* Vol. 5, p. 340–341
[41] Elliot's *Debates,* Vol. 1, p. 219
[42] .
[43] Elliot's *Debates,* Vol. 1, p. 228
[44] This question of incapacity came up several times, but it was not dealt with, in fact. Presumably, it is now within the 25th Amendment.
[45] Elliot's *Debates,* Vol. 1, p. 280.

and early June. Various other categories had been discussed between then and late August-early September. Yet when the committee of eleven report was taken up, treason and bribery were the only grounds mentioned. Had "corruption" been tried and found wanting by someone? Was it just a technical omission that could be taken care of as a "conforming change?"[46]

George Mason asked: "Why is the provision restrained to treason and bribery only?" He said that there many "great and dangerous offenses" that would not be reached by "treason." Here in the reference to "great and dangerous things" is where he mentioned the case of Hastings. This case, which meant something to Mason, ought to have a little explanation for contemporary Americans. The reason is that it sets one standard for something impeachable, outside treason and bribery. *But it is far more intense and is qualitatively different from any action that the President is alleged to have done, or admits having done, in the matters now under discussion.*

The Hastings trial reference merely shows that Mason, and presumably others, were so well informed about England that they did not even think it necessary to identify "Hastings." Nor did they have to say anything about what made "Hastings" controversial, or what it had to do with the decision they were making in Philadelphia. Hastings' case shows the kind of thing that the framers did take into account when they were discussing what should be impeachable. Warren Hastings was the former Governor General of Bengal, in India. He was under severe criticism in Britain, one of the principal critics being William Burke. Through William Burke, his brother, the vastly more famous Edmund Burke was also involved.[47] Edmund Burke had, in addition to and arguably above, the financial interests of his relatives, political and policy reasons for being interested in India. He had at least ten years of involvement with Indian issues, and had gone from critic to adversary at least as early as 1783.[48] Hastings had been under attack in the House of Commons, with Burke in the lead, a little over a year before the Constitutional Convention met,[49] and the House of Commons proceeding was going on when the impeachment issue was in the Constitutional Convention.

Basically, the charges against Hastings were that he did Britain injury by running roughshod over Indian rulers that stood in his way, by collaborating in allowing Indian rulers of whom he approved to abuse and even contribute to the death of at least one British representative who would not cooperate, by enriching himself and his friends, and by facilitating tax collection practices that (in contemporary language) we would describe as gross abuses of human rights. In one particularly gruesome passage, Burke told the House of Lords:

> It is a most disgraceful scene to human nature that I am going to display to you. My Lords, when the people were stripped of everything, of all that they publicly possessed, it was suspected, and in some cases suspected justly that the poor, unfortunate husbandmen had hid in the deserts, disseminated through that country, some shred of grain, for subsistence in unproductive months and seed for future grain. Their bodies were then applied to. The first mode of torture was this:—They began winding cords about their fingers until they had become incorporated together, and then they hammered wedges of wood and iron between those fingers, until they crushed and maimed those poor, honest laborious hands. which had never been lifted to their own mouths but with the scanty supply of the product of their own labour.[50]

If such a case were to be covered, something more would have been needed. When Mason referred to Hastings, though he did not discuss the proceeding in as much detail as I have here, because he did not need to, neither he nor his colleagues were talking about something that could have been called "peccadilloes." He merely said

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[46] Elliot's *Debates,* Vol. 1, p. 283

[47] Lucy S. Sutherland, *The East India Company in British Politics,* Oxford" The Clarendon Press, 1952, v–vi, 327–328, and 382–414. Burke's role is discussed in P.J. Marshall, *The Impeachment of Warren Hastings,* London: Oxford University Press, 1965; and, Conor Cruise O'Brien, *The Great Melody: A Thematic Biography of Edmund Burke,* Chicago: University of Chicago Press, 1992.

[48] Marshall, op. cit., 21.

[49] The proceeding is referred to in U.S. House of Representatives, Committee on the Judiciary, *Constitutional Grounds for Presidential Impeachment,* Report by the Staff of the Impeachment Inquiry, Washington: Government Printing Office, 1974, 7, n. 19. The details of the proceeding are discussed in Marshall, op. cit., 39–63.

[50] The charges are recited, Ibid., xiv–xv. "The Impeachment Proceedings: A Sample," in Geoffrey Carnall and Colin Nicholson (Eds.), *The Impeachment of Warren Hastings: A Bicentenary Commemoration,* Edinburgh: Edinburgh University Press, 1989, at 15–16, with other allegations at 16–18.

that treason did not cover the Hastings case and, by implication (since he did not mention it), neither did bribery.

He moved to add after "bribery" or "maladministration." He was, we should recall, speaking on the presentation of a committee report. No one from the committee spoke. But James Madison objected. "So vague a term will be equivalent to a tenure during pleasure of the Senate." Governeur Morris, who had earlier spoken against impeachment, said (somewhat confusingly), "It will not be put in force, and can do no harm." But, then he said, as if he knew what maladministration entailed, "An election every four years will prevent maladministration." No one came forward to support "maladministration." With no apparent support for "maladministration," Mason, who could be quite persistent, withdrew "maladministration." Charles L. Black, Jr. is emphatic in his interpretation that "'maladministration' was distinctly *rejected* as a ground for impeachment."[51] He substituted "other high crimes and misdemeanors against the state."

Thus, on September 8, it was moved and seconded to insert the words "or other high crimes and misdemeanors against the state," and after the word "bribery," which passed 7 votes to 4. Other modifications then occurred, incorporating word changes and application of the impeachment clause to "the Vice President and other civil officers of the United States."[52]

The impeachment power had been settled as to its existence, and as to its scope. When I read this in the debates, I could imagine the framers saying "we already agree on treason and bribery." But Mason wanted more than that. His suggestion of "maladministration" had been opposed by Madison and supported by no one. In such a decision-making situation, the thing to do is to invent wholly new language that seems neutral (normally not good drafting tactics) or to fall back on some other language that most people think they know how to decipher. For these men, "high Crimes and Misdemeanors" had some meaning *at the time,* but there is an additional word that seems crucial. That word is "other." If they were going to extend impeachment beyond treason or bribery, and avoid the Madison stumbling block of vagueness, it would have to be some other things ("high crimes and misdemeanors") *as bad as* treason and bribery. Thus, it seems that this late-added provision refers to such "*other* high Crimes and Misdemeanors," as would be comparable in their significance to "treason" and "bribery."

This point of view, I discover, is explicitly made in Justice Benjamin R. Curtis's argument in behalf of President Andrew Johnson. (Curtis was one the justices of the Supreme Court who dissented from Chief Justice Taney's majority opinion in the Dred Scott case. At that time, he argued that the Chief Justice was wrong on law and on history.) Having referred to and evaluated treason and bribery—"offenses which strike at the existence of that Government (about to be created under the Constitution)"—Curtis goes on to describe "'Other high crimes and misdemeanors,'" as: "High crimes and misdemeanors,—so high that they belong in this company with bribery and treason."[53] The language was accepted so quickly as to suggest that the Constitution framers—18th century men—had a good idea what these words meant in English law and practice.[54] The fact that four states (of the eleven states represented) voted against even this inclusion tells me that they wanted to limit it to impeachment to treason and bribery. From both perspectives, I would guess that they meant to impose a narrow limit upon the impeachment process.

We should note that the principal speakers in Virginia and North Carolina showed a genuine 18th century concern with the facts of bribery, and the potentiality that Presidents might be bribed by foreign powers. These were, as I have emphasized, people who took a very practical view of things. When the issue came to the Virginia Convention, Governor Randolph had overcome the scruples at the Philadelphia signing and became an advocate. On 14 June 1788, in Virginia undertook to correct the interpretation of fact of another delegate. He explained that:

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[51] *Impeachment: a Handbook,* New Haven: Yale University Press, 1974, 8–29. Black makes the same point in Bob Eckhardt and Charles L. Black, Jr., *The Tides of Power: Conversations on the American Constitution,* New Haven: Yale University Press, 1976, 74–78.

[52] Elliot's *Debates,* Vol. 1, p. 294

[53] Benjamin R. Curtis, "Argument in Defense of President Johnson," Delivered before the United States Senate. Sitting as a Court of Impeachment, April 9, 10, 1868, in Benjamin R. Curtis (Ed.), *Memoir of Benjamin Robbins Curtis, LL. D.,* Boston: Little, Brown and Company, 1879, II, 410.

[54] U.S. House of Representatives, Committee on the Judiciary, *Constitutional Grounds for Presidential Impeachment,* Report by the Staff of the Impeachment Inquiry, (Washington, D.C.: Committee Print, Government Printing Office, 1974).

> In England, those subjects which produce impeachments are not opinions. No man ever thought of impeaching a man for an opinion . . . What are the occasions of impeachments most commonly? Treaties.

Governor Randolph may have thought so at the time, but the reality is that things take on lives of their own, and some of the earliest judicial impeachments did have to do exactly with opinions.)[55]

On 15 June 1788, Governor Randolph told the Virginia Convention:

> There is another provision against the danger . . . of the President receiving emoluments from foreign powers. If discovered, he may be impeached. If he be not impeached, he may be displaced at the end of the four years.

In this way Randolph thought the President restrained from corruption.[56]

The thought that Presidents might be impeached for misusing their power in making foreign policy decisions was restated by the anti-Federalists and had to be rebutted by James Madison. Madison explained the impeachment process as a defense against such action.

> The treaty power brought [George] Mason, [William] Grayson, and Henry into full-scale action once more. The President might get a treaty ratified in special session by failing to summon senators from states which would be injured by it. Replied Madison: "Were the President to commit anything so atrocious . . . he would be impeached and convicted as a majority of the states would be affected by his misdemeanor."[57]

The House should not fail to take note that, in this hypothetical situation, which Madison characterizes as "atrocious," he also categorizes it as "misdemeanor." The idea of impeachment as protection against bribery, especially from a foreign power, came into debate on 28 July 1788 in the North Carolina convention. In a discussion of treaties and potential Presidential abuse. James Iredell, whom we note as an early Supreme Court justice, said "the only instances, in which the President would be liable to impeachment, would be where he had received a bribe, or had acted from some corrupt motive or other. "He went on to say that "If the President had received a bribe, without the privity or knowledge of the Senate, from a foreign power, and, under the influence of that bribe, had address enough with the Senate, by artifices and misrepresentations, to seduce their consent to a pernicious treaty,—if it appeared afterwards that this was the case, would not that Senate be as competent to try him as any other persons whatsoever?"

He goes on to argue that Presidential misrepresentation of information to the Senate in regards to treaty formation would be impeachable, but that innocent policy differences would not be.[58]

The idea of impeachment as applicable to particularly grave cases is also presented when a North Carolina delegate, MacClaine, finds it necessary to explain that the impeachment power does not apply to petty officers. Evidently, there had been some concern in the North Carolina Convention that the impeachment provision reached to "petty officers,"[59] by which some delegates meant the officers of state and local governments, including state legislators.[60] In trying to settle such apprehensions, the speaker says: "This clause empowers the House of Representatives . . . to bring great offenders to justice. *It will be a kind of state trial for high crimes and misdemeanors.*"[61]

Impeachment is not, within the political logic of the separation of powers system, designed, to cope with just *any* situation where a President might face "outrage," nor just any situation where a President might patently have been engaged in "wrongdoing."[62] It does not make sense to bring that behavior, however objectionable it may be, within the "other high Crimes and Misdemeanors" category, for it has no similarity to any of the illustrations that the framers used or are presumed to have known about because of their indirect reference. They are not similar to misrepresenting foreign policy information to the Senate (Randolph's example), nor to manipulating the Senate schedule in such a way as to have only favorable sen-

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[55] Elliot's *Debates,* Volume 3, p. 402–3.
[56] Elliot's *Debates,* Volume 4, p. 32–5.
[57] Irving Brant, *James Madison: Father of the Constitution,* Indianapolis: Bobbs-Merrill, 1950, 218.
[58] Elliot's *Debates,* Vol. 4, p. 281.
[59] Elliot's *Debates,* Vol. 4, 45.
[60] Elliot's *Debates,* Vol. 4, 32–37.
[61] Emphasis added. MH
[62]

ators present for a treaty vote (Henry's example to which Madison replied) nor to the gross violations of human rights that were alleged in the Hastings trial. These are the kinds of matters that, on the written record, about which the 1787 framers knew. We should also take into account that the constitutional design was constructed in 18th century language by men with 18th century experience and ideas.

The idea that morality was defined, for a convention with many Southern planters, by sexual relationships seems fragile. The idea that sexual morality would play a large role, in the ideas of Benjamin Franklin, who supported the impeachment concept seems strained. There has been some press reportage of legal filings by President Clinton's attorneys that make reference to Alexander Hamilton, and these have brought some responses various of the President's persistent critics.[63] Some of those critics have expressed their bad opinion both of the President and of the filing because, apparently, it is said to reach back to injure the reputations of historic figures in order to escape present responsibility.[64] The question that I touch is not whether President Clinton should be excused or not, because of Franklin, Hamilton or any of the historic figures. The question is rather, whether the standards of sexuality morality that the President apparently practiced, can be brought within the meaning of "other high Crimes and Misdemeanors" similar to treason and bribery.

On the other hand, it very hard to imagine that the delegates had anything in mind about any sexual references when they adopted "other high Crimes and Misdemeanors" on September 8, 1787. It is, of course, possible to say that "sexual morality" should now be incorporated, by contemporary interpretation, into that phrase. However, that requires one to take a very broad concept of "the living constitution" that seriously overrides the independence that the President is given of Congress. If it is possible to extend that far, then we will have overridden the original determination not even to accept "maladministration." To do that is also to extend so far as to convert the impeachment process into a referendum on the Presidency.[65]

D. Choice III: Who Is to Decide?, Or the Senate as the Court of Impeachment

The remaining fragment, of the impeachment issue was the trial forum? What kind of decision-maker should decide an impeachment case. This proved complex. Until late in the Constitutional Convention, the dominant tone had been that the trial after an impeachment would be before a court. From the little-noticed plan of Pinckney to all other proposals until early August, the Supreme Court or some other special court, had been set as the venue for trial.[66] Hamilton had proposed all impeachments to be tried by a court, to consist of the chief or senior judge of the superior court of law, in each state. . . ."[67]

In the committee of eleven report, impeachments were to be tried in the Senate. James Madison came right back to the same objection he had to "maladministration" as a ground for impeachment. He objected to a trial of the President by the Senate for any act which might be called a misdemeanor. The President under these circumstances was made improperly dependent.[68] Madison on this point is the explicit defender of Presidential independence from Congress.

Pinckney, whose unused plan had called for trial in the Supreme Court, disapproved of making the Senate the court of impeachment, as rendering the President too dependent on the legislature. However, his South Carolina colleagues did not agree. On the motion by Mr. Madison to strike out the words "by the Senate" after the word "conviction,": failed 2 states to 9.[69]

The revised Draft of the Constitution reads: "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."[70] On the 17th of September, the delegates adjourned, and proposed Constitution was sent on its route to Congress for transmission to the states.[71]

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[63] I do not need to enter this, but the most recent study of Alexander Hamilton, by a scholar with a distinguished record, makes the case that abstinence was not something Hamilton practiced intensively. Arnold A. Rogow, *Fatal Friendship: Alexander Hamilton and Aaron Burr,* New York: Basic Books, 1998, 150–156.

[64] Paul Greenberg.

[65] It is also not to provide the functional equivalent of a hostile takeover attack, similar to that in the corporate sector.

[66] Elliot's *Debates,* Vol. 5, 143.

[67] Elliot's *Debates,* Vol. 1, p. 180

[68] Emphasis added. MH.

[69] Vol. 5, p. 528–529

[70] Vol. 1, p. 303

[71] Elliot's *Debates,* Vol. 1

E. Insight from the States

The state ratifying conventions do not appear to have found impeachment a very problematical issue, or it may be that it was remote enough from other concerns that they did not get to it. In most states it appears not to have been discussed.

In the Carolinas impeachment was discussed in general terms as to protecting the system. James Iredell thus addressed the North Carolina convention:

> This clause, vesting the power of impeachment in the House of Representatives, is one of the greatest securities for a due execution of all public offices. Every government requires it. Every man ought to be amenable for his conduct, and there are no persons so proper to complain of the public officers as the representatives of the people at large. The representatives of the people know the feelings of the people at large, and will be ready enough to make complaints. If this power were not provided, the consequences might be fatal. It will be not only the means of punishing misconduct, but it will prevent misconduct. A man in public office who knows that there is no tribunal to punish him, may be ready to deviate from his duty; but if he knows there is a tribunal for that purpose, although he may be a man of no principle, the very terror of punishment will perhaps deter him.[72]

The language that had to be chosen in the North Carolina convention is a language to indicate particularly grave acts of systemic consequence.

In South Carolina Gen. Charles Pinckney observed (January 17, 1788) that:

> . . . [U]nder the new Constitution, the abuse of power was more effectually checked than under the old one. a proper body . . . are to impeach those who behave amiss, or betray their public trust; another body . . . are to try them. No man, however great, is exempt from impeachment and trial. If the representatives of the people think he ought to be impeached and tried, the President cannot pardon him; and this great man himself . . . as well as the Vice president, and all civil officers of the United States, are to be removed from office on conviction of treason, bribery, or other high crimes and misdemeanors.[73]

The state conventions paid hardly any attention to the question of who should be the trier. It arose once, in Pennsylvania, apparently because there was some concern over whether the Senate had been made too powerful. James Wilson tried to counter this fear, when he told the Pennsylvania Convention (December 4, 1787) that the Senate's impeachment power was checked in that the House must initiate such proceedings.[74] It arose, apparently from the opposite viewpoint, in New York. Chancellor Robert Livingston, on the day before New York concluded its ratification proceeding (25 June 1788) referred to the impeachment power saying that in the House of Representatives, probably would not abuse the power, but that was a check in that the Senate tried the cases.[75]

V. CAN THE SENATE REGAIN THE CONCEPT OF A COURT OF IMPEACHMENT, RATHER THAN AN ARENA OF PARTISAN GLADIATORS?

There is a second line of argument which I am frank to say, does not have the same degree of clarity, chiefly for the practical reason that no one has thought it worthwhile to invest thought and attention. Impeachment of a President has some risk because the country may have repudiated the clear concept of the Constitution, that the United States Senate is to function as a "court of impeachment," not merely as an arena of partisan gladiators. The Judiciary Committee, its staff and everyone else who is concerned with this impeachment issue should take this matter seriously. Though the prime issue, at this stage, deals with matters unique to the jurisdiction of the House, there is a matter critical to the Senate. The Senate appears to be renouncing the role discussed by Hamilton in *Federalist* Number 65. The question that Hamilton had to discuss was whether the Senate was a suitable place for impeachment trials. Hamilton adopted the predicate that the Senate, removed from electoral public opinion in the near term, would be unable to abuse its powers because initiation rested with the House. It be a more restrained body able to act as a "court of impeachment." No. 65 on this point is clear as to the standard, though equivocal as to the predicted behavior.

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[72] Elliot's *Debates,* Vol. 4, p. 44–5.
[73] Elliot's *Debates,* Vol. 4, p. 350
[74] This was in the context of a broader speech on the Senate. Elliot's *Debates,* Vol. 4, 466.
[75] Elliot's *Debates,* Volume 2, p. 323

> Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent. What other body would be likely to feel *confident enough in its own situation,* to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused, and *the representatives of the people, his accusers?*[76]

Because there are no binding precedents that lawyers know how to cite, it has become virtually a cliche that impeachments are wholly "political." By "political" in this context, people appear to mean that each senator is free to, and should be predicted to, to make judgments on the basis of his or her personal advantage, or his or her partisan/ideological attachment. Political journalists have repeated this idea for years, and I hear it repeated today by those who are anti-Clinton and those who are pro-Clinton. Moreover, the reality appears to be that the legal community now holds the same view. Thus far, I have heard little or no articulation from the leaders of the bar as to the desired standards of conduct for senators. Nor have I seen any examination from my own political science community as to whether unrestrained self-will is the only predictable path of behavior.

In other words, there is no current cultural conception that senators have any obligation of self-restraint. When people speak of the impeachment process as "political," they may be correct, as a basis for predicting Senate action. If that concept were to remain alive, the unrestricted "political" language seems an improbable interpretation of what the Constitution means. The basic idea of the American Constitution is power restrained and checked. The Constitution framers could not have, consistently with their principles and their objectives, intelligently meant to accept a situation where power would be unrestrained by an external influence or internal norm. Senators could not be expected to legitimately to do anything they might choose. To say otherwise means that one must say that what they wrote is itself misleading.

The idea of restraint is similarly expressed by Benjamin R. Curtis, the counsel for President Andrew Johnson before the United States Senate, in that impeachment trial one hundred and thirty years ago.

> Mr. Chief Justice, I am here to speak to the Senate of the United States sitting in its judicial capacity as a court of impeachment, presided over by the Chief Justice of the United States, for the trial of the President of the United States. This statement sufficiently characterizes what I have to say. Here party spirit, political schemes, foregone conclusions, outrageous biases can have no fit operation. The Constitution requires that there shall be a "trial;" and, as in that trial, the oath which each one of you has taken is to administer "impartial justice according to the Constitution and the laws," the only appeal I can make in behalf of the President is an appeal to the conscience and the reason of each judge who sits before me.[77]

Despite the common characterization of the Andrew Johnson trial as "political," the reality is that in some measure the results fit Curtis's appeal. Let us assume that Curtis is right in principle. If that is correct, then a fundamental feature of the constitutional design appears to have been diminished. Instantaneous electronic communication and the 17th Amendment draw senators into the melodramatic process. Neither the 18th century framers, nor President Johnson's advocates, could conceive the 17th Amendment and instantaneous electronic communication.

What follows is that, absent external constraints, there is an obligation to choose a course of action to separate the Senate process, presided over by the Chief Justice, from the House process.[78] It would be possible to argue, as a moral norm, all Senators who have thus far chosen to engage themselves with the Independent Counsel investigation, should recuse themselves, and should say no more to their colleagues or to anyone else. Arguably, this would require recusal on the part of the group of senators who reportedly played so large a role in the displacement of Mr. Robert Fiske and the choice of Judge Kenneth Starr, those senators who have been expressly active in making judgments about President Clinton, about the House Judiciary Committee and others of similar stance. Is it plausible to argue that Senators, as jurors like other jurors, declare themselves and stand aside, if they know that have already made judgments, even if no one else knows of their judgments.

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[76] *Federalist* No. 65, 425. Emphasis in original.

[77] "Argument in Defense of President Johnson," Delivered before the Senate of the United States. Sitting as a Court of Impeachment, April 9, 10, 1868, in Benjamin R. Curtis (ed.), *Memoir of Benjamin Robbins Curtis, LL.D.,* Boston: Little, Brown and Company, 1879, II, 343.

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VI. IMPEACHMENT IS A CAGED LION: SHOULD IT BE LOOSE IN THE STREETS?

Someone, at a responsible level, must face up to the fact that impeachment is a caged lion, and ask seriously, and without prejudice, whether letting that lion loose in the streets will leave anyone safe. The final observation is that someone, at some responsible level, must face up to the fact that impeachment is a caged lion. When is it worthwhile to let the lion loose in the streets?

The House of Representatives is placed by the constitutional prescription in the role analogous to that of the prosecutor. When is it necessary to go forward? In the narrower domain of ordinary criminal law, the criminal prosecutor considers many factors in deciding whether to bring charges. Among others, the prosecutor considers "the strength of the evidence, the suspect's background and characteristics, the costs and benefits of obtaining a conviction and the attitude of the community toward the offense the suspect is believed to have committed."[79]

The discussion for the past four years, and especially for the past ten months, has not gotten to this, the nexus of the most serious issue. The discussion has focused upon attitudes toward the person who now occupies the office of President, and secondarily upon what people believe is the evidence. But the most serious issue is different. *There has been a continual avoidance of the costs and benefits of impeachment when considered in relation to the whole political system.*

There is some discussion of the attitude of the community, often in puzzlement as to the difference between opinion reflected in mass poll data and opinion expressed by those commentators whose profession it is to express opinion. I can recall a television commentary, in August 1998, when a panelists were asked about the reason that public audiences generally did not have the same intense feelings about the Clinton-Lewinsky information as the television journalists did. One panelist said: "We'll just have to educate them." Such commentary fails to consider that the general public may already have made its judgments, however rough, that the "cost" of further action against the President may exceed the "benefit" to the political system. The general public has good reason to believe that, on the basis of past performance, its evaluation of such a cost-benefit ratio may be more clear-minded than that of many reporters and editors from whom they have heard.

To initiate an impeachment (accusation of asserted "high crime" or "high misdemeanor") against the President would impose far too heavy a burden upon the political system since no reasonable person argues that the acts under discussion in any way disable, or potentially disable, the Congress. Neither Congress nor courts is disabled, or under any potentiality of being disabled, or the President would not now be on the defensive. Impeachment and conviction of a President would mean replacing an entire administration.

Within the parameters of the Constitution some significant institutional features have developed, and it is to their interrelationships that the idea of the "system" refers. Our ability to operate under this Constitution, with a strong Presidency, has given the United States a remarkably stable government. If, for example, the United States had a parliamentary regime, President Reagan probably would have had to yield in 1982 under the pressure of economic recession. If that were so, he could never have evolved to a de facto partnership, as some see it, with Gorbachev toward winding down the arms race.

The President has a unique combination of formal and informal powers that revolve around his centrality to the Executive Branch, his role as the prime leader in national security policy, his leadership of one of the political parties, and his twentieth century role in legislative leadership, strongly affected by all his other powers, but grounded in his possession of the veto, which effectively makes him one third of the legislative process.

The President does not prevail all the time in these domains, or even in any one of them. But the President's role in several of them is almost always critical, and is so even now.[80]

The normal requirement of American government engages all these resources, as Presidents work with, against, and around a variety of allies and opponents. If any President were to be removed, no other person could exercise equivalent leadership until the successor had developed his own relationships.

The level of cost to the system goes far beyond this. It is in the intense animosity that almost surely will have developed.

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[79] Frank W. Miller, Robert O. Dawson, George Dix, and Raymond Parnas, *Prosecution and Adjudication,* 4th Ed. (Westbury: The Foundation Press Inc., 1991), 695.

[80] This is reflected in Republican protests about the farm bill which they have had to accept much more on President Clinton's terms than they wish, even as he faces the impeachment proceeding. *Washington Times,* October , 1998; and, *Wall Street Journal,* October, 1998.

These 17th century cases that I mentioned earlier are not mere decoration, but have direct application. Lawyers, of course, use them to trace the very meaning of the law itself.[81] These historical cases help me to state a simple hypothesis: *Whatever new weapon is introduced into the political battle tends soon to become domesticated, even banalized, so that its use is more and more common judgment. It will be adapted and adopted by many other groups.* James J. Kilpatrick was not talking about impeachments, but about law suits against future Presidents since the Supreme Court hold the Paula Jones law suit out until the conclusion of the President's term. But his statement the decision "is likely to encourage trumped-up harassments of future Presidents on down the line"[82] is apposite.

Impeachment investigations, trumped-up and otherwise, will virtually be mandated by going forward on this one. Richard H. Tawney, who wrote an account of the governmental career of Lionel Cranfield, also wrote that "The resurrection of (this) antiquated weapon [. . .] produced some forty impeachments between 1621 and 1688."[83] That is sixty seven years (67) times twelve months for a sum of eight hundred and four months (804). Divided by forty (40), the number of impeachments, the result is on a straight line average one impeachment every twenty months. In fact, of course, these impeachments came in clusters, rather than on a straight-line average basis. But the echoes from 17th century England, with its fifteen to twenty impeachments during a three year period, with numerous impeachments on slender evidence,[84] are not to taken lightly. In the slow moving 17th century, factions brought each other to the test—whether routinely over long periods or more intensely in periodic bursts. We should not expect an impeachment in 1999 or 2000 to let the United States slip back into political tranquillity.

The better hypothesis is that we should expect more turmoil. The twentieth century has been, since World War II perhaps, somewhat similar to the 17th century in one respect: intense ideological antagonisms. Even in the past twenty years, when it might have been thought to decline, there are intense ideological battle groupings, easily activated. The resultant turmoil will be made far worse by an impeachment on the grounds that we now know. Massive distrust will feed it. Ideological antagonism will feed it. Well-financed political entrepreneurs will feed it. Instantaneous communication of information, disinformation, and misinformation will feed it. Impeachment as technique will increasingly be domesticated as legal defense funds, political action committees (PACs), and many other techniques have been domesticated. Private groups will urge their Congressional friends to initiate calls for independent counsels or other procedures to inquire into whether there might be a basis for determining that someone has violated, or conspired to violate, some law. Those who urge this resurrection should, if they believe that the political system concern is worthwhile, have a public duty to weigh carefully whether the result they achieve is the result they want to achieve.

It is thus likely that we will see attempts to initiate impeachment actions against other presidents. In each instance, one may assume that such effort will be made by people who genuinely believe their charges, and who believe they have credible cases. Since all successful efforts depend upon coalitions, explicit or de facto, such efforts will become successful only as varieties of other groups and persons join the efforts on a variety of grounds. There must be a number of upward mobile Congressmen, Senators, and Governors—Republican as well as Democratic—who should expect to find themselves absorbed in such controversies over the next two, three, or four presidential cycles.

Congressional leaders know that impeachment does not have to stop with a President. The same provision (Article II, Section 4) also applies to "the Vice President, and all civil Officers of the United States." Cabinet officers and sub-Cabinet officers are also civil officers. There is no reason for adversaries not to seek to invoke the process whenever they are deeply angry, or simply calculatedly rational, about some action. Is it beyond the imagination that, as many people genuinely believe that abortion is an ultimate evil, impeachment attempts would not be initiated against some Secretary of Health and Human Services on the basis that he or she is conducting policies favorable to this perceived evil? Is there any reason to believe that some Attorney General, even the present one, might not be the object of attempted impeachment actions if he (or in the present case she) were resolutely to decline to

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[81] U.S. House of Representatives, Committee on the Judiciary (93rd Congress, 2nd Session), *Impeachment: Selected Materials on Procedure,* Washington: Government Printing Office, 1974.

[82] James J. Kilpatrick, in Symposium, "*U.S.* v. *Clinton,*" National Review, September 28, 1998, 46.

[83] Richard H. Tawney, *Business and Politics Under James I: Lionel Cranfield as Merchant and Minister,* Cambridge: Cambridge University Press, 1958, at 248.

[84] Holdsworth, op. cit., 260.

initiate some independent counsel investigation desired by Senate leaders? Is there any reason to suppose that such an Attorney General would be even more at peril for limiting, or exercising the legal discretion to terminate, an independent counsel investigation if the Independent Counsel were to wish to continue? Is the Independent Counsel a civil officer also within the scope of Article II, Section 4, if there are those who are motivated to make the effort?

Even regulatory commissioners, beyond Presidential direction, are also civil officers, are they not? What reason is there for affected interests not to use this newly available weapon? While the impeachment of Federal judges does not provide much to go on, as to standards for evaluating Presidential impeachments, there is one response in which the reverse situation becomes part of the system threat. The Article III courts subject to the same threats of punitive impeachment actions—regardless whether they succeed—if someone becomes dedicated to making their lives miserable.

This is, again, not to be taken lightly. Even under the stricter standards that apply to Article III judges there are Members of Congress who have, within the past three years, been known to argue that judges making "wrong" decisions should be impeached.[85] Will this approach be withheld if Federal trial judges depart from what have been thought conventional procedures? For example, a trial judge had appointed a special master to conduct certain proceedings involving the Justice Department's current litigation against Microsoft. In due course, he was obliged to dispense with the special master by virtue of an appeals court decision. The judge has reportedly "told lawyers for both sides that he may ask [this dismissed special master] to write a 'friend of the court' briefly summarizing his views on the case. . . ."[86] Is it beyond reasonable belief that, under intense conditions, someone would choose to impeach such a judge in such a case?

Clearly, my approach is framed, as stated in the first place, in political *system* terms. This does not imply that impeachment should never be employed. It does, however, suggest a balancing test: specifically, that the gravity of the presidential offenses should be weighed against the potential of far greater costs to the whole country. The assigning some behavior to the category of those "other high crimes and misdemeanors"—parallel to treason and bribery—should be done only with utmost seriousness, and assessed with maintaining the essentials of the political system (or "the structure of government" or "institutional stability") as the prime purpose.

The maintenance of this kind of seriousness will be increasingly problematic, in somewhat the same way of maintaining a high level of dignity has already proved problematic. House leadership has, presumably with all seriousness, urged dignity. But since the beginning of 1998, every level of the inquiry has become more raucous than anyone in the leadership predicted before. It will continue to go beyond control unless there is some clear decision that produces the contrary. Alexander Hamilton was right to say in *Federalist* No. 65: "The prosecution of [actions deemed impeachable] . . . will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused."[87] That tells us that such matters should be approached with prudence and wisdom.

The impeachment process lends itself to the persistent conflict of factions. Each of which will seek to use the process to advance its own material goods and its own revered symbols, to pursue vengeance and feud as they were Capulet and Montague. Case in point: On October 8, 1998, during the House debate on the resolution to launch an impeachment inquiry into the conduct of President Clinton, one man from Alabama called the CNN conservative phone line to say that what he enjoyed was frustration and defeat in the eyes of the liberals who had been having it all their way, having been in power for 40 years. Such a statement should be seen as the cloud no bigger than a man's hand. Again, to cite Hamilton: "In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt."

The importance of prosecution, with impeachment as its leading case, as a weapon of recurrent group conflict becomes more important as each side disputes the morality and the methods of the other. Political leaders have already lost too much of the lessons of how to trade with each other and learn instead to turn each conflict into

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[85] The references in support of this are not immediately at hand, but they will be found in the *ABA Journal* and in the *National Law Journal.*

[86] *Washington Post,* Friday, September 25, 1998, F1.

[87] *Federalist,* 65, p. 423.

a dramatic morality play, or to an occasion of political vengeance. The magnification of conflict is something we have seen before. Congress should do nothing further to let this lion loose in the streets. Prudence and wisdom argue for terminating this process. Close the cage.

Mr. CANADY. Professor Harrison.

STATEMENT OF JOHN C. HARRISON, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. HARRISON. Mr. Chairman and Ranking Member, I think I can be quite brief. I want to talk about the bearing on the subject today of one particular precedent in the conduct of the House of Representatives with respect to impeachment, that of Judge Harry Claiborne about 12 years ago.

Judge Claiborne was impeached, convicted and removed from office for committing income tax evasion—not for bribery, not for corruption in office, not for anything directly connected to his office, but for committing serious misconduct that called into grave question his integrity and that damaged the reputation——

Mr. CANADY. Some members ask that you pull the microphone closer.

Mr. HARRISON. Judge Claiborne was convicted of income tax evasion, which is to say conduct unrelated to his office, unrelated to his official powers, not for abuse of office. Judge Claiborne was in strained financial resources. He had income; he didn't report it. He was convicted and then impeached by the House of Representatives, convicted by the Senate and removed from office.

Again, what he did did not directly do any particular damage to the State, unless you count the loss of tax revenue. It did not involve the abuse of office. It was private misconduct. Its connection to his office was that it strongly indicated that he could not be trusted, that he was a person lacking in integrity who could not properly carry out the responsibilities of a Federal judge. It also cast grave doubt on the overall integrity of the Federal judiciary.

I think that the Claiborne precedent indicates that private misconduct, that is to say not involving the abuse of official power, can be a ground for impeachment and conviction when it bears on fitness for office; again, when it calls into question someone's integrity and trustworthiness. Naturally, when you talk about a precedent that has to do with a Federal judge, the question arises whether such precedents are applicable to the President of the United States.

First, the Constitution draws no distinction. The impeachment provision in Article II says that the President, Vice President and all civil officers are subject to impeachment and removal for high crimes—treason, bribery, or other high crimes and misdemeanors. It is the same standard for all of those officers.

Second, the requirement of integrity is at least as strong for the President as it is for the Federal judiciary. It is common for the President to have to make decisions that are much like those of a Federal judge, in that they require that personal considerations and sometimes, for example, partisan considerations be put aside.

The President is the Nation's chief law enforcement officer, the boss of the United States Attorneys. Extremely delicate criminal prosecution decisions may come before the President, who is the

Chief Executive in whom the executive power is vested by the Constitution. There are certain considerations that the President is not supposed to take into account in making the decision whether to initiate a prosecution that can send someone to prison. Keeping those considerations out of the decisionmaking is the very sort of thing that a judge is required to do.

There is thus a close relationship, a close similarity in the requirements of integrity of the office of the President and the office of a Federal judge. Indeed, given the vast powers of the presidency, the standard for the President should be higher than for any other.

Now, all of that is not to say that it is not a legitimate political consideration, in deciding whether to impeach or whether to convict a President, to realize that the President is elected by all the people as the sole officer, other than the Vice President, so elected. Those are perfectly legitimate considerations, but they seem to me to be considerations of policy, not considerations of constitutional law. With respect to the law, the standard is the same for the President and for judges, and hence I think that the Claiborne impeachment and removal bear strongly on the question of impeaching the President.

Thank you.

[The prepared statement of Mr. Harrison follows:]

PREPARED STATEMENT OF JOHN C. HARRISON, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Thank you Mr. Chairman. The Subcommittee has invited me to participate in this hearing on the background and history of impeachment. I wish to address specifically the history of judicial impeachment and its bearing on the impeachment of a President. Questions concerning judicial impeachment came before the National Commission On Judicial Discipline and Removal, on which I served along with two distinguished former members of the House Judiciary Committee, Robert W. Kastenmeier and Hamilton Fish, Jr.

My conclusion is that the practice of the House of Representatives strongly supports the proposition that a civil officer may be impeached for serious misconduct that compromises the officer's integrity or fitness for office, whether or not the conduct itself involves abuse of office or injures the government. This principle emerges most clearly from the House's action on the impeachment of Judge Harry E. Claiborne in 1986.

Judge Claiborne, while a United States District Judge for the District of Nevada, violated the federal income tax laws. During 1979 and 1980 he received fees connected with his former law practice that he did not declare on his federal tax returns. After a jury trial in the United States District Court for the District of Nevada, Judge Claiborne was convicted on two counts (one for 1979 and one for 1980) of filing a false return in violation of 26 U.S.C. 7206(1).

On the recommendation of the Committee On the Judiciary, the House of Representatives impeached Judge Claiborne before the Senate. The House presented four articles of impeachment. Articles I and II rested directly on Judge Claiborne's criminal behavior. Article III rested on the fact that he had been convicted of crimes. H.R. Rep. No. 99–688, at 1–3 (1986) (hereafter Claiborne Report). According to the Report, Article III stood "for the proposition that when a federal judge is convicted of a felony and has refused to vacate his office he has misbehaved in office and by conviction alone he is guilty of having committed high crimes' in office as that term is set out in the United States Constitution." Id. at 22. Article IV alleged that Judge Claiborne's misconduct "has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts." Id. at 2. The Report explained that Article IV "makes clear that Judge Claiborne's conviction for falsifying his income tax return for two consecutive years does more than tarnish only his personal reputation as a member of the judiciary. The consequence of his illegal and improper actions has brought his court and the entire federal judiciary into disrepute, thereby undermining public confidence in the integrity and impartiality of the administration of justice." Id. at 23

Judge Claiborne was tried before the Senate, convicted by the required two-thirds majority, and removed from office.

Judge Claiborne's misconduct did not involve use or abuse of official power. There is no indication in the Articles of Impeachment or the Report of the Judiciary Committee that Judge Claiborne's actions were corrupt or that the money he received was not properly payable to him with respect to legal work he had performed before being appointed to the bench. Rather, according to the Report, Judge Claiborne found himself in difficult financial circumstances when he left his lucrative private practice to become a federal judge. Claiborne Report at 9. He responded to those difficulties as people sometimes do, by trying to conceal taxable income so as to reduce his tax liability. Judge Claiborne committed a crime that any citizen can commit.

The House of Representatives evidently regarded Judge Claiborne's crimes as impeachable offenses in themselves, making him unfit for office without respect to any additional injury to the state. That conclusion follows from the House's decision to include such injury to the state in a separate Article of Impeachment, Article IV. Articles I and II referred only to Judge Claiborne's crimes and not to their effects on the judiciary or the government as a whole. While the House may well have thought that those crimes demonstrated Judge Claiborne's lack of integrity, it apparently did not believe that anything more than lack of personal integrity shown by misconduct was required for impeachment, because Articles I and II were offered as free-standing grounds on which Judge Claiborne could be convicted and removed from office.

His impeachment thus cannot be reconciled with the claim that the Constitution authorizes impeachment only for misconduct that involves official power or is otherwise connected to public office. Nor can it be reconciled with the claim that the Constitution authorizes impeachment only for misconduct that causes some distinctive harm to the public or the state. (Loss of tax revenue hardly constitutes the kind of special harm that advocates of a narrow reading of the impeachment power seem to have in mind. Moreover, to say that failure to declare federally taxable income constitutes such special injury to the United States is to imply that Judge Claiborne could not have been impeached for similarly false statements on a state income tax return, which is difficult to imagine.)

Judge Claiborne's impeachment represents a precedent, not only for judges, but for Presidents and probably for all civil officers of the United States. Article II, Section 4, of the Constitution, which states that the President, Vice President, and all civil officers shall be removed upon impeachment and conviction, does not distinguish among those subject to impeachment. All may be removed for "Treason, Bribery, or other high Crimes and Misdemeanors." That standard applies to judges, the President, and, to borrow a phrase from the framing period, the lowliest tide-waiter.

One could argue, however, that whether a crime or misdemeanor is high or not varies with the sensitivity of the office, so that misconduct that must be tolerated in a tide-waiter nevertheless would justify impeaching an Article III judge. The text indicates no such distinction, but even if this reading is correct it has no bearing on the impeachment of a President, who must be held to the highest standard of all. Under the Constitution the presidency is unique in its powers and responsibilities. While the legislative and judicial powers are vested in institutions, the executive power is vested in an individual. The public must look to the integrity of that individual alone, and not to any collegial process, to ensure that the executive power is exercised properly. Moreover, the President's powers extend to the most delicate of matters, including diplomacy and the command of military affairs; shrouded in secrecy as those affairs necessarily often are, their conduct requires an individual in whom the people can place complete trust. And while Americans pride themselves on a federal bench that is nearly (although as Judge Claiborne demonstrates only nearly) free of misconduct, the bench's probity depends in large measure on the probity of the officer who appoints the judges. It is thus no accident that while the Constitution requires that Members of this House, Senators, and all other federal and state officers but one take an oath to support it, the President must promise to preserve, protect, and defend the Constitution. U.S. Const., Art. II, Sec. 1, para. 8.

History provides a briefer way to express the standards by which President's must be measured: they are the successors of George Washington.

It thus seems clear that if the magnitude of offense required for impeachment varies from office to office, the standard of conduct is the highest, and the threshold for impeachment the lowest, for the President.

Judge Claiborne committed a crime. Advocates of the view that impeachment must rest on abuse of power or special harm to the state could say that such harm necessarily results from conduct that is forbidden by the criminal law. On this view

the standard for non-criminal misdemeanors would be different, so that such a misdemeanor would be impeachable only if it injured the state in some identifiable way.

Such a per se rule has little to recommend it as a reading of the Constitution. The modifier "high," which is one proposed source of a requirement of injury to the state, applies to both crimes and misdemeanors. Moreover, the principle that every crime necessarily injures the public makes the concept of injury to the public so broad as to be of virtually no independent significance. Some criminal conduct, including some criminal conduct that actually imposes distinctive harm on the government, is utterly trivial. For example, it is a federal crime for unauthorized persons to wear "the uniform or badge which may be prescribed by the Postal Service to be worn by letter carriers," 18 U.S.C. 1730, and a federal crime to use, for profit and without authorization, the character "Woodsy Owl" or the associated slogan, "Give a Hoot, Don't Pollute," 18 U.S.C. 711a. If such harms to the common weal count for constitutional purposes, it is hard to conceive of otherwise private misconduct that does not do at least equal damage to the public by injuring the reputation of the country in whose name the officer exercises power. (The fact that injury to the government as such can be so minor, while wholly private crimes can include murder, casts doubt on the suggestion that the distinction between public harm and private misconduct is of constitutional magnitude.)

Judge Claiborne made false statements on his income tax returns. Conduct like that calls into grave question the integrity of the person who engages in it. The House's decision to impeach Judge Claiborne is thus consistent with (although it does not logically imply) the principle that misconduct may be grounds for impeachment only when it bears on fitness for office. That principle probably will gain broad acceptance in any event, but it is unlikely to present difficult questions of application because virtually any serious personal misconduct can bear on fitness for office. Certainly any misconduct that goes to trustworthiness does so. The latter observation is especially true with respect to the President, whose character is so important for reasons discussed above.

In light of that principle, my interpretation of the Claiborne impeachment should not be taken to suggest that impeachment is proper for private misbehavior that has no relationship at all to public office (if there is such a thing). To say that the Constitution does not require abuse of power or damage to the state is not to say that impeachment is like the ordinary criminal law. It is not. It is an essentially political process designed to ensure, among other things, that officers are removed when their misconduct indicates that they cannot be trusted with power.

My conclusions rest on the House's decision to impeach Judge Claiborne and on the Judiciary Committee's explanation of that decision. From the decision to impeach we can of course infer that a majority of the House believed that impeachment was warranted. It would not be sound, however, to infer from a decision not to impeach the conclusion that a majority of the House believed that impeachment was constitutionally barred. The Constitution imposes necessary conditions on impeachment, but it creates no sufficient conditions—it never requires that the House impeach an officer. As a result, the House is always free to conclude that impeachment is not warranted even though an officer has committed an impeachable offense. For example, when an executive officer misbehaves the House usually can assume that the President (upon whose integrity the country must so often depend) has the matter well in hand and that the public interest would not be served by distracting the House and Senate from their legislative business. The House also can conclude that for reasons of state it must overlook troublesome misbehavior. Hence for precedential purposes decisions to impeach are much more readily interpreted than are decisions not to impeach, or not to include some particular article of impeachment.

In sum, the practice of the House, as exemplified in the impeachment of Judge Harry Claiborne, is inconsistent with the principle that impeachment must rest on misuse of office or direct injury to the state arising from the misconduct itself.

This testimony is provided as a public service, not on behalf of any client or institution.

Mr. CANADY. Thank you.

Professor Sunstein.

STATEMENT OF CARL R. SUNSTEIN, KARL N. LLEWELLYN DISTINGUISHED SERVICE PROFESSOR OF JURISPRUDENCE, UNIVERSITY OF CHICAGO SCHOOL OF LAW

Mr. SUNSTEIN. Thank you very much, Mr. Chairman. I would like to step back a little bit and talk about, first, principles.

My basic submission is that the great function of the Impeachment Clause of the Constitution, not just in the 20th century, not just in the 19th, but in the 18th too, is to allow the country to remove from office those Presidents who have abused public office by using their distinctly presidential powers in a manner that involves egregious or large-scale abuse. This is a suggestion that the President, in order to be impeachable, must as a general rule have misused powers that exist by virtue of the fact that he is the President of the United States.

Under that test, the actions alleged by Judge Starr and others involving President Clinton do not make out an impeachable offense under the Constitution, and an impeachment by the House of Representatives would violate the Constitution of the United States on the allegations as they currently exist.

Let me say something about text, something about history, and something about the 19th and 20th century.

The text of the Constitution is often ambiguous. With respect to the Due Process Clause and Equal Protection Clause, we may not know a lot, what it means, if we just read it. The text of the Impeachment Clause has a lot more weight and texture in it than these other clauses. It refers to Treason, Bribery or other high Crimes and Misdemeanors.

If you remember anything from this testimony, remember the word "other." That has a lot of interpretive weight. The word "other" suggests we need acts of the same magnitude and the same nature as treason and bribery. Treason and bribery are terms that go to misuse of distinctly public office, and the word "other" is a clear signal that that is what the framers had in mind.

The word "misdemeanor" is not a reference to small crimes as opposed to felonies. It is a reference to bad conduct of the same kind that would justify removal of a high officer because that is bad conduct of the officer exercised as an officer. The debates on the Constitution are very clear on this. This was not something that just passed by the framers.

I would like to underline three simple points:

The first point is, many of the framers wanted no impeachment power whatsoever. They suggested that in a world of separation of powers and election of the President, there was no place for impeachment.

The second point is, that position was defeated by reference to egregious hypotheticals in which the President betrayed the country during war or got his office through bribery. Those are the cases that persuaded the swing votes that there should be impeachment power.

The third point is, contrary to the draft of the House majority report which is now circulating and has it exactly—bad words—the word "maladministration" was suggested and eliminated, in favor of high Crimes and Misdemeanors, not to expand the power to impeach, as the draft suggests, but just the opposite, to specify and

decrease the power. That is what the framers wanted to do with the words "high Crimes and Misdemeanors."

At ratification, the position for which I am arguing was the exclusive position offered in the prominent debates, that the ground for elimination of the President from office was the abuse of distinctly presidential office.

Now let us jump to the present. What has happened since the Constitution?

In the Nation's entire history, only one President has been impeached and only one other President has been subject to serious impeachment inquiry. What is important to underline about this is the dogs that haven't barked in the night. That is, the numerous cases in which Presidents of the United States, sad to say, were engaged in unlawful activity or lying or even criminal activity, and Congress did not choose to impeach. That is even more indicative of a tradition of restraint and forbearance than the two little number cases that we have actually had.

President Nixon was alleged to have been engaged in unlawful tax evasion. The Democrats decided by a healthy majority not to call that an impeachable offense. President Johnson, Presidents Reagan and Bush, even President Lincoln, who suspended the writ of habeas corpus; President Roosevelt, who lied to the country and violated the law with respect to the Lend-Lease Program for a period of 2 months, none of these, thank goodness, were subject to serious impeachment inquiries as they would have been under the standard suggested today.

As Professor Harrison has rightly suggested, judges have been subject to impeachment for a lower standard. The Nation, this Republic, is in very serious trouble if the Claiborne precedent is brought to bear on future Presidents of the United States. Judges are in a very different category; they were not subject to the kinds of protective debates that the framers themselves had.

The Impeachment Clause has always been understood to apply to specific offices in different ways, just as Congress treats the nomination of a Secretary of State differently from a nomination of a judge to a Court of Appeals under the same provision, so Congress has always treated Federal judges very differently from how it has treated the President of the United States.

How do these considerations apply to this case? I suggest that this case is not close to the line that would be raised by a case involving misuse of distinctly presidential power or imaginable horrendous cases, such as those involving murder or rape and the like.

It is not the case that the Take-Care Clause, the oath of office or the commission of a crime could plausibly justify removal of the President from office. President Truman violated the Take-Care Clause. A majority of the Supreme Court said so in the steel seizure case. President Truman ought not to have been impeachable.

The oath of office has been violated by many Presidents, not by criminal conduct necessarily, but by conduct in violation of civil statutes. That is true with respect to President Roosevelt and President Lincoln, two of our greatest Presidents. They ought not to have been subject to impeachment hearings because they behaved inconsistently with their oath of office.

The strongest argument for impeachment does involve the perjury and obstruction charges. Those are extremely serious charges, and no one should deny their magnitude. They rightly subject the President, after he has left office, to a risk of criminal prosecution. That is the constitutionally prescribed solution.

My concern about using perjury and obstruction of justice as a basis for impeachment here is that surely whether perjury and obstruction of justice are a legitimate basis for impeachment depends on what the perjury and obstruction of justice are about. If the President of the United States perjured himself in defending a friend in connection with a negligence action in an automobile tort suit, there would be no legitimate basis for impeachment.

The ominous fact is that the invocation of impeachment for this kind of perjury makes it very hard to distinguish conceptually numerous cases in which the Congress of the United States has behaved with forbearance and restraint involving Presidents Reagan and Bush and Johnson and Nixon and Lincoln and Roosevelt. The question is whether this can meaningfully be distinguished from some of those, even if it can conceptually, and people of good faith think it can, conceptually; in practice we are unleashing a terrible caged lion, in the words of my predecessor on this panel.

I would like to conclude with a very simple suggestion, which is that the basic office of the Impeachment Clause is to allow removal from Office of the President when he has behaved inconsistently with his duties as President. They are hard questions that could be raised by ingenious people testing the reach of that proposition. Much the best route for the future is to adhere to that proposition, which is consistent with our practices throughout the 19th and 20th century, consistent with the framers' judgment in the 18th century, and leave the hardest questions raised hypothetically for another and better day.

[The prepared statement of Mr. Sunstein follows:]

PREPARED STATEMENT OF CASS R. SUNSTEIN, KARL N. LLEWELLYN DISTINGUISHED SERVICE PROFESSOR OF JURISPRUDENCE, UNIVERSITY OF CHICAGO SCHOOL OF LAW

I am grateful to have the opportunity to appear before you today to discuss some constitutional issues in connection with impeachment. The basic question I will be examining is the appropriate understanding of the constitutional phrase, "high Crimes and Misdemeanors." U.S. Const., Art. 1, section 4.

I suggest that with respect to the President, the principal goal of the impeachment clause is to allow impeachment for a narrow category of large-scale abuses of authority that come from the exercise of *distinctly presidential powers.* Outside of that category of cases, impeachment is generally foreign to our traditions and prohibited by the Constitution. Outside of that category of cases, the appropriate course for any crimes is not impeachment, but a prosecutorial judgment, *after* the President has left office, whether indictment is appropriate. The original understanding of impeachment strongly supports this view; equally important, this view is strongly supported by the longstanding historical practice in America.

While it is not my purpose here to defend President Clinton in any way, it is entirely clear that thus far, the charges made by Judge Kenneth Starr and Mr. David Schippers do not make out an appropriate or legitimate case for impeachment under the Constitution. In addition, impeachment of a President, on the basis of these sorts of charges, would greatly unsettle the system of separation of powers. It would threaten to convert impeachment into a legislative weapon to be used any occasion in which a future President is involved, or said to be involved, in unlawful or scandalous conduct. From the constitutional point of view, this would be an extremely unfortunate development.

My statement comes in six parts. Part I deals with the text. Part II explores the founding period. Part III deals briefly with English practice; Part IV briefly explores

American practice. Part V examines how we might think about the constitutional question today. Part VI is a brief conclusion.

I. TEXT

Constitutional interpretation of course begins with the Constitution's text. The text strongly supports the view that in order to support impeachment of the President, the underlying offense must usually involve the abusive exercise of a distinctly presidential power.

More particularly, the text's opening reference to treason and bribery, together with the word "other," seems to justify a clear and important inference: high crimes and misdemeanors should be understood to be of the same general "kind" as treason and bribery, as in the Latin canon of construction, *ejusdem generic.* Thus it would be reasonable to think that "other high Crimes and Misdemeanors" must be in the nature of large-scale abuse of public office—large-scale in the sense of "high" and similar, in kind as well as degree, to treason and bribery. It is entirely sensible, textually speaking, to understand "other high Crimes and Misdemeanors" in such a way as to conform to "Treason" and Bribery," and to take the relevant "Misdemeanors" to have to meet a certain threshold of "highness" as well.

The text thus supports the view that I will be defending here: impeachment is designed for large-scale abuses of public authority. But reasonable people could disagree about the meaning of the bare text, and it is certainly appropriate to look at other sources.

II. THE FRAMING

A. The Convention

I now turn to the Constitutional Convention. The extensive debates in the convention strongly suggest a sharply limited conception of impeachment, one that sees the process as a targeted response to the President's abuse of public power through manipulation of distinctly presidential authority, or through procurement of his office by corrupt means.

The initial draft of the Constitution took the form of resolutions presented before the members meeting in Philadelphia on June 13, 1787. One of the key resolutions, found in the Convention's official Journal, said that the President could be impeached for "malpractice, or neglect of duty." On July 20, this provision provoked an extended debate. Three positions dominated the day's discussion. One extreme view, represented by Roger Sherman and attracting very little support, was that the legislature should have the power to remove the Executive at its pleasure. Charles Pinckney, Rufus King and Gouvernor Morris represented the opposing extreme view, that in the new republic, the President "ought not to be impeachable whilst in office." 2 Max Farrand, Records of the Constitutional Convention of 1787, at 64 (1937). This view, which did receive considerable support, was defended partly by reference to the system of separation of powers, which would be compromised by impeachment, and partly by reference to the fact that the President, unlike a monarch, would be subject to periodic elections, a point that seemed to make impeachment less necessary. The third position, which ultimately carried the day, was that the President should be impeachable, but only for a narrow category of abuses of the public trust, by, for example, procuring office by unlawful means, or using distinctly presidential authority for ends that are treasonous.

George Mason took a lead role in promoting the compromise course. Against Pinckney, he argued that it was necessary to counter the risk that the President might obtain his office by corrupting his electors. "Shall that man be above" justice, he asked, "who can commit the most extensive injustice?" Id. at 65. This question identified the risk, to which the convention was quite sensitive, that the President might turn into a near-monarch; and it led the crucial votes—above all, Morris—to agree that impeachment might be permitted for (in Morris's words) "corruption & some few other offences." Id. James Madison promptly concurred with Morris, pointing to a case in which a president "might betray his trust to foreign powers." Id. Capturing the emerging consensus of the convention, Edmund Randolph favored impeachment on the ground that the executive "will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands." Id. at 67. The clear trend of the discussion was toward allowing a narrow impeachment power by which the President could be removed only for gross abuses of public authority.

But Pinckney, concerned about the separation of powers, continued to insist that a power of impeachment would eliminate the President's "independence." Id. at 66; see also id. at 68. Morris once again offered the decisive response, urging that he was convinced of the necessity of impeachments, because the President "may be

bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard against it by displacing him." Id. at 68. At the same time, Morris insisted, "we should take care to provide some mode that will not make him dependent on the Legislature." Id. at 69. Led by Morris, the convention thus moved toward a compromise position, one that would continue the separation between the President and the Congress, but permit the President to be removed in the most extreme cases. But the discussion ended without agreement on any particular set of terms.

The new draft of the Constitution's impeachment clause emerged two weeks later, on August 6. It would have permitted the President to be impeached, but only for treason, bribery and corruption (apparently exemplified by the President's securing his office by unlawful means). With little additional debate, and for no clear reason, this provision was narrowed on September 4, to "Treason and Bribery." But in early September, the delegates took up the impeachment clause anew. Here they slightly broadened the grounds for removing the President, but in a way that stayed close to the compromise position that had appeared to carry the day in July.

The opening argument was offered by Mason, who complained that the provision was too narrow to capture his earlier concerns, and that "maladministration" should be added, so as to include "attempts to subvert the Constitution" that would not count as treason or bribery. Id. at 550. Mason's strongest point was that the President should be removable if he attempted to undo the constitutional plan. But Madison insisted that the term "maladministration" was "so vague" that it would "be equivalent to a tenure during pleasure of the Senate," id., which is something that what the framers had been attempting to avoid all along. Hence Mason withdrew "maladministration" and added the new, more precise terms "other high Crimes and Misdemeanors against the State." Id. at 550. The term "high Crimes and Misdemeanors" was borrowed from English law, as we shall see; but it received no independent debate in the convention. During the debates, the only subsequent development—and it is not trivial—was that "against the State" was changed to "against the United States," in order to remove ambiguity. Id. at 551.

There is one further wrinkle. The resulting draft was submitted to the Committee on Arrangement and Style, which deleted the words "against the United States." Hence there is an interpretive puzzle. Was the deletion designed to broaden the legitimate grounds for impeachment? This is extremely unlikely. As its name suggests, the Committee on Style and Arrangment lacked substantive authority (which is not to deny that it made some substantive changes), and it is far more likely that the particular change was made on grounds of redundancy. Hence the impeachment clause, in its final as well as penultimate incarnation, was targeted at high crimes and misdemeanors against the United States.

The clear lesson of these debates is that in designing the provision governing impeachment, *the founders were thinking, exclusively or principally, of large-scale abuses of distinctly public authority.* The unanimous rejection of "maladministration" suggests that the framers sought to create an authority that was both confined and well-defined. The alleged grounds for impeachment all involved abuses of public trust through the exercise of distinctly presidential powers (or corruption in procuring those powers); there were no references to private crimes, such as murder and assault. Now we cannot overread silence on that point. But the debates strongly suggest that the model for impeachment was the large-scale abuse of public office.

B. Ratification

The same view is supported by discussion at the time of ratification and in the early period. The basic point is that impeachment was explained and defended as a way of removing the President when he used his public authority for treasonous or corrupt purposes. I offer a few brief notations here.

Alexander Hamilton explained that the "subjects" of impeachment involve "the abuse of 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 society itself." The Federalist No. 65. One of the most sustained discussions came from the highly respected (and later Supreme Court Justice) James Iredell, speaking in the North Carolina ratifying convention: "I suppose the only instances, in which the President would be liable to impeachment, would be where he had received a bribe, or had acted from some corrupt motive or other." By way of explanation, Iredell referred to a situation in which "the President has received a bribe . . . from a foreign power, and, under the influence of that bribe, had address enough with the Senate, by artifices and misrepresentations, to seduce their consent to a pernicious treaty." 2 Philip Kurland and Ralph Lerner, The Founders' Constitution 165 (1987).

James Wilson wrote similarly in his great 1791 Lectures on Law: "In the United States and in Pennsylvania, impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments." Id. at 166. Another early commentator went so far as to say that "The legitimate causes of impeachment . . . can have reference only to public character, and official duty. . . . In general, those offenses, which may be committed equally by a private person, as a public officer, are not the subjects of impeachment. Murder, burglary, robbery, and indeed all offenses not immediately connected with office, are left to the ordinary course of judicial proceedings. . . ." Id. at 179. This was a contested view; but there was general agreement that the great office of impeachment was to remove from office those who had abused distinctly public power.

III. HIGH CRIMES AND MISDEMEANORS IN ENGLAND

Because the term "high crimes and misdemeanors" comes from English law, it is possible to contend that it should be interpreted in accordance with English understandings. See Raoul Berger, Impeachment (1974), which turns largely on this claim. There is considerable sense in this view—the term certainly does come from English law—but a serious question might be raised about the analysis. The most important point is that it is not at all clear that the American understanding was or has been the same as the English one. Recall that in the framing period, participants were aware of two exceedingly important differences between America and England: (1) the election of the President and (2) the separation of powers. As we have seen, these differences led many to suggest a far narrower power to impeach the President than to impeach high officials under English law. Thus it is hazardous to suggest, as some have, that the American understanding essentially incorporates the English understanding. See Peter Charles Hoffer and N.E.H. Hull, Impeachment in America, 1635–1805 (1984), at 266–70.[1]

With that qualification, let me briefly investigate the English practice. As it turns out, that practice strongly supports the basic argument I am making here.

The English idea of "impeachment" arose largely because its objects were, for various reasons, not subject to the reach of conventional criminal law. Thus ministers and functionaries of the King were subject to impeachment for public offenses. Under English law, the term "misdemeanor" was not a reference to what we would now call misdemeanor (as opposed to felony); it referred instead to distinctly public misconduct. Thus the term "high Crimes and Misdemeanors" represented "a category of political crimes against the state." Raoul Berger, Impeachment 61 (1973).

In English law, there was some ambiguity in the use of the word "high": did the term refer to the seriousness of the offense, or to the nature of the office against which the proceeding was aimed? Probably the better view, based on the actual practice, was that the term referred to both. In any case a "high Crime and Misdemeanor" could be a serious crime, but it could also be a serious offense that was not a technical violation of the criminal law. Serious misconduct, as in the form of committing the nation to "an ignominious treaty," was said by some to be a just basis for impeachment in England. See id. at 63. Whatever one thinks of the particular example, it is clear that there was no consensus in England that a "high Crime and Misdemeanor" had to be a violation of the criminal law; and indeed the better view is that an impeachable offense, to qualify as such, need not be a crime in the United States.

For present purposes, the more important point is this: The great cases involving charges of impeachable conduct in England reveal a far readier resort to the practice than has been the case in America, probably for reasons mentioned above. But those cases involved either criminal or extremely inappropriate conduct in the form of *abuse of the authority granted by public office, or, in other terms, the kind of misconduct that someone could engage in only by virtue of holding public office.* Thus a prominent listing of the key cases refers to the following: unlawful use of publicly appropriated funds; thwarting Parliament's order to store arms and ammunition in storehouses; preventing a political enemy from standing for election and causing his unlawful arrest and detention; arbitrarily granting general black search warrants; and stopping writs of appeal. See id. at 67–68. In addition, a general list suggests no case in which an impeachment proceeding was brought for something other than the use of the distinctive authority vested in public officers. Id. at 69–73.

[1] Hoffer and Hull examine state practices and show that impeachment was relatively common in the colonies and the states. This practice does not, however, show that impeachment of the President was intended to be relatively common, and I do not understand Hoffer and Hull to have so argued.

We may summarize the discussion with two simple points. *First:* The English practice shows a far readier resort to impeachment than the American practice. This difference makes sense in light of the fact that the President is subject to electoral checks and the American commitment to separation of powers. *Second:* The English practice was concentrated, exclusively or nearly so, on the abusive exercise of distinctly public authorities.

III. HISTORICAL PRACTICE IN AMERICA

What about the American practice? The question is exceptionally important, for our constitutional tradition is not one that relies entirely on the original understanding of constitutional terms. Historical practices, built up over decades or even centuries, play a significant role in determining constitutional meaning.

This is not the occasion for a detailed analysis of the historical practice in the United States. I restrict myself to several points here. The most important is that *the exceptional infrequency of serious impeachment proceedings against the President—even in circumstances in which such proceedings might have appeared legitimate—suggests a historical understanding that impeachment is appropriate only in the most extraordinary cases of abuse of distinctly presidential authority.* With respect to President Clinton, nothing of this kind has been alleged thus far.

First: We should notice at the outset that there have been sixteen impeachments in the nation's entire history, that only one President, in that entire history, has been impeached, and that only one other President, in that history, has been subject to serious impeachment inquiry. President Nixon was of course subject to an impeachment inquiry because of a series of alleged abuses of the public trust. Thus Article 1, of the articles of impeachment against President Nixon, referred to the an unlawful entry into the headquarters of the Democratic National Committee "for the purpose of securing official intelligence" and then conspired to cover it up; Article 2 referred to the allegation that he "repeatedly engaged in conduct violating the constitutional rights of citizens," including the use of the Internal Revenue Service, the Federal Bureau of Investigation, and the Secret Service; Article 3 referred to repeated refusals to produce papers and things under subpoenas specifically signed "to resolve by direct evidence fundamental, factual questions relating to Presidential direction, knowledge or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President." In retrospect, a remarkable feature of these Articles is their relative restraint—fastening on large-scale abuses of distinctly public authority.

President Andrew Johnson was impeached because of a series of allegedly unlawful acts as President, above all the unlawful discharge of officials who had, under law, been given immunity from presidential discharge. Posterity has judged the impeachment of Johnson to have been a highly partisan and indeed illegitimate affair, one in which political opponents seized on the President's violation of a law that he believed unconstitutional (rightly, as it turned out). But even in the Johnson case, when partisan fervor was at its height, the allegations involved the allegedly large-scale abuse of presidential authority, through the lawless exercise of presidential power. With respect to the President, at least, impeachment has been considered as a weapon of rare and last resort, in a way that vindicates the framers' emphasis on the safeguards of the electoral process.

Second: By far the largest majority of impeachments in American history have involved federal judges. Even here, the number is extremely low: In all of American history, there have been just twelve cases. Of those cases, by far the largest number—and arguably all—involved at least some allegation of abuse of distinctly judicial office. It is possible to argue that one or two, or perhaps more, of those cases also involved egregious private behavior. But this interpretation is itself questionable, and the most extreme cases involving impeachment of federal judges should not be understood to set a precedent for impeachment of Presidents, a point to which I will return.

Third: To have a sense of American history, it is as important to have a sense of the cases in which impeachment did not occur as of cases in which it did occur. This topic has received far too little emphasis during discussion of the impeachment question. An examination of American history shows that even when impeachment might well have been contemplated, cooler heads prevailed, and both the nation and Congress insisted on an extremely high standard. Consider here simply a few cases (they could easily be multiplied) from twentieth century history; in all of these the House has acted with great restraint. The House was correct to do so, both as a matter of constitutional law and as a matter of prudence. I list the cases not to complain about the failure to pursue the impeachment route, but on the contrary to suggest the solidity of the American presumption against impeachment.

—In a decision that has received considerable publicity in the last weeks, the House refused to include, as an impeachment count, legitimate allegations of income tax evasion against President Nixon. The basic ground for the refusal was that income tax evasion—though hardly excusable and indeed a major breach of every citizen's obligation—did not amount to a misuse of distinctly presidential authority.

—President Reagan was allegedly involved in unlawful misconduct in connection with the Iran Contra controversy; at least he presided over an administration allegedly involved in such unlawful misconduct. Indeed, the independent counsel's investigation yielded no fewer than seven guilty pleas and four convictions, including convictions of relatively high-level executive branch officials.

Many people believed or feared that President Reagan was personally involved in the unlawful acts. Thus it would have been possible to commence impeachment hearings to investigate the charges. Nonetheless, impeachment was never considered as a serious option.

—Many people have alleged that Vice-President Bush was involved in aspects of the Iran-Contra controversy, and some people suggested that he had personal knowledge of the unlawful activity. An impeachment investigation would not have been hard to imagine. Here too impeachment never emerged as a serious possibility.

—In World War II, the Lend-Lease Act allowed the President to build and sell arms and ammunition to other nations, most notably England. Before the passage of the Act, the sale of arms to other nations, including Britain, was prohibited by law. Nonetheless, it is generally agreed that President Roosevelt was secretly and unlawfully transferring arms—including over 20,000 airplanes, rifles, and ammunition—to England. Indeed, illegal approval of such weapons transfers were quite routine in two full months before Congress authorized it. Even President Roosevelt's Secretary of State "felt troubled by the illegality and deception." Aaron Fellmeth, A Divorce Waiting to Happen, 3 Buff J Intl. L. 413, 487 (1996–97). It is often said that Roosevelt both deceived and lied to Congress and the American people in connection with the program.

—There were widespread claims of a secret "deal" between President Ford and President Nixon, culminating in the pardon received by President Ford. At the time, many Americans suspected that such a "deal" has occurred. So far as I am aware, no evidence supports any such suspicion. But in view of the climate of the time, these claims might well have produced an impeachment inquiry.

—It was widely believed that President Kennedy was involved in a serious of illicit sexual relationships while in office, including an illicit sexual relationship with a woman simultaneously involved with a member of the Mafia. This relationship—some people have suggested—would potentially compromise the efforts of the Department of Justice. Some people have alleged that this reckless behavior, whether or not involving technical violations of law, reflected serious indifference to law enforcement efforts. Yet no one has suggested, at the time or since, that impeachment was the appropriate course.

These are simply a few random examples, and doubtless reasonable people will suggest that some or all of them involve conduct far less egregious, or less legitimately impeachable, than has been alleged with respect to President Clinton. Other reasonable people will disagree; and if these examples seem weaker, it should not be hard to come up with others. (Consider, as just one further illustration, the fact that President Lincoln suspended the writ of habeas corpus, a serious violation of civil liberties that was ruled unlawful.) My basic point is to establish a lengthy historical practice of great restraint. The fact that only one President has been impeached, when many others might have been, attests to the strength and longevity of our historical understandings. Impeachment of President Clinton, on the basis of the charges made thus far, would be an astonishing departure from those understandings.

IV. IS THE PRESIDENT UNIQUE FOR IMPEACHMENT PURPOSES?

The Constitution allows impeachment of all civil officers—not only the President, but also the Vice President, cabinet heads, and judges—for high crimes and misdemeanors. Does this mean that the same standard applies to all such officers? Are there differences between the legitimate grounds for impeaching a President and the legitimate grounds for impeaching a federal judge? The question is extremely important for current purposes. If the same standards apply, it would make sense to say that the relatively more lenient standards applied to the impeachment of federal judges apply as well to the impeachment of Presidents. My basic conclusion is that the standard for impeaching the President has been much higher, and properly so.

We can distinguish three possible positions here. First: It might be thought that the legitimate grounds for impeachment are the same for all officers. Second: It

might be thought that to impeach the President, Congress must meet a higher standard; what counts as a high crime or misdemeanor is context-specific. Third: it might be thought that the constitutional standard is the same, but that the House legitimately exercises prosecutorial discretion so as to match offense to office. On this view, for example, perjury may be a clear basis for impeaching a judge (who is charged with operating the system of justice), but not impeaching for the President. For constitutional purposes, we might collapse the first and third positions, since no one disagrees that the House, in its exercise of prosecutorial discretion, might legitimately choose not to proceed against someone who has committed technically impeachable offenses, and that the nature of the office is relevant to the exercise of discretion.

At first glance, the constitutional text seems to support the view that the constitutional standards are identical. As noted, the text is the same. But there are several problems with this apparently simple position. The first is based on the history recited above. The framers' particular concerns involved protection of the President from the discretionary authority of Congress; they sought to insulate the President in particular from a high degree of dependence. They expressed no such concern about judges.

Judicial independence is of course important, but the fact that judges have life tenure might well be thought to justify a somewhat more expansive impeachment power. If judges can be impeached only for gross abuses, then the nation will be stuck with judges for their whole lives; this practical concern argues in favor of a lower standard for impeaching judges. Indeed, this practical concern might reasonably be labelled a structural one. The Constitution's structure—life tenure for judges, four year terms for Presidents—argues in favor of a narrower impeachment power for the President.

The second argument is that judges have tenure "during good behavior," a provision that does not, of course, apply to the President. The President may not be removed for "bad behavior." Thus it might be suggested that with respect to judges, the "good behavior" provision qualifies or works hand in hand with the impeachment clause. It does so as by allowing impeachment of judges on somewhat broader grounds—bad behavior, not simply high crimes and misdemeanors, or perhaps high crimes and misdemeanors, understood, in the context of judges, to include bad behavior.

But I do not believe that this argument is convincing. Judges may not be removed from office for bad behavior; they may be removed only for high crimes and misdemeanors. The function of the "good behavior" clause is not to give Congress broader power to remove judges from office; it is simply to make clear that judges ordinarily have life tenure. Thus there is no authority in Congress to remove judges who have not engaged in "good behavior."

On the other hand, historical practice suggests a broader congressional power to impeach judges than Presidents, and indeed it suggests a special congressional reluctance to proceed against the President. We might say that our history has converged on the judgment that there is a lower threshold for judges than for Presidents. Perhaps the theory is that judges cannot otherwise be removed from office; perhaps the theory is that it is uniquely destabilizing if Presidents are too freely subject to removal from office. The existence of a wide range of political checks on presidential misconduct has apparently been thought to provide a kind of surrogate safeguard, one that makes impeachment a remedy of rare resort.

V. HOW SHOULD WE UNDERSTAND IMPEACHMENT TODAY?

Thus far I have suggested that both the original understanding and historical practice converge on a simple principle. The basic point of the impeachment provision is to allow the House of Representatives to impeach the President of the United States for *egregious misconduct that amounts to the abusive misuse of the authority of his office.* This principle does not exclude the possibility that a President would be impeachable for an extremely heinous "private" crime, such as murder or rape. But it suggests that outside of such extraordinary (and unprecedented and most unlikely) cases, impeachment is unacceptable. The clear implication is that the charges made thus far by Judge Kenneth Starr and David Schippers do not, if proved, make out any legitimately impeachable offenses under the Constitution.

In the present context, it would be possible to respond to this suggestion in two different ways. First, it might be urged that actual or possible counts against President Clinton—frequent lies to the American public, false statements under oath, conspiracy to ensure that such false statements are made, perhaps perjury, interactions with his advisers designed to promote further falsehoods under oath, and so forth—are very serious indeed and that if these very serious charges are deemed

a legitimate basis for impeachment, little or nothing will be done to alter the traditional conception of impeachment. Perhaps some of these possible counts, involving interactions with his advisers designed to promote lies or continued procedural objections to the underlying inquiry, even amount to abuse of power. Second, it might be said that whatever history and past practice show, we should understand the Constitution's text to allow the President to be impeached, via the democratic channels, whenever a serious charge, of one sort or another, is both made and proved. I take up these two responses in sequence.

If the first claim is that certain kinds of falsehoods under oath, perjury, conspiracy to lie, and so forth, could be a legitimate basis for impeachment, there can be no objection. A false statement under oath about a practice of using the IRS to punish political opponents would almost certainly be an impeachable offense; so too about a false statement about the acceptance of a bribe to veto legislation. Thus false statements under oath might well be a legitimate basis for impeachment. Indeed, lying to the American people may itself be an impeachable offense if, for example, the President says that a treaty should be signed because it is in the best interest of the United States when in fact he supports the treaty because its signatories have agreed to give him a lot of money. But it does not diminish the universal importance of telling the truth under oath to say that whether perjury or a false statement is an *impeachable offense depends on what it is a false statement about.* The same is true for "obstruction of justice" or interactions with advisers designed to promote the underlying falsehood.

Anyone can be prosecuted for violating the criminal law, and if the President has violated the criminal law, he is properly subject to criminal prosecution after his term ends. But it does not make sense to say, for example, that an American President could be impeached for false statements under oath[2] in connection with a traffic accident in which he was involved, or that a false statement under oath, designed to protect a friend in a negligence action, is a legitimate basis for impeachment. Probably the best general statement is that a false statement under oath is an appropriate basis for impeachment if and only if the false statement involved conduct that by itself raises serious questions about abuse of office. A false statement about an illicit consensual sexual relationship, and a "conspiracy" to cover up that relationship, is not excusable or acceptable; but it is not a high crime or misdemeanor under the Constitution. The same is true for the other allegations made thus far. It trivializes the criminal law to say that some violations of the criminal law do not matter, or matter much. But it trivializes the Constitution to say that any false statement under oath, regardless of its subject matter, provides a proper basis for impeachment.

Of course people of good faith could say that the President has a special obligation to the truth, especially in a court of law, and that it is therefore reasonable to consider impeachment whenever the President has violated that obligation. It is certainly true that as the nation's chief law enforcement officer, the President has a special obligation to the truth. Perhaps such people also believe that false statements under oath, and associated misconduct, are genuinely unique and that impeachment for such statements and such misconduct would therefore fail to do damage to our historical practice of resorting to impeachment only in the most extreme cases. But this position has serious problems of its own. Even if it would be possible, in principle, for reasonable people to confine the current alleged basis for impeachment, it is extremely doubtful that the line could be held in practice. Thus a judgment that the current grounds are constitutionally appropriate would set an exceedingly dangerous precedent for the future, a precedent that could threaten to turn impeachment into a political weapon, in a way that would produce considerable instability in the constitutional order.

Consider, for example, the fact that reasonable people can and do find tax evasion more serious than false statements about a consensual sexual activity, and that reasonable people can and do find an alleged unlawful arms deal more serious, from the constitutional standpoint, than either. Here is the underlying problem. Whenever serious charges are made, participants in politics may well be pushed in particular directions by predictable partisan pressures. The serious risk is therefore that contrary to the constitutional plan, impeachment will become a partisan tool, to be used by reference to legitimate arguments by people who have a great deal to gain.

A special risk of a ready resort to the impeachment instrument is that it would interact, in destructive ways, with existing trends in American democracy. Those

[2] I use this term as a placeholder for any allegations of conspiracy, obstruction of justice, improper use of legal privileges, and so forth in connection with the illicit sexual relationship in question.

trends—toward an emphasis on scandals and toward sensationalistic charges—have characterized the conduct of members of both parties in the last decades. For those who love this country and its institutions, the use of impeachment, in such cases, is quite ominous—not least because of the demonstrable good faith of many of those who are recommending it.

From the standpoint of the constitutional structure, it is far better to try a kind of line in the sand, one that has been characteristic of our constitutional practice for all of our history: A practice of invoking impeachment only for the largest cases of abuse of distinctly presidential authority.

CONCLUSION

Text, history, and longstanding practice suggest that the notion of "high crimes and misdemeanors" should generally be understood to refer to large-scale abuses that involve the authority that comes from occupying a particular public office. Thus a President who accepted a bribe from a foreign nation—or who failed to attend to the public business during a war—would be legitimately subject to impeachment. Perjury, or false statements under oath, could certainly qualify as impeachable offenses if they involved (for example) lies about using the Internal Revenue Service to punish one's political opponents or about giving arms, unlawfully, to another nation. But the most ordinary predicate for impeachment is an act, by the President, that amounts to a large-scale abuse of distinctly presidential authority.

If there is ever to be impeachment outside of that category of cases, it should be exceedingly rare. The current allegations against President Clinton do not justify a departure from our traditional practices. Such a departure would be not trivially but profoundly destabilizing; it would be far wiser to adhere to our traditions and to leave the hardest constitutional problems for another, and better, occasion.

Mr. CANADY. Professor Parker.

STATEMENT OF RICHARD D. PARKER, WILLIAMS PROFESSOR OF LAW, HARVARD UNIVERSITY LAW SCHOOL

Mr. PARKER. Thank you. I thank the committee for inviting me today. Perhaps I should note that although my invitation came from the majority, I am now and have always been an active Democrat as two members of the minority on this committee are aware.

Let me begin with two general propositions. First, what I understand the meeting today to be about is the question of what is impeachable under Article II, Section 4, and that is what I am going to address. It is not about what I see as a distinct question, which is whether the Judiciary Committee should go on to vote and the House should go on to vote to impeach. I see those as distinct issues. That is, I am sure, debatable, but it is my first starting point.

Secondly, I want to offer a general proposition that at least didn't used to be controversial, and that is that a key to the success of our Constitution as a living basis for government has been its flexibility, its capacity for growth, its capacity as John Marshall said, to adapt to circumstances unforeseen at an earlier time, or its capacity, as Justice Frankfurter said, to gather new meaning from new experience.

Now, this approach to the language of the Constitution applies to the great outlines of the government's power, for example, the commerce power. Everyone agrees on that. It applies clearly, as Professor Sunstein said, to crucial guarantees of individual rights, equal protection, free speech. It seems clear to me that it applies as well to powers of the nonjudicial or of all the branches of government having to do with their relations with other branches of the government. I see no reason why the language, so long as it is general in terms, should be taken differently.

Now, this process of adapting the meaning of constitutional language to new circumstances, the process of its gathering new meaning from new experience, is not confined to the Article V process of amendment, although that is very important. It is not confined to judicial interpretation. It is also, I think, quite clearly a responsibility of the nonjudicial branches of government, including the House of Representatives and including, of course, the Judiciary Committee.

So I conclude, at the outset, that it is a very great mistake to try at any one point in history to freeze-dry the meaning of important constitutional language.

Now, what about this language in Article II, Section 4? I think it is quite clear that it is meant to impose some limitation on the House of Representatives and then the Senate, but at the same time, it is intended to be highly flexible, and as Professor Gerhardt said, case specific.

Can anything be said about the general contours of the Article II, Section 4, language? I believe three simple things should be agreed to.

First, as Professor Sunstein and Professor Holden have said, the word "other" is crucial. Treason and bribery are comparative reference for the meaning of "other Crimes and Misdemeanors."

Secondly, I think it is widely, if not uniformly, agreed that the phrase "high Crimes and Misdemeanors" drawn from English practice is not the same thing as a technical violation of whatever happens to be in the criminal law at the moment. A technical criminal violation is neither necessary nor necessarily sufficient to establish impeachable behavior.

Thirdly, therefore, it seems to me that the nub of the matter is that impeachable behavior is behavior that is serious or grave or gross in its substantive effect and/or in the state of mind by which it came about as to bear upon the fitness or, I suppose we should say, the unfitness, of a particular individual to hold the Office of President of the United States.

That is the bottom line: Is this person fit to be President on the basis of proof as to specific behavior by him or her?

Now, let me address finally four arguments that are made by advocates for the administration in this case and offer a response briefly to each.

First, we hear that public behavior that arises from or springs from the private life of a President should not be impeachable. That plainly is wrong. It is plainly wrong because the word "other" is crucial, because bribery is the reference and, as we know, bribery, the taking of bribes in particular, typically springs from private greed or need of an individual.

So the first question I hope the committee will ask itself is, what is the difference, the constitutional principal difference, if there is one, between private greed and need on one hand and private lust on the other hand?

Under the Constitution, should there be a difference?

Secondly, we hear that public behavior, but not official public behavior, that is designed to cover up an embarrassment should not be impeachable. That again it seems to me is plainly wrong. One way to cover up embarrassment is to bribe somebody, to give a

bribe, and the giving as well as the taking of bribes plainly is included under bribery.

If, for example, a President bribed a judge in a sexual harassment civil lawsuit against him or her, that would be impeachable—plainly, obviously. The first article of impeachment against President Nixon involved giving out hush money to individuals involved in the break-in.

So, again, I think the committee has to ask itself if bribing a judge to cover up an embarrassment is plainly impeachable, why not obstruction of justice, subornation of witnesses, and lying under oath in Federal judicial proceedings?

Thirdly, we hear that this is unprecedented, these allegations are unprecedented, and this argument is that in the two previous or perhaps three previous precedents, as we have been told, there was no case quite like this one. Or sometimes this precedent argument is turned around, and we are told, as Professor Sunstein suggested, that nearly all Presidents, or all recent Presidents have violated their oath of office. So who cares?

Well, the answer to the first version of the argument on precedent is that it would reduce the meaning of the Constitution and the work of this House to utter arbitrariness. Why should we freeze-dry the meaning of the language of Article II, Section 4, to fit the case of Andrew Johnson and Richard Nixon? That, frankly, I would suggest is just absurd.

As to the other version of the precedent argument, they all do it, that is, all Presidents violate their oath of office, I would say that counts as a reason for this House to say perhaps at long last that it has a responsibility it has not been fulfilling to impose some discipline upon the President.

Fourth and finally, we hear that, well, this behavior isn't serious or grave or gross enough, it did not involve an act against the state or abuse of official power. Let me mention one precedent of my own.

After the election of 1972—in which I was a speech writer in the Democratic campaign, by the way—and after the Watergate investigation had begun, Federal prosecutors in Maryland discovered in the course of a grand jury investigation that the Vice President, Spiro Agnew, had been taking bribes from Maryland contractors while a county executive and while Governor of Maryland. There was even suggestion that on a couple of occasions he had taken money from such contractors in his office in the White House, although as far as I know, there wasn't proof that he ever did anything for those contractors after becoming Vice President.

Now, this behavior perhaps was tawdry, it perhaps was grossly tawdry, but my memory is that most people at the time, including Republicans, believed that it would have been impeachable if Attorney General Richardson had determined that the criminal proceeding ought not go forward. That was a very hot issue at the time.

So I hope the committee will ask itself what, if any, is the difference between this case now and the case, that almost happened, of Vice President Agnew?

Mr. CANADY. Thank you, Professor Parker.

[The prepared statement of Mr. Parker follows:]

PREPARED STATEMENT OF RICHARD D. PARKER, WILLIAMS PROFESSOR OF LAW, HARVARD UNIVERSITY SCHOOL OF LAW

Having reviewed a variety of interpretations, historic and contemporary, of standards for impeachment of a President by the House of Representatives, I shall briefly address three issues. First, what agreement is there on basic parameters that should frame a discussion of "impeachable" presidential behavior under Article II, Section 4 of the Constitution? Second, what should be made of claims that obstruction of justice (including lying under oath) in federal judicial proceedings is not impeachable if the behavior arose out of "personal" or "private" affairs of the President? And, third, if behavior is determined to be impeachable, what sorts of considerations may appropriately guide the House of Representatives in deciding whether to go on and vote to impeach the President?

A. PARAMETERS OF "IMPEACHABLE" BEHAVIOR

(1) It is important to begin with a basic distinction: A determination that presidential behavior is "impeachable" does not *necessarily* mean that, once such behavior is proved, the House of Representatives has to impeach the President. Questions of "what is impeachable" and of "whether to impeach" are, in principle, distinct. Considerations sufficient to answer the first question may not be sufficient—taken by themselves—to resolve the second.

(2) The language of Article II, Section 4 which describes impeachable behavior—"Treason, Bribery or other high Crimes and Misdemeanors"—is meant to impose some limitation on the power to impeach. It is mistaken to say that the House may define this language in any way it wishes. For that is to claim that there is, in principle, no limitation on the power.

(3) On the other hand, it is evident that the exact scope of the power is anything but clear. The pre-1787 practice of impeachment in England, on which our constitutional provision was modelled semantically, does not resolve the matter. Nor do truncated references to it in the records of the constitutional convention or the Federalist Papers. Nor, finally, do the precedents in which Congress has considered the matter. The precedents (particularly those involving impeachment of presidents) are simply too rare and too bound up in specific contexts to yield a precise definition—precise enough, that is, to resolve unprecedented issues arising in novel contexts.

(4) That means that interpretation of the constitutional language must evolve through case-by-case consideration of concrete issues in particular contexts. This is hardly unusual. The interpretation of a great many constitutional provisions—including provisions that assign powers to government—has, necessarily, evolved through time, adapting to and gathering meaning from specific circumstances.

(5) Nor is the evolving, situational nature of the language's meaning somehow "unfair" to the President. It is crucial to keep in mind that impeachment involves only removal from office. It is not "punishment." Article I, Section 3 makes that clear. The same Section allows for criminal punishment as a separate matter *after* impeachment. Hence, the standards of "fair warning" that apply to safeguard a defendant in a criminal prosecution do not apply to impeachment. The Federalist No. 65 makes this point, observing that impeachment "can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security."

(6) What, then, can be said generally about the broad contours—and limitations—of the constitutional language within which the Congress must exercise discretion? It appears that students of the subject agree on five propositions: (a) The predicate of impeachment must involve proof of specific acts or omissions rather than a generalized description of misbehavior. (b) The standard for "impeachable" presidential conduct is not necessarily the same as for "impeachable" behavior by judges or cabinet officers. On one hand, the standard for the President might have to be more tolerant of misbehavior. (Unlike the other officials, for example, the President is elected.) On the other hand, it might need to be less tolerant. (The President, for example, is far more powerful.) Reasonable people may disagree about that, but agree that the presidential standard is unique. (c) The range of impeachable conduct is not limited to behavior currently punishable under criminal law. Nor is impeachment necessarily subject to the exact technical requirements and defenses—for instance, the intent requirements, the exclusionary rule or the entrapment defense—applicable in a criminal prosecution. Yet, at the same time, not all criminal behavior is necessarily impeachable. (d) The Congress should look, by way of analogy, to "Treason" and "Bribery" in considering the scope of "other high Crimes and Misdemeanors." (e) And, finally, if an overarching description can be made of the latter,

it is that "high" misbehavior must transcend mere "maladministration." It must be "grave" or "gross" or "serious."

(7) Can anything more be said about the level of "gravity" that is required? Attempts are common. Most of them have to do with the "official" nature of the misbehavior: (a) Some say that impeachable conduct should be limited to offenses against "the State" or "the Republic" or the "constitutional order." (b) Others say it should, at least, involve performance (or nonperformance) of the official duties of the President. (c) Still others say that it must involve some use of the powers or privileges of the office, whether or not within the scope of official duties. And (d) some say that it should just be limited to conduct by the President while in office. Yet nearly everyone seems to agree that a President found to have murdered someone or to have committed child abuse—even before assuming office—is impeachable. Thus, as with so many efforts at general definition of constitutional powers, we find ourselves retreating to the most capacious standard of all: (e) Impeachable behavior is behavior that, once found out, gravely damages the capacity of the President to lead—that gravely impairs his fitness for office.

B. WHAT ABOUT OBSTRUCTION OF JUSTICE IN FEDERAL JUDICIAL PROCEEDINGS ARISING OUT OF THE "PERSONAL" OR "PRIVATE" AFFAIRS OF THE PRESIDENT?

Seeking to short-circuit application of this standard, some now claim that conduct arising out of the private affairs of the President can never gravely impair his fitness for public office and, hence, can never be impeachable. So sweeping a claim cannot be sustained, however. For it would rule out a case of murder committed for private motives. The claim might then be amended to bar impeachment for conduct arising out of one sub-category of the President's private life: his sex life. But that cannot be sustained either. For it is not hard to imagine cases of murder arising from just that source. Thus the claim might be amended again, to advocate a presumption against impeachment for conduct arising out of the President's private life, a presumption that could be overcome only if the conduct itself were very, very "grave" or "gross" or "serious." Now, we're almost back where we began, but with the scales sharply tilted against impeachability for misbehavior whose source is "personal" or "private."

This now-familiar line of argument concludes as follows: Lying under oath and obstruction of justice in federal judicial proceedings are, even if proved, not impeachable because they simply are not sufficiently "grave" or sufficiently "gross" or sufficiently "serious," so long as such conduct arose from the President's private affairs.

I would like to make four comments on this claim.

(1) Strictly as a matter of principle, it is not clear why substantial presidential misconduct should be *presumed* non-impeachable just because it "arose from" a realm of "private" life. Is the claim that the "value" of privacy should usually immunize any misbehavior—*public* misbehavior—springing from this realm? Is it too "embarrassing" or too "unseemly" (whatever that means) to look into such misbehavior? Is the idea that small motives cannot lead to large transgressions?

These notions are peculiar enough in themselves. But, in terms of constitutional principle, they make no sense. The reason is that the phrase, "other high Crimes and Misdemeanors," must be understood in light of "Bribery," one of its referents. Acts of bribery—as is well known—tend to arise from the "private" lives of the actors. The fact that bribery may arise from private greed (or need) does not presumptively immunize it from impeachment. Why, then, should public acts be presumptively immunized solely on the ground that they arose from private lust?

(2) It is, of course, common to imagine that "the standard" for impeachment is established by President Nixon's misbehavior. It is equally common to characterize Nixon's misbehavior as imminently threatening the destruction of the Constitution. Such hyperbole aside, it is useful to recall another impeachment issue from the same era. It involved Vice President Spiro Agnew. A criminal investigation in Maryland uncovered evidence that Agnew had solicited and accepted kickbacks from local contractors before assuming his federal office—and that he had then received some payments from the same contractors in his office in the White House. Attempting to forestall this investigation, the Vice President employed three main strategies. One was denial. Another was to attack the chief prosecutor. And the third was to "go to the House." He sought, that is, to persuade the House of Representatives to initiate impeachment proceedings against him. The leaders of the House chose to defer to the criminal prosecutors. But what if the prosecutors had, instead, deferred to them? In that case, wouldn't the House have looked into the matter? And, if it had begun impeachment proceedings against Agnew, who would have argued that his misbehavior was presumptively immunized just because it arose from his private life?

To be sure, Spiro Agnew was "only" a Vice President. What, then, if it had been President Nixon who was shown to have solicited and accepted bribes from Maryland contractors? It was one thing to argue that Nixon should not be impeached for income tax evasion. It would have been quite another to argue that bribery was not even impeach*able.* The reason, again, is that "Bribery" is one of the two referents of "other high Crimes and Misdemeanors." Minimal fidelity to the Constitution demands that bribery be taken very seriously—working, at the very least, from a presumption that any act of bribery Is impeachable. So, again, we must ask ourselves: What constitutional difference is there between greed and lust as motivations for presidential misconduct?

(3) Now, consider another hypothetical situation: Suppose the President were shown to have bribed the judge in a civil lawsuit against him for sexual harassment, seeking to cover up embarrassing evidence. As bribery, this act would be impeachable, despite its source in the President's sex life. What is the difference between that and lying under oath or obstructing justice in the same judicial proceeding—to say nothing of before a federal grand jury—for the same purpose? By analogy, both sorts of behavior would seem grossly to pervert, even to mock, the course of justice in a court of the United States. Is that not so?

(4) We hear, however, that lying under oath and obstruction of justice in federal court are simply too trivial to be analogized to bribery—and surely too trivial to count as "grave" or "gross" or "serious" presidential misconduct. The argument is: "Everyone does it." Or: "Everyone does it in civil cases." Or: "Everyone does it in civil cases about sex." Or at least: "Everyone can understand doing it." One response to these arguments is to pause and let them sink in.

Because the arguments are now so familiar, however, four further responses are helpful. (a) Even if it is true that lying under oath and obstruction of justice in federal court are really so common nowadays, it is not clear what should follow. Why wouldn't that be a reason to take such misbehavior more rather than less seriously? When we hear that a problem (and, in this case, crime) is becoming more common, we often respond by calling for a crackdown on it. Why not here? (b) If we truly no longer care very much about this kind of misconduct, are we willing to say so generally? Are we willing to acknowledge it—and to accept the complicity of the legal profession in it—openly? If not, why not? (c) What evidence is there for the proposition that participants in federal judicial proceedings do not, in fact, regard lying under oath and obstruction of justice as a "grave" matter? And (d) if we still do want to treat such acts by ordinary people as a "serious" matter, why are they not "serious" when done by a President? If we do not treat them as "serious" when done by a President, how can we keep treating them as "serious" when done by ordinary people?

I don't pretend to know the answers to all these questions. But they add to my conclusion that a consideration of the "gravity" or "seriousness" of such presidential misconduct should not be short-circuited solely on the ground that the misconduct arose out of the President's private life.

C. WHETHER TO IMPEACH

If the House of Representatives concludes that the President's misconduct, once proven, is impeachable, it must then face the distinct question of whether to impeach him. Because members of the House are uniquely entitled—and, as I'll note, uniquely suited—to answer this question, there is little that I, testifying as an academic "expert" on the Constitution, should say about it. I, therefore, will simply comment on five possible elements of the decision to be made by the House.

(1) Ultimately, as I have already indicated, it is a decision about the President's fitness for office. Though it must be predicated on proof of specific acts or omissions, it must focus, in the end, on inferences to be drawn from such acts or omissions in the particular case, with respect to the particular person responsible for them. That is to say, it must focus on the character of the President. That is the bottom line.

This may strike some as troubling. (a) How, after all, is personal character to be judged? There is certainly no science to rely on. But, in criminal and civil trials, juries make such judgments every day. These judgments inevitably affect a jury's assessment of the credibility of witnesses and the relative desert of parties to litigation. What's more, we all draw inferences about character from the behavior of others in our ordinary lives. On that basis, we decide whether to do business with someone, whether to rely on someone. It's not a science, but neither is it rocket science. (b) But how, in particular, is character to be judged to determine fitness for office? How do we know what "fitness for office" means? Obviously, there is no "correct" answer to this question. Conceptions of "fitness" may vary at any one time

in our history, and they may vary from time to time. Yet, again, we all make such judgments every day whether in evaluating the fitness for office of our boss or our subordinate. (c) Haven't the voters already made this judgment, however, in the case of the President? Yes, they have. And if, at that time, the voters knew about the misconduct at issue, then it seems to me that the House should take that fact very much into account. If, for instance, the voters in 1972 had known Spiro Agnew had solicited and taken kickbacks from Maryland contractors, that knowledge would have been relevant (though not necessarily determinative) in an impeachment inquiry. By the same token, if the voters in 1996 knew, in fact, of lying under oath or obstruction of justice in federal court by the President, that too should be relevant.

(2) The judgment the House of Representatives must make is a political judgment. It is, however, a political judgment of a specific, limited kind. (a) If anything is clear in the discussion of impeachment in The Federalist No. 65 and 66, it is that partisan—or "factional"—politics ought not determine the decision whether to impeach. Partisan loyalty should not impel a member of the House to vote "aye"—or to vote "nay." Either way, it would tend to dilute or pervert the standard for impeachable behavior, turning it into mere opposition to, or support for, the policies of the President. (b) At the same time, it is not just appropriate, but desirable and even necessary that another sort of politics be brought to bear on the decision. That is "institutional" politics. The Constitution's framers believed that, as a check on presidential misbehavior, periodic elections were insufficient. Hence, the provision for impeachment. And, in order to make effective this between-elections checking mechanism, they assigned responsibility for it to a body with (what they called) an institutional "motive" to do the job with vigor—the Congress. The framers, in other words, relied on an institutional rivalry between the legislative and executive branches of government to motivate the former to discipline the latter. It follows that members of Congress should not be embarrassed to criticize vigilantly a President's misconduct—and to draw inferences from it about his fitness for office. For that is their job. (c) Finally, by assigning this job to the Congress rather than to the Supreme Court, the framers intended that yet another sort of politics should have influence in the process. Members of Congress are elected to act for the good of the country. And they must be expected to pay attention to the views of their constituents. Thus no Member ought be embarrassed to factor that goal and those views into his or her vote. Impeachment, after all, is supposed to be an integral part of—not external to—our democracy.

(3) If impeachment of the President is purposely rooted in the separation of powers, what about the effects of impeachment on the separation of powers? The claim is often made that the House should be very, very reluctant to impeach for fear of the effect on the institution of the presidency. Impeachment is sometimes described as a legislative "coup." Its consequences are said to include "immobilization" of the presidency, a destruction of its "independence." For the presidency, we are told, is "fragile." It should be handled, if at all, with the greatest care.

Of course, the decision whether to impeach should attend to likely consequences, especially institutional consequences. And background assumptions about the strength or weakness of the presidency, at a particular stage in our history, must affect an assessment of those consequences. In this century, however, its power has grown. That is obvious. True, its power has ebbed and flowed from time to time. But a description of the modern presidency as inherently "fragile" is nothing short of bizarre—about as bizarre as a description of impeachment, provided for in Article II, as inherently equivalent to a "coup." If a study of our constitutional history shows anything, it is that each branch of the government, when tested, has gone on to prove its tensile strength.

(4) Yet an argument is made that, as the power of the presidency has grown, its nature—and, so, what counts as fitness for the office—have changed. Multiple modern presidents, it is said, committed impeachable acts. They weren't impeached; hence, their successors shouldn't be. This argument flips the previous one upside-down. But it is hardly less bizarre. If it is true that the presidency has accumulated power through a pattern of impeachable behavior, that would seem a reason, at long last, for Congress to check this aggrandizement—not collapse in the face of it.

(5) There is, finally, the question whether disapproval of the chief accuser in a case counts as an appropriate ground for voting against the prescribed sanction. Vice President Agnew, I've noted, raised the issue. So did President Nixon. No doubt, the House may consider the matter. But this is a constitutional process. It has to do with the misbehavior of one person, the President. At issue is his removal from office. It is not a criminal trial. It is not the O.J. Simpson case.

The Minority Leader put the point dramatically. Impeachment, he said, is the "most important thing we do" short of declaring war. For that reason the House of

Representatives needs to focus on the two fundamental inquiries: What did this President do? Is he fit to be President?

Mr. CANADY. Professor Schlesinger.

STATEMENT OF ARTHUR M. SCHLESINGER, JR., PROFESSOR OF HISTORY, CITY UNIVERSITY OF NEW YORK

Mr. SCHLESINGER. I thank the committee for the opportunity to set forth my understanding as an American historian of the nature and role of impeachment under the American Constitution.

I would like to incorporate, by reference, the discussion of the Impeachment Clause, treason and bribery and other high crimes and misdemeanors—incorporate by reference the discussions of my colleagues Professor Sunstein and Professor Holden.

I must register emphatic disagreement with the notion that bribery is a private offense. Bribery is obviously corruption of public duty and public service. Evidence seems to me conclusive the Founding Fathers saw impeachment as a remedy for grave and momentous offenses against the Constitution; George Mason said, great crimes, great and dangerous offenses, attempts to subvert the Constitution. And the question we confront today, the question that your committee will confront in the weeks ahead, is whether it is a good idea to introduce a new area of impeachment and to lower the bar to this action.

The charges levied against the President by the Independent Counsel plainly do not rise to the level of treason and bribery. They do not apply to acts committed by the President in his role as public official. They do not involve grave breaches of official duties. At best, if proven, they would perhaps be defined as low crimes and misdemeanors.

They arise from instances of private misbehavior. All the Independent Counsel's charges thus far derive from the President's lies about his sex life, his attempts to hide personal misbehavior are certainly disgraceful, but if they are to be deemed impeachable, then we reject the standards laid down by the framers of the Constitution and trivialize the process of impeachment.

Madison in the Constitutional Convention said making impeachment too easy would be to make the presidential term equivalent to a tenure during the pleasure of the Senate.

Lying to the public is far from an unknown practice among Presidents. If you recall President Reagan's lies during the Iran-Contra brouhaha, on November 6, 1986, President Reagan said the story about trading arms for hostages has no foundation. A week later he called the story utterly false and added we did not—repeat, did not trade weapons or anything else for hostages. President Reagan's falsehoods had to do with his official duties, not with his private behavior, and were a gross dereliction of his executive responsibility, but I recall no congressional cry for impeachment. Lies about private behavior told under oath certainly heighten the presidential offense, but they are not political offenses against the state.

The Take-Care Clause has been mentioned. In 1974, the House Judiciary Committee, confronted by convincing evidence that President Nixon had connived at the backdating of documents in the instance of tax fraud, dropped the charge on the ground that such personal misconduct did not involve official actions or abuse of

power, and thus was not an impeachable offense. As the committee report said, tax fraud was not a type of abuse of power at which the remedy of impeachment is directed.

The Take-Care Clause has been—is far from imperative in all its applications. As Professor Charles Black of the Yale Law School asked in his book on impeachment, suppose a President violated the Mann Act by transporting a woman across State lines for an immoral purpose. Would it not be preposterous, by rights, to think that any of this is what the framers meant when they referred to treason, bribery and other high crimes and misdemeanors, or any sensible constitutional plan would make a President removable on such grounds?

The framers were much concerned about what we would now call the legitimacy of the impeachment process. They believed that if the impeachment process is to acquire legitimacy, the bill of particulars must be seen as impeachable by broad sections of the electorate. The charges must be so grave and the evidence for them so weighty that they persuade members of both parties that removal must be considered. The framers were deeply fearful of partisan manipulation of the impeachment process.

As Hamilton wrote in the 65th Federalist, the process will seldom fail to agitate the passions of the whole community and to divide it into parties. There will always be the greatest danger, Hamilton said, that the decision will be regulated more by the comparative strength of the parties than by the real demonstrations of innocence or guilt.

The framers were deeply fearful of partisan manipulation of the impeachment process. They abhorred what Hamilton called the demon of faction, the domination of the impeachment process by faction would, in the view of the framers, deny the process legitimacy.

The current impeachment proceedings, judging by the strictly partisan vote in the House of Representatives, fails the legitimacy test. The results of last Tuesday's midterm election confirmed the drastic failure of the impeachment drive and its quest for popular legitimacy.

Lowering the bar to impeachment creates a novel, indeed revolutionary theory of impeachment, a theory that would send us on an adventure with ominous implications for the Separation of Powers that the Constitution established as the basis of our political order. Let us recall the impeachment of President Andrew Johnson. That effort failed the legitimacy test, and it failed in the Senate of the United States by a single vote.

President Johnson was rescued in 1868, but even the failed impeachment had serious consequences for the presidency. The aftermath bound and confined the President for the rest of the century. A brilliant young political scientist at Johns Hopkins, Woodrow Wilson, concluded the Congress had become, as he said, the central and predominant power of the system, and he called his influential book of 1885 "Congressional Government."

Between Lincoln and Theodore Roosevelt in 1901, no President exerted strong executive leadership. Had the impeachment drive against Johnson succeeded, the constitutional separation of powers would have been radically altered, and the alteration would have

been protected and maintained by the lower threshold of impeachment. The presidential system might have become a quasi-parliamentary regime in which the impeachment process would serve as the American equivalent of the vote of confidence. Presidency would have been permanently weekend and our polity permanently changed.

James G. Blaine, a formidable Republican leader of the last part of the 19th century, a former Speaker of this House, voted in 1868 for impeachment, but rejecting on the Johnson impeachment 20 years after, he wrote that the success of that impeachment drive would have resulted in greater injury to free institutions than Andrew Johnson in his utmost endeavor was able to inflict.

Johnson's acquittal made it more certain than ever that as the framers had wished, impeachment would be used against Presidents only in the case of major offenses against the state. It is this theory of impeachment that is under challenge today by those who want to make it easy for Congress to get rid of Presidents.

The Republic could afford a period of "congressional government" in the 19th century, when the U.S. was a marginal actor on the world stage. Today, the U.S. is the world's only superpower. The American Government is irrevocably involved in international affairs, plays an essential role in the search for peace in Ireland, in the former Yugoslavia, the Middle East and South Asia, that seeks to contain the consequences of economic collapse in East Asia, to prevent the dissemination and testing of nuclear weapons, to stop the plagues of terrorism, drugs, poverty and disease. In such a time we cannot afford the enfeebled and intimidated presidency the revolutionary theory of impeachment would inevitably produce.

I am sure that the House of Representatives will approach their constitutional obligations with a due sense of the solemnity of the decision they are about to make. The report of the Judiciary Committee and the votes of the House will reverberate through the future. It will set precedents for future attempts to rearrange the separation of powers. I trust that the House of Representatives will meet their responsibilities and not seek to download the problem on the Senate.

Thank you.

Mr. CANADY. Thank you, Professor Schlesinger.

[The prepared statement of Mr. Schlesinger follows:]

PREPARED STATEMENT OF ARTHUR M. SCHLESINGER, JR., PROFESSOR OF LAW, HARVARD UNIVERSITY OF LAW

I thank the Committee for the opportunity to set forth my understanding as an American historian of the nature and role of impeachment under the American Constitution. The idea of impeachment is part of our legal inheritance from Great Britain, where it had been used to remove public officials at least since the year 1386. Adapting what Alexander Hamilton called the British "model", the Framers of the Constitution designated as grounds for removal from office "Treason, Bribery, or other high Crimes and Misdemeanors." This formulation suggests that the "other high crimes and misdemeanors" must be on the same level and of the same quality as treason and bribery. They must, as George Mason said in the Constitutional Convention, be "great crimes," "great and dangerous offenses," "attempts to subvert the Constitution." They must, said Hamilton in the 65th Federalist, be offenses that proceed

> . . . 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 society itself.

Making impeachment too easy, said James Madison, would be to make the Presidential term "equivalent to a tenure during the pleasure of the Senate" and would therefore undermine the separation of powers. According to James Wilson, the co-father with Madison of the Constitution, "Impeachments are confined to political characters, to political crimes and misdemeanors." According to Justice Story, impeachment was intended "to secure the state against gross official misdemeanors." The term "high misdemeanor," inherited from the British tradition of impeachment, referred to such offenses as treason; it is not to be confused with "misdemeanor" in its present-day usage as a petty offense. The evidence is conclusive that the Founding Fathers saw impeachment as a remedy for grave and momentous offenses against the Constitution, for "great injuries" to the state, for formidable abuses of official authority.

The question we confront today is whether it is a good idea to lower the bar to impeachment. The charges levied against the President by the Independent Counsel plainly do not rise to the level of treason and bribery. They do not apply to acts committed by a President in his role of public official. They arise from instances of private misbehavior. All the Independent Counsel's charges thus far derive entirely from a President's lies about his own sex life. His attempts to hide personal misbehavior are certainly disgraceful; but if they are to be deemed impeachable, then we reject the standards laid down by the Framers in the Constitution and trivialize the process of impeachment.

Lying to the public is not an unknown practice for Presidents. Recall President Reagan's lies during the Iran-contra imbroglio. On 6 November 1986 President Reagan said that the story about trading arms for hostages "has no foundation." A week later he called the story "utterly false" and added, "We did not—repeat—did not trade weapons or anything else for hostages." President Reagan's falsehoods had to do with his official duties, not with his private behavior, and were a gross dereliction of his executive responsibility. But I recall no congressional cry for impeachment.

Lies about private behavior told under oath, even in a civil case subsequently dismissed, certainly heighten the Presidential offense. But they are not political offenses against the state. Thus in 1974 the House Judiciary Committee, confronted by convincing evidence that President Nixon had connived at the backdating of documents in the interests of tax fraud, dropped the charge on the ground that such personal misconduct did not involve official actions or abuse of executive power and thus was not an impeachable offense.

As Professor Charles Black of the Yale Law School asked in his book *Impeachment*: suppose a President violated the Mann Act by transporting a woman across a state line for, in the words of the act, an "immoral purpose,"

> Would it not be preposterous to think that any of this is what the Framers meant when they referred to "Treason, Bribery, and other high Crimes and Misdemeanors," or that any sensible constitutional plan would make a president removable on such grounds?

This is not to say that all instances of private misconduct by Presidents may not rise to the constitutional level. If a President were to engage in murder, in rape, in child molestation, that would, as Professor Black suggests, "so stain a president as to make his continuance in office dangerous to public order." Monstrous crimes acquire public significance. But lying about one's sex life is not a monstrous crime. Most people have lied about their sex lives at one time or another. We lie to protect ourselves, our spouses, our children, our lovers. Gentlemen always lie about their sex lives. Only a cad tells the truth about his love affairs. Many people feel that questions no one has a right to ask do not call for truthful answers.

The Framers further believed that, if the impeachment process is to acquire popular legitimacy, the bill of particulars must be seen as impeachable by broad sections of the electorate. The charges must be so grave and the evidence for them so weighty that they persuade members of both parties that removal must be considered. The Framers were deeply fearful of partisan manipulation of the impeachment process. They abhorred what Hamilton called "the demon of faction." Charles Pinckney in the Constitutional Convention even questioned the proposal of the Senate as the court of impeachment, warning that Congress might "under the influence of heat and faction, throw him [the President] out of office." The domination of the impeachment process by "faction" would in the view of the Framers deny the process legitimacy.

The current impeachment proceedings, judging by the strictly partisan vote in the House of Representatives, fails the legitimacy test. The results of last Tuesday's midterm election confirm the drastic failure of the impeachment drive in its quest for popular legitimacy.

One hesitates to speculate about the reasons for this rebuff to impeachment. Voters may perhaps have a visceral understanding that the lowering of the bar to impeachment creates a novel, indeed revolutionary, theory of impeachment—a theory that would send us on an adventure with ominous implications for the separation of powers that the Constitution established as the basis of our political order.

Let us recall the impeachment of President Andrew Johnson. The basic cause was disagreement over the policies of Reconstruction. On this question scholars today would generally say that Johnson was wrong and his Radical Republican opponents were right. But the constitutional question was whether the House could impeach a President for honest disagreements over policy. When Johnson fired his Secretary of War in violation of a Tenure of Office Act passed by Congress (later to be declared unconstitutional by the Supreme Court), the House seized on this as a pretext for impeachment. Congress acted with impressive haste. The House voted impeachment on 3 March 1868 and sent the articles of impeachment to the Senate on 5 March. The court of impeachment was convened on 13 March. The trial began on 30 March. Eighty-one days after the House voted to impeach, the Senate acquitted Andrew Johnson by a single vote.

The President may have been rescued in 1868, but even the failed impeachment had serious consequences for the Presidency. As Senator James Dixon of Connecticut put it,

> Whether Andrew Johnson should be removed from office, justly or unjustly, was comparatively of little consequence—but whether our government should be Mexicanized, and an example sent which would surely, in the end, utterly overthrow our institutions, was a matter of vast consequence.

Senator Dixon had a point. The aftermath bound and confined the Presidency for the rest of the century. A brilliant young political scientist at Johns Hopkins, Woodrow Wilson, concluded that Congress had become "the central and predominant power of the system" and called his influential book of 1885 *Congressional Government.*

Had the impeachment drive succeeded, the constitutional separation of powers would have been radically altered, and the alteration would have been protected and maintained by the lowered threshold of impeachment. The presidential system might have become a quasiparliamentary regime, in which the impeachment process would have served as the American equivalent of the vote of confidence. The Presidency would have been permanently weakened and our polity permanently changed.

James G. Blaine, a formidable Republican leader who in 1869 became Speaker of the House, voted in 1868 for impeachment; but, reflecting twenty years after, Blaine wrote that the success of the impeachment drive "would have resulted in greater injury to free institutions than Andrew Johnson in his utmost endeavor was able to inflict." Johnson's acquittal made it more certain than ever that, as the Framers had wished, impeachment would be used against Presidents only in the case of major offenses against the state and as a weapon of last resort. It is this theory of impeachment that is under challenge today by those who want to make it easy for Congress to get rid of Presidents.

The republic could afford a period of congressional goverment in the 19th century when the United States was a marginal actor on the world stage. Today the United States is the world's only superpower. The American government is irrevocably involved in international affairs. It plays an essential role in the search for peace in Ireland, in the former Yugoslavia, in the Middle East, in South Asia. It seeks to contain the consequences of economic collapse in East Asia, seeks to prevent the dissemination and testing of nuclear weapons, seeks to stop the plagues of terrorism, drugs, poverty and disease. In such a time we cannot afford the enfeebled and intimidated Presidency the revolutionary theory of impeachment would inevitably produce.

The question remains whether there is not some way by which the feeling of national regret and disapproval over a President's personal behavior can be registered. Such proposals as fining a President or requiring him to appear on the floor of the House for a public (verbal) stoning are ludicrous ideas that would make our great republic the world's laughing stock. You might as well demand that the President wear a scarlet letter.

A resolution of censure is a more plausible suggestion. As a practical way to terminate this wretched affair, censure, divested of any hint of a bill of attainder, has evident appeal. It may be the best way out of a national embarassment. But I would caution against any tendency to make censure a precedent or to regard it as a routine congressional weapon.

Censure has been used against Presidents once before. On 28 March 1834 the Senate voted to censure President Andrew Jackson on the ground that, in withdrawing federal funds from the Bank of the United States, he had "assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both."

Jackson responded on 15 April with a celebrated "Protest to the Senate." If the Senate really believed he had committed "the high crime of violating the laws and Constitution of my country," then, Jackson said, the proper remedy was impeachment. Senatorial censure was "wholly unauthorized by the Constitution, and in derogation of its entire spirit. . . . In no part of that instrument is any such power conferred on either branch of the Legislature." Jackson emphasized "the pernicious consequences which would inevitably flow from . . . the practice by the Senate of the unconstitutional power of arraigning and censuring the official conduct of the Executive." He rejected censure "as unauthorized by the Constitution, contrary to its spirit and to several of its express provisions, subversive of that distribution of powers of government which it has ordained and established." The basic problem with the proposal of a plea bargain in the form of a negotiated censure resolution is that Presidential acceptance of censure would hand one or both houses of Congress a new weapon to threaten and intimidate Presidents.

One must hope that any President guilty of personal misconduct falling below the level of impeachable offenses will so rebuke and castigate himself, and feel such shame in the eyes of his family, in the eyes of his friends and supporters and in the eyes of history, that he will punish himself for his own self-indulgence, callousness and stupidity.

Mr. CANADY. Professor McGinnis.

STATEMENT OF JOHN O. McGINNIS, PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY

Mr. MCGINNIS. Thank you very much, Mr. Chairman.

Mr. CANADY. You need to pull the microphone close to you and make sure that it is on.

Mr. MCGINNIS. Thank you, Mr. Chairman, and thank you, Ranking Member, and thank you, other Members, for the opportunity to speak before you here today.

I will speak on two issues: First, the question of what constitutes an impeachable offense, and secondly, what are the possible punishments that are allowed under impeachment proceedings.

First, let me just briefly state, and I have discussed this at greater length in my testimony, that I believe that impeachable offenses include all serious and objective misconduct that undermines an official's fitness for further service in office. I believe there is substantial reason to believe this definition meets the structure of the Constitution.

After all, the purpose of impeachment, the only sanction for the impeachment process, is removing an official from office. That goes just far enough and no further than removing further possibility of future injury to the Republic.

I think also that this definition is one that clearly comes from the Convention. At that time Madison thought it was quite a broad power, high crimes and misdemeanors, and said the President could be impeached for any misdemeanor. Throughout our history, the Impeachment Clause has reached all serious and objective misconduct, interferes with fitness for office including, as Professor Harrison has suggested, tax evasion, including previously perjury, including even drunkenness in office.

I would like now, if I may, turn to the question of some of the arguments that have been made by previous witnesses because it is not my purpose here to say that the President must be im-

peached for these offenses simply to clear away the legal underbrush from arguments that try to limit this House's discretion to the rid the Republic of an official who is unfit for office because of serious misconduct.

The first argument that high crimes and misdemeanors must concern the abuse of official power because treason and bribery concern official power is mistaken at the outset. It is simply not the case that bribery requires the use of official power. A President could himself or for some private motive bribe a judge, and then he would be impeachable under the express language of the judge. Indeed, Justice Joseph Story, the foremost early commentator on the Constitution, made this point over 150 years ago, when he rhetorically asked, suppose a judge or other officer receives a bribe not connected with his office; could he be entitled to any confidence? Would these reasons for removal be just as strong if he were a case of a bribe taken in official duties?

Moreover, the distinction between private and public conduct does not, I think, attempt to get out the real purposes of the clause, which is removing an official who is unfit for office.

Secondly, some have questioned whether some acts of perjury are impeachable. Perjury is very much like bribery, and bribery is impeachable by express terms of the Constitution. In what way is bribery like perjury? Like bribery of a judge, perjury or obstruction of justice always interferes with the coordinate branches of government to the detriment of a citizen's rights, and therefore is directed against the state.

Indeed, I think we can look from the Constitution itself to the prominence of oaths for all officials about the central necessity of truth-telling under the Constitution.

Previous societies had depended on established religions or hierarchies for social cohesion, but the United States was then different. It was a bold experiment precisely because it depended on the rule of law to protect the rights of each citizen, and the rule of law, in turn, is grounded on the duty of every citizen to testify truthfully under oath.

Fidelity to one's oath is also crucial to retain the public trust and confidence of a republican leader, because it demonstrates that despite his high position, he is as much subject to the social compact as any citizen, even the least of the citizens. Thus, lying under oath by a public official can in any context be a public harm because it strikes both practically and, for the President in particular, symbolically at the heart of the republican order.

Finally, it has been suggested that impeaching a President should require a higher legal standard than impeaching a judge. I think that also has no basis in the Constitution. As Professor Harrison has pointed out, the standard in the Constitution is the same. Indeed, Madison at the time pointed out that impeachment was unnecessary for legislators because they acted collectively and the corruption of a single legislator was less dangerous to the republics.

By the same reason, the unfitness of one of our district court judges, as damaging as that is, is far less dangerous to the Republic than the unfitness of its chief magistrate. And the chief magistrate of the Republic is responsible for taking care that the laws be faithfully executed.

As a former official in the Justice Department, I know that much of the work of the President and his subordinates is not partisan at all, but it involves protecting the rights of the citizens in their day-to-day business; and the question I think the committee has to ask is whether denying a citizen the right of a day in court through perjury or obstruction of justice bears on these general responsibilities of the President.

Finally, let me just briefly suggest that there is really no other means in the Constitution, other than removal from office, that flows from impeachment. This, I hope we can have a high degree of consensus among scholars here today on, even if we disagree about other matters.

It is quite clear that impeachment is the only punishment, only sanction, that is thought to come out of the impeachment process. And the framers were very specific in only limiting it to removal, because if the framers had made impeachment, allowed other kinds of punishments to occur, it would no longer be an awesome weapon and Congress might be able to use it to harass executive officials or otherwise interfere with the operations of coordinate branches.

It is sometimes said that censure here should be a possibility because censure can be made on the analogy of the legislative branch censuring some of its own Members. I think if you look at the clause of the Constitution that authorizes the legislature to censure its own Members, allowing quite plenary power to punish its own Members for disorderly behavior, it is nothing like the impeachment provision which only has one punishment, removal from office, required; and then allows Congress to go on to choose whether to also disqualify that official from office.

I think this is an extremely important point because what we do here, I think, makes a lot of difference to the Republic in the future, because what really will release legislative power will be to have a whole panoply of punishments that extend from impeachment.

Finally, Mr. Chairman, I would like to address myself to those who have said that the concern about impeachment is that they are a distraction from government, therefore, that is a good reason that we should really end these impeachment proceedings. I think that simply cannot be squared with the framers' paramount concern for protecting the integrity of public officials. They recognized that prosperity and stability didn't only depend on the good management of the economy, didn't depend on beneficial legislation. It ultimately rests on the people's trust in their rulers, and they designed the threat of removal from office to restrain the inevitable tendency to breach that trust.

But that constitutional restraint can only work if citizens and legislatures alike have the self-restraint to allow its processes to unfold solemnly, deliberately, and without concern for their own short-term gains and losses. Impeachment is not about popularity, it is about maintaining the public trust, and the framers understood that those concepts were very different indeed.

Thank you.

Mr. CANADY. Thank you.

[The prepared statement of Mr. McGinnis follows:]

PREPARED STATEMENT OF JOHN O. MCGINNIS, PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY

Thank you for the opportunity to appear before the Committee on the important subject of the history and background of impeachment. I will first discuss two issues of lasting importance to constitutional governance—the meaning of "high Crimes and Misdemeanors" and the issue of what sanctions Congress may impose on civil officers of the United States, including the President. During the course of this testimony, I will try to address some of the arguments other scholars and citizens have been making about both these issues in relation to current events.

The Constitution states that "the President, the 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."[1] To understand the meaning of "high Crimes and Misdemeanors," we must understand the purpose of this clause. Like other constitutional mechanisms, impeachment responds to a particular problem of governance—in this case how to end the tenure of an officer whose conduct has seriously undermined his fitness for continued service and thus poses an unacceptable risk of injury to the republic.

This purpose is evident from the structure of this provision and other provisions relating to impeachment. First, the only legal consequences that flow from impeachment proceedings—removal from office and potential disqualification from future office—make little sense unless impeachment is aimed at removing unfit officials.[2] Impeachment permits no penal sanctions and contemplates no consequences short of removal. The consequences of impeachment and conviction go just far enough, and no further than, removing the threat posed to the republic by an unfit official.

The procedure for impeachment—indictment by the House and trial by the Senate—suggests that the Framers were interested in addressing any misconduct seriously undermining fitness rather than addressing some fixed list of offenses or even some set of offenses determined by some abstract rule. If impeachable offenses could be set out in such a determinate matter, it would have made more sense to give the responsibility for evaluating them to the judiciary, the arbiter of cases under determinate rules. On the other hand, if the task of impeachment requires the evaluation of a range of offenses in relation to fitness for office, the logical place for such responsibility is in Congress, the repository of prudential judgement. Judging whether misconduct undermines fitness and makes continued service an unacceptable risk to the republic requires inferences not readily reducible to fixed rules, particularly because fitness for service involves both immediate, practical considerations ("Does this misconduct interfere with the official's day to day execution of his duties?") and symbolic considerations ("Does this official's misconduct dangerously lower the standards for future officeholders.") In addition, particular misconduct may not itself interfere with current tasks, but may reveal defects in an officer's integrity that present an unacceptable risk of future misconduct in areas where misconduct could harm the republic.

On its face the phrase "Treason, Bribery, and other high Crimes and Misdemeanors" wholly comports with the same overriding purpose of impeachment—preventing injury to the republic from seriously unfit officials. Because the categories of misconduct that may undermine fitness to serve cannot be determined in advance, the phrase unsurprisingly does not provide a closed list of impeachable offenses. Nor does it provide on its face some abstract rule for what is "impeachable," other than that which flows from the purpose and structure of the clause and related impeachment provisions. It is true that locating the impeachment process in Congress under a standard requiring prudential judgement raises another problem of governance—the danger that impeachment may make civil officers dependent on the caprice of legislators. But the structure of the impeachment provisions addresses this problem without resorting to a fixed set of impeachable offenses or an arbitrary test for determining their content. In employing the phrase "high Crimes and Misdemeanors" the Framers used a phrase that on its face refers to objective misconduct and not to political differences or disagreements. Indeed, requiring a predicate of an objectively bad act as a precondition to impeachment assures that more than a simple legislative vote of "no confidence" is needed for removal.

Moreover, in keeping with their recognition that mere "parchment barriers" could not be relied on to protect against political excesses, the Framers did not, in any event, simply depend on a linguistic phrase to prevent abuse. Instead, they protected against the inappropriate removal of officials by establishing a high procedural hurdle. They required a substantial supermajority of one branch of the legislature—two-thirds of the Senate—to approve the removal of any officer. They under-

Footnotes at end.

scored the need to avoid partisan considerations in such a procedure by putting Senators under a special oath for the trial, an oath which is unique for legislative proceedings. And in the case of Presidential impeachment, they even required the Nation's highest judicial officer—the Chief Justice of the Supreme Court—to preside over the trial and thereby check any partisan procedural devices. In this manner they both assured that officials seriously unfit for office could be removed but did not make them unduly subservient to the legislature.

Thus, the evident purpose and structure of impeachment clauses show that "high Crimes and Misdemeanors" should be understood in modern lay language as something like "objective misconduct that seriously undermines the official's fitness for office where fitness is measured by the risks, both practical and symbolic, that the officer poses to the republic." The requirement of objective misconduct assures that a civil officer cannot be removed for reasons of policy, but only for an affirmative act of serious misconduct. The requirement that the act seriously undermine the official's fitness for office assures that the focus will be on inferences drawn about his fitness, because it is unfitness that may create an unacceptable risk of injury to the republic.

On the other hand, this definition leaves substantial room for judgment in Congress on the nature of the objective misconduct seriously affecting service in office. This is as it should be, because there could be no checklist of impeachable offenses in a constitution that would stand the test of time, and thus protect against the continuing danger to the republic that comes from seriously unfit officials. As Chief Justice Marshall stressed almost two hundred years ago, in interpreting the general authorities of Congress, "we must never forget that it is a *constitution* we are expounding."[3]

This interpretation of "high Crimes and Misdemeanors" is further supported by the historic meaning of the phrase, the debates at the Constitutional Convention, and the constitutional practice of over two hundred years. First, English history shows that the phrase "high Crimes and Misdemeanors" was a term of art that was not limited to a fixed set of crimes under positive law or the common law of general criminal offenses.[4] Instead, under its rubric the English parliament fashioned a common law of misconduct for officials. It exercised a wide discretion to indict officials for bad acts that made them no longer fit to serve and thus a potential danger to the kingdom.

The history of the adoption of the phrase at the Constitutional Convention also shows that it allows Congress broad discretion to take action in light of serious affirmative misconduct that undermines fitness. It is true that the Convention struck from the original draft of the principal impeachment provision language that permitted impeachment for "maladministration."[5] But that decision simply shows that the Framers recognized that negligence in supervision of the office is so much in eye of the beholder that it would inevitably allow disagreements over public policy to enter into impeachment proceedings. The decision not to permit impeachment on the basis of maladministration is wholly consistent with authorizing it on the basis of objective misconduct that bears on the official's fitness.

At the Convention, the substitute phrase "high Crimes and Misdemeanors" was thought to be broad in scope. Madison believed that it allowed the President to be tried for "any act which might be called a misdemeanor."[6] Subsequent commentators were also impressed by its wide scope. Alexander De Tocqueville, the acute analyst of the American political system noted that all observers of the Constitution were struck by "the vagueness" of the standard for impeachment.[7]

Congressional practice confirms that "high Crimes and Misdemeanors" is broad enough in scope to reach all misconduct that undermines fitness to serve.[8] Of course, most offenses giving rise to impeachment have also been serious crimes because such violations so undermine a person's integrity as to call into question the official's ability to serve. However, even when the conduct at issue may have been a crime, the House of Representatives has often framed the articles in a manner that avoids legal technicalities, and focuses directly on the conduct that detracts from the office of the person accused. Perjury and tax evasion have in the past been grounds for impeachment because they reflect on the fitness of those officials who have sworn to uphold the law, not simply because they are crimes.[9]

Once we have grasped the purpose and history of impeachment, we can readily see that some current legal arguments about the scope of the phrase "high Crimes and Misdemeanors" are simply wrong. For instance, it has been suggested that because Treason and Bribery are crimes requiring the abuse of official power, all "high Crimes and Misdemeanors" must concern the abuse of official power. But even the premise of this argument is inaccurate. An executive branch official could bribe a judge in order to receive favorable treatment in a civil case of his own. He then could be removed under the express language of the clause despite the fact that his

misconduct arose from acts in his private capacity. Similarly, the Constitution defines treason in a way that does not depend on abuse of official power.[10] Justice Joseph Story—the foremost early commentator on the Constitution—made this same point over a hundred and fifty years ago when he asked rhetorically, "Suppose a judge or other officer receive a bribe not connected with his judicial office, could he be entitled to any confidence? Would not these reasons for his removal be just as strong, as if it were a case of an official bribe?"[11]

Moreover, the distinction between private and public capacity does not comport with the purpose of the clause since private offenses of a public man can make him unfit for office. If the official commits a murder in a lover's quarrel or embezzles funds from a relative, such crimes would be deeply personal and yet would still undermine his fitness to serve. Objective private misconduct is relevant to the extent that it allows an inference that future exercise of power by this individual either poses an unacceptable risk of future injury to the republic, or that his continued service would so lower the standards of office that it would represent a risk for the future. Integrity under law is simply not divisible into private and public spheres.

In the face of the impossibility of limiting "high Crimes and Misdemeanors" to crimes committed in a public capacity, some law professors have suggested that if the crime is committed in a private capacity the crime must be "heinous" to be impeachable. But the use of the adjective heinous is simply superfluous if it means that impeachment denotes objective misconduct seriously undermining fitness for office. But if it is to suggest some higher threshold for misconduct in a private capacity, it has no support in either the text or purpose of impeachment. In any event, labeling murder "heinous" and describing perjury or obstruction of justice as not "heinous" is certainly not a legal determination but simply a matter of judgment. It would be very damaging for this House to accept a *legal* definition of "high Crimes and Misdemeanors" that creates a republic which tolerates "private" tax evasion, "private" perjury and "private" obstruction of justice from officials who would then continue to have the power to throw their citizens into prison for the very same offenses.

I have suggested that if the President is determined to have committed objective misconduct, the House has both the duty and the discretion to decide whether the misconduct has undermined his fitness for office in a manner that requires his removal. No law professor has any special expertise to guide this Committee in the solemn exercise of this duty. But I do want to respond to several misconceptions and outright legal errors that have recently crept into discourse about impeachment. If allowed to stand, they would wrongly and dangerously narrow this House's entirely lawful discretion.

The first misconception is that an official's course of conduct must be divided into offenses, and then each offense judged separately as to whether it is impeachable. While the House has returned multi-count impeachments in the past, it has been well understood that a course of conduct as a whole should be the subject of judgment. The consequence of impeachment and conviction is the same on any count—removal from office. Moreover, other things being equal, a pattern of misconduct may be more probative of unfitness than an isolated criminal act. Thus, both the nature of the consequences and of the proof in impeachment proceedings suggest that offenses should be considered collectively in determining whether an official should be removed from office. Certainly, for instance, a series of calculated perjuries and obstructions of justice over a substantial period is potentially more serious than a single misstatement in a moment of weakness. The inferences to be drawn from the course of conduct might be more serious still if the official used the resources of the government to further such corrupt conduct, or lied to the American people about his actions in addition to lying about them under oath.

Second, some have questioned whether some acts of perjury are impeachable. But bribery is impeachable by the express terms of the Constitution and, like bribery of a judge, perjury or obstruction of justice always interferes with the coordinate branches of government. Thus even if one believed, contrary to the argument I have set forth, that "high Crimes and Misdemeanors" required that the predicate misconduct be directed at the state, perjury or obstruction of justice would come within its ambit.

Moreover, the Constitution itself shows that Framers would have always regarded lying under oath as a serious matter for a public official and a potential violation of "the public trust," which, in the words of Alexander Hamilton warrants consideration of impeachment.[12] The Constitution recognizes that truth-telling under oath is central to the maintenance of a republic. Oaths are mentioned in the Constitution on at least five separate occasions, not least of which is the President's own oath to defend the Constitution.[13]

The prominence of oaths for all officials in the Constitution as well as the Fifth Amendment show that the Framers recognized that taking a civil oath was an important ingredient of the cement that holds a civil society together. Previous societies had depended on established religions or hierarchies for social cohesion but the United States was then a bold experiment that depended on the rule of law to protect the rights of each citizen. The rule of law in turn is grounded on the duty of every citizen to testify truthfully under oath: Truth is the handmaiden of justice. Fidelity to one's oath is also crucial to retain the public trust and confidence in a republican leader because it demonstrates that despite his high position, he is as much subject to the social compact as the lowliest of citizens. Thus lying under oath by a public official can in any context be a public harm in itself because it strikes both practically and symbolically at the heart of the republican order.

Some have suggested that the continuing popularity of a President perhaps should insulate him from impeachment. Once again, the Constitution itself shows that this cannot be the case. The Senate is given the discretion to disqualify an official who has been impeached and convicted from any future office of "honor, Trust or Profit."[14] This clause shows that the Framers recognized that officials who should be impeached and convicted may not only remain popular in the face of serious charges, but that they may retain a strong following even after conviction. This provision is a consistent with the Framers understanding that popularity alone is not the only qualification for office. Demagogues might be popular because they told the people what they wanted to hear. What is needed in a President to preserve the republic, however, is the ability to rally its people in times of crisis to do something that might be unpopular in the short term, like going to war. For such a task, deeper qualities are required and of these qualities trust is one of the most important. The enduring public trust necessary for effective leadership is simply distinct from the popularity that can vanish at the first stern test in the nation's hour of greatest need.

Finally, it has been suggested that impeaching a President should require a higher legal standard than impeaching a judge because a President has been elected by the people. Of course, the language of the Constitution itself imposes no higher standard. The President no less than a judge is charged with carrying out the laws of the United States. Indeed, he is expressly directed by the Constitution to "take Care that the Laws be faithfully executed."[15] This injunction covers all laws, civil and criminal, and makes no exception for laws that apply to himself, in his private or public capacity. Moreover, he takes a special Oath to support the Constitution that underscores that obligation: "I do solemnly swear . . . that I will faithfully execute the office of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.[16] In light of both the President's function and his emphatic oath, the President is surely no less sworn than any judge to uphold the law, and is no less accountable under the Constitution for violating his oath.[17]

Moreover, important considerations of constitutional structure might well suggest the opposite conclusion, that we should be more loathe to retain a President in office who has breached the public trust than any other official. James Madison himself stated that impeachment was necessary for the President and not for legislators since they acted collectively, and the corruption of a single legislator was less dangerous to the republic.[18] By the same reasoning, the unfitness of one of our hundreds of district judges is far less dangerous to the republic than the unfitness of its chief magistrate.

Finally, changes in the Constitution since 1789 make the argument for a higher standard for impeaching the President on the basis of the elected nature of his office even weaker. Since the enactment of the Twelfth Amendment the President and Vice-President have run as a team and therefore voters will generally have approved a specific successor if a President were constitutionally unable to continue. Second, since the enactment of the Twenty-Fifth Amendment Presidents are limited to two terms. Thus, the possibility of running for another term no longer disciplines presidential behavior as it once might have. The impeachment provisions should not be construed to condone lawlessness in term-limited officers.

I would now like to turn briefly to the question of Congress's authority to sanction the President in a manner other than removal from office. I believe it lacks any such authority. The Constitution clearly contemplates a single procedure for Congress to address the derelictions of a civil officer—impeachment by the House, and subsequent trial by the Senate. Article II of the Constitution also specifies the necessary consequence of conviction in an impeachment case: "The President, the Vice–President and all civil officers shall be removed from Office on Impeachment for, and, Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors."[19]

Article I states that "Judgment in cases of Impeachment will not extend further than removal from office, and disqualification to hold and enjoy any Office of honor, Profit or Trust under the United States."[20] This provision, however, does not authorize Congress to impose legislative punishments short of removal. Read together, the impeachment clauses require removal upon conviction, but allow the Senate at its discretion to impose a single additional penalty—disqualification from future office. The Senate itself has consistently adopted this interpretation.[21] The Senate's vote to convict on an impeachment count brings automatic removal without any further action on its part. It occasionally then votes also to disqualify the official from future office.

The Framers decision to confine legislative sanctioning of executive officials to removal upon impeachment was carefully considered. By forcing the House and Senate to act as a tribunal and trial jury, rather than merely as a legislative body, they infused the process with notions of due process to prevent impeachment from becoming a common tool of party politics. The requirement of removal upon conviction accentuates the magnitude of the procedure, encouraging serious deliberation among members of Congress. Most importantly, by refusing to include any consequences less serious than removal as outcomes of the impeachment process, the Framers made impeachment into such an awesome weapon that Congress could not use it to harass executive officials or otherwise interfere with operations of coordinate branches.

Thus, it would be clearly unconstitutional for Congress to require the President to pay a fine. Indeed, besides perverting the Framers design for impeachment, a resolution actually imposing a fine would violate other constitutional provisions. First, the Constitution explicitly forbids bills of attainder.[22] Such bills were the legislative acts by which the British parliament punished individuals, including executive officials, with death or forfeiture of property. Second, the Constitution prevents the Congress from reducing the President's "compensation" during his term.[23] Both prohibitions underscore that Congress's power to punish the President is limited to impeachment.

Nor should Congress attempt to avoid this restriction on sanctions by entering into a deal by which the President can voluntarily pay a suggested amount into the Treasury's miscellaneous receipts account. The voluntariness of the President's payment would be a legal fiction. The President would be paying a fine under the shadow of impeachment. Congress would be using its impeachment powers as a club to impose a bill of attainder.

This would represent a truly disastrous precedent. Congress could then establish a schedule of legislative fines for the perceived offenses of other branches. Life-tenured Judges might even be required to pay fines for unpopular opinions on pain of impeachment. Congress will have created a power to enable it to harass the other branches and yet escape its constitutional duty to hold officials to ultimate account.

Another way of understanding why this procedure is so fundamentally wrong is to consider the analogy that is drawn between it and plea bargaining. Plea bargaining is justified because the individual could be legitimately charged with the lesser included offense to which he pleads guilty. But as we have seen, for important reasons the Constitution includes no outcome for impeachment less than removal from office.

Some members have also proposed censure as a sanction from analogy to the legislative procedures by which members of each House censure its own members. The analogy fails because the Constitution expressly provides plenary authority to each House of Congress to fashion penalties for members of the legislative branch short of expulsion, but provides no such authority to discipline officers of other branches in the same manner.[24] It is pursuant to this explicit authority that each House can require one of its members to go the well of the House and receive the judgment of their peers. For the President or any other civil officer, this kind of shaming punishment by the legislature is precluded, since the impeachment provisions permit Congress only to remove an officer of another branch and disqualify him from office. Moreover, for the same reasons that a deal leading to a fine would set a dangerous precedent, "voluntary" agreement by the President to accept such punishment would also undermine the separation of powers.

It is true that nothing in the Constitution precludes any member of Congress from individually denouncing anyone. A resolution criticizing the President thus may be legally permitted as a loud collective shout from the floor. To understand the legal nature of such an resolution, however, shows that it is in no way equivalent to the solemn act of legislative censure flowing from express authority under the Constitution.

I would go so far as to say that the current interest in creating new forms of sanctions for the President reflects a cavalier attitude toward constitutional governance,

and indeed illustrates the kind of lasting damage that the country risks from presidential misconduct. If a President cannot legitimately deny that he has breached the public trust there will be a widespread feeling that he must be punished. He or his supporters then may be willing to trade the prerogatives of his office for their personal or political benefit. Thus one way a President who has committed serious misconduct poses a threat to the Republic is the increased likelihood that he will agree to disastrous constitutional precedents to protect his own tenure.

In closing, let me directly address the argument that current impeachment proceedings must be ended, since they distract from the real business of government, such as maintaining a good economy or passing beneficial legislation. This sentiment simply cannot be squared with the Framers paramount concern for the integrity of public officials. They recognized that the prosperity and stability of the nation ultimately rest on the people's trust in their rulers. They designed the threat of removal from office to restrain the inevitable tendency of rulers to abuse that trust. But this constitutional restraint can work only if citizens and legislators alike have the self-restraint to allow its processes to unfold solemnly, deliberately, and without concern for their own short-term gains and losses.

ENDNOTES

[1] Art. II, sec. 4.

[2] For a more comprehensive discussion of how the Constitution limits impeachment to only these two potential consequences, see notes 19–24 and accompanying text.

[3] *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat) 316, 406 (1819).

[4] *See* RAOUL BERGER, IMPEACHMENT 62 (1973).

[5] 2 FARRAND 550.

[6] 2 FARRAND 550. The breadth of this phrase was the reason that Madison wanted to assign responsibility for impeachment to the Court rather than to the Senate, presumably in the hopes that they would impose some further judicial limitations.

[7] *See* ALEXANDER DE TOCQUEVILLE, DEMOCRACY IN AMERICA 109 (Mayer, ed. 1996). It is true that some commentators suggested that impeachment lies for the crimes by "public men." But this does not necessarily mean that crime must be committed in a public capacity. A crime is that of a public man if it reflects on his public character and thus presents a risk of unacceptable injury to the republic.

[8] For instance, the House has impeached a judge for drunkenness because a judge persistently inebriated cannot administer the laws.

[9] For instance, in which the officials for were impeached for bribery and tax evasion, see H. Res. 461, 99th Cong. (1986); Judge Harry E. Claiborne for tax evasion) and H. Res. 407, 100th Cong. (1988) (Judge Walter L. Nixon for perjury).

[10] Article III, section 3 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them Aid and Comfort").

[11] Joseph Story, 2 Commentaries on the Constitution § 802 (1833).

[12] *See* FEDERALIST No. 65 at 439 (Rossiter, ed.). (Alexander Hamilton).

[13] *See* Art. I, sec. 3 (oath required when trying impeachment). Art. II, sec. 1 (presidential oath); Art. VI (oath for all federal and state and federal officers. 4th Amend. (Oath for securing warrants); 14th Amend., sec. 3 (preventing those who violated their oath under Art. VI by participating in the Civil War from holding office).

[14] Art. I, sec. 3, cl. 7.

[15] Art. II, sec. 3.

[16] Art. II, sec. 1, cl. 8.

[17] Some have suggested that language in Article III, section 1, to the effect that "Judges, both of the supreme and inferior courts, shall hold their offices during good Behavior," furnishes an independent basis for removing judges other than impeachment. This view is by no means clearly right, since the language does not provide for another mechanism of removal but simply denotes that federal judges, unlike other officials, do not serve for a fixed term of years, but for life. *See, e.g.,* Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment,* 76 KENT. L. REV. 707, 720 (1988). In any event, this clause has never been relied upon as basis for removing any judge. Thus, conduct of judges who have been removed for perjury and other misconduct are precedents for regarding such acts as "high Crimes and Misdemeanors."

[18] 2 FARRAND 64.

[19] Art. II, sec. 4.

[20] Art. I, sec. 3. cl. 7.

[21] *See* MICHAEL GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 60 (1995).

[22] Art. I. Sec. 9, cl. 3.

[23] Art. II, sec. 1, cl. 7.

[24] *See* Art. I, sec. 5, cl. 2 (" Each House may determine the Rules of its own proceedings, punish its members of disorderly behavior, and, with the Concurrence of two thirds, expel a member").

Mr. CANADY. Father Drinan.

STATEMENT OF ROBERT F. DRINAN, S.J., PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, AND MEMBER, HOUSE JUDICIARY COMMITTEE, 1971–1981

Father DRINAN. Mr. Chairman, Members, the framers of the Constitution knew that every President would have many and powerful enemies. The authors of the Constitution consequently made the President virtually immune from legal action.

They knew furthermore that the United States was creating not a parliamentary democracy, but a system in which the majority of the Members of Congress could not win a vote of no confidence. But the Founding Fathers felt that in an extreme case, there would be a need to remove a President prior to the time of his election. This was especially true since at that time we did not have the 8-year limitation in office and they felt that a President could aggregate power to himself and stay in office forever as if he were a member of a royal family. Benjamin Franklin noted that the method adopted in impeachment and removal was devised as a process to prevent the assassination of a President by an exacerbated and hostile public.

The framers sharply curtailed the availability of impeachment which had been liberally used and abused in England. At first, the authors of the Constitution made treason and bribery the only offenses that merited impeachment. This was then broadened by a member to say "nonadministration" or "maladministration." But then that was restricted to the consecrated phrase "other high Crimes and Misdemeanors."

The word "other," as has been pointed out here several times, is most significant. It clearly implies that the high crimes and misdemeanors must be comparable to or close to or analogous to treason and bribery.

The U.S. Congress has always, almost always, understood that impeachment was designed by the Founding Fathers to be a remedy for a dire situation for which no other political remedy exists. The one exception to the conduct of the Congress was the impeachment of Professor Andrew Johnson in those tumultuous years after the Civil War. It seems to be the consensus of historians and analysts that the impeachment of Johnson was motivated primarily by political and partisan reasons and hence was misuse of the power of the House of Representatives.

The impeachment process, Mr. Chairman, is, by its very nature, somewhat political. The power was not given to the courts or to the executive branch of government, but to the House of Representatives, the entity of government closest to the people. The only involvement of the courts is the role played by the Chief Justice in the event of a presidential conviction or trial in the Senate.

Perhaps the best definition of impeachment is found in the classic work on jurisprudence by Justice Joseph Story of the United States Supreme Court. He states that impeachment is a "proceeding purely of a political nature." It is not so much designed to punish an offender as to secure the state against gross official—I underline—official misdemeanors. Story concludes it touches neither his person nor his property, but simply divests him of his political capacity.

The impeachment, therefore, should not be looked upon or compared with an indictment, nor should the role of the House of Representatives be deemed to be that of a grand jury. Impeachment is a noncriminal and a nonpenal proceeding.

Of equal importance is the fact that the impeachment of a President must relate to some reprehensible exercise of official authority. Quoting Justice Story, "if a President commits treason, he clearly has abused his executive powers, and likewise if a President accepts bribes, but that anything else in this consideration must somehow relate to those two heinous crimes."

The House Judiciary Committee in 1974, where I served, recognized this distinction. It was very clear from all the documentation that we received that President Clinton had backdated his taxes in order to claim a tax deduction for his papers, a deduction which was no longer available at the time that he and his accountants prepared his income tax return. This was a serious offense, in all probability a felony, but the House Judiciary Committee in a vote of 26 to 12 on a nonpartisan basis——

Mr. SCOTT. Father Drinan, you meant President Nixon, did you not? You said Clinton.

Father DRINAN. The House Judiciary Committee concluded—as a member of the House Judiciary Committee, I voted with the 26 members who believed that the President's misconduct was not impeachable. At that time, Mr. Donald Alexander, the Commissioner of the Internal Revenue Service, said that any other person would clearly be prosecuted for this offense, which was a serious crime.

This decision confirmed the fact that an indictable offense need not be impeachable, and all of the literature concerning this topic—and it is vast—reiterated that time and time again.

The noncriminal character of the impeachment process is uniquely important in this particular case, Mr. Chairman, because the recommendations for impeachment have been set forth not by the Congress, but by the Office of Independent Counsel. They are furthermore framed as a criminal indictment, and consequently, we have the historic situation that for the first time in American history, an entity in the executive branch of government has performed the work specifically delegated by the Constitution to the U.S. House of Representatives. This fact is enormously important because it seems to change and distort the legal machinery designed by the framers for the process of impeachment. It is a process, this impeachment, which in the very words of the Constitution is in the sole power of the House.

It is noteworthy that in 1974, the Special Prosecutor gave information and facts to the House Judiciary Committee. He did not, however, recommend impeachment. He knew that the power to recommend impeachment was committed solely to the House of Representatives by the Constitution itself.

On the contrary, Mr. Chairman, the idea of a congressional censure for the President has no legal or constitutional history. It needs to be considered apparently only because the majority of citizens in this country stated time and time again that they oppose impeachment, but desire some form of congressional sanction as a way of expressing their disapproval of the President's conduct.

But there has never been any sensible definition of censure. Is it an admonition? A rebuke? A reprimand? Presumably it has no legal consequences.

The only occasion when a congressional censure was enacted was in the 1830s when President Andrew Jackson received a censure from the Senate. Not surprisingly, that censure was initiated by Senator Henry Clay whom Jackson had defeated in the presidential race. The censure was subsequently expunged.

The Constitution clearly states that the House may impeach or not impeach. The Separation of Powers grants, guarantees the President immunity from any other penalty. To encourage or allow the House to censure the President for misconduct bypasses the only process set forth in the Constitution to penalize the President.

A vote to censure a President by one or both parties of Congress would establish a dangerous precedent which would weaken the institution of the presidency. It would invite an erosion of the Separation of Powers in ways in which the framers sought carefully to prevent.

I can envision, Mr. Chairman, if one censure was set forth by the House or the Senate, that almost every election cycle we would have the Congress censuring the President if he were of a different party; and as Professor Schlesinger suggested, that would weaken any road to independence and integrity of the President over a long period of time.

In conclusion, it seems clear from all we know about the long history and the rich tradition surrounding impeachment that the framers intended that impeachment was placed in the Constitution as a final safety net in case, somehow, the separation of powers did not work, the political process had failed, and that a near-tyrant in the executive branch could not be stopped by any means short of removal.

Thank you very much, Mr. Chairman.

Mr. CANADY. Thank you, Father Drinan.

[The prepared statement of Father Drinan follows:]

PREPARED STATEMENT OF ROBERT F. DRINAN, S.J., PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER, MEMBER, HOUSE JUDICIARY COMMITTEE 1971–1981

The framers of the United States Constitution knew that every president would have many political enemies. The authors of the Constitution consequently made the president virtually immune from legal action. They knew furthermore that America was inventing not a system of parliamentary democracy but a system in which the majority of the members of the Congress could not call or win a vote of no confidence.

But the founding fathers knew that in an extreme case there would be a need to remove a president before the time of his re-election. This was especially true since the writers of the Constitution feared (long before the time when a president was limited to eight years in office) that a president could aggregate power to himself and stay in office as if he were a member of a royal family.

Benjamin Franklin noted that the method adopted in impeachment and removal was devised as a process to prevent the assassination of a president by an exasperated and hostile adversary.

The framers sharply curtailed the availability of impeachment which had been liberally used and abused in England. At first the authors of the Constitution made treason and bribery the only offenses that merited impeachment. This was broadened to include "mal-administration" but then was restricted to include *other* high crimes and misdemeanors. The word "other" is most significant. It clearly implies that the "high crimes and misdemeanors" must be comparable or close to "treason and bribery."

The United States Congress has almost always understood that impeachment was designed by the founding fathers to be a remedy intended only for a dire situation for which no other political remedy exists. The one exception was the impeachment of President Andrew Johnson in the tumultuous years after the Civil War. It seems to be the consensus of historians and analysts that the impeachment of Johnson was motivated primarily by political and partisan reasons and hence was a misuse of the power of the House of Representatives to impeach a president.

Similarly the House has been very reluctant to use its power to impeach since in all of American history it has used that power on some 20 occasions—mostly on federal judges.

The impeachment process is by its very nature somewhat political. The power was not given to the courts or the executive branch of government but to the House of Representatives—the entity of government closest to the people. The only involvement of the courts is the role played by the Chief Justice who is to preside at the trial of a president (not judges or other civil officers) in the Senate.

Perhaps the best definition of impeachment is found in the classic work on jurisprudence by Justice Joseph Story of the United States Supreme Court, which states that impeachment is "proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity."

Impeachment, therefore, should not be looked upon or compared with an indictment. Nor should the role of the House of Representatives be deemed to be that of a grand jury.

Impeachment is a non-criminal and a non-penal proceeding.

Of equal importance is the fact that the impeachment of a president must relate to some reprehensible exercise of *official* authority. If a president commits treason he has abused his executive powers. Likewise a president who accepts bribes has abused his official powers. The same misuse of official powers must be present in any consideration of a president's engaging in "other high crimes and misdemeanors."

This House Judiciary Committee in 1974 recognized this distinction. It was clear that President Nixon had back-dated his taxes in order to claim a tax deduction for his papers which was no longer available at the time he and his accountants prepared his income tax return. This was a serious offense, probably a felony. But the House Judiciary Committee in a vote of 26–12 on a non-partisan basis, declined to make this conduct an impeachable offense. As a member of the House Judiciary Committee at that time, I voted with the 26 members who believed that the President's misconduct was not impeachable.

This decision confirmed the fact that an indictable offense need not be impeachable. All of the literature concerning the Constitutional Convention demonstrates that there is no evidence that any member of that convention expressed the opinion that impeachment was only intended to cover indictable offenses. That is the conclusion of the learned volume of Professor Raoul Berger entitled *Impeachment: The Constitutional Problems.* Professor Berger states that

> One may fairly conclude that indictability was not the test of impeachment. . . ." He expands on this by asserting that "In sum high crimes and misdemeanors (are) without roots in the ordinary criminal law and which, as far as I can discover, had no relation to whether an indictment would lie in the particular circumstances.

The non-criminal character of the impeachment process is uniquely important in the case of the recommendations set forth by the office of Independent Counsel. These are framed as a criminal indictment.

In addition, for the first time in American history, an entity in the executive branch of government has performed the work specifically delegated by the Constitution to the U.S. House of Representatives. This fact is enormously important because it seems to change and distort the legal machinery designed by the framers for the process of impeachment; it is a process which, in the very words of the Constitution, is in the "sole" power of the House.

It is noteworthy that in 1974 the Special Prosecutor gave information and facts to the House Judiciary Committee; he did not urge impeachment. He knew that the power to recommend impeachment was committed solely to the House in the Constitution itself.

The history and definition of impeachment do not yield all of the clarity which everyone might wish. But the intention of the founding fathers as found in the ways in which Congress for over 200 years has reacted to the impeachment process demonstrates a consensus that is clear and remarkably consistent. Impeachment is a

unique and extraordinary weapon which should be considered only in extreme cases when impeachment is the only remedy available to oust a president even though the majority of the nation's voters elected him.

On the contrary the idea of a Congressional "censure" for the President has no legal or Constitutional history. It needs to be considered only because the majority of citizens in this country state in polls at this time that they oppose impeachment but desire some form of Congressional "sanction" as a way of expressing their disapproval of the President's conduct. They propose a "censure" as a compromise or a plea bargain. But there has never been a definition of "censure." Is it an admonition, a rebuke or a reprimand? Presumably it has no legal consequences.

The only occasion when a Congressional censure was enacted was in the 1830's when President Andrew Jackson received a censure from the Senate. Not surprisingly it was initiated by Senator Henry Clay whom Jackson had defeated in the presidential race. The censure was subsequently expunged.

The Constitution states clearly that the House may impeach or not impeach. The separation of powers guarantees the president immunity from any other penalty.

To encourage or allow the House to "censure" the President for misconduct bypasses the only process set forth in the Constitution to penalize a president. A vote to censure a president by one or both bodies of Congress would establish a dangerous precedent which would weaken the institution of the presidency. It would invite the erosion of the separation of powers in ways which the framers sought carefully to prevent.

It seems clear from all that we know about the long history and rich tradition surrounding the impeachment clause that the framers intended that impeachment was placed in the Constitution as a final safety net in case somehow the separation of powers did not work and that a near tyrant in the executive branch could not be stopped by any means short of removal. The extremely cautious approach which should characterize any consideration of the use of the impeachment clause should be intensified when an independent counsel and not the Congress has initiated the possibility of impeachment. The Constitution made it clear that the framers placed the power to bring action for impeachment not in the courts or in the executive branch or the Senate but in the agency in government which is closest to the people—the House. Impeachment is not a criminal matter or a judicial procedure. It is one that depends in significant ways on the people. It is the people who elected a president who should be consulted before the Congress seeks to impeach him and remove him from office.

Mr. CANADY. Now our last witness on this panel, Professor Presser.

STATEMENT OF STEPHEN B. PRESSER, RAOUL BERGER PROFESSOR OF LEGAL HISTORY, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. PRESSER. Thank you, Mr. Chairman. It is a great honor and a great privilege to be invited to testify before you this morning, and a gruesome responsibility to be the tenth man on a 10-man panel. Please bear with me for just a few minutes.

We are here because of something that was done 211 years ago in Philadelphia, and it is your job today to carry out responsibilities that were entrusted to you when the Federal Constitution was ratified 2 years later. Like Professor Sunstein, I want to go back to first principles. I want to talk a little bit about what made that Constitution necessary, and how it helps us understand your responsibilities.

In the years following American independence, there was a tremendous doubt whether the 13 former colonies would be able to survive as independent States. Their State legislatures behaved with extraordinary irresponsibility, refusing adequately to fund the Revolutionary War effort and refusing to commit the resources necessary for the enforcement of commercial contracts or for a stable currency.

It was the view of the 55 men who met in 1787 that the State legislators and other State officials often lacked the integrity and honor to behave responsibly, and that too many of them were shameless demagogues who cared more about furthering their own wealth and careers than they did for looking out for the welfare of the people.

The remedy for these ills, the men who met at Philadelphia believed, was the creation of a new Federal Government which would have the power to protect us from threats, both external and internal. Great discretion and great power were given to the new government and, in particular, to the President of the United States.

The authors of *The Federalist*, the most famous contemporary explication of the Constitution, emphasized that the power and responsibilities of the President were awesome and that only a person with extraordinary integrity and the highest reputation for honesty and virtue could be trusted to bear it.

John Jay, writing in Federalist 64, made it plain that the impeachment mechanism, removal for treason, bribery or other high crimes and misdemeanors, was a guarantee that the President would be such an exemplary person. If he was not, Jay's clear implication was, he ought to be removed from office.

It is no coincidence that the man the framers had in mind as the first President of the country was George Washington, then, as now, regarded as the father of his country and the very plutonic form of virtue, honor, integrity and probity.

In *The Federalist* and in the debates of the Constitutional Convention, it is explained that the constitutional obligation—and it is an obligation—to impeach and remove from office for treason, bribery or other high crimes and misdemeanors, covers a multitude of possible offenses, as we have heard this morning. All of these offenses, as far as the framers were concerned, however, share some things in common. All of them are instances in which an official has subverted the Constitution and the laws, and has betrayed the interests of the people he is supposed to serve.

Such a betrayal is most obviously indicated as we have learned by the words "treason" or "bribery." But the phrase "high Crimes and Misdemeanors," as Professor McDowell told us, also had a clear meaning to the framers who adopted the phrase from over 400 years of English impeachment experience.

English proceedings for impeachment were brought because of the commission of high crimes and misdemeanors and included proceedings brought to remove officials who refused to carry out the duties of their office, officials who wrongly used their offices for personal gain instead of public service, or of officials who wrongly interfered with the regular course of legal proceedings. These were all cases of offenses against the state, of attempts to undermine the Constitution as the framer, George Mason, called them.

In order for President Clinton properly to be made a subject of impeachment proceedings then, you would have to accuse him of a similar offense against the state, a similar attempt to undermine the Constitution. That means you have to ask yourself what our Constitution, what our Nation, is really all about.

Now, there are many things that might be said on this point, but I will say only one, picking up a major theme of this morning. In-

deed, if I had to boil the results of my 24 years teaching and writing about our constitutional history down to a single proposition, it would be that one often advanced by our second President, John Adams, that our system is supposed to be a government of the laws and not of men. We are supposed to be governed by persons of virtue, disinterestedly applying our Constitution and our laws. This is our constitutional faith, as Professor McGinnis suggested. It is a sort of secular religion of American law.

The charges lodged against the President by Judge Starr and by your committee's chief investigator, Mr. Schippers, must be examined against this background, and you have to decide if they are the sort of matters the framers meant to cover by the phrase "high Crimes and Misdemeanors." If these allegations are true, though it appears that the President has repeatedly failed to tell the truth under oath in a Federal Court proceeding, he has repeatedly failed to tell the truth under oath in Federal grand jury proceedings, he has apparently engaged for many months in what Mr. Schippers has described as a conspiracy to obstruct justice by enlisting others to prevent them from cooperating with the Office of Independent Counsel and by seeking to get others falsely to testify before the grand jury—if these charges are true—and that is a big "if," and I think you have to decide that—but if it is true, then the President has engaged for many months in a calculated and shameful effort to deceive and frustrate the enforcement of both our civil and criminal laws to serve his personal ends.

The President of the United States takes an oath to support the Constitution, and the Constitution, as you have heard, requires him faithfully to execute the laws. If what Judge Starr and Mr. Schippers have said is true, even if the President has broken his oath of office and set out to betray this trust, you have to decide if these charges are true. You have to ask not only has the President committed serious criminal offenses, but you have to ask yourself a deeper question: Has he clearly demonstrated that he is not the kind of a man of virtue, honor and integrity that his constitutional office demands?

It is very significant that George Washington in his farewell address emphasized that if oaths ever lost their sacred sense of obligation, that in his words, it would shake the foundation of the fabric of government itself.

If Judge Starr and Mr. Schippers are right, this is what President Clinton has been doing. George Washington, I think, would have advised you to carry these proceedings forward to determine the truth of these charges, and if they were true, to impeach and remove this President.

One of our fellow witnesses today, Professor Schlesinger, observed, when impeachment proceedings were contemplated for President Nixon, that if the President had indeed committed acts which undermined the basis of our democracy, the Office of President would be strengthened for the future and not weakened by exercising the constitutional remedy of impeachment. As Professor Schlesinger put it so eloquently then, the continuation of a law breaker as chief magistrate would be a strange way to exemplify law and order at home or to demonstrate American probity abroad. Professor Schlesinger was right.

Then there are those who seem convinced that even if what Judge Starr has said is true, that all the President has done is lie about sex, and Mr. Conyers and Professor Schlesinger made out a case to that effect. It is very difficult for many people to believe that such conduct is anything but a private matter, far removed from constitutional procedures or requirements. Other members have noticed that the President is accused of much more than lying about sex. But it should be made clear that our legal tradition—that ours is a government of laws, not of men—has never made any distinction about the content of matters that might involve perjury, obstruction of justice, or tampering with witnesses.

No person and, least of all, no President who has sworn faithfully to execute all the laws can pick and choose over which matters he will be truthful and over which he will not, particularly when he is under oath. An oath and the virtue of one swearing to it, perhaps lightly regarded by many today, were not so lightly regarded at the time of the Constitution's framing.

The oath that the President took when he assumed his office was supposed to mean that he would not betray his constitutional duties. If it appears to you that he has, your constitutional oath requires you to begin the process of his removal.

Thank you.

Mr. CANADY. Thank you, Professor Presser.

[The prepared statement of Mr. Presser follows:]

PREPARED STATEMENT OF STEPHEN B. PRESSER, RAOUL BERGER PROFESSOR OF LEGAL HISTORY, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

My name is Stephen B. Presser, and I am the Raoul Berger Professor of Legal History at Northwestern University School of Law. I have been teaching and writing about American legal and Constitutional history for the past twenty-four years. I am the senior author of a leading law school American Legal History casebook, the author of a monograph on modern Constitutional law, and the co-author of a recently published Constitutional Law casebook. I have also written many articles on legal history, Constitutional law, and corporations. I appear at the request of the Committee to discuss the history of impeachment, and the meaning of the Constitutional phrase "high Crimes and Misdemeanors."

The Constitution, as you know, provides in Article II, 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."[1] I am a practicing legal historian and much of my research, writing, and teaching has concerned the late eighteenth century period when the Federal Constitution was drafted and first implemented. I think I can be of most service to the subcommittee if I examine the question of what "Treason, Bribery or other high Crimes and Misdemeanors" means by asking what the phrase would have meant to the Constitution's framers. In order to understand this we need to try to place the impeachment remedy in the context of the framers' assumptions about how the Constitution would work, and what would make it work best.

The first important thing to understand, in grasping the concerns of our Constitution's framers, is that the Federal Constitution came about because of a belief on the part of most of the framers that following independence the newly-created state legislatures were behaving in a manner that was inimical to the success of our Republic. These state legislatures were passing measures which interfered with preexisting contracts, both by suspending them, and by allowing payments to be made in newly printed state-issued paper money. This was regarded as irresponsible action—action believed to be undertaken by unscrupulous state politicians—which cast doubt on whether the American people and their governments possessed the virtue necessary to make a republican government work. The state legislatures, in short, were encouraging dishonesty in commercial matters, they were engaged, in effect, in suspending the legal foundations of property and propriety, and they were

[1] U.S. Constitution, Art. II, Section 4.

putting in jeopardy the future smooth functioning of American economy and society.[2]

The phrase "It's the economy, stupid," so important for political success in recent years, would have had resonance for the framers as well. Their idea of a good economy, however, was one founded in honesty, in reliance on commitments made, and on the presumed security of past and future promises. The hopes for future success in the new republic rested on the integrity of the federal government and its laws; if these were subject to displacement by whim or by corruption—as it seemed the state legislatures were doing—there was little hope that the new United States could long endure. Integrity in the new government, its judiciary, and its acts was vital, if commercial prosperity was to be secured, and this prosperity was deemed essential to achieve domestic tranquility and the other goals of the new Constitution.[3] The new Constitution forbade the State legislatures from interfering with contracts, and from continuing to issue paper money. The new federal government was charged with establishing a foundation for continued economic and political stability. Most important for our purposes, elaborate structural safeguards were put in place in the new federal Constitution to make sure that the new federal government would behave with integrity and that its officials would display the kind of disinterested virtue necessary to make American government work.

The debates over the 1787 Constitution are filled with discussion about how virtue was to be secured in the new government, in all three branches. It is in this context that impeachment must be understood. Impeachment was believed by the framers to be a vital device intended to guarantee that the President and other federal officials would act with integrity. Indeed, it was a device designed to ensure that the President and other federal officials would do what they were supposed to do, *because they would know that they would face removal if they did not.* This becomes clear when we examine the contemporary record.

I will rely, for most of my testimony, on the text of the Constitution, and on the most important contemporary exposition of the Constitution, *The Federalist Papers,* the series of essays on the Constitution written by James Madison, Alexander Hamilton, and John Jay, in the years 1787–88, immediately following the drafting of the Constitution at the Philadelphia Convention.[4] *The Federalist* is universally acknowledged to be the most important contemporary exposition of the federal Constitution. But it is more than a powerful contemporary account. It is, in many ways, a work exploring timeless political truths. To this day, it is regarded as the most important American work in political science.[5] Thomas Jefferson praised the book as "the best commentary on the principles of government which ever was written."[6] James Madison, one of *The Federalist*'s three authors, suggested in 1825 that *The Federalist* was "the most authentic exposition of the text of the federal Constitution, as understood by the Body which prepared and the authority which accepted it."[7] The fact that the third and the fourth Presidents were thus so fulsome in praise of *The Federalist* suggests that they agreed with *The Federalist*'s views of how the Presidency and how the impeachment process was to operate.

One very clear indication of what was intended with regard to impeachment is provided in *Federalist 64,* one of the few numbers written by John Jay, who was to become the first Chief Justice of the United States. Jay is discussing the treaty power, and is responding, in particular, to critics of the Constitution who argued that the President and the Senate were given too much discretion in committing the new nation to treaties with other nations. Jay notes that the Presidential power of making treaties—perhaps the most important foreign policy power which the Presi-

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[2] On this matter see generally the now-classic account in Gordon S. Wood, Creation of the American Republic 1776–1787 (1969).

[3] Cf. U.S. Constitution, Preamble: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

[4] James Madison, Alexander Hamilton, and John Jay, The Federalist Papers (Penguin Books edition, Isaac Kramnick, ed., 1987). I have also used, in the preparation of this testimony, a piece soon to be published in volume 8 (winter 1998–99) of the journal *Law and Courts,* written by Scott D. Gerber, "Would the Framers Impeach President Clinton?" Mr. Gerber was kind enough to share with me a pre-publication draft, and I am indebted to him for some of the analysis made here, particularly that regarding the Federalist and the debates in Philadelphia. I also wish to thank ArLynn Leiber Presser, Elisabeth Catherine Presser, and Douglas W. Kmiec for helpful comments on drafts of this testimony.

[5] See Isaac Kramnick, Editor's Introduction, Id., at 75 (noting Clinton Rossiter's belief that the Federalist is the "one great American contribution to the world's literature on politics"). For Kramnick's quoting others to the same effect, see Id., at 75–76.

[6] Id., at 11–12.

[7] Ibid.

dent has discretion to exercise—is important because it relates to "war, peace, and commerce," and that it should not be delegated "but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good." Jay goes on to explain that the means of picking the President—indirectly through the electoral college—is calculated so that the President will be a person noted for integrity, virtue, and probity, and that the original indirect means of selecting Senators—through the state legislatures—was to assure the same for the Senators.[8]

Jay makes plain that when a President fails to live up to the requirement of trust, honor, and virtue that is necessary to meet his treaty-making and other executive responsibilities—if, in short, he is not an honorable or virtuous person who will perform his duties in the interest of the people—impeachment is available to remove him. When Jay addresses the requisite integrity for Presidents and Senators, he states:

> With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind, such as honor, oaths, reputations, conscience, the love of country, and family affections and attachments, afford security for their fidelity. In short, as the Constitution has taken [through the indirect election of Senators and Presidents] care that they shall be men of talents, and integrity, we have reason to be persuaded that the treaties they make will be as advantageous as, all circumstances considered, could be made; *and so far as the fear of punishment and disgrace can operate, that motive to good behaviour is amply afforded by the article on the subject of impeachments.*[9]

Virtue, probity, and honor were so important in the executive, as Jay's remarks indicate, that it is no surprise that the framers assumed that the first President of the United States would have to be George Washington. He was the greatest national hero, he was given the lion's share of the responsibility for securing independence, and then as now was regarded as the father of his country. His reputation for integrity, virtue, and honor was unparalleled. George Washington, the national epitome of virtue and honor,[10] was, in short, precisely the kind of executive Federalist 64 contemplates.

Federalist 64 thus tells us about the requisite character of federal officials, and is persuasive authority for believing that when it becomes clear that the President has committed acts which raise grave doubts about his honesty, his virtue, or his honor, impeachment is available as a remedy. This is further supported by the text of the Constitution itself, where it provides in article I, section 3, that the punishments which are to be imposed following impeachment by the House and conviction by the Senate are "removal from Office, and *disqualification to hold and enjoy any Office of honor, Trust or Profit* under the United States."[11] The kind of a person who would be impeached was believed to be one without honor and who thus could not be trusted. The fear was that such a person, if allowed an office offering the opportunity to profit, would use his office for personal ends and not for the good of the people. *Impeachment, then, is all about deciding whether a particular official can be trusted to act with disinterested virtue, or whether an official will put his own needs or desires above his Constitutional duties.*

It is for this reason—that impeachment is a remedy against those who would betray their oaths to uphold the Constitution and would instead seek personal advantage—that the framers chose to describe, *although not to limit* impeachable offenses, by including and using as an analogy "Treason and Bribery." "Treason" is defined in the Constitution itself as "levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."[12] The essence of Treason, then, is that it involves a betrayal of one's obligation to one's own people, by making war against them, or by adhering to their enemies. Similarly, "Bribery" involves a betrayal of virtue and a refusal to exercise disinterested judgment in the interests of the people in order to serve the interests of someone else—someone who wrongly and corruptly buys what should only belong to the people. In both cases the wrong-

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[8] Id., at 375–376.

[9] Federalist 64, Id., at 380 (emphasis supplied).

[10] On Washington, the manner in which he was the epitome of American virtue and honor, and his continuing importance to present-day America, see generally Stephen B. Presser, The Restoration of George Washington, 25 Reviews in American History 545 (1997).

[11] U.S. Constitution, Art. I, Section 3 (emphasis supplied).

[12] U.S. Constitution, Art. III, Section 3.

doer, the traitor or the person bribed, turns from his duty and puts his own interests ahead of those who trusted in him.

This suggestion that impeachment, in essence, is about a fundamental betrayal of trust, finds further support in the limited records that we have of the Constitutional Convention. On August 20, 1787, the Committee of Detail presented a proposal that would have made federal officers "liable to impeachment and removal from office for neglect of duty, malversation,[13] or corruption."[14] Somewhat later, however, on September 8, 1787 the Convention had before it a revised text that would have limited impeachment only to those cases involving "Treason & bribery." George Mason, of Virginia, thought this too limiting, and argued:

> Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. [Warren] Hastings [the administrator of the East India Company and Governor-General of Bengal whom Edmund Burke led an effort to impeach for corruption] 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.[15]

Mason then moved to add after the word "bribery" the words "or maladministration." James Madison, one of the authors of *The Federalist,* and the man most commonly described at the "Father" of the Constitution, objected on the grounds that "maladministration" was too elusive. "So vague a term," he said, "will be equivalent to a tenure during pleasure of the Senate." To meet Madison's objection, and to make clearer that more than Senatorial whim was required for removal, Mason "withdrew 'maladministration' and substitute[d] 'other high crimes & misdemeanors,'" which was then accepted and became the Constitutional text we now seek to interpret.[16]

The colloquy between Mason and Madison is the only evidence we have from the debates at the 1787 Constitutional Convention at Philadelphia, but it appears to suggest that more than mere maladministration, something approaching "great and dangerous offences," or an "[a]ttempt to subvert the Constitution" is required. Those who emphasize the awful consequences of impeachment, and the propriety of its use only for offenses that strike at the heart of American government can find support in Mason's words. But it must be understood what Mason and the other framers believed the needs of the state were, and what American government was all about. The essence of the new republic was that ours was to be a "government of laws and not of men," and that our laws and our legal doctrines were not to be tossed aside at whim for personal or partisan political purposes.[17] For a President to be impeached, then, he must have committed some grave offence which is contrary to his oath to uphold the Constitution and laws of his country; he must have put his interests above the Constitution and the laws.

The distinction between mere "maladministration" and the betrayals of the Constitution with which impeachment was supposed to be concerned is also the subject of some rumination by another one of the Federalist's authors, Alexander Hamilton. In *Federalist 79,* Hamilton warns against using "inability," a term similar in meaning to "maladministration,"[18] as a trigger for impeachment because "[a]n attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good."[19] Impeachment, then, is a remedy for, and is not

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[13] Black's Law Dictionary defines "malversation," as "In French law, this word is applied to all grave and punishable faults committed in the exercise of a charge or commission (office), such as corruption, exaction, concussion, larceny." Black's Law Dictionary 865 (5th ed., 1979). "Concussion," according to Black's is "In the civil law, the unlawful forcing of another by threats of violence to give something of value." Id., at 264.

[14] 2 Max Farrand, The Records of the Federal Convention of 1787 337 (1966 reprint).

[15] Id., at 550.

[16] Ibid.

[17] For the importance of the notion that ours was to be "a government of laws and not of men," see generally Stephen B. Presser, Recapturing the Constitution 33–35 (1994).

[18] The meaning of maladminstration may be somewhat elusive. Black's Law Dictionary defines it as "This term is used interchangeably with *misadministration,* and both words mean "wrong administration." Black's Law Dictionary, supra note 13, at 861. The Concise Oxford Dictionary defines "maladministration" as "Faulty administration," H.W. Fowler and F.G. Fowler, eds., The Concise Oxford Dictionary of Current English 693 (3rd ed. 1944).

[19] Federalist No. 79, Madison, Hamilton, & Jay, supra note 4, at 444. In Federalist 79 Hamilton is discussing impeachment of judges, which he suggests can occur whenever there is "malconduct." He draws no distinction between the criterion for impeachment of judges and those for the President, however, and thus the "malconduct" to which he refers is most likely

to be used as a tool of, personal or party ambition or enmity; impeachment is to be used to further "justice" and "the public good." Again, the essence of what's impeachable appears to be an unjust turning against public duties, an attempt to work an "injustice" and to betray one's duties to the public—in short, to act contrary to one's oath to uphold the Constitution and laws of the Country.[20]

The words "high crimes or misdemeanors" similarly suggest the anti-public oath-abjuring characteristics of what ought to constitute an impeachable offense. A "high" crime or misdemeanor is distinguishable from run of the mill crimes or misdemeanors in that it requires proof of an "injury to the commonwealth—that is, to the state and to its constitution."[21] An impeachable act, then, must be one that involves injury to the state, one that, as Mason suggested, subverts the Constitution. In the United States, of course, acts which consciously seek to undermine the nature of our rule by settled laws and processes are just such an injury to the state, such a subversion of our Constitution.

There are many ways such an undermining or subversion can take place. Accordingly, the framers believed that "high Crimes and Misdemeanors," if the impeachment provisions were to serve their purposes of keeping the executive and judiciary faithful to their Constitutional trust, could be broadly construed. Thus, Alexander Hamilton, in *Federalist 65,* where he discusses the judicial function of the Senate in trials of impeachments, broadly defines impeachment as a remedy generally available to correct wrongdoing. "The subjects of [the Senate's impeachment] jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."[22] Hamilton, as did some of the other framers noted above, supplied some limitation on the impeachment power when he wrote that impeachable offenses "relate chiefly to injuries done immediately to the society itself."[23] Hamilton even observed—presciently, given recent events in our case—that when an impeachment proceeding was underway it

> . . . will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.[24]

Hamilton believed that the Senate, supposedly further removed from the people through election by state legislatures and not by the people themselves, would be better able to put raw partisan political concerns aside, and make objective determinations on the guilt or innocence of one impeached. Since the Senate is no longer thus insulated from popular election, it is doubly important that both the House and the Senate try to approach the impeachment of the President in as objective a matter as possible. Given the breadth of the possible definition of "high Crimes and Misdemeanors," and, as Hamilton noted, the inevitable involvement of partisan politics, it is no wonder that there is division in this body and in the nation generally about what constitutes an impeachable offense. If we are able to set aside partisan politics, however, we can fix with some certainty the nature of the acts against the state and the Constitution which the framers would have regarded as coming within the phrase "high Crimes and Misdemeanors."

At the time the Framers were inserting the phrase "high Crimes and Misdemeanors" into the Constitution they had a wealth of English experience with those words

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the same kind discussed in Federalist Nos. 64 and 65 which deal with impeachment of the President. There are some who have sought to suggest that the criteria for impeaching a judge ought to be different from the criteria for impeaching a President, but there is no clear indication of a difference either in the Constitution or in the Federalist.

[20] Article II, Section 1, paragraph 8 requires the President, before assuming office, to take the following "Oath or Affirmation," "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. Const. Art. II, Section 1. It should be noted that in Article II, Section 3, one of the duties of the President is that "he shall take Care that the Laws be faithfully executed. . . ." U.S. Const. Art. II, Section 3. Accordingly part of the President's duty to "protect and defend the Constitution" is to carry out his role to see that "the Laws be faithfully executed."

[21] The quotation is from Professor Arthur Bestor, from his review of Raoul Berger, *Impeachment: The Constitutional Problems* (1973). Bestor, Book Review, 49 Wash. L. Rev. 255, 263 (1973). He reaches his conclusion based on the English treason and impeachment cases reviewed by Berger.

[22] Federalist No. 65, in Madison, Hamilton, & Jay, supra note 4, at 380.

[23] Ibid.

[24] Id., at 380–381.

to draw on,[25] and it appears clear that the framers intended and understood that the phrase "high Crimes and Misdemeanors" was to be interpreted according to the meaning it was given by English Common Law.[26] As Justice Joseph Story was later to write, "The only safe guide in such cases must be the common law, which is the guardian at once of private rights and public liberties."[27]

Raoul Berger, in his book on impeachments, has given us a handy summary of some of the impeachment proceedings brought in England before the framing of our Constitution, proceedings described as involving all or part of the phrase "high Crimes and Misdemeanors." These included the proceedings brought against the Earl of Suffolk (1386), who "applied appropriated funds to purposes other than those specified;" the Duke of Suffolk (1450), who "procured offices for persons who were unfit and unworthy of them; [and who] delayed justice by stopping writs of appeal (private criminal prosecutions) for the deaths of complainants' husbands;" Attorney General Yelverton (1621), who "committed persons for refusal to enter into bonds before he had authority so to require; [and who also was guilty of] commencing but not prosecuting suits;" Lord Treasurer Middlesex (1624) who "allowed the office of Ordinance to go unrepaired though money was appropriated for that purpose [and who] allowed contracts for greatly needed powder to lapse for want of payment;" the Duke of Buckingham (1626) who "though young and inexperienced, procured offices for himself, thereby blocking the deserving; [who] neglected as great admiral to safeguard the seas; [and who] procured titles of honor to his mother, brothers, kindred;" Justice Berkley who "reviled and threatened the grand jury for presenting the removal of the communion table in All Saints Church; [and who] on the trial of an indictment, . . . 'did much discourage complainants' counsel' and 'did overrule the cause for matter of law;'" Sir Richard Burney, Lord Mayor of London (1642), who "thwarted Parliament's order to store arms and ammunition in storehouses"; Viscount Mordaunt (1660), who "prevented Tayleur from standing for election as a burgess to serve in Parliament; [and who] caused his illegal arrest and detention;" Peter Pett, Commissioner of the Navy (1668) who was guilty of "negligent preparation for the Dutch invasion; [and who was responsible for] loss of a ship through neglect to bring it to mooring;" Chief Justice North "[who] assisted the Attorney General in drawing a proclamation to suppress petitions to the King to call a Parliament;" Chief Justice Scroggs (1680), who "discharged a grand jury before they made their presentment, thereby obstructing the presentment of many Papists; [and who] arbitrarily granted general warrants in blank;" Sir Edward Seymour (1680) who "applied appropriated funds to public purposes other than those specified;" and the Duke of Leeds (1695) who "as president of the Privy Council accepted 5,500 guineas from the East India Company to procure a charter of confirmation."[28]

One way of characterizing all of this English experience is to say, as Joseph Story did, that "lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws, and introduce arbitrary power."[29] The English cases lend further support to the notion derived from *The Federalist* and the text of the Constitution that impeachable offenses, "high Crimes and Misdemeanors" if you will, are acts that are inconsistent with the obligations and duties of office, are acts that involve putting personal or partisan concerns ahead of the interests of the people, and are acts which demonstrate the unfitness of the man to the office.

The Constitution, *The Federalist,* and the English common law experience give a very good general idea of what was meant by the Constitution's impeachment clauses. The meaning of "high Crimes and Misdemeanors" is thus capable of being understood as it was to the framers. It is important also to understand, however, that it is impossible to fix with certainty the complete enumeration of impeachable offenses, and it is impossible to escape the fact that the Constitution vests complete and unreviewable discretion with regard to impeachment and removal in Congress. Hamilton recognized this too:

> This [the trial of impeachments] can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors [The House of Representatives] or in the construction of it by the judges [the Senate], as in common cases serve to limit the discretion of courts in favor of per-

[25] The first use of the phrase "high Crimes and Misdemeanors" is in an impeachment proceeding against the Earl of Suffolk in 1386. Berger, supra note 21, at 59.

[26] Id., at 71, 87, 87 nn. 160–161.

[27] Joseph Story, *Commentaries on the Constitution of the United States* 288 (one volume student edition, 1833, reprinted 1987).

[28] Berger, supra, at 67–69.

[29] Id., at 69, quoting Justice Story.

> sonal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons [and so it is placed in the hands of the entire Senate].[30]

All of this and more, of course, has led earlier students of impeachment to believe that the phrase "high Crimes and Misdemeanors" does not necessarily encompass only criminal acts, but is a general term to refer to any kind of misuse of office that the Congress finds intolerable.[31] Indeed, Gerald Ford's famous suggestion that "high Crimes and Misdemeanors" means anything the House of Representatives wants it to mean,[32] reflects the essential notion that the Constitution confers broad discretion on this House to make up its own mind about what kinds of conduct should lead to an impeachment proceeding.[33] It is more than a little presumptuous, then, for me or any other law professor—or even 400 history professors—to tell you how you should define "high Crimes and Misdemeanors"—the oath you took to uphold the Constitution requires you to make that determination for yourselves, *because the maintenance of the quality of the Executive which the Constitutional structure demands is part of your job.*

It should be remembered, after all, that the Constitution, while it gives you discretion to determine whether a particular act or series of acts amounts to grounds for impeachment, *requires you to move forward to impeach if you determine there are such acts.* The language of Article II, Section 4 is imperative: "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."[34] Once you determine that impeachable acts have been committed, you have no choice—if the Constitution is to function as the framers' understood—you must impeach, leaving the decision on removal to the Senate. In the exercise of your discretion, though, as we have seen, there are some guidelines from the text of the Constitution, from the contemporary exposition in *The Federalist,* in the debates over the impeachment provision, and in the examples from English practice: impeachable offenses are those that demonstrate a fundamental betrayal of a public trust; they are those that suggest the federal official under investigation has deliberately failed in his duty to uphold the Constitution and laws he was sworn to enforce; and they are those which suggest that the official does not possess the virtue or character necessary to maintain the faith of the people in his honesty and wisdom. This is a determination to be made by the peoples' representatives in the House of Congress closest to the people themselves—you.

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[30] Madison, Hamilton, & Jay, supra note 4, at 382.

[31] This was the conclusion reached, for example, in the Report by the Staff of the Impeachment Inquiry on the Constitutional Grounds for Presidential Impeachment, Committee Print, Committee on the Judiciary, 93d Cong. 2d Sess., Feb. 1974: "The emphasis [in impeachment proceedings] 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."

[32] What, then, is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be suficiently serious to require removal of the accused from office . . . there are few fixed principles among the handful of precedents." 116 Cong. Rec. H. 3113–3114 (daily ed. April 15, 1970) (statement of Congressman Gerald R. Ford).

[33] There is, however, some indication from Hamilton, in Federalist 65 that the kind of acts which amount to impeachable offenses will also give rise to the possibility of criminal prosecution—which may lead to the conclusion that there must be a crime before there can be an impeachment:

> [T]he punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.

Id., at 382. In this connection it should be noted that one of the country's foremost authorities on impeachment, the distinguished legal historian who gave my chair to Northwestern Law School, after an exhaustive review of the records of impeachments concluded that a "crime" was not necessary for something to constitute an impeachable offense, even though he believed that Gerald Ford's claim to "an illimitable power" in Congress to impeach went too far. Raoul Berger, Impeachment: The Constitutional Problems 53–62 (1973).

[34] U.S. Constitution, Art. II, Section 4 (emphasis supplied).

But perhaps it would not be untoward of me, in light of what I have tried to suggest about the Framers' understanding, briefly to consider the charges so far levied against President Clinton, and to express an opinion about whether they rise to the level the framers' thought necessary. As this is written, there are two formulations of these charges that have come before you. The first is from Judge Starr's report to you, and the other is by the Committee's chief investigator, David Schippers.

Judge Starr submitted what he believed to be "substantial and credible information" regarding eleven impeachable offenses. These were Judge Starr's allegations that (1) President Clinton repeatedly lied under oath regarding his sexual relationship with Monica Lewinsky, during the pre-trial discovery process in the civil case brought against him by Paula Jones, (2) President Clinton lied under oath to the grand jury about his sexual relationship with Monica Lewinsky, (3) President Clinton lied under oath during his civil deposition in the Jones case, when he stated that he could not recall being alone with Ms. Lewinsky and when he minimized the number of gifts they had exchanged, (4) President Clinton lied under oath during his civil deposition in the Jones case concerning conversations he had with Ms. Lewinsky about her involvement in the Jones case, (5) President Clinton endeavored to obstruct justice by attempting to conceal evidence of his relationship with Ms. Lewinsky from the judicial process, (6) President Clinton had an understanding with Ms. Lewinsky that they would lie under oath in the Jones case about their relationship, and President Clinton endeavored to obstruct justice by suggesting that Ms. Lewinsky file an affadavit which would prevent her deposition in the Jones case and which would enable him to avoid having his testimony contradicted by her and would enable him to avoid questions about her, (7) President Clinton endeavored to obstruct justice by helping Ms. Lewinsky obtain a job in New York at a time when she would have been a witness against him were she to tell the truth during the Jones case, (8) President Clinton lied under oath in describing his conversations with Vernon Jordan about Ms. Lewinsky, 9) President Clinton endeavored to obstruct justice by attempting to influence the testimony of Betty Currie, (10) President Clinton endeavored to obstruct justice by refusing to testify for seven months in a grand jury investigation while simultaneously lying to potential grand jury witnesses knowing that they would relay the falsehoods to the grand jury, and (11) President Clinton did not follow his constitutional duty to faithfully execute the laws when he misled the American people and Congress regarding the truth of his relationship with Ms. Lewinsky, when he allowed and encouraged his wife, his Cabinet, and his associates to perpetrate untruths regarding his relationship with Ms. Lewinsky, when he repeatedly and unlawfully invoked Executive Privilege to conceal evidence from the grand jury, when he refused to answer relevant questions before the grand jury, and when he misled the American people on August 17, 1998 by stating that his answers in the January civil deposition had been "legally accurate."[35]

Your Chief Investigative Counsel, Mr. Schippers, based on the referral from Judge Starr, recast Judge Starr's evidence into fifteen purportedly impeachable offenses, including that (1) The President may have been part of a conspiracy with Monica Lewinsky and others to obstruct justice by providing false and misleading testimony under oath in a civil deposition and before a grand jury, withholding evidence, and tampering with prospective witnesses, (2) The President may have aided, abetted, counseled, and procured Monica Lewinsky to file and caused to be filed a false affidavit in the case of *Jones* v. *Clinton,* et. al., (3) The President may have aided, abetted, counseled, and procured Monica Lewinsky to obstruct justice by filing a false affidavit (4) The President may have engaged in misprision of felonies by taking affirmative steps to conceal Monica Lewinsky's felonies in connection with her submission of a false affidavit, (5) The President may have testified falsely under oath in his deposition in *Jones* v. *Clinton* regarding his relationship with Ms. Lewinsky, (6) The President may have given false testimony under oath before the federal grand jury on August 17, 1998, regarding his relationship with Ms. Lewinsky, (7) The President may have given false testimony under oath in his deposition in *Jones* v. *Clinton* regarding his statement that he could not recall being alone with Ms. Lewinsky and minimizing the number of gifts they had exchanged, (8) The President may have testified falsely in his deposition concerning conversations with Ms. Lewinsky about her involvement in the *Jones* case, (9) The President may have endeavored to obstruct justice by engaging in a pattern of activity calculated to conceal evidence from the judicial proceedings in *Jones* v. *Clinton* regarding his relationship with Monica Lewinsky, (10) The President may have endeavored to obstruct justice in *Jones* v. *Clinton* by agreeing with Ms. Lewinsky on a cover story, by causing a

[35] The Starr Report: The Official Report of the Independent Counsel's Investigation of the President 9–15 (Prima Publishing edition, 1998).

false affidavit to be filed by her, and by giving false and misleading testimony in his deposition, (11) The President may have endeavored to obstruct justice by helping Ms. Lewinsky obtain a job in New York at a time when she would have given evidence adverse to Mr. Clinton if she had told the truth in the *Jones* case, (12) The President may have testified falsely under oath in his deposition in *Jones* v. *Clinton* concerning his conversations with Vernon Jordan, (13) The President may have endeavored to obstruct justice and engage in witness tampering in attempting to coach and influence the testimony of Betty Currie before the grand jury, (14) The President may have engaged in witness tampering by coaching prospective grand jury witnesses and by telling them false accounts intending that the witnesses would repeat these before the grand jury, and (15) The President may have given false testimony under oath before the federal grand jury on August 17, 1998.[36]

In either version, if true, these allegations show a pattern of conduct, extending over many months, on the part of the President, of deception, of lying under oath, of concealing evidence, of tampering with witnesses, and, in general, of obstructing justice by seeking to prevent the proper functioning of the courts, the grand jury, and the investigation of the Office of Independent Counsel. These offenses, if true, would undoubtedly amount to criminal interference with the legal process, but more to the point, *they would demonstrate that the President had failed to live up to the requirements of honesty, virtue, and honor which the framers of the Constitution and the authors of the Federalist believed were essential for the Presidency.* These offenses, if true, would bear a clear resemblance to many of the English precedents of impeachment for interfering with orderly processes of law, for tampering with the grand jury, and for seeking to use one's office for personal rather than public ends. These offenses, if true, would show that President Clinton engaged in a pattern of conduct which involved injury to the state and a betrayal of his Constitutional duties, because President Clinton would have thereby abused his office for personal gain and betrayed the ideal that ours is a government of laws and not of men.

If these allegations are true, then the President, instead of carrying out his oath of office to uphold the Constitution and faithfully to execute the laws, sought instead to subvert the judicial process specified in Article III, and, in order to protect himself from an adverse judgment in the Jones proceeding, sought to frustrate the laws designed to protect Ms. Jones and others like her. There are those who will argue before you that what the President did was simply to lie about his private sexual conduct. It should be remembered, however, that the essential allegation in *Jones* v. *Clinton* was that the President misused his governmental office (then as Governor of Arkansas) to attempt to procure sexual favors from Ms. Jones, and the allegations of impeachable offenses of the President now before you all flow from efforts of the President to suppress the truth in the course of *Jones* v. *Clinton*. It should also be remembered that Judge Starr expanded his investigation to include the facts regarding Ms. Lewinsky because Judge Starr believed that he could discern a pattern of interference with judicial proceedings on the part of the President which Judge Starr had before encountered in the Whitewater investigation.[37] Judge Starr's inquiry, after all, has never been about sex, it has been about abuse of power, obstruction of justice and other impeachable offenses.

There may still be further allegations of impeachable offenses from Judge Starr to come before you,[38] but looking only to the allegations made by Judge Starr and by your Chief Investigator detailed above, there is more than enough to require you to move forward now. These allegations concern conduct by the President in which he allegedly ignored his Constitutional obligations to take care that the laws be faithfully executed, and instead used his august position to frustrate enforcement of the law. If these allegations are true, then the President has acted in a manner against the interests of the state and he has sought to subvert the essence of our Constitutional government—that ours is a government of laws and not of men. If these allegations are true, then the President has engaged in conduct that can only be described as corrupt, and corrupt in a manner that the impeachment process was expressly designed to correct.

For many people, apparently, the allegations against the President can still be characterized as "lying about sex," and it is difficult for many people to believe that such conduct is anything but a private matter, far removed from Constitutional procedures or requirements. The President is accused of much more than "lying about sex," of course, as Judge Starr and Mr. Schippers have made plain. It is appropriate to note in passing, however, that our legal tradition has never made any distinction

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[36] Presentation before the Committee on the Judiciary, U.S. House of Representatives, Monday, October 5, 1998.

[37] Starr Report, supra note 35, at 38.

[38] Id., at 47–48.

about the content of matters that might involve perjury, obstruction of justice, or tampering with witnesses. *No person and least of all no President, who is sworn faithfully to execute all the laws, can pick and choose over which matters he will be truthful and which he will not, particularly when he is under oath.*

An oath, and the virtue of one swearing to it, perhaps lightly regarded by many today, were not so lightly regarded at the time of the Constitution's framing. Our best evidence of this is George Washington's statements in his famous "Farewell Address." The "Farewell Address" is the first President's "one outstanding piece of writing," and is regarded as comparable in importance to Thomas Jefferson's Declaration of Independence, Alexander Hamilton's financial plan, or James Madison's journal of the proceedings of the Constitutional Convention."[39] Like the Declaration, Hamilton's ideas about the importance of Commerce and Manufacturing, or the Constitutional Convention, Washington's Farewell Address offers a valuable and authentic glimpse into what the framers considered vital for the new Republic they were founding. In that Farewell Address, in one of its most important passages, the man whom the framers designated as their First President, asked "[W]here is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice?" Somewhat later in the address Washington added:

> It is substantially true, that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabrick?"[40]

Washington, the Platonic Form of an American President, believed that the oath taken in court was a fundamental security for all that was held dear in American Society. He believed that those who took their oaths in vain were eroding the foundation of American government, and that they had lost the virtue which he believed essential to sustain freedom and popular sovereignty. Even if all President Clinton had done were to lie under oath in a judicial proceeding, the first President would have believed that President Clinton was engaged in an effort to "shake the foundation of the fabrick" of our Constitutional scheme. It is clear, based on this, that George Washington would have recommended President Clinton's impeachment, and this would likely have been the view of Madison, Hamilton, Jefferson, and Mason as well.

The allegations against President Clinton amount to much more than lying under oath, however. I think that the framers' view of the Constitution means that if these allegations are true, then the oath that you took to support the Constitution[41] requires you to impeach the President.

Mr. CANADY. At this time, the subcommittee will recess until the hour of 1 o'clock. We will then reconvene for questions of the witnesses on the first panel, and then proceed with the second panel.

The subcommittee will stand in recess until the hour of 1 o'clock.

[Luncheon recess.]

Mr. CANADY. The subcommittee will be in order. At this time we will have a round of questions for the members of this panel. As I announced earlier, each member of the subcommittee will be given 10 minutes for the purpose of asking questions. I will now recognize myself to begin the questions.

I would like to begin by talking a little bit about the procedures that we have followed in this inquiry in the context of the history of procedures that have been used in earlier impeachment inquiries, and most particularly in the case of President Nixon.

Father Drinan, you were there as a key participant in those proceedings.

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[39] Frank Donovan, editor, *The George Washington Papers* 258 (1964). There is much speculation among historians about whether the Farewell Address was primarily drafted by Alexander Hamilton, but it has still come down to us as the wisdom of our First President.

[40] George Washington, "To The People of the United States [the Farewell Address]," September 19, 1796, reprinted in II John Marshall, *The Life of George Washington* 479 (1930 reprint)

[41] U.S. Constitution, Art. VI, Paragraph 3 provides that "The Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution. . . ."

I want to make it clear that the procedure we are following here, in not establishing a fixed standard for impeachable offenses in advance of conducting an inquiry, is by no means novel. It is my understanding, based on a reading of the historical record, that in the Nixon case, the committee never adopted a fixed definition of impeachable offenses. What the committee did was examine the conduct of Richard Nixon and then determined that certain acts he was responsible for rose to the level of high crimes and misdemeanors and the articles of impeachment were adopted by the committee.

As a matter of fact, I further understand that the committee never—in that context—never conducted a hearing such as the hearing we are conducting today, which looked at the history and background of impeachment. Of course, the committee staff prepared a report, which I think is a very thoughtful and helpful report; I cited it earlier in my own remarks. But as far as any hearing such as this, nothing of the sort took place.

Am I incorrect in my description of those procedures, Father Drinan?

Mr. DRINAN. Well, I think, Mr. Chairman, that we didn't have what you people have, namely, a series of indictments from the Special Prosecutor. That was unknown. That document appeared relatively early, the big, big, 800-page document.

Mr. CANADY. Well, but I am asking about the procedure for establishing whether or not there is a fixed standard of impeachable offenses.

Mr. DRINAN. I think there was something simply in the atmosphere that we all educated ourselves and the staff gave abundant material. I don't recall any specific hearing on the nature itself, but we knew an awful lot; and there were all types of memos that were coming out, and we just understood that it had to be high crimes and misdemeanors.

Mr. CANADY. I appreciate that. And I think the same is true of this committee. All of us understand that this is a grave matter. We have been studying the historical resources, and as a matter of fact, we have been studying resources that were developed by your committee in their very thoughtful deliberations in the Nixon case.

Now, there is one thing that relates to the Nixon case that I want to address. This has come up in various pieces of testimony of members of this panel, some people on the second panel also, who are going to testify on this. The President's lawyers have raised this issue.

In the President's lawyer's brief, which was submitted to the committee at the time of the hearing on whether to institute an inquiry, they submitted an argument that the perjury charge against President Clinton is analogous to the tax fraud charge against President Nixon, and that since the tax fraud article was not adopted against President Nixon, therefore, the charge of perjury here clearly does not rise to the level of a high crime and misdemeanor. I disagree with that conclusion.

In support of that, they cite the statements by four members of the Judiciary Committee in the Nixon inquiry who did indicate that they did not believe that tax fraud would rise to the level of

an impeachable offense. They quote those four members at some length in the brief.

What the brief fails to mention is that there were many more members of the committee who, in the debate, indicated that they would not support the article for tax evasion because there was insufficient evidence of tax fraud. This is a very important distinction.

I believe that a fair reading of the historical record indicates that the committee did not decide that tax fraud was not an impeachable offense. A majority of the members of the committee who spoke on the issue expressed another reason for their vote against the article for tax fraud, and that was that there was insufficient evidence.

In reading the record, Father Drinan, from what I could tell, you just asked questions, and did not really express a clear view. I think it is important that we set the record straight on that.

Another point that I would like to make in connection with that is, a number of the witnesses have made reference to the small book by Professor Charles Black of the Yale Law School on impeachment. Some have lauded him and view that as an important statement of various principles related to impeachment. I would like to quote him briefly on the issue of income tax fraud. Of course, this was the live issue at the time he was writing.

He says, "Income tax fraud, in any case," and I quote him here; this is on page 41 of the book, "in any case, it undermines government and confidence in government. A large-scale tax cheat is not a viable chief magistrate."

Now, he also indicates here that some things that were particularly relevant to what he understood about the Nixon case, in that the tax fraud involved the donation of government papers, and his view that that exacerbated it. But the bottom-line conclusion here is that what he refers to as "large-scale"—"a large-scale tax cheat" is someone who should be subject to impeachment and would be guilty of a high crime and misdemeanor.

Now, that is Professor Black, who is often quoted and cited, and I think it is important in the context of this argument about what the committee did in the Nixon inquiry on the tax fraud charge is quite relevant.

Let me move on to an issue that has come up in the testimony of various witnesses. I raised it in my statement at the outset, and it has to do with the integrity of government.

As I expressed at the outset, I believe that if a President commits perjury and a President obstructs justice, that President is clearly undermining the integrity of office. That President is clearly undermining a confidence in the system of justice, and is bringing the system of justice into disrepute, bringing his office into disrepute. That is the sort of thing which in an impeachment process we should be concerned about.

Now, Professor Gerhardt, I want to refer to your testimony. In your testimony you make some reference to the Harry Claiborne case and you say this, and I will quote you at some length. This is on page 15 of your written testimony.

You say that, "For example, in 1986, the House impeached and the Senate convicted and removed Federal District Judge Harry

Claiborne from office based on income tax evasion. At first glance, it seems as if Claiborne's misconduct has no formal relationship to his official duties. Nevertheless, it is conceivable that Congress' judgment in impeaching and removing Claiborne was that integrity is an indispensable criterion for someone to continue to function as a Federal judge."

Then you go on to say, "While integrity is obviously important for a President or, for that matter, any public official, it is not necessarily a sine qua non, especially given all the checks that exist for scrutinizing political officials' actions."

I am troubled by your conclusion there, Professor Gerhardt. You talk about checks on the President. Well, there are certainly checks on judicial officers as well. A district judge has all of his opinions, all of his decisions subject to appeal. A circuit court judge typically sits on a panel with two other judges, and those decisions would be subject to appeal to the Supreme Court. A judge on the Supreme Court is there as one of nine.

The President, it seems to me, stands out as the one person in our system who is in a unique position where the checks on any lack of integrity there are more important than for anyone else in the system of government.

So would you respond to that, or do you care to?

Mr. GERHARDT. Sure. I have a number of responses.

Mr. CANADY. I am sorry. I see that my 10 minutes has expired, and I am going to—I am sorry, I am going to enforce the rule on myself as I intend to enforce it with respect to the other members, and I am sure there——

Mr. SCOTT. Well, can he answer the question?

Mr. CANADY. If there is no objection, I will grant Professor Gerhardt 1 minute.

Mr. GERHARDT. Thank you, Mr. Chairman.

I think that to put that statement in context, I think the important—let's go back a step to sort of again look at the Claiborne case. There are a few different ways in which to understand what the House and the Senate did with respect to Judge Claiborne.

Much of that case, I think, was heard on the fact that the judge was sitting in prison at the time his impeachment arose, and that obviously put pressure on this body, as it ultimately did on the Senate, to act.

Mr. CANADY. Professor, I saw that in your testimony as well. But in all candor, if he was guilty of the offense, whether he had been convicted previously or not, wouldn't the issue still be the same?

Mr. GERHARDT. I would not disagree with that, Congressman. But I think—one of the ways in which I think people generally understand the Claiborne case is that the tax evasion conviction, or the commission of income tax fraud in that case, was thought by members of both this body and ultimately the Senate to reflect on his integrity, and that for a Federal judge there is no more single criterion or qualification than his or her integrity.

Now, with respect to the present circumstance, I think that a lot depends on what we are going to term or call "integrity," and it seems to me that we had a very precise understanding of that in the context of Judge Claiborne's circumstance. In the present circumstance, integrity could be a pretty amorphous concept and,

therefore, could become a dangerous basis on which to exercise the impeachment power.

Mr. CANADY. Thank you.

The gentleman—the gentleman from New York, Mr. Nadler, is now recognized.

Mr. NADLER. Thank you, Mr. Chairman. I yield myself 5 minutes, and then I will yield the other 5 to someone else. Is that okay?

Mr. CANADY. Please proceed.

Mr. NADLER. In other words, tell me when the 5 minutes is up.

Mr. CANADY. The light will come on.

Mr. NADLER. Professor McDowell, you stated that—at one point in the Constitutional Convention the draft said, "other high crimes and misdemeanors against the state" which was changed to "other high Crimes and Misdemeanors against the United States"; and then you say when the draft from the Committee on Style was laid before the Convention, all references to high crimes and misdemeanors against the United States was dropped in favor of what we have now, in other words, just high crimes and misdemeanors. Thus, as finally adopted, the standard of "high Crimes and Misdemeanors" seems to have a broader, less restricted meaning than merely "crimes against the government," narrowly understood, because they dropped the phrase, "against the United States."

Now, isn't it true, though, that the Committee on Style that produced the final draft of the Constitution which eliminated that phrase "against the United States," had been directed by the Convention not to change the meaning of any provision, and that almost everybody has always understood that change to be simply a question of style and surplusage, that they felt that that was redundant?

Mr. MCDOWELL. One could certainly see it that way. In fact, one could see it in terms of federalism, that is to say, that the United States Constitution dealt with high crimes and misdemeanors against the United States, not against the States and, therefore, that would not be impeachable.

Mr. NADLER. But isn't it true that the Committee on Style had been told not to make any change in the meaning of the document and, therefore, inferring the meaning of the Constitution, as we have it now from a change they made, is simply wrong?

Mr. MCDOWELL. I don't think so. I don't think it's simply wrong.

Mr. NADLER. Okay. Thank you.

Can you infer that perjury is an impeachable offense under almost any circumstances from the Claiborne case? Isn't it true that in all three cases of judges being impeached, you had a variety of corruption and bribery relating to the misuse of the public office and, in fact, in Judge Claiborne's case, the perjury was covering up his tax evasion conviction related to his failure to report bribes he had received? Wasn't this a case of perjury connected to covering up a crime against the state, namely bribery, and therefore, you cannot draw a broader conclusion from that case regarding impeachable conduct?

Mr. SUNSTEIN. That actually was the Alcee Hastings case which involved that. The Claiborne case was one of simple tax evasion.

But I agree with the thrust of your question, which is that this ought not to be precedent for President Clinton's case. Note that no Federal judges at all were impeached between something like 1930 and something like 1980. Then there have been three cases in the relatively recent past. The most borderline of these was Judge Claiborne.

If we treat these as one for impeachment of the President, then all our standards are out the window, the difference between judges and Presidents is collapsed, the difference between public misconduct relating to official duties, which you emphasize, and something not—that is collapsed, and the whole system is radically transformed.

Mr. NADLER. Let me ask you one more question, Professor Sunstein.

It has been suggested by the Chairman that if we go on to an evidentiary hearing, that Judge Starr perhaps could be the only witness and that we can take the testimony—we know the facts, because, after all, he testified to the grand jury under oath. Could you comment on such a procedure and on how that relates to our formal standards of fairness and due process?

Mr. SUNSTEIN. Well, I would make two points. The first is that it is peculiar certainly to have as the only witness someone who is effectively a prosecutor. That is a very peculiar procedure. The second and, I think, the more fundamental point is that we have no impeachable offense here, so to have one witness who is the prosecutor to——

Mr. NADLER. No, no, excuse me. Assuming we did have impeachable offenses. I am talking about the evidentiary hearing and the fact that we are not having any cross-examination of witnesses, for example.

Mr. CANADY. Mr. Nadler, your first 5 minutes have expired.

Mr. NADLER. I yield myself 30 seconds.

Mr. CANADY. You are on your second 5 minutes now.

Mr. SUNSTEIN. The thrust of your question I agree with. It is a very peculiar, unusual proceeding. Never heard of anything like that.

Mr. NADLER. Okay. Thank you.

I now yield 2 minutes and 15 seconds to Ms. Jackson Lee, and 2 minutes and 15 seconds to Mr. Meehan.

Mr. CANADY. They are going to have to keep track of the time within the 5 minutes you have been yielded. We aren't set up to orchestrate that here.

Mr. NADLER. All right.

Mr. MEEHAN. Thank you. Before the time runs out, Mr. Chairman, thank you very much.

Professor Parker, in arguing that so-called private wrongs may justify impeachment proceedings, you point to the example of former Vice President, Spiro Agnew, whose private wrong in your view was to solicit and accept kickbacks from local contractors while serving as the Governor of Maryland.

Is it really fair, though, to characterize Spiro Agnew's solicitation of kickbacks as governor as conduct that arose from his private life. Isn't that, instead, core professional public misconduct, easily dis-

tinguishable from what President Clinton is alleged to have done in his civil deposition?

Mr. PARKER. It is public conduct, soliciting and taking bribes; so is obstruction of justice, lying under oath in Federal proceedings and so forth. I would point out that these acts in Maryland committed by Vice President Agnew were committed before he became Vice President; they had nothing to do with any kind of abuse or misuse of Federal power whatsoever. So if you believe——

Mr. MEEHAN. State bribery as opposed to Federal bribery then?

Mr. PARKER. Right. There are some who argue that high crimes and misdemeanors should be limited to the misuse of the power of a Federal office. You ought to then ask how you would have come out in the Agnew case.

Mr. MEEHAN. If the public knew of misconduct at the time that they voted that President into office, then you say it should have some bearing on the evaluation of his or her fitness for office through the impeachment process.

What if the public didn't know of a President's misconduct on Election Day, but knew now and overwhelmingly opposed impeachment? Shouldn't that have the same or similar bearing on our willingness to impeach?

Mr. PARKER. I do believe it should be taken into account. Impeachment is part of the democratic process, not external to it, although I think that Members of Congress should not act in a partisan way, pro or con. I think that they should take into account both the good of the country and the desires and feelings of their constituents, certainly.

Mr. MEEHAN. My time is up.

Ms. JACKSON LEE. Let me thank Mr. Nadler and thank the ranking member and say to Chairman Hyde and the chairman of this committee, with no disrespect, that this is an insult to my constituents and an insult to the process, that this is not a full Judiciary Committee hearing, and that we do not have the opportunity to fully address these witnesses.

Very briefly, let me acknowledge I believe that Professor Parker signed an amicus curiae brief of law professors in support of Paula Jones and, likewise, Mr. McDowell considers Mr. Starr a very good friend of his, and Mr. Presser also signed an amicus curiae in support of Ms. Jones. So obviously I want to probe them on these issues, but because of the limited time, I can't ask questions about those issues.

Professor Schlesinger, scientists have determined, through DNA testing that President Thomas Jefferson had a relationship with Sally Hemings, a slave and fathered children. This is post the time that he was in the presidency. Would his denials during that time now equate to grounds for impeachment if we had to assess his conduct in office at that time, and are we in any different times right now?

Mr. SCHLESINGER. I think Jefferson was a man of his time. It is very difficult to assay, take out, pluck out one single strand in his life.

Ms. JACKSON LEE. You're right. But if Thomas Jefferson had said publicly somewhere, I have not had sexual relations with that woman. If he said that somewhere, do you think that on those

grounds his conduct would be impeachable from what you have said in your testimony today?

I don't want to point out President Jefferson, but from what you have said in your testimony today——

Mr. SCHLESINGER. I think the important thing to keep in mind is what Representative Lindsey Graham is quoted as saying in the paper today, or yesterday, on one of the talk shows, the sense of proportionality. If a person commits perjury in order to send someone falsely to prison or to the electric chair, that is one thing. If a person commits perjury to conceal his love life, that seems to be quite another thing.

I do not think these two acts of perjury can be equated, and everyone lies about their love life. I doubt whether there is anyone in this room who at one time or another hasn't told a lie about his or her love life. I think this is a venal sin as against a mortal sin.

Mr. CANADY. The gentleman's time has expired.

Mr. Hyde.

Chairman HYDE. Thank you very much, Mr. Chairman. I would like to set the record straight.

Early in this meeting, my good friend from North Carolina, Mr. Watt—I don't see him here, he was here—oh, there he is.

You were behind Mr. Nadler. When you're behind Mr. Nadler, it is difficult.

Mr. Watt complained of a publication, a staff publication that they didn't have any input into it. In October of 1973, under the direction of Chairman Rodino, the Judiciary Committee released a committee print prepared under the supervision of its general counsel, Jerome Zeifman, entitled "Impeachment: Selected Materials." This was prepared beginning in August of 1973 with no consultation or input from the minority members or staff.

A second committee print entitled "Impeachment: Selected Materials on Procedure" was produced similarly and released in January of 1974.

On February 22nd, 1974, a third committee print was released. The impeachment inquiry staff produced a document entitled "Constitutional Grounds for Presidential Impeachment" at the request of Chairman Rodino. The input of his committee's minority members was not sought.

Now, I requested my staff to update these documents so they could be made available to members of the committee and the American public, and that is this publication. Minority staff was given a copy of the report before it was printed, and an invitation was extended to submit for our consideration any additional reports or materials the minority staff would like us to use as a resource, and they came forth with nothing.

So what we have done far exceeds what the Rodino committee did, and I don't think criticism is appropriate. However, I expect it.

Now, I am going to pick on Professor Presser, because while he doesn't think I heard his testimony, I was watching very carefully inside.

I want to tell you what bothers me about this whole light opera: the rule of law. We are all lawyers, or most of us are lawyers, and we have studied the law, we have made it our life's work. And the

rule of law, it seems to me and perhaps in my unsophisticated way, protects your family and my family from that knock on the door at 3 a.m. It is important. It is critical. It defines our country, most of the countries throughout history; and anything that erodes, that taints, that corrodes, that diminishes the rule of law is something we ought to be mindful of and be very careful about.

Now, we have one unique person in this country, the President of the United States, and he is unique not just because he is President, but he assumes—when he swears that he is going to defend and protect the Constitution, he assumes an obligation to take care that the laws—it doesn't say what laws—it says that the law be faithfully executed.

He then goes into a litigation and he is asked some questions which are quite embarrassing. Now he has some options. He could say, I am not going to answer those questions; they are too personal, they offend my sense of propriety, they are too intrusive, and I am just not going to answer them.

The other thing he can do is plead the Fifth Amendment—very embarrassing, but it avoids committing a felony.

The third option is to say, I swear to tell the truth, the whole truth—the whole truth—and nothing but the truth, and then lie.

When that happens, this person wearing this mantle of "take care that the laws be faithfully executed," has performed a public act. Now, he is not charged with marital infidelity, he is not charged with adultery that I have seen, but he is charged with possibly committing perjury, possibly suborning perjury, possibly obstructing justice, putting gifts under—having them put under somebody's bed, all sorts of things going on, public acts that tend, in my unnuanced opinion, to erode this rule of law that he has a peculiar and unique responsibility to uphold. That is the problem I have.

God, I would like to forget all of this. I mean, who needs it? We don't need it. We paid attention to the polls and the elections, but I am not letting that influence my intent or desire to proceed with what I think is our constitutional duty under the law and the Constitution. But I am frightened for the rule of law. I don't want that torn down or diminished or turned into a piece of plastic that can be molded.

I really believe that notion that no man is above the law. That is naive of me, I suppose. There are some people who are above the law, but they shouldn't be. They shouldn't be. We should have a government of laws, not of men. And we are going in the other direction.

All of the sophistries that I hear: rationales, justifications, everybody does it, it was just about sex. It is perjury. I swear to tell the truth. The whole system of justice depends on that, doesn't it?

Mr. PRESSER. Yes, it does. I have nothing to add to what you said.

Chairman HYDE. I didn't think you would. That's why I picked on you. I will yield any time I have left to Mr. Rogan.

Mr. ROGAN. Mr. Chairman, thank you. Just a quick question, I guess for Professor Schlesinger, only because he is the professor of whom I am most aware, having read many of his works.

And it is a great pleasure to finally have a chance to meet you in person, Professor.

One of my concerns throughout this entire process has been what this whole procedure could end up doing at the end of the day to the sexual harassment laws in this country. Looking at this whole thing in its proper context, we had somebody who was a defendant in a Federal civil rights action, who was ordered by a Federal judge as part of that action to answer questions under oath dealing with a sexual harassment claim. It isn't our job here to determine the merits or demerits of that claim. But when a judge orders a defendant to answer certain questions in a sexual harassment case that deals with questions as to whether there was a pattern of conduct between an employer and a subordinate female employee, if we then excuse perjured answers by saying, well, simply it is all about sex, everybody lies about this, doesn't that essentially destroy the sexual harassment laws in this country? And more importantly, doesn't it send a message to every woman in the country who may want to proceed with a sexual harassment case against an employer who is abusing her in the workplace by telling her, you'd better not even bother coming forward, because if you do, if the person lies under oath and commits perjury, in the unlikely event they are caught, it will simply be excused as having to do with only sex, and everybody lies about sex.

Do you see that as a concern here?

Mr. SCHLESINGER. I thank you for your kind words about me as a historian, and I hope I will not cause you to regret those words by my reply to your question.

But I do think this is what Reed Powell of the Harvard Law School used to call "a parade of horribles"; that is, things which may appear in logical sequence, but are very unlikely to appear in practical sequence.

I do not think this will weaken the sexual harassment laws. I do not defend for a moment Mr. Clinton's deceptions in connection with the Paula Jones case. I call—I do want to call upon members of the committee to regard, to see this as a balancing of considerations. If you lower the bar to impeachment by making perjury in connection with one's sex life an element in impeachment, an impeachable offense, you are going to weaken the current status of the presidency; and since the Republicans, I imagine, still hope to regain the presidency one of these days, it is an interest on the part of the Republicans, as well as of the Democrats present, to maintain the status, the independence of the presidency, and that is what it seems to me is at issue here.

Mr. CANADY. The gentleman's time has expired.

Chairman HYDE. Don't cut the Professor off.

Mr. SCHLESINGER. I would only recall, it seems to me that the Reagan administration systematically violated the Boland amendments in the course of aid to the Contras in Nicaragua. I do not recall the majesty of the law being invoked by members of the majority in that instance.

Chairman HYDE. If I may answer, Professor, I was on the Iran-Contra Committee and we went all summer turning over every rock we could. Nobody ever filed a bill of impeachment against the President.

Ms. WATERS. They should have.

Chairman HYDE. Well, where were you?

Ms. WATERS. I wasn't here.

Chairman HYDE. More's the pity.

Mr. CANADY. The gentleman from Michigan, Mr. Conyers, is recognized.

Mr. CONYERS. Mr. Chairman and ladies and gentlemen, this discussion has taken a very disturbing turn for me to hear the Chairman of this committee explaining why the perjury that may be involved with the President in the Paula Jones matter has to go to some impeachable circumstance, and I direct this to Professor Schlesinger and Professor Sunstein.

It seems that when the day is done and we have had all of this valuable consultation with scholars and lawyers and professors and judges, the fact of the matter is that we are going to have to decide whether or not something in the Ken Starr narratives submitted to this body requires that we go forward with evidentiary hearings, and yet the only thing I hear about is perjury.

Now, Gary Trudeau dismissed that a few weeks back, and now it is brought back with new force and new vigor, that anyone that would not disclose fully his private life under oath has now committed an impeachable offense.

Now, this is a little—this is the biggest stretch that has ever occurred to me that could be happening here, and I would really like both of these witnesses to go over this again, because if this is impeachable conduct, we have now turned the precedents of impeachment on their head.

Make no mistake about it. I am not saying that this committee can't do it if it chooses, but the question is, are we aware of it, to try to garble it up like this is the way we have always done it, and I invoke the need to defend the rule of law. It is my concern that the rule of law be honored. It is my concern that the 16 cases in 209 years have borne some similarity to what we are doing here today.

I would like to yield to the witnesses, please.

Mr. SCHLESINGER. Well, I sympathize very much with your point, obviously. I feel that if we were to establish as a basis for removing Presidents perjury, lying about your sex life is the last thing surely that the framers of the Constitution ever had in mind, nor do I think legitimate growth at the gathering of knowledge, which Frankfurter cited as advocating, I do not think that would include matters like this. We would become the laughing stock of the world and also the presidency would be diminished forever, and that would, as I suggest, apply to Republican Presidents as well as to Democratic Presidents.

We must not lower the bar of impeachment, we must not make it easier for the House and the Senate to dominate the executive branch. That is really the choice we face when we are asked to accept offenses like these as impeachable offenses.

Mr. SUNSTEIN. Chairman Hyde gave a wonderfully eloquent presentation about the rule of law, and I would like to relate that to your question.

The constitutional term is "high Crimes and Misdemeanors," not "violation of the rule of law." If the President did violate the rule

of law—and that is a very serious offense, and it appears possible that he did—he is subject to criminal punishment after he leaves office; and what Chairman Hyde said, I endorse every word, and for lawyers and nonlawyers, there is nothing more important than that. But what you said, Representative Conyers, I think also holds true.

There was an extremely interesting exchange between Representative Waters and Chairman Hyde about the Iran-Contra proceeding, which I think is worth underlining. Representative Hyde noted that his committee went very carefully over the allegations there and no one mentioned impeachment. And Representative Waters said, "exactly."

Now, that is extremely illuminating. No one, thank goodness, no one called for impeachment of President Reagan or President Bush or Vice President Bush in connection with Iran-Contra. That was very important for domestic and international stability.

Chairman HYDE. Mr. Sunstein, may I just maybe correct the record? I am not sure of this, but Henry Gonzalez always filed lots of bills of impeachment, and there may well have been one pending against—I thought about that after I spoke.

Mr. CONYERS. Please, Mr. Chairman.

Mr. SUNSTEIN. What was wonderful about the Iran controversy is that impeachment was never seriously considered an option, even by President Reagan and President Bush when he became President. His strongest political opponents did not consider impeachment a problem.

Now, a reasonable person could believe one is more serious than the other, the other is more serious than the one. I think Representative Conyers is correct that we should draw a line in the sand and stop this train before it runs away.

Mr. CONYERS. I thank you both for your contributions. It seems to me that if we miss this among the humor and lightheartedness, which is a little stunning here, we are talking about a prosecutor, an Office of Independent Counsel that is under its own investigation at several levels of government; and now we are bringing him in as the witness, and I mean, this is beyond contemplation in a real sense.

And I am deeply troubled by the way that the discussion in this committee is cavalierly accepting the fact that a misstatement, or even perjury in a civil case dismissed, is now going to lead to an impeachment. Not prosecution, which everyone here knows could happen after the term if someone ever sought to do it. And I want the record to show my dismay with the tone of this discussion after it has been gone over dozens and dozens of times.

There can't be a Member in this body that doesn't understand the decisions that they are making, and if you are making it as a new low and lowering the barrier, that is one thing. But if you are trying to complain that you are continuing the rule of law or that this is the way it has always been done, it is not going to wash.

I recognize the gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Ranking Member.

I don't have too much time left, but perhaps I can just, since I might get another minute to ask my full question, ask Professor Holden to comment.

I saw that when Professor McGinnis was expounding on the conversations, I saw you visibly flinch at the discussion he was engaging in as to the Founding Fathers. I wondered if you might like the opportunity to expound on your flinch.

Mr. HOLDEN. Maybe I should learn to be still. Congresswoman, you have to refresh me on what the question was.

Ms. LOFGREN. Let me regroup. My time is up and I will ask my full question during my time. I should have done so, I think, to begin with.

Mr. CANADY. The gentleman from South Carolina, Mr. Inglis, is recognized.

Mr. INGLIS. Thank you, Mr. Chairman.

Earlier, Ms. Jackson Lee seemed to cast doubt on the credibility of two of the witnesses before us for signing a friend of the court brief in support of Paula Jones' position. I understand on the next panel we will have two folks who signed the brief for the President in an amicus curiae situation. So I suppose that Laurence Tribe and Susan Low Bloch will be similarly discredited on the next panel by Ms. Jackson Lee. In other words, I don't think that anyone here should be discredited for signing such a friend of the court brief.

Now, I note with some humor here the level of sophistication, shall we say, of everyone here, and the sophistication seems to get us into trouble. It seems to me that Professor Schlesinger has just suggested to all future occupants of the White House, if you are ever called to testify in a case involving sex, lie if you wish, because it doesn't matter, because according to Professor Schlesinger and the sophisticated, it just doesn't matter. Lie if you choose. In other words, we should publish in the Federal Register a list of permitted perjuries. One of them, apparently, for President is that if you are called to testify, lie.

Professor Sunstein's wonderfully sophisticated solution to that is, get somebody to prosecute you afterwards; and as Mr. Conyers just said, if you can. If you can. Because of course, what we see here is—I suppose what Mr. Conyers is suggesting we do is completely abrogate our responsibilities under the Constitution.

In other words, we are constituted here as the Committee on the Judiciary, but we are going to leave it to somebody else. See if maybe later some U.S. district attorney might like to take up a matter against the President of the United States, Mr. Clinton; and Professor Sunstein may come and assist in that case, possibly.

But we on the committee, well, we turn the other way because, under Mr. Schlesinger's point of view, it is okay. Lie if you are the President; lie in a case involving sex, because after all, he says, gentlemen do that. Gentlemen, apparently—well, you would just not be with it if you didn't lie about sex.

So for all of those folks out there who question the rule of law dealing with sexual harassment, lie if you wish. If you are the big boss in some big company and you are called on to testify, lie as you wish. According to Mr. Schlesinger, you are a sophisticated gentleman then. And if you don't, you are some sort of an unsophisticate.

So let me——

Mr. SCHLESINGER. May I be allowed to comment on this?

Mr. INGLIS. In a moment. In a moment.

Mr. SCHLESINGER. You keep repeating yourself.

Mr. INGLIS. I notice the same with your testimony as well. A great deal of sophistication, but very little common sense.

Let me now suggest some common sense from somebody that I heard in South Carolina. A lady at the end of a jetway who said to me, if I did that, I'd go to jail. She's right. There are 115 people in jail. And you know, I stood there and I said yeah, I think there are some people in jail. She said, 115 is the exact number.

Now, we would assume that she wouldn't be so sophisticated as to know all that. But she understands that the rule of law that Chairman Hyde was talking about is crucial to this country, and that means that everyone is subject to the law—not if they are sophisticated and the President, they get away with it, but rather, everyone is subject to the law.

So, for example, let me pose a hypothetical. Let's say that somebody in South Carolina today is in a divorce matter. The issue is adultery, a private matter which apparently you are allowed to lie about if you are the White House. But in South Carolina the issue of adultery in a matter involving divorce is very significant, because if you are guilty of adultery, you get zip from the other spouse, zip. So, a great deal turns on it, doesn't it?

So right now, in South Carolina, somebody is raising their hand to tell the truth and the issue is adultery. What shall we say to them from this rather august assembly, lie if you wish? Shall we say to them that the rule of law just doesn't matter in South Carolina, because they can lie in Washington?

No, I think what we say here is, it does matter, and you must tell the truth even if it causes embarrassment, even if it causes you discomfort, you must tell the truth in that matter involving adultery in that divorce case today in South Carolina.

I would ask Professor Presser if that is the matter of the rule of law we are talking about here. Does it—we get to the level of the divorce case in South Carolina, where the issue is adultery and the issue is whether the person sworn to testify today is going to tell the truth.

Is that what we are talking about with the rule of law that I think you so eloquently testified about?

Mr. PRESSER. Yes. I can only resubscribe to what Mr. Hyde said, and that is just, to use another metaphor, the law is a seamless web and once you begin eroding it, you begin to erode everything. You can't make distinctions and say, this part of the law we won't worry about. You have to worry about all of it.

Mr. INGLIS. Right. Well, I wonder if we had this situation where we are going to say that the President can be prosecuted later, which signal do we send in the meantime? I will be happy to entertain that possibility, and I hope if we decide to sort of just dissolve this thing, because it is too sophisticated for all the rest of us to understand about how in the world perjury in the case of the White House is okay but not in the case of the lady I saw in Charleston, South Carolina. So if we dissolve all of this, maybe there would be some future U.S. attorney that would prosecute Clinton for perjury once he leaves office.

But how do you come back to it later if we have disposed of it here? I don't know if you have any thoughts about how realistic that is to have somebody prosecute President Clinton after he leaves office.

Mr. PRESSER. Obviously it would depend on which party is in office and who wants to pardon whom before that happens.

But even more important than that, the point you raise is absolutely fundamental. When you elect a President for 4 years, even when a President is elected for 8 years, you do not have an elect sovereign. You still have an ordinary mortal who is subject to the rule of law. And the message that you send is, it doesn't matter for the President; that is a wrong message to send.

Mr. INGLIS. I would be happy to yield now to my colleague from South Carolina, Mr. Graham.

Mr. GRAHAM. That is certainly a hard act to follow. I don't want to—I think the law, history and common sense can coexist, and my name was mentioned and the only thing I would like to correct is about proportionality.

I have tried a few cases in South Carolina on adultery as a divorce lawyer. And people do lie, and you would have to build a lot of jails if you put everybody in jail who lied in a divorce case; and that is reality. It doesn't mean that it is right or wrong, that is just the way things are.

Sometimes people are tempted to shade the truth when it affects them in a very personal manner, and I can understand that.

I want to say something to Mr. Conyers. Deposition perjury in this case, I have tried to apply the test of what I think would happen to a common person, and I am not saying that the President of the United States should be treated as a common person, because I think he has a much higher obligation; but if you use the common person standard, I think you will find pretty quickly where the sex part of this thing falls out.

Let me tell you if I am a prosecutor and you bring in a case where a guy in a sexual harassment suit lied in a deposition and the deposition was dismissed and the case was dismissed, that with all of the things that I have got going on in my office, the rapes and the murders and all of the other stuff, I doubt, folks, if I am going to spend a lot of time trying to put that guy in jail even though he may deserve it, because a sexual harassment case is a very sensitive area. That is just the way things are with the common man.

However, Professor Schlesinger—I have a lot of respect for you; I think we just disagree on this point—if you brought somebody into my office as a Federal prosecutor who found themselves in a Federal grand jury and were asked a relevant question about a relevant matter, whether it pertains to sex or not, and they lied, they would be going to jail if I had anything to do with it because that is a crime against the state.

Let me tell you why I probably won't vote for deposition perjury articles of impeachment. The President was in a situation where he was asked about a relationship that he probably wanted to keep private. Even though it is wrong, I can understand the human need to do that. He was blindsided, and he lied through his teeth. He tap-danced on a needle, and he made a fool of himself; and he tried

to make a fool of the American people, but he got caught. And there is some punishment in that, I think, for the President to come.

However, I really do believe criminality may not have been as much present there because of the surprise factor. We all might see ourselves doing that. But let me tell you, if you find yourselves in a situation 6 or 7 months later when you are called before the grand jury and everybody in the country tells you, if you just come clean with the American people, we are ready to forgive you. If 6 or 7 months later you go into a situation and raise your hand and lie again when everybody in the country is begging you, don't do it, if you do do it, you may be jeopardizing your presidency, and you do lie there, I think you are a good candidate for an article of impeachment.

Mr. CANADY. The gentleman's time has long ago expired.

Mr. SCHLESINGER. May I comment on Representative Inglis' highly sophisticated misrepresentations of my position.

Far from advocating lying, I think lying is reprehensible. If you would bother to listen to my remarks or read my testimony, I say President Clinton's attempts to hide personal behavior are certainly disgraceful, but if they are deemed impeachable, then we reject a standard laid down by the framers of the Constitution. That seems to be the nub of the case.

I conclude my testimony by saying one must hope that any President guilty of personal misconduct falling below the level of impeachable offenses can castigate himself and feel such shame in the eyes of his family and in the eyes of his friends and supporters and in the eyes of history that he will punish himself for his own self-indulgence, callousness and stupidity.

I really protest your interpretation of my position.

Mr. CANADY. The gentlelady from California, Ms. Waters, is recognized.

Ms. WATERS. Thank you very much. I would like to get a few things on the record before I ask Mr. Sunstein to respond to some of my comments.

First of all, Professor Schlesinger, your very honorable reputation precedes you, and it is only someone with no sense who would accuse you of not having common sense, and I would like the record to reflect that.

Secondly, I would like the record to reflect that Mr. Rodino in a recent press release finds no evidence to impeach, in case someone misunderstood the opening statement that was shown on the screen about what Mr. Rodino was thinking.

Thirdly, I want to place on the record something that I think is extremely important for all of us. There has been considerable discussion about the President being held to a higher standard. I want it to be absolutely clear that I expect as much from myself in terms of how I conduct myself as I expect of the President or anybody else. I don't know of anybody that I hold to any higher standard than me, and for those who sit here and talk about the President should be held to a higher standard, dismiss their own responsibility, and so I want that to be on the record.

Now, I found that Mr. Sunstein's discussion about lying and that which could have been impeachable not being impeachable or no

one attempting to impeach under certain circumstances very compelling and engaging. The Iran-Contra affair was mentioned here, and it strikes me—it strikes at the very core of work that I am involved in because of the long-standing fallout of drugs and the CIA issue that I have been working on for the past 2 years.

And basically what the CIA has concluded, that they knew of drug traffickers, that they had been identified, that certainly some of this activity had gone on, but they have a memorandum of understanding from the Justice Department and that administration that they didn't have to report drug trafficking because somehow it may reveal some of the covert activities that our Intelligence Community was involved in, and that may not be in the best interests of the country.

I want to tell you when I compare the devastation of the drugs that have been dumped on America's streets and the lives that have been lost, the families destroyed, this business of lying about a private sexual affair, whatever you want to call it, pales in comparison to that.

However, Mr. Sunstein, regarding that discussion here, and if we recall when the President, President Reagan was asked about whether or not he was involved in the sale of arms to Iran, he lied and he said no.

Now, you started this discussion here. Would you take us a little bit further into, number one, the evidence of lying by President Reagan on that matter?

And, secondly, how it certainly could have been possible for someone to bring up impeachment even though—and you and I disagree on that; I think it should have been, you think it should not have been. But I think the case can be made, as you attempted to make it here, that it certainly could have been based on what appeared to be the seriousness of some of the discoveries that were made at that time.

Mr. SUNSTEIN. There have been two extended and relatively successful Independent Counsel investigations. One is Judge Starr's and the other is Judge Walsh's. Judge Walsh produced seven guilty pleas and four convictions, including convictions of high-level executive branch officials. And I don't have any accusations to render against President Reagan or President Bush, but you know a lot more about this than I do. But people of good faith do believe that they were deceitful with the American public, one or the other, with respect to matters of high importance.

What I do know something about is the Lend-Lease Act, which was passed to allow the President to build and sell arms and ammunition to other countries. President Roosevelt violated the Neutrality Act for 2 months in such a way so as to trouble his own Secretary of State because of the, quote, "the illegality and deception." That is President Roosevelt.

President Lincoln suspended the writ of habeas corpus, and it was unlawful, it was subsequently held by a court.

What I would like to see happen is for there to be some sort of mutual understanding among Democrats and Republicans that impeachment is very heavy artillery, and while reasonable people could think that the Iran-Contra situation is much more troublesome than this one, and some people here reasonably think perjury

is uniquely awful and worse than that misinterpretation of law in the interest of patriotism, which is what many people think President Reagan was basically about, shouldn't there be a kind of mutual arms control agreement that we will stick to our tradition with respect to impeachment, a tradition which has resulted in one impeachment of a President in the entirety of American history. So I think the country and the Democrats' forbearance on Iran-Contra argues very powerfully for forbearance on this one, too.

Ms. WATERS. Thank you. I yield the balance of my time to Ms. Lofgren.

Ms. LOFGREN. Thank you. I have a question for Professor Schlesinger.

As we have listened carefully here to the entire panel, obviously there are differences of viewpoint not only among the members of the committee, but also the witnesses. And as we have read the statements, and many of us have gone on the Internet and read articles that all of you have published that further inform us as to your viewpoints, I am wondering how to reconcile some of the comments.

For example, Professor Presser has an article that I read in which he talks about the need to get back to what the framers believed, the drafters of the Constitution. He suggested that there be seven members of the Supreme Court, rather than the current nine, going back to the number that there originally was. He also criticized the application of the Bill of Rights to State governments as "legal alchemy."

Looking at your testimony, I note that on page 6 you quote with favor John Jay and suggest that the basis for impeachment could be doubts that we might have about the honesty, virtue or honor of the President. I am wondering, Professor Schlesinger, as a Nobel Prize winner and someone who is renowned in the world as a historian, how in your mind the John Jay reference can be reconciled with the colloquy between Mason and Madison in the notes of the Constitutional Convention that the standard needs to be a great and dangerous offense or an event to subvert the Constitution.

Do you have a comment?

Mr. SCHLESINGER. I think I have, but would you read the John Jay quote again?

Ms. LOFGREN. Basically that, with doubts about honesty, virtue, and honor of the President, impeachment would be available as a remedy.

Mr. SCHLESINGER. Well, I think that obviously there is an argument about the intentions of the framers of the Constitution. It seems to me that the weight of evidence is very strongly on the thought that these represent a grave danger to the state; but I would add that one thing which I think all people of all of the Constitutional Convention had in mind was the fear of the politicization of the impeachment process, what Alexander Hamilton called "the demon of faction" and the need, therefore, if you are going to have legitimacy in the process of having bipartisan support for impeachment.

One great difference between the Andrew Johnson impeachment and the Nixon impeachment was that the weight of evidence was such in the Nixon case that members of his own party agreed that

removal was necessary. In the case of Andrew Johnson, it was a purely partisan effort and it failed. I think the test of legitimacy depends on the ability of the evidence to command the support of a wide portion of the electorate.

Ms. LOFGREN. I see that my time has expired. I would like to say that I am disappointed that this is a subcommittee hearing rather than a full committee hearing in which all of us could participate, and Mrs. Waters asked me to give further time to Mr. Delahunt. It is very disappointing that we should have these 19 witnesses jammed into this small amount of time. I flew across the country to participate.

Mr. CANADY. The gentlelady's time has expired.

We will now go to the gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT. Thank you, Mr. Chairman. I intend to ask two questions and yield the last half of my time to my colleague from Texas, Mr. Smith.

Let me first ask Professor McGinnis and Professor Parker on the second question: I have heard discussion today about—concern among this panel about lowering the standard for impeachment. I think that is an important concern. I think another important concern for the American public is lowering the standards of conduct for the President; and to what extent are we prepared to lessen what we expect out of a President of the United States while in office? And I know this is a very distinguished panel, we have several coming after this.

As an attorney, I can say that we have chosen law as our profession. We all love the law and we have made a livelihood out of it. Most of you folks teach our future lawyers, and hearing some of the testimony from you today, it concerns me. But I think where I am conflicted is in one of the statements, not on this panel, but it says—after ascribing some of the things that might be an impeachable offense, the statement says, but that is a far cry from what occurs if a President personally violates several related Federal criminal laws in the course of trying to cover up an embarrassing sexual affair without doing some other things which he thinks might connect it. But I think he is saying that a President of the United States commits several Federal crimes, and that is not impeachable, that concerns me; and that is why I have a conflict with this idea of the rule of law and that this President is the chief law enforcement officer.

When I was a U.S. attorney, he could have fired me or told me what to do through the Attorney General. That concerns me. Professor McGinnis.

Mr. MCGINNIS. I think you are right. I believe the standard for impeachment goes to fitness for office, and that includes whether the President can actually carry out day-to-day operations, but the symbolic effect for future Presidents and future generations of having a President who has committed, if these facts are true, a whole series of lies and perhaps obstructions of justice, that does, I think, lower the bar of standards of integrity that we demand of a President in a public trust that really we all—our futures as citizens really repose in, and that concerns me a lot.

I think it is a mistake not to consider the symbolic importance of the President as the chief magistrate who has to take care that

the laws are faithfully executed. I think that is clearly what one should consider part of fitness for office.

Mr. BRYANT. Including several Federal crimes regardless of what they are?

Mr. MCGINNIS. I think that is right. I think it is hard to understand how we would want someone convicted of perjury or obstruction of justice as President, to be elected as President. I don't think we want him as President.

Mr. BRYANT. Even about sex?

Mr. MCGINNIS. I think that is a mistake about this case. It happens to be about sex, but the conduct I think speaks of a state of mind to actually obstruct the rights of another citizen.

Surely it is about sex, and the framers couldn't have imagined any sexual harassment laws, that is absolutely true, but their commitment was to the rule of law, not any particular law. The subject matter happens to be sex here.

What if the issue were an employment discrimination case that the President had—was sued for some employment discrimination before he was in office, and while he was in office he denied some racial remarks, he denied that he made some racial remarks, and that was perjurious? I think that would be a basis for removing a President, and setting a standard for private conduct would mean that we couldn't reach such a President.

Mr. BRYANT. Thank you for your answer.

Professor Parker, we talked about bribery, and that is mentioned in the Constitution, treason or bribery, and we all know the public policy, why we don't want public officials being bribed; but in the context of bribing a witness, not taking money to build a bridge, but in bribing a witness, that is also bribery as defined in the Constitution. The public policy there is that we don't want witnesses lying. We want the truth to come out through a witness. That's why we don't want people bribing a witness; is that correct?

Mr. PARKER. Yes.

Mr. BRYANT. What is the difference between that public policy of not wanting witnesses to lie and tampering with witnesses or hiding evidence or suborning perjury? Is that not also the same thing that we want to protect against?

Mr. PARKER. I personally do not see the difference. I think that is right. Charles Black in his book on impeachment written during the Watergate period said giving bribes, no less than taking bribes, is impeachable, no question about it.

Mr. BRYANT. So if we are talking about equating other crimes to treason and perjury which are specifically mentioned, it might be said that other high crimes and misdemeanors should also include tampering with witnesses, suborning perjury, obstructing evidence, hiding evidence and those kinds of things?

Mr. PARKER. Yes, by comparison with giving bribes of the sort that you mentioned, certainly.

Mr. BRYANT. Thank you, Professor Parker. And I yield the balance of my time to Mr. Smith.

Mr. SMITH. Mr. Presser, my question will go to you.

I think it is appropriate today that we hear from the legal experts such as yourself, but there is one expert who is not here today, in fact she passed away several years ago, who has made a

number of insightful observations on the issue at hand, which is upon the definition of impeachable crimes. She was also a member of this same Judiciary Committee back in 1974 during the Nixon proceedings. What I would like to do is read a statement that she made and ask you if you agree with it, and if you think that it is applicable today as well.

Barbara Jordan is who I am referring to, and she said this before this committee:

"The South Carolina ratification convention impeachment criteria. Those are impeachable who behave amiss or betray their public trust. Beginning shortly after the Watergate break-in and continuing to the present time, the President engaged in a series of public statements and actions designed to thwart the lawful investigation by government prosecutors. Moreover, the President has made public announcements and assertions bearing on the Watergate case which the evidence will show he knew to be false. These assertions, false assertions, impeachable, those who misbehave, those who misbehave or betray their public trust.

James Madison, again at the Constitutional Convention, a President is impeachable if he attempts to subvert the Constitution. The Constitution charges the President with the task of taking care that the laws be faithfully executed, and yet the President has counseled his aides to commit perjury." That is the end of her quote and statement.

Would you say that her statement is accurate and is it accurate today as well?

Mr. PRESSER. Yes, it is, and I can't think of anything that she has said that I would disagree with.

Mr. SMITH. Thank you.

Professor McGinnis, I like certain members who are here today, who have already commented on this, have a number of constituents who often remind me, as one did in fact on the plane on my way back to Washington on Saturday, if any business executive, if any military officer, any professional educator, any member in authority had committed some of the acts that President Clinton may have, their career would be over.

So, to me, the relevant question is this: Should the President be held to a lower standard than these individuals?

Mr. MCGINNIS. The President—certainly insofar as the conduct is against the law, the President has to be held to the same standard. I think many executives might have gotten into trouble certainly for the actions the President took with an intern. The question is, should we simply impeach the President for that? I don't believe that is the case; I don't think that is the kind of objective misconduct that would really rise to that. But on the other hand, I certainly do not think that it is an excuse. It is not an excuse.

Mr. SMITH. I am talking about the subsequent conduct as well.

Mr. MCGINNIS. Right. This conduct, which was itself disgraceful, is then used as an excuse for violating the law, and that seems to me rather mystifying.

Mr. SMITH. Professor McDowell, I think it would be interesting today, Professor, to know whether you would agree with Bill Clinton's definition of high crimes and misdemeanors, and this was a definition that he gave when he was a law professor.

"I think that the definition should include any criminal acts plus a willful failure of the President to fulfill his duty to uphold and execute the laws of the United States. Another factor that I think constitutes an impeachable offense would be willful, reckless behavior in office."

Do you think that definition holds today as well?

Mr. MCDOWELL. I think many of us agree with that.

Mr. SMITH. Thank you, Professor.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you.

The gentleman from North Carolina, Mr. Watt, is now recognized.

Mr. WATT. Thank you, Mr. Chairman.

I want to express my thanks to Chairman Hyde for coming back into the room because I want to clarify the record a little before I go off.

Nothing we do is outside the context of history, and this is not the first time Chairman Hyde and I have had this discussion where I ask him not to do things simply because somebody else had done something in the past that was wrong. I have reminded him many times of the statement that my mother always made that "two wrongs don't make a right," and I keep hoping that we will rise to the level of statesmanship here rather than lowering to the standard that somebody who did something that was not justified in the past did.

Having said that, I want to adopt the statement that my good friend from South Carolina made about telling the truth. He says that we shape the truth when it affects us directly. We do shape the truth when it affects us directly, and I am not going to call for the chairman's impeachment on this, but I would like to ask unanimous consent, Mr. Chairman, of the subcommittee, to insert into the record, page 2 of the majority report, which is the certification, the foreword signed by our chairman, Mr. Hyde, dated November 4, 1998; a letter from the chief of staff, Mr. Mooney, to Julian Epstein, conveying the draft of the majority report dated November 4, 1998; a letter from the chief minority investigative counsel to Mr. Mooney dated November 6, 1998. That was after the staff report had been issued to the public, I would say to you.

It was mailed to us on the 5th after being conveyed to our staff on the 4th, and then a follow-up letter dated November 9, 1998, from Mr. Conyers to Mr. Hyde, so that the record will reflect the exact sequence and opportunity that the minority counsel had to have any input into this staff report that was issued by the majority.

I ask unanimous consent that these documents become a part of the record, Mr. Chairman.

Mr. CANADY. Without objection.

[The information follows:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, November 4, 1998.

JULIAN EPSTEIN,
Minority Chief Counsel and Staff Director,
House Committee on the Judiciary,
Washington, DC.

DEAR JULIAN: Pursuant to our talk, enclosed is a draft copy of an update of the 1974 Staff Report on the constitutional grounds for impeachment. We hope to distribute copies to all Members for use as a resource as we proceed with the inquiry.

If you would like to put together any information or research for distribution to Members, I would be happy to bring it to the Chairman.

Sincerely,

THOMAS E. MOONEY, SR.,
Chief of Staff and General Counsel,
House Committee on the Judiciary.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, November 6, 1998.

THOMAS E. MOONEY, SR.,
Chief of Staff-General Counsel,

DAVID P. SCHIPPERS, ESQ.,
Chief Majority Investigative Counsel,
Committee on the Judiciary,
U.S. House of Representatives,
Washington, DC.

DEAR TOM AND DAVID: On Thursday, November 5, I was given a copy of staff memorandum prepared by the Majority addressing the 1974 Watergate Staff Report on Standards for Impeachment. The memorandum was covered with a letter from Tom to Julian which stated that it was a "draft copy" and that it was to be distributed "to all Members for use as a resource as we proceed with the inquiry." The letter went on to invite us to "put together any information or research for distribution to Members." The staff memorandum had no listing of staff or any indication that it was about to become final or be published before we had a chance to submit our conterpart.

With that invitation, we began to immediately write a response to the Majority Staff memorandum, with which we take issue. The very next day, Friday, November 5, 1998, I received a printed Committee Report entitled "Constitutional Grounds for Presidential Impeachment: Modern Precedents." I also saw the same "Report By The Staff" published on the Committee's web page.

I was very surprised that this memorandum had been published without our having had a chance to submit our information. More importantly, I was shocked that my name and the names of the Minority Staff were listed on the Majority memorandum indicating that we had participated or approved of the report. As you know, neither is true. I did not even see a draft until the day before it was printed in final. I was never asked to comment, edit, or revise the memorandum. We were in the process of writing our rebuttal when the Report was finalized.

It violates all protocol, courtesy, and precedent for the Majority to write a memorandum on its own, send it as if it is a draft, prepare it as a final report for publication at the same time, and then include the names of the Minority as if it participated in that project. I do not understand how this could have happened, but I am obliged to protest these events and ask for correction. On behalf of the Minority Staff, I am asking that publication and listing of the Report on the Internet cease, that the Report be corrected to rename it as a Majority Report and to remove the names of the Minority Staff, that the Minority Report be included as part of the Committee's official publication (with the names of the Minority Staff listed there), and that this letter be distributed to the Committee.

It is simply unfair for the Majority to have produced this document as if it was work in which the Minority participated and concurred.

Sincerely,

ABBE DAVID LOWELL,
Chief Minority Investigative Counsel.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, November 9, 1998.

ABBE DAVID LOWELL,
Chief Minority Investigative Counsel,
Committee on the Judiciary,
Washington, DC.

DEAR ABBE: This will respond to the letter dated November 6th which you delivered to Tom Mooney this morning.

In October 1973, under the direction of Chairman Peter W. Rodino, Jr., the Judiciary Committee released a committee print prepared under the supervision of its General Counsel, Jerome Zeifman, entitled "Impeachment—Selected Materials." This was prepared beginning in August of 1973 with no consultation or input from the Minority Members or staff. A second committee print entitled "Impeachment—Selected Materials on Procedure" was produced in a similar fashion and released in January of 1974.

On February 22, 1974, a third committee print was released. The impeachment inquiry staff produced a document entitled "Constitutional Grounds for Presidential Impeachment" at the request of Chairman Rodino. The input of his Committee's Minority Members was not sought. We also note that the names of the Majority and Minority staffs were listed in those publications.

Chairman Hyde, as did Chairman Rodino, requested that the staff update these documents and that they be made available to both the Members and the American public. Minority staff was given a copy of the staff report before it was printed and an invitation was extended to submit for consideration by the Chairman for printing any additional reports or materials the minority staff would like the Members to be able to use as a resource. This exceeds the Rodino precedent. If you wish that the names of the Minority Staff be deleted in the future publications, please advise.

Sincerely,

THOMAS E. MOONEY,
Chief of Staff-General Counsel.

DAVID P. SCHIPPERS,
Chief Investigative Counsel.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, November 9, 1998.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
Washington, DC.

DEAR MR. CHAIRMAN: I am writing to express my dismay over the publication of the Committee Print entitled *Constitutional Grounds For Presidential Impeachment: Modern Precedents,* November 1998.

My concerns over this report are several fold. First, the minority was neither consulted on the plan to publish the report, nor consulted on the substance of the report. Nevertheless, the report indicates on its front page that it is a "Report Prepared by the Staff of the Impeachment Inquiry," and thereby may give the unfortunate and misleading impression that it was prepared with bipartisan support. Obviously, this is not the case, and the minority strongly disagrees with the conclusions in that report, and believes that it makes marked departures from the 1974 report. I believe the report should, more properly, indicate on its cover that it is a report prepared by the Republican staff. I anticipate that you may respond to this concern by citing the 1974 precedent. However, I regard such precedent as unhelpful for two reasons. Unlike 1974, the Committee has not engaged in a meaningful bipartisan process on standards. In addition, the Committee has ignored the 1974 precedent on a number of issues, including its decision to release raw grand jury materials to the public.

Second, when this report was circulated to us on Wednesday, and when we learned that it would be published without any minority input or consultation, we requested an opportunity to prepare our own report and to have it published simultaneously. This request was not met. Therefore, I would, at a minimum, like to now request that the minority report be published as a Committee print.

Third, while it was my hope that such a process of debating the proper constitutional standard could have been done in a bipartisan manner, it was certainly my expectation that such a process would have occurred *after* the Committee's hearing

today. We certainly hoped that the this hearing would have been viewed as serious enough so as to be influential in whatever product the Committee would produce on impeachment standards.

Thank you for your attention to this.

Sincerely,

JOHN CONYERS,
Ranking Minority Member.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, November 11, 1998.

THOMAS E. MOONEY, SR.,
Chief of Staff and General Counsel,

DAVID P. SCHIPPERS, ESQ.,
Chief Majority Investigative Counsel,
Committee on the Judiciary,
U.S. House of Representatives,
Washington, DC.

DEAR TOM AND DAVID: I appreciate your prompt response to my November 6 letter on the issue of the staff report. I have only a few points I would like you to consider.

First, *The Washington Times* November 11, 1998 edition already cites to the conclusions of that report as if it was more than an "update" to its Watergate counterpart and as if it was joined by all the staff. This underscores my concern about its significance and our lack of involvement.

Second, I was surprised that you were willing to justify the acts taken solely with reference to how the same thing happened to the Republicans in 1973 and 1974. Each of us has gone back and forth to cite some part of the Watergate proceedings when we can find one to support our positions. I understand that device. However, as Tom has explained, the Republicans who were in the Minority during the Watergate era sometimes complained that a certain procedure or decision was unfair or should be changed. Now that the Republicans are in the Majority, I would have thought that they in particular would correct what they thought at the time was wrong. To simply adopt a process that you condemned at the time because you are now in the Majority seems to be retribution or revenge, not the best government we can provide. Why cannot we both agree that where the Watergate precedents are fair and appropriate, they should be used, and when they are unfair, they should be improved? Otherwise, if the Congress is ever again to have to face this difficult procedure, we will have only made it impossible for things to ever change because one side or the other will only seek to get even for the wrongs that occurred in the past.

With this in mind, I would like to take you up on your offer. When the Minority has not been given the chance to comment on or revise a staff memorandum or report, or at least submit its own dissenting views, we would prefer that you not include our names. This would make it clear for today and in the future that we were not involved and that we do not concur.

I appreciate the time and attention you have given me on this topic.

Sincerely,

ABBE DAVID LOWELL,
Chief Minority Investigative Counsel.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, November 12, 1998.

ABBE DAVID LOWELL,
Chief Minority Investigative Counsel,
Committee on the Judiciary,
Washington, DC.

DEAR ABBE: We are in receipt of your letter of November 11th and appreciate your prompt response and clarification.

As you are aware, we have no control over the *The Washington Times'* interpretation of our material, or for that matter, control over any other newspaper. Having followed these newspaper accounts rather closely over the last six to eight months,

I find them less than factual. As a matter of fact, their accounts of what this Committee is about has been subject to a great deal of "spin" produced by the professional spinmeisters.

Please be advised, that in accordance with your request, that whenever the "Minority has not been given the chance to comment on or revise a staff memorandum or report . . ." no Minority staff names will be listed in that Committee document.

Thank you for your cooperation.

Sincerely,

THOMAS E. MOONEY,
Chief of Staff-General Counsel.

DAVID P. SCHIPPERS,
Chief Investigative Counsel.

JEROME M. ZEIFMAN,
Sandy Hook, CT., November 14, 1998.

Hon. HENRY HYDE, *Chairman,*
Committee on the Judiciary Committee,
U.S. House of Representatives,
Washington, DC.

DEAR MR. CHAIRMAN: I would like to comment on your recently published Committee Print and on your statement regarding prior Committee Prints prepared under my supervision as the Committee's then-General Counsel and published in October 1973 and January 1974. Both were concerned with the historical meaning of the term "High Crimes and Misdemeanors" and with prior impeachment procedures.

I have reviewed the recent Committee Print and the extent to which it brings up to date the 1973 and 1974 Committee Prints prepared by me. I concur fully with your staff's analysis regarding both the history of impeachable offenses prior to 1974 as well as the more recent history. I also consider your staff's analysis as reflecting the highest standards of professional integrity.

As you will recall, in 1996 you and I had a two-hour interview by Milton Rosenberg in Chicago concerning my then recently published book "Without Honor: The Impeachment of President Nixon and the Crimes of Camelot"—which was based largely on a personal diary that I kept at the time of Watergate. At the time of our broadcast we also had a private conversation in which I expressed to you the extraordinarily high regard that I have for the personal integrity and professionalism of your present Chief of Staff and General Counsel, Tom Mooney, with whom I had worked closely during the Rodino Committee's impeachment proceedings.

This letter will also confirm the accuracy of your recent statement that I first began the preparation of these volumes in August 1973 under the direction of then-Chairman Peter Rodino—and that the Minority Staff was given no opportunity to participate in the preparation of these official publications of the full Committee. In addition, the exclusion of the Minority Staff from participation in the project was pursuant to Chairman Rodino's personal orders to me not to disclose the project to either the other Democratic or Republican members of the Committee prior to publication.

Mr. Chairman, let me also add that during my entire 17 year tenure as a congressional counsel (when the Congress was then controlled only by Democrats) such a practice was frequently followed by Judiciary Committee Chairman Emanuel Celler and continued under Chairman Rodino.

In 1973 and 1974 under the restrictions of confidentiality imposed on me by Chairman Rodino, I felt strongly that my personal professional integrity—and responsibilities to *all* of the Members of the Committee and to the public—would be directly reflected in the historical accuracy and fairness of the volumes that we eventually published as official Committee Prints. In short, I had a personal responsibility to be as non-partisan and objective as humanly possible. In that regard, I was particularly pleased to include in the first volume a Law Review article by Paul Fenton, who had previously served on the Republican Minority Staff at the time the Committee (under the then-Chairmanship of Emanuel Celler) considered the impeachment charges against Justice William O. Douglas brought by then-Minority Leader Gerald Ford.

It is a gratification to me that, to my knowledge, when the volumes were published in 1973 and 1974 no member of the Congress, whether Republican or Democrat, or any academic scholar challenged the historical accuracy or fairness of the two volumes. On the contrary, many of the Republican members of the Judiciary

Committee, including President Nixon's most stalwart defenders, found the volumes to be useful tools in understanding the true history of the impeachment process.

It is now also gratifying to me that you have called the attention of the Committee, the House of Representatives and the public to the two Committee Prints that were prepared by me under Mr. Rodino's chairmanship. I also note that you have given the Democratic Minority staff an opportunity to submit for consideration in subsequent official publications any suggested revisions or additions to the 1973 and 1974 Committees Prints. In that regard, let me commend you and your staff for exceeding the standards of fairness of the Rodino Committee and other Democratic controlled committees in the past.

That the present Judiciary Committee Democrats and their recent witnesses from academia have to date not questioned the accuracy or professional integrity of the two volumes prepared under my supervision is also noteworthy. However, as a lifelong Democrat, I am now somewhat dismayed by the positions being taken by the present Committee Democrats and their staff. In my view, the White House and its Democratic defenders are promulgating disinformation regarding the true history of the Nixon impeachment proceedings. In that regard, I note with particular sadness that the press is now quoting members of the Democratic staff as stating "We felt that [the Hyde Committee Print] is a *forgery* [emphasis added]. (In that regard I am attaching hereto a recent article in the Washington Times.)[1] At the time I served as the Committee's General Counsel, had any Democratic staff member made the kind of scurrilous statements as are now being continuously made by the present minority staff, I would have insisted that they be fired.

Because of the importance of the present impeachment crisis, I now feel a personal responsibility to make public my own professional opinions regarding comparisons between the impeachable offenses of President Nixon and Clinton. As you know, my views differ from those of the present White House and its congressional defenders. In that regard, on October 6, I published an op-ed article in the Wall Street Journal. I have more recently published 3 articles in Insight magazine. I am sending copies of these articles herewith as additional attachments to this letter to you of today.[1]

Please regard this as an open letter and feel free to make it and the attachments available to the Congress and the public.

Although I remain a classical liberal Democrat, it is comforting to me that, with you as the present Chairman and Tom Mooney as General counsel, the traditionally high constitutional, legal, and ethical standards of the Judiciary Committee are still alive and well in your offices

Sincerely,

JEROME M. ZEIFMAN.

[1] Retained in the Committee files.

105th Congress
2d Session

COMMITTEE PRINT

Ser. No. 9

CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS

REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

HENRY J. HYDE, *Chairman*

NOVEMBER 1998

U.S. GOVERNMENT PRINTING OFFICE
51-740 WASHINGTON : 1998

FOREWORD

I am pleased to make available a staff report updating the 1974 Impeachment Inquiry staff report regarding the constitutional grounds for presidential impeachment. This report has been prepared by the staff of the Committee for the use of the Committee on the Judiciary.

It is understood that the views and conclusions contained in the report are staff views and do not necessarily reflect those of the Committee or any of its members.

Henry J. Hyde

November 4, 1998

93d Congress
2d Session

COMMITTEE PRINT

CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT

REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

FEBRUARY 1974

U.S. GOVERNMENT PRINTING OFFICE

28-959 WASHINGTON : 1974

Foreword

I am pleased to make available a staff report regarding the constitutional grounds for presidential impeachment prepared for the use of the Committee on the Judiciary by the legal staff of its impeachment inquiry.

It is understood that the views and conclusions contained in the report are staff views and do not necessarily reflect those of the committee or any of its members.

PETER W. RODINO, Jr.

FEBRUARY 22, 1974.

Mr. WATT. Thank you. Now, I have various requests from my other colleagues here for time, so I am going to yield 2 minutes—3 minutes to Mr. Delahunt, first, if I could—3 minutes, and I will try to keep time on you.

Mr. DELAHUNT. I thank the gentleman for yielding. I wanted to change the discussion here somewhat, and I ask this question so that members of the next panel would also consider it.

I want to talk about the issue of censure and alternate sanctions. I think it was Professor McDowell who indicated that President Jackson rejected the censure out of hand. Was that you, Professor?

Mr. MCDOWELL. It was.

Mr. DELAHUNT. The reality, however, is that there is a precedent where the Senate, I understand, did in fact back in 1834 censure a President, so we do have a precedent. I think your reference was that it is the cowardly way out. I guess the Members back in 1834, according to your definition, could be described as cowardly.

I think it is also important to note that Professor Black, Charles Black, who is considered the preeminent authority on impeachment, devotes an entire chapter to alternatives entitled "Short of Impeachment." I think it is important to read language from that chapter where he says it might be well to consider whether a more finely graded system of controls might be developed.

And I also bring to the attention of this panel and to the subsequent panel that the House resolution authorizing this committee to proceed is clear and unequivocal that it is the responsibility and the mandate of this particular committee to consider alternate sanctions, and I am going to read that language because I think it is very important to stress here.

"The committee shall report to the House of Representatives such resolutions, articles of impeachment, or other recommendations as it deems proper."

I think that language is, at least according to my reading, and maybe I am not all that sophisticated, but it is rather clear to me that that is part of our responsibility, too.

I would like to go to another area which I would like to have Professor Gerhardt respond to, since you have some credibility as the shared witness, so I would be interested in your response to this.

Earlier I think it was the chairman and I think it was my colleague from Georgia, Mr. Barr, who recited what appeared to be facts, and I might be wrong, but clearly there has been no fact-finding process conducted by this House and this Congress. I have this uneasy concern that there has been some discussion, in the media, that we will be on November 19th considering a single witness, the Independent Counsel, Mr. Starr, his testimony.

Clearly we know what his version of the facts is. Do we have, in your opinion—and I note that many of you, I think it was Professor Presser and Professor Holden and Professor Sunstein mentioned or prefaced their comments by saying if these facts be true, if these facts be true—do you, Professor Gerhardt, suggest or would you agree that we have an independent responsibility to meet our constitutional obligation to determine what the facts are?

Mr. GERHARDT. A brief answer, Representative Delahunt, is I think one thing that does characterize the current proceeding is that there have not been any facts yet found, certainly formally.

The referral was a product of a nonadversarial proceeding. Right now it is appropriate for this committee to consider the history of impeachment and what might be the appropriate standard, but at some point, it makes sense to consider what the facts are. That obviously was the great focus, the primary focus of the Watergate hearings, taking over a year.

If I may, Mr. Chairman, I want to make one comment about the censure, just a clarification and also picking up on Mr. Delahunt's point.

I think censure has a textual pedigree that one should not ignore. The textual support is found in the fact that there are resolutions that this body, as well as the Senate, each may pass, the Constitution says nothing about what the content of a resolution should be, and each body passes resolutions all the time.

Secondly, there have been seven censures, two censures of Presidents, one of President Jackson, and it was pointed out that was expunged, but this House also censured President Polk in the midst of a resolution praising the winning general of the Mexican War, Zachary Taylor; and in the late 19th century there were five censures of Federal judges.

So while those are all in the 19th century, that pedigree should at least be acknowledged for the record.

Mr. CANADY. The gentleman's time has expired.

The gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. Thank you, Mr. Chairman. I have a question for Professor Schlesinger and one for Professor McGinnis.

Professor Schlesinger, let me say that I want this to be more pleasant than the last exchange. I, like Mr. Rogan, am very proud to have an opportunity with such a noted historian and American.

You have characterized these deeds in this case as low crimes and misdemeanors, and you have testified that if there was perjury in this case, or lying under oath, that it was not an impeachable offense. You have not testified, I do not believe, as others have suggested, that if there was perjury in this case, that it still is an indictable offense that could be pursued subsequently; is that correct?

Mr. SCHLESINGER. That is correct.

Mr. JENKINS. My real question is, are you not creating—with saying this about perjury, are you not creating categories of perjury that do not in fact exist under our law?

Mr. SCHLESINGER. I am creating categories of perjury. As I have said, I think, earlier, perjury that results in sending a man falsely to prison or to the electric chair does not seem to be in the same category as perjury about one's love life.

I would suggest that Representative Graham's appeal to proportionality would be useful as a way of considering these matters.

Mr. JENKINS. Let me ask Professor McGinnis. Professor McGinnis, you elevated perjury to the level of bribery, perjury not being mentioned in the Constitution, bribery being mentioned in the Constitution, and you identified both as an indictable offense; is that correct?

Mr. MCGINNIS. Yes.

Mr. JENKINS. Do you believe that that would be true of any act of perjury?

Mr. MCGINNIS. Well, I think that any act of perjury would be an impeachable offense, and the reason for that is, I believe, like bribery, it is an attack on a coordinated branch of government if the President acts and undermines the rule of law and, therefore, deprives citizens of rights. That does not mean that I think every act of perjury is equal. I think this House has discretion to decide whether or not to go ahead with impeachment on the basis of how serious it is, but I think it is legally an impeachable offense.

Mr. JENKINS. So you would disagree with your distinguished neighbor for the day?

Mr. MCGINNIS. Yes, I would, with great trepidation.

Mr. JENKINS. Mr. Chairman, I would like to yield 1 minute to the gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. I have a question for Professor McDowell.

In your testimony you referred to the importance of taking an oath and of perjury, and referred to British and American common law. When one takes a sworn oath to tell the truth, the whole truth and nothing but the truth, it is obviously supposed to mean something; and to lie under oath obviously would have grave consequences.

Would you elaborate on how perjury is not merely private behavior, but it is public behavior, and how perjury affects our society and our Nation?

Mr. MCDOWELL. What I tried to get out in my written statement is going back, time immemorial, oaths and perjury under oaths were considered very serious offenses. Blackstone understands and points out that in the first instance the punishment was death. It was later commuted to heavy prison sentences, and in his time, it had been reduced to fines, and failure to pay the fines resulted in your ears nailed to the pillory. These were serious offenses.

The idea that there are degrees of perjury, that it simply matters less if it is a subject matter that we can all understand that everybody would be inclined to lie about, history on the question of perjury does not make for distinctions of degree. It always was rooted in the sanctity of the oath. The oath is what is given first to promote a fear of divine vengeance if you should lie, later joined to common law punishments of criminal sanction in order to make sure that the person who swears an oath in a court of law to tell the truth, the whole truth and nothing but the truth will do so. And failure to do so is considered to be a very serious offense against the public in the sense, as someone else pointed out, it is the institutions and the functions of the judicial branch that this affects.

Mr. CHABOT. Thank you, Professor, and I yield back to the gentleman from Tennessee.

Mr. JENKINS. I will yield to the gentleman from Indiana.

Mr. BUYER. Mr. Presser, I have some questions for you, and I will tell you I am trying to develop all of this in my mind. I am trying to differentiate what would occur in a legal proceeding that would be held at levels of contempt before a particular judge in a case versus that matter which would bring such contempt upon the third branch of government. And I am trying to differentiate between those two.

So what we have here is perhaps matters that would happen within a particular case before a Federal judge, could that be restrained or narrowed to contempt in that particular court? Or would those actions, because it comes from a defendant who happens also to be the President, having taken an oath to faithfully execute the laws of the land and be in charge of the U.S. attorneys who practice in those courts, do we then elevate that now to subversion of the third branch of government?

Mr. PRESSER. I think it is mainly one of those instances where there is a difference between an ordinary litigant and the President.

I think, as a number of the witnesses have indicated today, when you are looking at this particular matter, when you are considering the charges filed by Judge Starr, when you are considering the reformulation by your chief investigator, you have to ask, is there a whole pattern here; not, is there a single instance of contempt of one judge which might well be dealt with by a more modest process, but have you seen something that rises to the constitutional level, either because of the person involved or the long pattern of conduct over many months? So I think there is difference.

Mr. BUYER. We have been confusing here today. Sometimes we mix law with our policies, and this policy of saying that no person is above the law, yet we would expect that of the presidency to set the higher standard, yet he should be equal under the law. So sometimes we mix law with our policy. But we have some problems. You have made this comment about possibly other cases and their implications: He is also the commander in chief. So whether, in fact, he sends his judiciary out to prosecute these cases in a criminal or civil matter, or if he accepts the resignation of an ambassador as he did last year for sexual misconduct, or if he says that a particular general can't serve as the next chairman of the Joint Chiefs of Staff for having done similar things, not even close to similar things, therein lies part of our problem.

So you are saying, because it is the President, then we could have problems elsewhere?

Mr. PRESSER. That is right. I have to refer you again to what Professor Parker said, that fundamentally it is a matter of trust, and if the actions indicate that that trust isn't there, then you move forward.

Mr. BUYER. I thank the gentleman for yielding.

Mr. CANADY. I now recognize the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I would like to narrow the scope of what we have been looking at here; we have been all over the map on things, one of which is whether this committee would be applying a different standard to this President if it acted on these particular charges.

I am not aware of any previous President, including President Reagan, ever having been accused of lying under oath in a Federal court or in a civil deposition or before a grand jury, and I would ask the entire panel to name for me all of the past Presidents of the United States who have either lied in a Federal court proceeding or before a grand jury. Can anybody identify such?

Mr. SUNSTEIN. You can only name one President who illegally suspended the writ of habeas corpus, Lincoln. We can only name one President who illegally transferred, it is said, arms to the Contras; that is Reagan.

Mr. GOODLATTE. But those are not charges of having lied under oath before a grand jury.

Mr. SUNSTEIN. I know. The problem with this line of argument is that everyone in the room who is a lawyer knows that every case is sui generis. If you want to draw the distinction by saying this case is unique, you can do that.

Mr. GOODLATTE. But what I would point out to you is that your comparison of this matter to the Iran-Contra matter is totally off the wall because it has absolutely no comparison in terms of supporting the rule of law in our judicial system.

My next point is——

Mr. SUNSTEIN. May I respond to the "off the wall"? That is a tough charge.

Mr. GOODLATTE. Let me just say that I am concerned about the contention on the part of some, including Father Drinan——

Father DRINAN. May I speak to that?

Mr. GOODLATTE. Let me get to this point and then you can mix them together.

The idea that this only applies to the reprehensible exercise of official authority, which you cited Justice Story for—Justice Story was also quoted as saying: "not just that crimes of a strictly legal character fall within the scope of the power, but that it has a more enlarged operation and reaches what are aptly termed political offenses growing out of personal misconduct."

Do you agree that there is personal misconduct that could be an impeachable offense?

Father DRINAN. Let me respond to your first question.

No President has been charged, because we didn't have the Independent Prosecutor until this committee, shortly after Watergate, enacted it. I voted for it, and I think I made a mistake. It has twice ran out, and it is up for renewal next year. We were so afraid that more Archie Coxes would be fired that we put through the Special Prosecutor which was, namely, the Independent Counsel. That has been incorporated 10 or 15 times, and I am prepared to state that the people who voted for it in this very room probably now regret it because it transferred the power, the unique and sole power of this body of the House to impeach people to an outside investigator.

This House has never had a prosecutor who has recommended——

Mr. GOODLATTE. Let me interrupt you, because I have limited time, and say, I agree with you on that point. This statute came up for renewal since I have been in this House. We suggested very drastic amendments to the Independent Counsel statute, and because those were rejected by the then Democratic majority, I and many members of the House voted against that reauthorization of the Independent Counsel statute.

I would also point out that another allegation regarding the President would have come about whether or not that were the case because of the President's testimony in the civil suit, which our judicial system——

Father DRINAN. It would never have been followed up by this body if the Independent Counsel didn't follow it through with techniques that are quite questionable.

Mr. GOODLATTE. Now, if you would answer the second point, because I am concerned about this idea that no personal conduct on the part of a President would be impeachable.

Father DRINAN. I think somebody in the Congress would raise all of these issues, but it undoubtedly would not rise to the level of where this charge is now.

Mr. GOODLATTE. If we are talking about murder or rape, certainly you would not argue that a President who committed those, not in his official capacity, but against a personal friend, that would be——

Father DRINAN. I think farfetched hypotheticals just confuse the issue. I am not going to take bait with your hypothetical.

Mr. GOODLATTE. Let me ask Professor Parker what you think about that.

Mr. PARKER. I think everyone would agree that murder and rape would be impeachable. I am sure Father Drinan actually agrees, as well. I would come back to my initial distinction as to what is impeachable and whether to impeach.

The second question would depend on all of the kinds of circumstances, I would hope not with murder or rape, but circumstances become important with respect to the second question. On the first, we can be much more categorical; and I think it would be a tragedy if this committee watered down the standard of impeachability, bringing forbearance in at the second stage if that is what you want to do.

Mr. GOODLATTE. Thank you. Now, let's narrow this to this issue of the question of the allegations of the President with regard to perjury.

Professor Schlesinger indicated if it were perjury that caused somebody to go to the electric chair, that is one thing. If it is perjury about one's personal love life, that is something else. But what about something in between? What if it is perjury to obstruct justice in a civil proceeding such as is alleged in this particular case, Professor McGinnis?

Mr. MCGINNIS. Well, I absolutely think that is an impeachable offense. I think it really is at the core of what the framers are concerned about using, obstructing the legitimate exercise of governmental power—in this case, the coordinate judicial branch—for one's own private gain.

One has to remember that this is not just a question of the President's, as I think it has been put, sex life, but someone else's rights under the law; and the President stood to lose real money here, and so this is very much a case of using and abusing another governmental agency for private gain in the most basic sense. He stood to lose money.

Mr. GOODLATTE. Now moving forward 7 months, the other allegation of perjury by the President involves his testimony before a grand jury. That clearly would not have been related to his attempt to conceal his personal relationship, because moments after he conducted that grand jury testimony, he then went before the American people and acknowledged wrongdoing of that nature, so clearly

in that instance we are not talking about simply a matter of his personal behavior, but something related to, I would suspect if the allegations are established, an effort to avoid prosecution, whether as President or after he is President, for crimes that he has now been alleged to have committed.

Mr. PRESSER. Your interpretation is exactly correct. There is nothing I would add to that. I would agree with that.

Mr. GOODLATTE. The last point in that regard, it seems to me, is the issue of whether or not we can draw that kind of distinction when we are talking about upholding the rule of law in this country.

Can we make a decision that the President of the United States, as Professor Sunstein has pointed out, may not be subject to prosecution while he is President? Is the President of the United States above the law while he is President of the United States, subject to prosecution perhaps later on, but due a different treatment than other people while he is President of the United States?

And, Professor, I will give you the first shot at that.

Mr. SUNSTEIN. Thanks. I hope that you won't find this off the wall, but the Constitution that you are describing is not a constitution that I recognize. It doesn't make the President impeachable for crimes. It makes the President impeachable for high crimes and misdemeanors, and there is a very deliberate choice to have that phrase rather than the word "crimes." If you look at other provisions of the Constitution, they use the word "crimes." So this effort to identify the rules of law, which are extremely serious——

Mr. GOODLATTE. But you are not answering my question of whether or not, based on your interpretation of the Constitution, the President is above the law during the time that he is in office. He is not subject to prosecution according to your testimony?

Mr. SUNSTEIN. After he leaves office.

Mr. GOODLATTE. He has a 4-year term. Let's take a hypothetical President who is found to have committed a serious offense, perhaps an impeachable offense, but a serious crime nonetheless, during that first few months in office. Is he then immune from the people taking any action to remove him from office for 4 years?

Mr. SUNSTEIN. If you commit criminal libel during a speech on the floor of the House of Representatives, you have immunity under the Constitution. Are you not above the law? The speech-and-debate clause gives Members of the House of Representatives an immunity while in office for speeches on the floor. The President probably has immunity from criminal prosecution while in office. That is an unsettled question.

I mean to agree with you, not to disagree with you, and to say that the President is not above the law. He is subject to criminal indictment and prosecution, and a very interesting statement from Representative Graham, he is subject to those things after he leaves office.

Mr. GOODLATTE. But he is above the law for the 4 years he is in office because he cannot be prosecuted, nor by your definition can he be removed from office?

Mr. SUNSTEIN. He may well have immunity, the same kind of immunity that you have, but less.

Mr. CANADY. The gentleman's time has expired.

I now recognize the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

I want to follow up on that because our discussion is suggesting that if we do not impeach, therefore we have overlooked criminal activity. As I read the Constitution, we are restrained in our power to forcibly remove a President in situations that would constitute, treason, bribery or other high crimes and misdemeanors.

Does anyone on the panel think that treason, bribery or other high crimes and misdemeanors necessarily covers all felonies? If so, raise your hand. Any felony would therefore, by virtue of the fact that it is felony, would be treason, other high crimes and misdemeanors. The record should reflect that no one thinks that.

The next question therefore is, if the title of the offense isn't the question, we have a situation where we want to know what the measure is that makes a crime a high crime, and we look at most of the precedents and find that it has to involve your official duties. The one exception is the Claiborne case, who was in jail for income tax evasion.

And, Mr. Gerhardt, can you explain why a Federal judge in jail can't perform the job and ought to be impeached?

Mr. GERHARDT. I should hope that he is not able to perform his job, Representative Scott. Clearly, in Judge Claiborne's case, the problem was that subsequent to his conviction and his appeals, he was imprisoned, and only then did the impeachment inquiry begin.

I am not suggesting that the impeachment inquiry would not have occurred otherwise, but clearly his imprisonment put extra pressure on this body as it did on the Senate to ultimately remove him from office. In those circumstances, the conventional way to understand Judge Claiborne's situation is that his conviction reflected on the fact that he lacked the essential criterion to be a Federal judge, and that is he lacked integrity.

The critical thing to keep in mind is, a Federal judge is going to oversee prosecutions all the time for something like tax evasion, and it is very difficult to maintain the respect and credibility you need to have as a judge if you are, in fact, under the same kind of conviction as the people whose cases you are hearing.

Mr. SCOTT. Thank you.

Professor Sunstein, we talked about the title of the offense and what makes a felony, or other crime or misdemeanor in the "high Crime and Misdemeanor" sense, what makes it an impeachable offense, the effect that it has on the state; and the measure has been suggested that we should determine whether or not the President is fit or can be trusted.

What is wrong with that as a standard?

Mr. SUNSTEIN. That would make a President impeachable whenever a majority of the House of Representatives thought that he was not fit and could not be trusted, and that is exactly what the framers were trying to avoid in framing the impeachment clause that they wrote.

Father DRINAN. We had that problem with Spiro Agnew and for 2 weeks the House Judiciary Committee agonized over whether the Spiro Agnew could be indicted as Vice President or whether we would have to impeach him. For better or for worse, Elliot Richard-

son got a plea bargain from him and he resigned his office, he was disbarred in Maryland, and he went away.

Some of those questions that you have raised are wonderful hypotheticals, but they are unresolved. We have not had that problem for 200 years.

Mr. SCOTT. Thank you. I would yield 2 minutes to the gentleman from New Jersey, Mr. Rothman.

Mr. ROTHMAN. Thank you, Mr. Scott.

First, let me say I hope we do not have to create a new impeachment standard for a Democratic President, and if there ever is another Republican President, create a new impeachment standard for a Republican President.

Many of us, including myself, have not yet decided whether the charges raised by Mr. Starr are true. We have already condemned the President's misconduct in office as morally wrongful conduct and believe that there should be some punishment for just lying to the public, aside from the unresolved questions of perjury, obstruction of justice, and abuse of power.

On the question of rule of law, I would remind my colleagues that the rule of law applies to this committee and to the Congress. It is called the constitutional law, and the constitutional law provides us with a standard for impeachment: treason, bribery or other high crimes and misdemeanors. It is up to us to obey the rule of the constitutional law.

There are those who suggest that we should expand and create some new constitutional definition which deals with such subjects as general unfitness for the office, a lack of virtue, conduct that is offensive, and a lack of trustworthiness, but that is not what is in the Constitution.

I suggest that it is a threat to our separation of powers which has kept our country strong and fit for 200 years, and a threat to our Constitution and to our Nation to now decide we want to, without consulting the people or having an official amendment to the Constitution, change the definition of what an impeachable offense is beyond treason, bribery or other high crimes and misdemeanors.

And let me repeat, I have not yet made a judgment about whether Mr. Starr's charges are true. We have not even had a hearing yet. We have not had the examination or cross-examination of witnesses, but I would say we should not create new standards for impeachment. Let us divine whether this President should be impeached under the standards that have kept our country strong for over 200 years.

Mr. SCOTT. I would yield 2 minutes to the gentleman from Wisconsin, Mr. Barrett.

Mr. BARRETT. Professor McGinnis, you indicated that the Senate has several options. It can remove the President from office, or remove the President from office and bar him from further types of service to the government.

In your mind, are those the only options available to the Senate, if the House impeaches?

Mr. MCGINNIS. Yes.

Mr. BARRETT. So that this House, if it decides it wants to impeach and sort of let the Senate fix it, as some have suggested——

Mr. MCGINNIS. I didn't suggest that.

Mr. BARRETT. I know, I didn't say you have. I think others have indicated if there is some sort of agreement to be worked out, it could be worked out in the Senate. My question to you is whether you think there are any constitutional underpinnings for that to occur.

Mr. MCGINNIS. No.

Mr. BARRETT. Do you think that every impeachable offense requires impeachment in the House?

Mr. MCGINNIS. No. I read the Constitution to say that everyone must be removed if they are impeached. I don't think the Constitution says you impeach every person. I associate myself with Professor Parker in that sense. It is a two-step process.

Mr. BARRETT. So if there is, if I can use the phrase, prosecutorial discretion, the appropriate body for that to occur would be in the House of Representatives?

Mr. MCGINNIS. It would be an appropriate body. I think the Senate could also simply decide not to convict.

Mr. BARRETT. Certainly. But in that case, if we have a situation here where maybe the American people feel the President should be censured, if this body were to impeach, the Senate would not be able to drop those charges. Maybe they could censure, sort of sua sponte, since there is nothing——

Mr. MCGINNIS. The Senate could ultimately decide not to convict the President, obviously.

Mr. BARRETT. Obviously. Professor McDowell, would you agree with that analysis, the entire analysis? Which body has the discretion, the House or the Senate?

Mr. MCDOWELL. I think there is a discretion here, certainly, that you have to weigh the evidence. Somebody said earlier that this House does not sit as a grand jury and this is not like an indictment. I think it is closer to that than that comment would suggest. You have to weigh the evidence and decide whether these are impeachable offenses, not based on partisan calculations but based on historical understanding, rooted in the common law, rooted in our experience. But when it comes down to it, you have to make a judgment as to whether that constitutes an impeachable offense or not, and if it does constitute an impeachable offense, do you have the political will to take it forward and vote articles of impeachment?

Mr. BARRETT. And very quickly, do you believe that every impeachable offense requires impeachment by the House?

Mr. MCDOWELL. No, I don't.

Mr. SCOTT. I yield the balance of my time to the gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the ranking member very much for his kindness. Let me just note that Professor Charles Black stated in *Impeachment: a Handbook*, that impeachment should be invoked only against serious assaults on the integrity of the processes of government, and such crimes that would so stain a President as to make his continuance in office dangerous to the public order.

I have two questions, one for Professor Holden, whose theory I was most gratified to hear, because he responded to the public concern—I think we should be speaking to the public today—and another question for Professor Sunstein.

Professor Holden, you compared impeachment to a caged lion; that it is of such a magnitude, such an impact on the public order, that we should be cautious in how we treat its implementation. Can you respond to that?

Professor Sunstein, my question is, how high an order is impeachment? How dangerous would its utilization be in terms of the attack on the very sovereignty of the Nation? As we proceed, should we be cautious, should we accept indictments as finality, or should we deliberate cautiously about this?

Professor Holden, your caged lion, if you would.

Mr. HOLDEN. My answer is very brief and very direct. We are starting down a path of using impeachment as an additional device. You are doing it with judges, we are in the second time of doing it with Presidents. And once that gets to be common practice, everybody will want to use it for every device they wish.

I saw the red light before. I said that the Secretary of Health and Human Services had better shudder in the future, because all of the people who are opposed to partial birth late-term abortions or other such highly sensitive matters where they have deep convictions will be going after the Secretaries who get in the way.

The next target on the agenda will be Attorneys General. All Attorneys General should be fearful. And there are some members on the committee who should be fearful, though I do not know who they are, because somebody in the next 15 or 20 years will be either a presidential potentiality or a Cabinet officer, which is a civil officer, and somebody will be after them, and this is a pressure device, not a final solution.

No, it is absolutely awful. Frankly, they made a mistake, they should never have put it in. The British from whom they copied it stopped using it in 1806, and they didn't know it. It should not be done anymore unless it is overriding, and there is nothing here overriding.

Ms. JACKSON LEE. Professor Sunstein, if you would?

Mr. CANADY. The gentlewoman's time has expired some time ago.

Ms. JACKSON LEE. Will the Chairman allow Professor Sunstein to briefly finish the answer? Excuse my voice.

Mr. SUNSTEIN. The danger is there would be retaliation on both sides and it would be like an arms race. That is the danger. That is very dangerous.

Mr. CANADY. The gentleman from Georgia, Mr. Barr, is now recognized.

Mr. BARR. Thank you, Mr. Chairman. I would like the Clerk, I have two documents to distribute, and I ask unanimous consent to have them inserted in the record. They will be given both to the witnesses and the members. One is simply Article I regarding the impeachment of Richard Milhouse Nixon. The other is simply a draft document regarding impeachment of Mr. Clinton. I would like to use them for questioning of the witnesses.

[The information follows:]

ARTICLE I

In his conduct of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take

care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, in that:

On June 17, 1972, and prior thereto, agents of the Committee for the Re-election of the President committed unlawful entry of the headquarters of the Democratic national Committee in Washington, District of Columbia, for the purpose of securing political intelligence. Subsequent thereto, Richard M. Nixon, using the powers of his high office, engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities. The means used to implement this course of conduct or plan included one or more of the following:

(1) making or causing to be made false or misleading statements to lawfully authorized investigative officers and employees of the United States;

(2) withholding relevant and material evidence or information from lawfully authorized investigative officers and employees of the United States;

(3) approving, condoning, acquiescing in, and counseling witnesses with respect to the giving of false or misleading statements to lawfully authorized investigative officers and employees of the United States and false or misleading testimony in duly instituted judicial and congressional proceedings;

(4) interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution force, and Congressional Committees;

(5) approving, condoning, and acquiescing in the surreptitious payment of substantial sums of money for the purpose of obtaining the silence or influencing the testimony of witnesses, potential witness or individuals who participated in such unlawful entry and other illegal activities;

(6) endeavoring to misuse the Central Intelligence Agency, an agency of the United States;

(7) disseminating information received from officers of the Department of Justice of the United States to subjects of investigations conducted by lawfully authorized investigative officers and employees of the United States, for the purpose of aiding and assisting such subjects in their attempts to avoid criminal liability;

(8) making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the executive branch of the United States and personnel of the Committee for the Re-election of the President, and that there was no involvement of such personnel in such misconduct; or

(9) endeavoring to cause prospective defendants, and individuals duly tried and convicted, to expect favored treatment and consideration in return for their silence of false testimony, or rewarding individuals for their silence or false testimony.

In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the case of law and justice and to the manifest injury of the people of the United States.

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

105th CONGRESS
2D SESSION

DRAFT

H. RES._____

IN THE HOUSE OF REPRESENTATIVES

Mr. BARR of Georgia submitted the following resolution

RESOLUTION

Impeaching William Jefferson Clinton, President of the United States, of high crimes and misdemeanors.

Resolved, That William Jefferson Clinton, President of the United States, is impeached for high crimes and misdemeanors, and that the following article of impeachment be exhibited in the Senate:

Article of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all the people of the United States of America, against William Jefferson Clinton, President of the United States of America, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

In his conduct of the office of the President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has attempted to corrupt justice in that:

In May 1994, Paula Corbin Jones filed a lawsuit against William Jefferson Clinton in the United States District Court for the Eastern District of Arkansas. Ms. Jones alleged that during his Governorship of Arkansas, President Clinton sexually harassed her and intentionally inflected emotional distress during an incident in a Little Rock hotel room.

In May 1997, the United States Supreme Court unanimously rejected President Clinton's claim of constitutional immunity from a lawsuit during his tenure in office. Subsequent thereto, William Jefferson Clinton, using the powers of his high office and betraying his constitutional duty to take care that the laws are faithfully executed, not sabotaged, engaged personally and through subordinates, friends, and Monica Lewinsky in a course of conduct or plan calculated to corrupt justice in the *Jones* v. *Clinton* lawsuit by withholding and concealing truthful information and by deceits under oath.

On January 16, 1998, the Special Division of the United States Court of Appeals for the District of Columbia Circuit issued an order that empowered the Office of the Independent Counsel headed by Mr. Kenneth Starr "to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . . in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case of *Jones* v. *Clinton.*" Subsequent thereto, William Jefferson Clinton, using the powers of his high office and betraying his constitutional duty to take care that the laws are faithfully executed—not sabotaged—engaged personally and through his subordinates, friends, and others in a course of conduct calculated to corrupt justice in the Office of the Independent counsel grand jury investigation by withholding and concealing truthful information and by deceits under oath.

The means employed to attempt to corrupt justice in the *Jones* v. *Clinton* lawsuit and the Office of the Independent counsel grand jury investigation have included at least all of the following:

[1]

Making, causing, and seeking to induce the making of false or misleading statements in the *Jones* v. *Clinton* case and in the Office of the Independent Counsel grand jury investigation of William Jefferson Clinton.

[2]

Withholding and collaborating in the withholding of truthful information from the United States District Court presiding in the *Jones* v. *Clinton* litigation.

[3]

Condoning and acquiescing in witnesses with respect to the giving of false or misleading statements in the *Jones* v. *Clinton* litigation and in the Office of the Independent Counsel grand jury investigation.

[4]

Making false and misleading public statements for the purpose of deceiving the people of the United States into believing that he did not have a sexual relationship or affair with Monica Lewinsky, that he had testified truthfully in his *Jones* v. *Clinton* deposition, and that he intended full, speedy and truthful cooperation with the Office of the Independent Counsel grand jury investigation of contrary allegations; or

[5]

Endeavoring to cause Monica Lewinsky to expect and receive favored treatment as a reward for her silence or false testimony in the *Jones* v. *Clinton* litigation and the Office of the Independent Counsel grand jury investigation.

In all of this, William Jefferson Clinton has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.

Wherefore William Jefferson Clinton, by such conduct, warrants impeachment and trial, and removal from office.

Mr. BARR. While that is being done, I would like to echo what my colleague Mr. Rothman expressed, and that is a fear that we not take steps to enact, either de facto or de jure, two different standards, one standard for Republicans and one standard for Democrats.

Simply by way of background but also some relevance, during my tenure as a U.S. Attorney appointed by President Reagan I had the opportunity to unfortunately fulfill the responsibility to prosecute cases involving public corruption of various public officials, Republican and Democrat. And during my tenure, and this was consistent with the policies of both the Reagan and Bush Administrations, I pursued those cases of corruption against Democrats and Republicans equally—we did not have one standard for Democrats and one for Republicans—including, as I believe I mentioned briefly in my opening remarks, prosecution of a sitting member of this committee during the time that he sat as a member of this committee for perjury before a Federal grand jury.

The first document, I am not sure which order they are in, but I would like the panelists to look briefly at Article I involving President Nixon. There has been some discussion of this article today, and I have not heard anybody posit this article as not consistent with constitutional and historical standards for impeachable offenses and would not have properly formed the basis for at least part of the impeachment of Richard Nixon.

The second is a draft article of impeachment with regard to Mr. Clinton.

The article with regard to Mr. Nixon of course posits that the underlying offense, which occurred on June 17, 1972, was a break-in not committed by the President but by political operatives working for the President's reelection committee. Obviously, therefore, that

underlying act which gave rise to Article I forms the basis, therefore could have in effect had nothing to do with the official acts of the President. He did not commit it, and even if he had, it would not have been in his capacity as President but rather as a candidate.

The operative language then becomes also in that second paragraph, "Subsequent thereto, Richard M. Nixon, using the powers of his high office," et cetera. And that is really the operative language of the impeachment article here and really what we are focusing on. It is not the underlying act itself, whether it is attempting to subvert a civil lawsuit involving Paula Jones, or whether it is involving an attempt to cover up an investigation, that is, subvert an investigation of political operatives.

The Article I with regard to President Nixon then includes nine means used to implement the course of conduct. Probably all but perhaps six and seven, or certainly six, since we have no information thus far that President Clinton endeavored to use the CIA in his cover-up, probably also perhaps number seven. Disseminating information and aiding and assisting such subjects in their attempts to avoid criminal liability does not seem to be applicable to the Clinton situation. The others do.

The parallels are indeed striking. If one looks at the specific means used to implement the cover-up for which President Nixon was impeached by this committee according to Article I, and almost certainly would have been impeached by the House and probably convicted thereof by the Senate, if I could perhaps starting with you, Professor McDowell, indicate to me if you see any essential operative distinction between these two documents.

If indeed Article I is a legitimate exercise of the impeachment power of this Congress and properly formed the legal, historical and constitutionally substantive basis for a impeachment of Richard Milhouse Nixon, is there any reason that the other document that you have before you, the draft articles of impeachment with regard to William Jefferson Clinton, would not also be consistent with the substantive and constitutional historical basis for impeachment, and the legal basis thereto also?

Mr. MCDOWELL. Well, I would think it is obvious from my earlier comments that perjury is perjury, as it were. If you are giving false statements under oath or seeking to mislead or obstruct an investigation, it doesn't really matter what the cause is, it is your action in doing that. If you engage in perjury or misrepresenting yourself under oath, that becomes the same offense, no matter what the cause is, for your concealment.

Mr. BARR. Are there other panelists that would have a different point of view, operating again from the presumption—I am plumbing—since nobody has objected to Article I against President Nixon, that the article, the draft article that you have before you with regard to President Clinton is essentially consistent by both its terms, its language as well as the basis on which the steps were taken to implement the subversive course of conduct, that is the cover-up, would not likewise form the proper basis for an article of impeachment of William Jefferson Clinton?

Mr. SUNSTEIN. The difference between the two is the whole predicate for the Nixon article, one, is the undermining of the demo-

cratic process by, and it is worth pausing over this, committing unlawful entry of the headquarters of the opposing political party. I don't agree with you that the subsequent "thereto" is what drives Article I. What drives Article I is the underlying act that was subsequently covered up. If the underlying act involves something trivial, then the rest would be—would have much less——

Mr. BARR. So, therefore, even had not the President at that time, Richard Nixon, not taken all of these steps enunciated in the article which was voted out, namely 1 through 9, you believe that it still would have provided an article of impeachment simply because agents of his reelection campaign, with which there was no evidence that he directly ordered them, broke into a headquarters? And if so, that would be a really a rather shaky basis on which an article of impeachment would be deposited, especially from somebody that is arguing, as you are, for a much, much tighter standard even than we are contemplating here today.

Mr. SUNSTEIN. It is a good point. With respect to whether the "prior to" would make an impeachable offense, it depends on what the President knew and when he knew it. But once it came out that that was the underlying fact, then to cover up that abuse of the democratic process is itself impeachable.

Mr. BARR. Okay. So it is really the democratic process. If we had an effort to subvert the legal process, namely perjury, committing perjury and taking other steps to subvert justice in a civil legal proceeding, that would be of much less constitutional importance. But if one does something to cover up an action in a political campaign, that is much more serious.

Mr. SUNSTEIN. I think the words "Democrat" and "legal" are both too abstract.

Mr. BARR. Really?

Mr. SUNSTEIN. Yes. Any subversion——

Mr. BARR. As a U.S. attorney, I did not find the legal process, the use of the term legal, and I think most U.S. Attorneys would beg to differ with you there.

Mr. SUNSTEIN. I agree with you as a U.S. attorney. I don't agree with you as a member of the Judiciary Committee thinking about whether to impeach the President of the United States. As a U.S. Attorney, "legal" doesn't have ambiguity with respect to the criminal law, and therefore in both cases we have very serious criminal charges.

I must say as someone who believes that these are not impeachable offenses, I am moved, as I believe most, maybe all members of this panel are on the left side, by the obvious commitment to the rule of law. It is extremely important. I hope everyone hears it.

Mr. BARR. I am not really sure that you are.

Mr. SUNSTEIN. Subversion of the legal process is not an impeachable offense.

Mr. BARR. Let me move on a little bit, Professor, because there are some others.

Professor McGinnis, how would you respond to my initial question with regard to these two documents and whether they would in fact, as one did historically and one is proposed to do, provide a proper basis for impeachment for essentially the same conduct?

Mr. MCGINNIS. As I said before, I believe that perjury and obstruction of justice are impeachable offenses, and since both make out a perjury and obstruction of justice as impeachable offenses, I think both documents, surely one could in good conscience vote for impeachment on their basis.

Mr. BARR. On both of them?

Mr. MCGINNIS. On both of them.

Mr. BARR. On the same basis?

Mr. MCGINNIS. Yes.

Mr. BARR. So you would agree that the parallels are rather appropriate and rather striking and very constitutionally sound?

Mr. MCGINNIS. As a legal matter authorizing you to vote for impeachment, yes.

Mr. BARR. I would also, just in closing, with those in the record, but I would also note that there are some additional matters that perhaps all of us ought to keep in mind, the case of Mr. Henry Cisneros as well. I think it has some applicability here, but we can go into that later. I yield back.

Mr. CANADY. The gentleman's time has expired.

I would now recognize the gentleman from Arkansas, Mr. Hutchinson.

Mr. HUTCHINSON. I thank the Chair, and I particularly appreciate these hearings because it is my understanding these types of hearings on the Constitution and history of impeachment were not held during the Watergate proceedings. It was really a staff report that set forth their standards for impeachment. So I think this is terrifically helpful.

I mentioned in my statement that I think this process is about the public trust, and that is really the heart and soul of whether you proceed with impeachment or not. And if the public trust has been violated, you remedy that by impeachment, which would ultimately lead to removal from office or holding the official, if he committed wrongful conduct, criminal conduct, high crimes and misdemeanors, accountable. But some are suggesting some other process.

Now, you have got a couple hurdles to that. There is a split in opinion, I believe it was referenced, about whether you can indict a sitting President, and pragmatically most likely that would wait until after he finished his term and it may never be pursued. Another avenue that has been mentioned is censure and fine. I want to come back to that in a minute. And then a third one that might throw some off guard, and I want to ask this of Professor Parker, is the role of the judiciary.

Judge Susan Weber Wright, in a footnote on page 7 of her opinion filed September 1, 1998, said that "although the court has concerns about the nature of the President's deposition testimony, given his recent public statements, the court makes no finding at this time regarding whether the President may be in contempt."

Is there any roadblock constitutionally to the judiciary proceeding to hold an official accountable who might have committed contempt in a court proceeding? Professor Parker?

Mr. PARKER. I am not an expert in that but I would guess that there are certainly, if there are roadblocks, they are lower than a criminal prosecution would be. Nonetheless, I am sure arguments

would be raised and appeals would be made to the equitable discretion of the judge in terms of those arguments.

As to the House of Representatives, which has a special constitutional responsibility, I would perhaps be in the minority but I don't see any roadblock to the House passing a resolution of whatever sort it wants. A fine, I am sure, is a different matter, but I can't imagine why the House couldn't pass a resolution of censure or condemnation or——

Mr. HUTCHINSON. Let me interrupt you there. Some people have said the President ought to be punished. Mr. Schumer mentioned that, although he is not here. Mr. Nadler also I think used similar language, that if the President is found guilty of an offense he should be punished in some fashion.

A fine would be levied by this body. How many would agree that that has serious constitutional problems? I think I see everybody's hand up except for two. Professor McDowell?

Mr. MCDOWELL. Yes.

Mr. HUTCHINSON. Your hand is up, Professor Schlesinger. It is unanimous that a fine in this body of the President would have some serious constitutional problems.

Now, just in reference to a censure, I believe Father Drinan indicated simply a censure would have terrible precedents for the future, and I believe Professor Holden also indicated that. How many would agree with that position, that just simply a censure would raise some serious constitutional problems?

All right. So it looks to me like there are five I see that have some serious problems with that avenue. Thank you very much.

Now, to——

Mr. HOLDEN. I didn't say anything about censure.

Mr. HUTCHINSON. Do you like it or don't you like it?

Mr. HOLDEN. You can do it if you want to.

Mr. HUTCHINSON. Let me go on here. Professor Sunstein, I was reviewing your testimony, and on page 14 you describe the President as the Nation's chief law enforcement officer. I don't believe you said that in your oral testimony, but that is your statement today?

Mr. SUNSTEIN. It sounds right to me.

Mr. HUTCHINSON. That is pretty clear and straightforward. So the President shouldn't have too much of a problem answering the first request of admission, that he is the chief law enforcement officer of this country.

I also note on page 12 of your testimony that your view was that judges can only be removed from office for high crimes and misdemeanors. Is that correct?

Mr. SUNSTEIN. Yes.

Mr. HUTCHINSON. So you reject the argument that there is a different constitutional criteria for impeachment for judges?

Mr. SUNSTEIN. Not quite. It is the same term, but its application is different.

Mr. HUTCHINSON. So the same language is used in the Constitution of "high Crimes and Misdemeanors," but you put a caveat in there that there should be a higher standard for impeaching a President?

Mr. SUNSTEIN. I think that is what the country, including the House of Representatives, has always believed, certainly what the framers believed.

Mr. HUTCHINSON. All right. Well, I think that might be in dispute by some people here, but let me go on. You have indicated, then, that a judge may be impeached for providing false statements; is that correct?

Mr. SUNSTEIN. For perjury.

Mr. HUTCHINSON. A judge may be impeached for perjury.

Mr. SUNSTEIN. It doesn't bother me a lot.

Mr. HUTCHINSON. And it has been done.

Mr. SUNSTEIN. Not a lot.

Mr. HUTCHINSON. It has been done.

Mr. SUNSTEIN. It has been done.

Mr. HUTCHINSON. So it is your view that such standard is all right for judges. It only bothers you a little bit. But it is not an acceptable standard for the President of the United States.

Mr. SUNSTEIN. I stand with Madison on this.

Mr. HUTCHINSON. And therefore we are basically setting a higher standard for the judges of our land than we are the President of the United States and the chief law enforcement officer.

Mr. SUNSTEIN. I am just talking about old stuff, nothing new or innovative. The textual term is the same. The application of the term has always been different because of the different functions. If the judges started—if a judge gave a State of the Union address every year, then that might be an impeachable offense. If the President failed to do it, then that might be an impeachable offense.

Mr. HUTCHINSON. I understand. You are saying that the Constitution provides the same definition, but we apply it differently and there should be a higher standard for impeaching the President. Professor Presser, do you want to respond to that?

Mr. PRESSER. I think Professor Sunstein's argument, to use Mr. Inglis' words, is a bit too sophisticated for me. There is nothing I find in the Constitution that sets a different standard. The language that does seem to differentiate is the one suggestion that judges should serve during good behavior, but I think that refers to their tenure in office and just distinguish that from the term that the President has. I don't see any difference.

Mr. HUTCHINSON. My time is running out. I want to yield to my friend from Florida.

Mr. MCCOLLUM. Thank you very much.

Professor Schlesinger, I want to ask you a question based on what you said in your written testimony, where you said "Gentleman always lie about their sex lives. Only a cad tells the truth about his love affairs. Many people feel that questions no one has a right to ask do not call for truthful answers."

Does this mean that you believe that if somebody is called to tell the truth and swears to tell the truth in a divorce case or a sexual harassment case about consensual sex, it is perfectly normal and permissible for them to lie and we should not ever charge them with perjury?

Mr. SCHLESINGER. I guess you were away when I tried to rebut Congressman Inglis on that point. I must apologize to the committee, I evidently overestimated——

Mr. CANADY. Can you pull your microphone a little closer? I can hardly hear you.

Mr. SCHLESINGER. I must apologize to the committee for having overestimated its sense of humor.

Mr. MCCOLLUM. Professor Schlesinger, I did understand the answers you were giving earlier, but you didn't really give much of one to Mr. Inglis and you certainly didn't give one to me. The point remains, if somebody commits perjury in a divorce case or in a sexual harassment case or anywhere else about consensual sex, it seems to me very striking that we need to be able to know that they can be prosecuted, or else we are going to have everybody lying in sex cases. Because the President of the United States is the highest law enforcement officer of this country, being allowed to get away with perjury is going to encourage other people to do it in similar cases.

Mr. SCHLESINGER. In no case did I encourage anyone to do it. I will not bore—you were absent from the room when I read the concluding paragraph of my prepared statement.

Mr. HUTCHINSON. Mr. Chairman, I yield the balance of my time to Mr. Cannon.

Mr. CANNON. Mr. Schlesinger, I have just one minute to ask a question, and if you don't mind, I would like to ask a question.

Mr. McDowell, my good friend Mr. Watt asked or referred to your referring to censure as cowardly, as being your quote, but as I recall you were quoting just a story?

Mr. MCDOWELL. That was my interpretation of basically President Jackson's response to those in the Senate.

Mr. CANNON. I want to get a little bit of history. I think it is cowardly, and to the degree that Father Drinan was talking about that, I would like to associate myself with those remarks. I think is the wrong thing to do, to even consider. It harms the presidency without helping the body politic to deal with censure as opposed to impeachment, that is, impeaching or vindicating the President.

If I might just ask Mr. Parker a question here, first I would like to associate myself with the comments of Mr. Inglis——

Mr. CANADY. Excuse me. The gentleman's time has expired, if you could conclude quickly.

Mr. CANNON. Could I ask unanimous consent to take 2 minutes? Would that work?

Mr. CANADY. Just—yes.

Mr. CANNON. Thank you. Mr. Inglis was talking about——

Mr. WATT. Did I just agree to a unanimous consent request?

Mr. CANADY. If you want to object, you can object.

Mr. WATT. I am not objecting. I wanted to know for sure what we were doing.

Mr. CANADY. The gentleman is going to ask his question quickly.

Mr. WATT. If that is what we are going to do, I think we are going to open up a Pandora's box.

Mr. CANNON. I will withdraw my request rather than drag this out all evening, so everyone feels comfortable objecting.

Mr. CANADY. I appreciate the gentleman's thoughtfulness. I want to thank the members of this panel for your very helpful testimony. You have shown commendable fortitude in being with us since 9:30 this morning. We are grateful to you.

The subcommittee now will move to the second panel. We will take a 5-minute break, but it will be no more than 5 minutes, so that the members here can leave and the new witnesses can reassemble. But we will reconvene promptly at 3:30.

[Recess.]

Mr. CANADY. The subcommittee will be in order.

We will now move to the testimony of our second and final panel of witnesses for the day. On our second panel we will first hear from Charles J. Cooper, who is a senior partner at the Washington, D.C. law firm of Cooper, Carvin & Rosenthal. Mr. Cooper was a law clerk for Justice William H. Rehnquist of the United States Supreme Court. He worked as Deputy Assistant Attorney General in the Justice Department's Civil Rights Division from 1982 to 1985, and Assistant Attorney General in the Office of Legal Counsel from 1985 to 1988. Mr. Cooper was appointed by President Bush to the National Commission on Judicial Discipline and Removal.

Our next witness will be Griffin Bell, who was in 1961 appointed by President John F. Kennedy to serve as a United States Circuit Judge on the 5th Circuit Court of Appeals. Judge Bell served on the 5th Circuit for 15 years, until 1976, when he returned to his former law firm of King & Spalding in Atlanta, Georgia. In 1977 Judge Bell was asked to serve by President Carter as the 72nd Attorney General of the United States, a position he held until 1979. In 1984 Judge Bell received the Thomas Jefferson Memorial Foundation Award for Excellence in Law.

Our next witness will be Daniel H. Pollitt, who is Graham Kenan Professor of Law Emeritus at the University of North Carolina Law School. He was a law clerk to Judge Henry W. Edgerton of the United States Appeals Court for the District of Columbia. In 1964 he served as Special Counsel to the House Committee on Education and Labor and its Subcommittee on Labor-Management Relations. Professor Pollitt has published approximately 60 articles on the issues of civil rights, civil liberties and labor relations. He has been a member of the North Carolina Law School faculty since 1957.

Our next witness will be Forrest McDonald, who is Distinguished University Research Professor at the University of Alabama. Professor McDonald has published 19 books in all on constitutional and American history, including *Novus Ordo Seclorum:*, if my Latin is correct there, *The Intellectual Origins of the U.S. Constitution*; *E Pluribus Unum: The Formation of the American Public*; *The American Presidency*; and *Alexander Hamilton: A Biography.*

Our next witness will be Lawrence H. Tribe, who is Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard University Law School. Professor Tribe has published many books in the area of constitutional law, including a leading treatise, *American Constitutional Law*, *Constitutional Choices*, and was coauthor of *On Reading the Constitution.* Professor Tribe teaches three different courses on constitutional law at Harvard Law School.

Our next witness is Susan Low Bloch, a professor of law at Georgetown University Law Center. Professor Bloch served as law clerk for U.S. Supreme Court Justice Thurgood Marshall. She is the author of *Supreme Court Politics: The Institution and Its Procedures*, and numerous law review articles on constitutional law and

communications. Professor Bloch teaches in the areas of constitutional law and Federal courts at the Georgetown Law Center.

Next we will hear from William Van Alstyne, who is Professor at the Duke University School of Law. Following brief service as Deputy Attorney General of California, Professor Van Alstyne joined the Civil Rights Division of the U.S. Department of Justice, handling voting rights cases in the South. He was named to the William R. and Thomas S. Perkins Chair of Law at Duke in 1974. His professional writings have appeared during four decades in the principal law journals in the United States. His work has been cited in a large number of judicial opinions, including those of the United States Supreme Court.

The next witness will be Jack N. Rakove, who is Coe Professor of History and American Studies at Stanford University. He joined the Stanford faculty in 1980. Professor Rakove was awarded the 1987 Pulitzer Prize for history for his book, *Original Meanings: Politics and Ideas in the Making of the Constitution.* He is also the author of *James Madison and the Creation of the American Republic.* I must also note a graduate of Haverford College, of which I am also a graduate, which goes to show that Haverford is a diverse institution.

Next, our final witness on this panel and our final witness of the day is Jonathan Turley, who is Shapiro Professor of Public Interest Law at the George Washington University Law School. Professor Turley is familiar to Congress as someone who has testified previously on constitutional and criminal matters before and during the inquiry now before the committee, including the recent Senate hearings, on constitutional issues related to impeachment.

I know that most of you are familiar with the format that we followed for the first panel of witnesses. We will follow the same format for this panel. We will allow you 10 minutes for your spoken remarks. Without objection, your full written statements will be made a part of the record. Please watch the light. It is late in the day, so do your very best to start concluding your remarks when the yellow light is illuminated. Of course, we will follow the same practice for the members, and the members will have 10 minutes each to ask questions.

Again, we thank you for being here. We will begin with Mr. Cooper.

STATEMENT OF CHARLES J. COOPER, ESQ., SENIOR PARTNER, COOPER, CARVIN & ROSENTHAL, WASHINGTON, D.C.

Mr. COOPER. Thank you, Mr. Chairman and distinguished members. Over the years, it has been my privilege and my pleasure to have testified before this and other congressional committees on a variety of subject matters.

Today, however, I cannot say that I am happy to be here. I can scarcely imagine a task less welcome to a lawyer than inquiring into the impeachability of certain crimes credibly charged against the President of the United States, nor is it easy to think of a less pleasant assignment for the House of Representatives than inquiring into whether the President of the United States has engaged in wrongdoing warranting his impeachment. But this body's responsibility for performing this duty, however unpleasant, cannot

conscientiously be avoided, for the Constitution prescribes that the House of Representatives shall have the sole power of impeachment.

We have heard this morning and will no doubt hear again this afternoon the extraordinary argument that the President cannot constitutionally be impeached for the crimes that have been credibly alleged against him. The assertion is not that perjury and obstruction of justice, both of which are punishable by up to five years imprisonment in a Federal penitentiary, can never qualify as impeachable offenses. Rather, the theory is that these crimes to be impeachable must involve the derelict exercise of executive powers, to use the formulation in a letter sent to this committee by some law professors, including some who will be heard and have been heard.

Under this view, because the President's alleged perjury and obstruction of justice grew out of his admitted efforts to conceal his private sexual misconduct, rather than to conceal a criminal exercise of presidential powers, the alleged crimes do not rise to the constitutionally required level of treason, bribery, and other high crimes and misdemeanors.

I believe that this official crimes theory runs contrary not only to the text of the Impeachment Clause and its original understanding at the time of the framing of our Constitution, but also to the actions by Congress in two recent cases in which Federal judges were impeached and removed from office. As to the first, the phrase in question appears in Article II, section 4 of the Constitution, which requires the removal of the President, Vice President, and all civil officers of the United States on impeachment for and conviction of treason, bribery, and other high crimes and misdemeanors.

Now, as the committee has heard earlier today, the use of the word "other" is quite telling. It plainly indicates that treason and bribery are themselves high crimes and misdemeanors, and bribery and treason unquestionably may be committed wholly apart from the offender's official duties. Earlier Professor Richard Parker gave the example of a President bribing a judge in a civil action to influence the decision. Other examples could be added to this, for example, bribing an Independent Counsel or bribing members of this committee to favorably influence their views with respect to a private sexual misconduct.

I believe that those examples would be impeachable offenses even though the crime did not involve the derelict exercise of executive powers. Justice Joseph Story, in his *Commentaries on the Constitution*, forcefully outlined the response to the argument that only official misconduct can constitute a impeachable offense. This is what he said:

"There is not a syllable in the Constitution, which confines impeachment to official acts, and it is against the plainest dictates of common sense, that such restraint should be imposed upon it. Suppose a judge should countenance, or aid insurgents in a meditated conspiracy or insurrection against the government. This is not a judicial act; and yet it ought certainly to be impeachable."

He went on to reference similar types of examples of bribery which John McGinnis shared with the committee earlier today. In

fact, we had a judge who committed treason, having nothing to do with his office, and he was, of course, impeached.

To be sure, serious crimes committed in the actual performance of official government functions are likely to constitute impeachable offenses in all cases. But the scope of the House's impeachment authority is not confined to such crimes or even to crimes at all. To the contrary, as Alexander Hamilton explained in *The Federalist Papers*, impeachable offenses relate chiefly to injuries done immediately to the society itself. Similarly, Joseph Story recognized that strictly speaking, the impeachment power partakes of a political character, as it respects injuries to the society in its political character.

After surveying the relevant English and American authorities, the House Judiciary Committee's impeachment inquiry staff stated in a 1974 report relating to President Nixon that impeachment is a constitutional remedy addressed to serious offenses against the system of government. Such offenses, the staff report noted, inflict injury to the commonwealth, that is, to the state itself and to its Constitution.

The crimes of perjury and obstruction of justice, like the crimes of treason and bribery, are quintessentially offenses against our system of government, visiting injury immediately upon society itself, whether or not committed in connection with the exercise of official government powers. For example, just as assaulting a police officer is different from assaulting a civilian, so too is lying under oath to a Federal judge or jury different from lying to your spouse. In the one indication the injury falls primarily on the private individual, and in the other on the body politic.

Before the framing of our Constitution and since, our law has consistently recognized that perjury primarily and directly injures the body politic, for it subverts the judicial process and thus strikes at the heart of the rule of law itself. In his *Commentaries on the Laws of England*, Blackstone categorized perjury right alongside bribery as among, in his words, crimes and misdemeanors as more especially affect the commonwealth or public polity of the kingdom, and more specifically as an offense against the public justice.

The Supreme Court has repeatedly emphasized this point. For example, in a 1976 case the Court stated: "Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it."

Nor does the history of actual impeachments in this country support the claim that Congress' impeachment powers are limited to offenses committed in connection with the performance of official government functions. To the contrary, recent cases of impeachment specifically refute this claim.

In 1986 District Judge Harry Claiborne was impeached by the House and convicted by the Senate for making perjurious statements on his income tax returns. Three years later, District Judge Walter Nixon was impeached and removed from office for giving perjured testimony before a Federal grand jury.

In both cases, it was undisputed that the perjurious statements had no relationship to the office held by the offender. Yet in both cases, no one, not a single Senator, not a single Member of the House, not even the offenders themselves, even mentioned the possibility that such offenses, though private, might not constitute high crimes and misdemeanors authorizing impeachment, conviction and removal from office.

Indeed, during the proceedings to impeach Judge Claiborne, Representative Hamilton Fish of New York specifically noted impeachable conduct does not have to occur in the course of performance of an officer's official duties. Evidence of misconduct, misbehavior, high crimes and misdemeanors can be justified upon one's private dealings as well as one's exercise of public office.

Now, that view was necessarily shared by the other 405 members who voted, without any dissent, to impeach Judge Claiborne, and the 417 members who voted, without dissent, to impeach Judge Nixon, as well as by the overwhelming majorities, over 90 percent in each case, who voted to convict these judges in the Senate.

There can be little doubt, I submit, that these precedents apply with full force to a case involving the President. The standard for impeachment laid down in the Constitution is the same for the President as for all other civil officers of the United States. That is, treason, bribery, and other high crimes and misdemeanors. And the articles of impeachment brought against Judges Claiborne and Nixon explicitly charged those offenders with high crimes and misdemeanors, and nothing else.

Moreover, the members of both houses considering those cases could not have been clearer in emphasizing that the judges' perjury constituted such grave affronts to the rule of law that no one guilty of these transgressions could remain in high office. Then-Senator Albert Gore, in explaining his vote to convict Judge Claiborne, said this:

"Given the circumstances, it is incumbent upon the Senate to fulfill its constitutional responsibility and strip this man of his title. An individual who has knowingly falsified tax returns has no business receiving a salary derived from the tax dollars of honest citizens. More importantly, an individual guilty of such reprehensible conduct ought not be permitted to exercise the awesome powers which the Constitution entrusts to the Federal Judiciary."

And as the House manager's report in Judge Nixon's case stated, "It is difficult to imagine an act more subversive to the legal process than lying from the witness stand. A judge who violates his testimonial oath and misleads a grand jury is clearly unfit to remain on the bench."

If the perjury of just one judge so undermines the rule of law as to make it intolerable that he remain in office, then how much more so does perjury committed by the President of the United States, who alone is charged with the duty to take care that the laws be faithfully executed, which brings me to my final point.

There is an additional and unique dimension to the gravity of the crimes of perjury and obstruction of justice when charged against a President. As the Judiciary Committee's 1974 staff report noted, "Because impeachment of a President is a grave step for the Nation, it is to be predicated only upon conduct seriously incompatible

with the proper performance of the constitutional duties of the presidential office. At the core of the President's responsibilities" under Article II of the Constitution "is his duty to take care that the laws be faithfully executed."

Indeed, the Supreme Court has called this responsibility the Chief Executive's most important constitutional duty. And because perjury and obstruction of justice strike at the rule of law itself, there are few crimes that more clearly or directly violate this core presidential duty. Far from taking care that the laws be faithfully executed, a President guilty of perjury and obstruction of justice has himself faithlessly subverted them.

Thus, while the crimes alleged against the President may not involve the derelict exercise of executive powers, they plainly do involve the derelict violation of executive duties. By the standards of our Constitution, our Founding Fathers, our history and our legal precedents, these crimes are plainly impeachable offenses.

[The prepared statement of Mr. Cooper follows:]

PREPARED STATEMENT OF CHARLES J. COOPER, ESQ., SENIOR PARTNER, COOPER, CARVIN & ROSENTHAL, WASHINGTON, DC.

Chairman Canady and members of the Subcommittee on the Constitution of the Committee on the Judiciary.

Over the years, it has been my privilege, and my distinct pleasure, to have testified before this and other Congressional committees on a variety of important issues. Today, however, I cannot say that I am happy to be here. I can scarcely imagine a task less welcome to a lawyer than inquiring into the impeachability of certain crimes credibly charged against the President of the United States. Nor is it easy to think of a less pleasant assignment for the House of Representatives than inquiring into whether the President of the United States has engaged in wrongdoing warranting his impeachment. But this body's responsibility for performing this duty, however unpleasant, cannot conscientiously be avoided, for the Constitution prescribes that the "House of Representatives shall have the sole Power of Impeachment." U.S. Const. art. I, § 2.

The President has been credibly charged with lying under oath, both in his testimony in the Paula Jones sexual harassment suit and in his testimony before the grand jury investigating his alleged criminal wrongdoing. The President has also been credibly charged with obstruction of justice in connection with both the *Jones* suit and the grand jury's investigation. The President's lawyers, with the support of some of the witnesses before you today, argue that the President cannot constitutionally be impeached for the crimes that have been charged against him. The argument is not that presidential perjury and obstruction of justice can *never* qualify as impeachable offenses, but rather that these crimes, to be impeachable, must "involve the derelict exercise of executive powers." Letter from J. Rubenfeld, et al., to N. Gingrich (Oct. 6, 1998) ("Rubenfeld letter"). Under this view, because the President's alleged perjury and obstruction of justice grew out of his admitted effort to conceal his private sexual misconduct rather than to conceal a "criminal exercise of presidential powers," *id.,* the alleged crimes do not rise to the constitutionally required level of "Treason, Bribery, and other high Crimes and Misdemeanors," U.S. Const. art. II, § 4.

As I shall discuss in detail, I believe that this view of the impeachment power is profoundly wrong. To be sure, serious crimes committed in the actual performance of official government functions are likely to constitute impeachable offenses in all cases. But the scope of the House's impeachment authority is not confined to such crimes, or even to crimes at all. To the contrary, "[i]mpeachment is a constitutional remedy addressed to serious offenses against the system of government." Staff of the Impeachment Inquiry on the Constitutional Grounds for Presidential Impeachment, 93d Cong., 2d Sess. IV (Comm. Print 1974) ("Staff Report"). As Alexander Hamilton put it in *The Federalist No. 65,* impeachable offenses "relate chiefly to injuries done immediately to the society itself." And the crimes of perjury and obstruction of justice, like the crimes of treason and bribery, are quintessentially offenses against our system of government, visiting injury immediately on society itself, whether or not committed in connection with the exercise of official government powers. Indeed, in a society governed by the rule of law, perjury and obstruction of justice cannot be

tolerated precisely because these crimes subvert the very judicial processes on which the rule of law so vitally depends.

But there is an additional and unique dimension to the gravity of the crimes of perjury and obstruction of justice when charged against a President. In a 1974 report, the Judiciary Committee's impeachment inquiry staff noted: "Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with . . . the proper performance of constitutional duties of the presidential office." Staff Report at IV. At the core of the President's constitutional responsibilities is his duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. And because perjury and obstruction of justice strike at the rule of law itself, it is difficult to imagine crimes that more clearly or directly violate this core presidential constitutional duty. Far from taking care that the laws be faithfully executed, a President guilty of perjury and obstruction of justice has himself faithlessly subverted them. Thus, while the crimes alleged against the President do not involve the "derelict exercise of executive powers," they plainly do involve the derelict violation of executive duties. Those crimes are plainly impeachable offenses.

I. HISTORICAL BACKGROUND

The Impeachment Clause provides:

> 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.

U.S. Const., art. 2, § 4. While the meanings of "Treason" and "Bribery" are relatively clear (the former is defined in the Constitution itself and the latter by both statutory and common law), the term "high Crimes and Misdemeanors" is nowhere specifically defined. To understand the meaning of this term, we must examine how that term was understood by the founders who framed and ratified the Constitution, and how that term has been applied in relevant American precedent. In my view, an examination of these sources compels the conclusion that perjury and obstruction of justice constitute "high crimes and misdemeanors" under any plausible and logically consistent construction of that term.

Perhaps the most extended examination of the impeachment power during the founding period was undertaken by Alexander Hamilton in *The Federalist Papers.* In *The Federalist No. 65* he identified as impeachable

> . . . those offenses 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.

The Federalist No. 65 (Alexander Hamilton) (emphasis in original). Hamilton was quick to note, however, that no single recipe could embrace the full scope of impeachable offenses. Instead, he recognized the need to confer substantial discretion upon the impeaching body, both in its authority to define the scope of impeachable offenses, and in the procedures by which such offenses would be tried:

> The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the Judges, as in common cases serve to limit the discretion of courts in favor of personal security. . . . The awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

Id. In these two passages, Hamilton captures the dominant themes that run throughout the various sources of the meaning "high Crimes and Misdemeanors." First, such offenses are "political" in the sense that "they relate chiefly to injuries done immediately to the society itself" by the "misconduct of public men." [1] And sec-

[1] I hasten to note that in the late 18th century (and, to a certain extent, still), all violations of the criminal law were viewed as injuries inflicted upon the body politic (hence, criminal cases were, and are, denominated *United State* v. *Smith*). Indeed, this distinction, between public and private harm, was not used to differentiate among crimes, but between criminal and civil wrongs:

Continued

ond, within this broad definition, the impeaching bodies must be given broad, but not unlimited, discretion to define the precise scope of impeachable offenses.

These broad themes were captured in the Constitutional Convention in Philadelphia in 1787. The initial draft of the Impeachment Clause made the President removable for "malpractice or neglect of duty." *See 2 The Founders' Constitution* 153 (Philip B. Kurland and Ralph Lerner eds., 1987). This formulation, however, was altered by the Committee of Detail to "treason bribery or corruption," and altered again, by the Committee of Eleven, to just "treason or bribery." *See* Raoul Berger, *Impeachment: The Constitutional Problems* 74 (Harv. Univ. Press 1973). Not until this point, it appears, did the Framers take up the issue of the scope of the impeachment power, with George Mason objecting that it was too narrow:

> Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. 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.

The Founders' Constitution at 154. To broaden it, Mason proposed adding the term "maladministration" to treason and bribery. James Madison, however, objected that the term would extend the impeachment power too far, for "[s]o vague a term [would] be equivalent to a tenure during pleasure of the Senate." Accordingly, Mason withdrew "maladministration" and replaced it with the current phrase, "high Crimes & Misdemeanors," which was adopted by the Convention. Madison then argued that the power to impeach the President "for any act which might be called a misdemeanor" would render the President "improperly dependent" on the Legislative Branch. He recommended that the power to try impeachments be located in the Supreme Court rather than the Senate, but his motion failed. *Id.* at 154–55.

Thus, this brief exchange reflects that "high Crimes and Misdemeanors" was intended to extend the impeachment power to "great and dangerous offences" in addition to treason and bribery, but not to the amorphous concept of "maladministration," which would permit impeachment for mere incompetence or for policy disagreements with the Congress.

While this was the only occasion on which the Framers discussed the scope of "high crimes and misdemeanors," it is not the only place that they addressed the nature of impeachable offenses. Earlier on in the Convention, they addressed the question whether the President should be impeachable *at all*; and in the course of the debate, those arguing in favor of an impeachment power set forth some grounds that, in their view, would justify removing the President. Like Hamilton's test in *The Federalist No. 65* and the broad contours set out in the debate over the text of the Impeachment Clause, this debate outlined the nature of impeachable offenses in broad strokes, apparently focusing, like Hamilton, on offenses inflicting injury on the body politic. James Madison, for example, spoke of the need to remove a President for "incapacity, negligence or perfidy." *The Founders' Constitution* at 153. Others described as impeachable offenses "mal- and corrupt conduct," "malpractice or neglect of duty," and "corruption." *Id.* at 152–53. But in this portion of the debate, the Framers also highlighted specific forms of foreseeable misconduct that, in their view, made the case for impeachment compelling. Madison, for example, warned that the President

> . . . might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation and oppression. He might betray his trust to foreign powers. . . . In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption . . . might be fatal to the Republic.

Id. at 153.

> The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, is this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity. . . . [T]reason, murder, and robbery are properly ranked as crimes; since, besides injury done to individuals, they strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

IV William Blackstone, *Commentaries on the Laws of England* 5 (special ed., 1983). Viewed in this light, Hamilton's standard for impeachable offenses clearly appears to embrace serious private crimes. In any event, the "public" crimes of perjury and obstruction of justice, like treason and bribery, are at the very core of the concept of high crimes and misdemeanors.

A broad view of the term "high Crimes and Misdemeanors," like that enunciated by Hamilton, also appears to have prevailed in the state ratification conventions. Of particular note is the North Carolina convention, where James Iredell, later to become a Supreme Court Justice, spoke at some length on the scope of impeachable offenses. One noted historian succinctly summarized Iredell's position, as well as that of Iredell's fellow North Carolinian, Governor Johnston, as follows:

> [Iredell] understood impeachment as having been "calculated to bring [great offenders] to punishment for crime which it is not easy to describe, but which every one must be convinced is a high crime and misdemeanor against government. [T]he occasion for its exercise will arise from acts of great injury to the community[.]". . . As examples of impeachable offenses, he suggested that "[the] president must certainly be punishable for giving false information to the Senate" and that "the president would be liable to impeachments [if] he had received a bribe or acted from some corrupt motive or other." . . . Governor Johnston, who would subsequently become the state's first U.S. senator, agreed that "[i]mpeachment . . . is a mode of trial pointed out for great misdemeanors against the public."

Michael Gerhardt, *The Federal Impeachment Process* 19 (1996) (internal citations omitted).

These historical sources—the framing debates at the Constitutional Convention, *The Federalist Papers,* and the ratification debates in the States—draw the broad confines within which the Framers believed impeachable offenses to fall. In short, within these confines fall "great offenses" that constitute violations of the "public trust" in the sense that they inflict injury upon the body politic. Beyond this, with the exception of the few illustrative examples provided in the course of the debates, the scope of impeachable offenses is largely left to be determined by the body charged with executing the impeachment power the House of Representatives and the Senate.[2]

These same conclusions were reached in 1974 by the impeachment inquiry staff of the House Judiciary Committee. After surveying the relevant English and American authorities, the impeachment inquiry staff concluded that "[i]mpeachment is a constitutional remedy addressed to serious offenses against the system of government." Staff Report at IV. Such offenses inflict "injury to the commonwealth that is, to the state itself and to its constitution. . . ." *Id.* at II.B.2 n.51. The impeachment power, the staff further noted, "is intended to reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office." *Id.* at III.C.3. And because "the scope of impeachment was not viewed narrowly" by the founders, "they adopted from English history a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee." *Id.* at II.B.3, I.

II. PERJURY AND OBSTRUCTION OF JUSTICE ARE IMPEACHABLE OFFENSES

Given that offenses against the system of government, inflicting injury immediately on the society itself, are at the core of the concept of "high crimes and misdemeanors," it follows that perjury and obstruction of justice are quintessential impeachable offenses. Before the framing of our Constitution and since, our law has consistently recognized that perjury subverts the judicial process and thus strikes at our nation's most fundamental value—the rule of law itself.

Indeed, in his *Commentaries on the Laws of England,* Blackstone differentiated between crimes that "more directly infringe the rights of the public or commonwealth, taken in its collective capacity," and "those which in a more peculiar manner injure individuals or private subjects." IV William Blackstone, *Commentaries on the Laws of England* 74, 176 (special ed., 1983). The latter category contained crimes such as murder, burglary, and arson. The former, however, catalogued crimes that could only be understood as assaults upon the state. Within a subcategory denominated "offenses against the public *justice,*" Blackstone included the

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[2] Justice Joseph Story captured the essence of the matter as follows:

> Not but that crimes of strictly legal character fall within the scope of the power; . . . but that it has 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, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law.

2 Joseph Story, *Commentaries on the Constitution of the United States* § 762 (1833).

crimes of perjury and bribery. *Id.* at 127, 136–39. In fact, in his catalogue of "public justice" offenses, Blackstone places perjury and bribery side-by-side. *Id.*

Likewise, the Supreme Court has repeatedly noted the extent to which perjury subverts the judicial process, and thus the rule of law. For example, in a 1976 case the Court emphasized:

> *Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings.* Effective restraints against this type of egregious offense are therefore imperative. . . . Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it.

United States v. *Mandujano,* 425 U.S. 564, 576 (1976) (plurality opinion) (emphasis added).[3] All the more serious is perjury if committed in the context of a grand jury proceeding, and especially in an investigation of alleged perjury in a prior proceeding. For in such a case, the *only* victim of perjury is the rule of law.

The seriousness of the crime of perjury is confirmed by the fact that it was among the few offenses that the First Congress outlawed by statute. In 1790, in a statute entitled "An Act for the punishment of certain crimes against the United States," Congress made the crime of perjury, including perjury committed "in any deposition taken" in an action pending in federal court, punishable by imprisonment of up to three years, a fine of up to $800, disqualification from giving future testimony, and "stand[ing] in the pillory for one hour." 2 Annals of Cong. 2219 (1790). Today perjury is punishable by up to five years imprisonment in a federal penitentiary. See 18 U.S.C. §§ 1621–23.

In the context of an impeachment inquiry, moreover, there is an additional and unique dimension to the gravity of the crimes of perjury and obstruction of justice when charged against a president. The 1974 report of the House Judiciary Committee's impeachment inquiry staff emphasized that "in determining whether grounds for impeachment exist," one must understand "the nature, functions and duties of the office." Staff Report at II.C.3. And because impeachment of a president, "is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with . . . the proper performance of constitutional duties of the presidential office." *Id.* at IV. At the core of the president's responsibilities under Article II of the Constitution is his duty to "take care that the laws be faithfully executed." Indeed, the Supreme Court has called this responsibility "the Chief Executive's most important constitutional duty." *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 577 (1992). It is no exaggeration to say that our Constitution, and the American people, entrust to the president singular responsibility for enforcing the rule of law. Perjury and obstruction of justice strike at the heart of the rule of law, and a president who has committed these crimes has plainly and directly violated his most important executive duty.

III. THE "OFFICIAL CRIMES" DEFENSE

As noted at the outset of this testimony, in recent weeks some of the President's supporters have advanced the extraordinary argument that he cannot constitutionally be impeached for the crimes that have been credibly alleged against him. In a letter to the Speaker of the House, a group of 13 law professors contends that these crimes do not rise to the constitutionally required level of "high Crimes and Misdemeanors." Rubenfeld letter. The law professors acknowledge that "lying under oath is a serious offense," and they concede that "[p]erjury and obstructing justice can without doubt be impeachable offenses." As currently charged against the President, however, these crimes are not impeachable offenses because they do not "involve the derelict exercise of executive powers." As the law professors put it: "*If* the President committed perjury regarding his sexual conduct, this perjury involved no exercise of presidential power as such. *If* he concealed evidence, this misdeed too involved no exercise of executive authority." *Id.*

Similarly, a group of some 400 historians, which calls itself "Historians in Defense of the Constitution," recently issued a statement asserting that the Constitution authorizes presidential impeachment only "for high crimes and misdemeanors in *the exercise of executive power.*" Statement of Historians in Defense of the Constitution

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[3] *See also, ABF Freight Sys.* v. *N.L.R.B.,* 510 U.S. 317, 324 (1994) ("False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a 'flagrant affront' to the truth-seeking function of adversary proceedings."); *Brogan* v. *United States,* 118 S. Ct. 805, 808–09 (1998) ("We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function."); *United States* v. *Norris,* 300 U.S. 564, 573 (1937) ("Perjury is an obstruction of justice . . .").

(1998) ("Historians' Statement"). These historians contend that "[i]mpeachment for anything else would, according to James Madison, leave the president to serve 'during pleasure of the Senate.'" *Id.*

I believe that this "official crimes" theory is demonstrably wrong, for it runs contrary to the text of the Impeachment Clause, to the understanding of the clause at the time of its framing, and to the actions by Congress in actual cases of impeachment. Turning first to the constitutional text, the Impeachment Clause speaks of "Treason, Bribery, and *other* high Crimes and Misdemeanors." U.S. Const. art. II, § 4 (emphasis added). This wording necessarily implies that treason and bribery are themselves "high Crimes and Misdemeanors," else the word "other" would not only be wholly superfluous, but affirmatively misleading. And the Impeachment Clause, by its express terms, prohibits treason and bribery without reference to whether the commission of those crimes is connected in any way to the offender's performance of his official functions. Thus, for example, if the president pays an illegal bribe to a judge in a private civil action in order to obtain a favorable ruling, then the president has committed the impeachable offense of bribery, even though the crime did not involve the "derelict exercise of executive powers."

In addition to being textually incoherent, the "official crimes" theory rests on a patent misreading of history. As noted, the historians assert that "[i]mpeachment for anything [other than official misconduct] would, according to James Madison, leave the President to serve 'during the pleasure of the Senate.'" Historians' Statement. Madison, however, said no such thing. Instead, as previously discussed, he objected that the term "maladministration" was so vague that the Senate would be empowered effectively to remove the President at its pleasure. He made no statement that could reasonably be construed as supporting an understanding of the impeachment power that would preclude its exercise for criminal conduct unrelated to the offender's office. Indeed, the term that Madison rejected—"maladministration"—is itself readily amenable to a construction that limits its scope to wrongdoing in connection with the administration of official functions. Moreover, the Framers had available to them, and rejected, the language of several state constitutions that arguably would have limited impeachable offenses to official misconduct. For example, the constitution of North Carolina allowed impeachment for "violating any part of this Constitution, maladministration, or corruption." *See The Founders' Constitution* at 150. The constitutions of Delaware and Virginia authorized impeachment for "maladministration, corruption, or other means, by which the safety of the [State] may be endangered;" New York's specified "mal and corrupt conduct in their respective offices," and Vermont's "maladministration." *Id.* at 150–51. Likewise, the Framers explicitly considered, and rejected, the formulations "mal- and corrupt conduct," and "malpractice or neglect of duty." *Id.* at 152–53.

Obviously, then, the Framers were aware of language that on its face implied a requirement of official misconduct but chose instead to adopt language that did not. Indeed, after carefully reviewing the text and history of the term "high Crimes and Misdemeanors," Justice Joseph Story[4] forcefully outlined the argument against the claim that the impeachment power is limited to wrongdoing connected to the powers of office:

> [T]here is not a syllable in the constitution, which confines impeachments to official acts, and it is against the plainest dictates of common sense, that such restraint should be imposed upon it. Suppose a judge should countenance, or aid insurgents in a meditated conspiracy or insurrection against the government. This is not a judicial act; and yet it ought certainly to be impeachable. He may be called upon to try the very persons, whom he has aided. Suppose a judge or other officer to receive a bribe not connected with his judicial office; could he be entitled to any public confidence? Would not these reasons for removal be just as strong, as if it were a case of an official bribe?

2 Joseph Story, *Comments on the Constitution of the United States* § 802 (1833).

To be sure, the severity of wrongdoing is aggravated if facilitated by an official's governmental powers. A drug dealer on the streetcorner is bad enough, but a drug dealer on the police force is much worse. Still, while the official nature of wrong-

[4] Professor Berger has observed that "Story's summary of the arguments betrays partiality to impeachment for unofficial misconduct. But conscious of the proprieties, for after all he was a Justice of the Supreme Court, he went on to say that he 'Expressed no opinion' because these are 'matters still *sub judice,*' that is, questions to be decided by the Senate." Berger at 198 n.31. Professor Berger likewise concluded that "[t]he necessity of dealing with offenses such as perjury and forgery *in private transactions* precludes a wholesale bar to inclusion of nonofficial conduct in 'high crimes and misdemeanors.'" Berger at 209 (emphasis added).

doing might aggravate the crime, it cannot, for the reasons shown, serve as a dividing line between impeachable and unimpeachable offenses.

In sum, the crimes of perjury and obstruction of justice, whether or not committed in the exercise of official powers, are quintessential "high Crimes and Misdemeanors" under the Impeachment Clause. Indeed, the Congress has, in the recent past, unanimously and near-unanimously, so concluded. That is, in recent years, the Congress has several times impeached and removed from office federal judges on the basis of conduct that, in all relevant respects, is indistinguishable from that alleged against the President.

IV. THE 1980S JUDICIAL IMPEACHMENTS

In the 1980s, three federal judges were impeached, convicted, and removed from office for making perjurious statements. It speaks volumes that, although each judge was represented by able counsel, none of them argued that perjury or making false statements are not impeachable offenses. Nor did a single Congressman or Senator, in any of the three impeachment proceedings, suggest that perjury or false statements do not qualify as "high Crimes and Misdemeanors." Finally, in two of the cases, it was undisputed that the perjury was not committed in connection with the exercise of the offenders' judicial powers, and yet *no one* suggested that the offenses, though private, might not constitute "high Crimes and Misdemeanors."

A. Impeachment of Judge Nixon

In 1989, Judge Walter L. Nixon, Jr., was impeached, convicted, and removed from office solely for perjury and lying to federal officers. Judge Nixon's offense stemmed from his grand jury testimony and statements to federal officers concerning his intervention in the state drug prosecution of Drew Fairchild, the son of Wiley Fairchild, a business partner of Judge Nixon's. Although Judge Nixon had no official role or function in Drew Fairchild's case (which was assigned to a state court judge), Wiley Fairchild had asked Judge Nixon to help out by speaking to the prosecutor. Judge Nixon did so, and the prosecutor, a long-time friend of the Judge's, dropped the case.

When Judge Nixon was interviewed by the FBI and the Department of Justice, he denied any involvement whatsoever. Subsequently, a federal grand jury was empanelled and Judge Nixon again denied his involvement.

After a lengthy criminal prosecution, Judge Nixon was convicted on two counts of perjury before the grand jury and sentenced to five years in prison on each count. Not long thereafter, the House impeached Judge Nixon by a vote of 417 to 0. The first article of impeachment charged him with making the false or misleading statement to the grand jury that he could not "recall" discussing the Fairchild case with the prosecutor. The second article charged Nixon with making affirmative false or misleading statements to the grand jury that he had "nothing whatsoever officially or unofficially to do with the Drew Fairchild case." The third article alleged that Judge Nixon made numerous false statements (*not* under oath) to federal investigators prior to his grand jury testimony. *See* 135 Cong. Rec. H1802–03.

Neither Judge Nixon nor his "very able counsel," 135 Cong. Rec. H1804, even suggested that perjury was not a "high Crime or Misdemeanor." Indeed, Judge Nixon affirmatively acknowledged to the Senate, "If you find that the prosecution has clearly met its heavy burden of proof, . . . then you may vote to convict." 135 Cong. Rec. S14493, S14502 (1989). His sole defense was that he was innocent, "unjustly and wrongfully convicted." *Id.*

As the House Judiciary Committee Report on his impeachment concluded, "Judge Nixon's conduct was wholly unacceptable for a federal judge and [has] tainted the integrity of the federal judiciary. The Committee therefore recommends that Judge Walter L. Nixon, Jr., be impeached by the House of Representatives and tried by the United States Senate." H.R. Rep. 101–36 (1989). The House unanimously impeached Judge Nixon, and the House Managers' Report expressed no doubt that perjury is an impeachable offense:

> It is difficult to imagine an act more subversive to the legal process than lying from the witness stand. A judge who violates his testimonial oath and misleads a grand jury is clearly unfit to remain on the bench. If a judge's truthfulness cannot be guaranteed, if he sets less than the highest standard for candor, how can ordinary citizens who appear in court be expected to abide by their testimonial oath?

House of Representatives' Brief in Support of the Articles of Impeachment ("Nixon House Br.") at 59 (1989). As House Manager Edwards further argued to the full Senate,

> We deal here with *a Federal judge who committed perjury.* A man who lied to law enforcement officials in an interview, and then lied again in sworn testimony before a grand jury. . . . After carefully investigating the facts and hearing all the evidence, the House voted 417 to 0 in favor of three articles of impeachment. Accordingly, you must now grapple with the same question we faced in the House. Is a man who repeatedly lied fit to hold the high office of Federal judge? I hope you agree the answer is obvious. To preserve the integrity of the judiciary, to maintain public respect for law and order, Judge Nixon must be removed from the bench.

135 Cong. Rec. S14495 (statement of Rep. Edwards) (emphasis added).

House Manager Sensenbrenner addressed the question even more directly:

> There are basically two questions before you in connection with this impeachment. First, does the conduct alleged in the three articles of impeachment state an impeachable offense? *There is really no debate on this point.* The articles allege misconduct that is criminal and wholly inconsistent with judicial integrity and the judicial oath. *Everyone agrees that a judge who lies under oath, or who deceives Federal investigators by lying in an interview, is not fit to remain on the bench.*

135 Cong. Rec. S14,497 (statement of Rep. Sensenbrenner) (emphases added).

The Senate agreed, overwhelmingly voting to convict Judge Nixon of perjury on the first two articles (89–8 and 78–19, respectively). As Senator Carl Levin explained,

> The record amply supports the finding in the criminal trial that Judge Nixon's statements to the grand jury were false and misleading and constituted perjury. Those are the statements cited in articles I and II and it is on those articles that I vote to convict Judge Nixon and remove him from office.

135 Cong. Rec. S14,637 (statement of Sen. Levin).

B. Impeachment of Judge Hastings

Also in 1989, the House impeached Judge Alcee L. Hastings for, *inter alia,* making numerous false statements under oath. The Senate convicted him, and he was removed from office. Initially, Judge Hastings had been indicted by a federal grand jury for conspiracy stemming from his alleged bribery conspiracy with his friend William Borders to "fix" cases before Judge Hastings in exchange for cash payments from defendants. William Borders was convicted, but, at his own trial, Judge Hastings took the stand and unequivocally denied any participation in a conspiracy with Borders. The jury acquitted Judge Hastings on all counts. Nevertheless, the House impeached Judge Hastings, approving sixteen articles of impeachment, fourteen of which were for lying under oath at his trial.

The House voted 413 to 3 to impeach. In the trial before the Senate, the House Managers' Report left no doubt whatsoever as to whether perjury alone is impeachable:

> It is important to realize that *each instance of false testimony charged in the false statement articles is more than enough reason to convict Judge Hastings and remove him from office.* Even if the evidence were insufficient to prove that Judge Hastings was part of the conspiracy with William Borders, which the House in no way concedes, the fact that he lied under oath to assure his acquittal is conduct that cannot be tolerated of a United States District Judge. To bolster one's defense by lying to a jury is separate, independent corrupt conduct. *For this reason alone, Judge Hastings should be removed from public office.*

The House of Representatives' Brief in Support of the Articles of Impeachment ("Hastings House Br.") at 127–28 (1989) (emphases added). Representative John Conyers (D–Mich.) also argued for the impeachment of Judge Hastings:

> [W]e can no more close our eyes to acts that constitute high crimes and misdemeanors when practiced by judges whose views we approve than we could against judges whose views we detested. It would be disloyal . . . to my oath of office at this late state of my career to attempt to set up a double standard for those who share my philosophy and for those who may oppose it. In order to be true to our principles, we must demand that all persons live up to the same high standards that we demand of everyone else.

134 Cong. Rec. H6184 (1988) (statement of Rep. Conyers).

C. Impeachment of Judge Claiborne

In 1986, Judge Harry E. Claiborne was likewise impeached, convicted, and removed from office for making false statements. In particular, Judge Claiborne had filed false income tax returns in 1979 and 1980, grossly understating his income. As a result, he was convicted by a jury of two counts of willfully making a false statement on a federal tax return in violation of 26 U.S.C. § 7206(1). Subsequently, the House unanimously (406–0) approved four articles of impeachment. The proposition that Claiborne's perjurious personal income tax filings were not impeachable was never even seriously considered. As the House Managers explained,

> [T]he constitutional issues raised by the first two Articles of Impeachment [concerning the filing of false tax returns] are readily resolved. The Constitution provides that Judge Claiborne may be impeached and convicted for "High Crimes and Misdemeanors." Article II, Section 4. *The willful making or subscribing of a false statement on a tax return is a felony* offense under the laws of the United States. *The commission of such a felony is a proper basis for Judge Claiborne's impeachment and conviction in the Senate.*

S. Doc. No. 99–48, at 40 (1986) (emphasis added).

House Manager Rodino (D–NJ), in his oral argument to the Senate, emphatically made the same point:

> Honor in the eyes of the American people lies in public officials who respect the law, not in those who violate the trust that has been given to them when they are trusted with public office. Judge Harry E. Claiborne has, sad to say, undermined the integrity of the judicial branch of Government. To restore that integrity and to maintain public confidence in the administration of justice, Judge Claiborne must be convicted on the fourth Article of Impeachment [that of reducing confidence in the integrity of the judiciary].

132 Cong. Rec. S15,481 (1986) (Statement of Rep. Rodino).

The Senate agreed. Telling are the words of then-Senator Albert Gore, Jr. (D–TN), in voting to convict Judge Claiborne and remove him from office:

> The conclusion is inescapable that Claiborne filed false income tax returns and that he did so willfully rather than negligently. . . . Given the circumstances, it is incumbent upon the Senate to fulfill its constitutional responsibility and strip this man of his title. An individual who has knowingly falsified tax returns has no business receiving a salary derived from the tax dollars of honest citizens. More importantly, an individual guilty of such reprehensible conduct ought not be permitted to exercise the awesome powers which the Constitution entrusts to the Federal Judiciary.

S. Doc. No. 99–48, at 372 (1986).

Notably, Judge Claiborne defended himself, *inter alia,* by claiming that he was the victim of a "vast" conspiracy, and, but for over-zealous and unscrupulous prosecutors, his crimes would never have been investigated in the first place. Although the prosecutorial misconduct alleged was serious, neither the House nor the Senate found it even remotely a barrier to impeachment. As then-Senator Gore explained,

> [Judge Claiborne's] contention seems to be that but for a vast conspiratorial vendetta, his innocence would have been proven or the charges would never have been brought. Claiborne contends that full consideration of his claims on this score leads to several conclusions which will exonerate him. Specifically, he suggests that federal prosecutors pursued him so relentlessly and unscrupulously that they bargained for perjured testimony from a known criminal and spearheaded an illegal burglary of his home in search of inculpatory evidence. He claims that exculpatory evidence was withheld and that witnesses were either intimidated or unfairly coached. If accurate, these claims warrant serious scrutiny and I have cosponsored legislation to establish a special subcommittee to investigate the issue further. If the claims have merit, steps should be taken to rectify the wrong. *Remedial measures, however, will in no way abrogate the finding that Claiborne has engaged in impeachable conduct.*

132 Cong. Rec. S16,827 (1986) (statement of Sen. Gore) (emphasis added).

D. Official Versus Private Misconduct

Two of these impeachments were predicated on crimes that were unrelated to the exercise of the judge's official powers. Judge Nixon's impeachment did not relate to

any official action. Drew Fairchild's case was not before Judge Nixon; indeed, it was not even in the federal courts, so Judge Nixon could not have exercised his judicial powers in connection with it. Rather, he privately and informally asked a friend (who happened to be the prosecutor) to drop the charges. And his impeachment was even once-removed from that: he was not impeached for privately interfering with the prosecution, but instead for perjuring himself about his involvement (improper or not) before the grand jury.

Likewise, Judge Claiborne's impeachment involved no official conduct whatsoever. His false tax returns, filed under penalty of perjury, were criminal, but they were not at all incident to or connected with his exercise of official powers. His income tax returns were purely personal, and his private life resulted in his being a repeat felon. Nevertheless, in both proceedings, the House concluded (and the Senate agreed) that the judges' private criminal conduct was fully impeachable. As Rep. Hamilton Fish (R–NY) observed during the Claiborne proceedings,

> [I]t is . . . self-evident that criminal conduct is a justifiable basis for a decision to impeach. . . . [But] [m]y overriding concern, given these facts, is public confidence in the integrity of the judicial branch and the individual Federal judges that exercise the most important responsibilities of that branch under our constitutional system. . . . Judge Claiborne is more than a mere embarrassment. He is a disgrace—an affront—to the judicial office and the judicial branch he was appointed to serve. . . . [I]n article II, section 4, of the Constitution, [the Founders] also recognized that judges and other high officers of the United States were not to be above the law. . . . *Impeachable conduct does not have to occur in the course of the performance of an officer's official duties. Evidence of misconduct, misbehavior, high crimes, and misdemeanors can be justified upon one's private dealings as well as one's exercise of public office. That, of course, is the situation in this case*. . . . There can be no doubt that conviction of a Federal crime falls within the definition of a "high crime" in article II, section 4 or the Constitution. . . . [Judge Claiborne's] refusal to resign, in the face of these facts and events, further demonstrates a disregard of his judicial responsibilities.

132 Cong. Rec. H4710 (1986) (statement of Rep. Fish) (emphasis added).

V. APPLICABILITY OF JUDICIAL PRECEDENTS TO IMPEACHMENT OF THE PRESIDENT

In order to avoid the conclusive force of these recent precedents—and in particular the exact precedent supporting impeachment for perjury—the only recourse is to argue that a "high Crime or Misdemeanor" for a judge is not necessarily a "high Crime or Misdemeanor" when committed by the President. The arguments advanced in support of this dubious proposition do not withstand serious scrutiny.

A. Good Behavior

Some have argued that because judges serve during "good behavior," a different impeachment standard applies to them than to the President. This argument, although popular on the television talk shows, has been widely rejected by the Congress and by legal scholars. *See, e.g.,* Berger at 132 ("[I]mpeachment for 'high crimes and misdemeanors' did not embrace removal for 'misbehavior' which fell short of 'high crimes and misdemeanors. . . .'").

For example, the 1974 impeachment inquiry staff report explained as follows:

> Does Article III, Section 1 of the Constitution, which states that judges "shall hold their Offices during good Behaviour," limit the relevance of the ten impeachments of judges with respect to presidential impeachment standards as has been argued by some? *It does not.* The argument is that "good behavior" implies an additional ground for impeachment of judges not applicable to other civil officers. However, *the only impeachment provision discussed in the Convention and included in the Constitution is Article II, Section 4, which by its expressed terms, applies to all civil officers, including judges,* and defines impeachment offenses as "Treason, Bribery, and other high Crimes and Misdemeanors."

Staff Report at II.C (emphases added).

Similarly, the House Managers observed in the Judge Claiborne proceeding that "[t]he *sole impeachment standard* for the President, Vice President and all civil officers of the United States, including federal judges, is found in Article II, Section 4 of the Constitution, which provides for removal from office for 'treason, bribery, or other high crimes and misdemeanors.'" S. Doc. No. 99–48, at 43 (1986) (emphasis added).

While there is some distant precedent for the inclusion of "misbehavior" as an *additional* ground for the impeachment of federal judges, *see, e.g.,* Impeachment of Judge Robert W. Archbald, 6 Cannon 686 (1912); Impeachment of Judge Halstead L. Ritter, 80 Cong. Rec. 3486–88 (1936), "no judge has been removed for misbehavior alone." Office of Legal Counsel, U.S. Dep't of Justice, *Legal Aspects of Impeachment: An Overview, Appendix I: The Concept of Impeachable Offense* at 34 (1974). And, more to the point, the 1980s judicial impeachments did not consider or purport to determine whether perjury and false statements constituted "bad behavior"; rather, they expressly and unequivocally decided that perjury and false statements were "high Crimes and Misdemeanors" under Article II, Section 4—the exact provision applicable to the President.

B. The President Is Different

Another argument made in support of establishing a unique constitutional test for impeaching Presidents is that, because the President is the head of an entire branch of government, impeaching him requires far worse conduct than does impeaching a simple federal judge, who is but one of many. *See, e.g.,* Laurence H. Tribe, Democratic Forum on Impeachment 8 (Oct. 15, 1998) ("Removing a federal district judge, serious though it is, does not involve decapitating a branch of the Government."). There is no doubt that impeaching a President is a graver matter than impeaching a single judge, and this fact is certainly relevant to the question *whether* to impeach. But it is difficult to understand how the relative gravity of impeachment could render perjury and obstruction of justice—unquestionably "high Crimes or Misdemeanors" for federal judges something less than "high Crimes or Misdemeanors" for the President. Either a particular crime is a "high crime or Misdemeanor," or it is not.

Moreover, even assuming that presidential "high crimes and misdemeanors" could be different from judicial ones, surely the President ought not be held to a *lower* standard of impeachability than judges. In the course of the 1980s judicial impeachments, Congress emphasized unequivocally that the removal from office of federal judges guilty of crimes indistinguishable from those currently charged against the President was essential to the preservation of the rule of law. If the perjury of just one judge so undermines the rule of law as to make it intolerable that he remain in office, then how much more so does perjury committed by the President of the United States, who *alone* is charged with the duty "to take Care that the Laws be faithfully executed."

Finally, the corollary to this argument, often offered in the same breath, is that impeachment of a President is a "constitutional crisis." This is not so. It is an event fully contemplated and provided for the Constitution. The fact that it may result in a new President does not make it a constitutional crisis, any more than does that same fact make each presidential election a crisis. And, while it is a political crisis for the particular President facing impeachment, presumably the Vice President stands by fit and able to step in and fulfill the role of President if necessary.

In sum, if perjury and false statements are "high crimes or misdemeanors" for a judge, then they are for a President as well.

VI. CONCLUSION

In the middle of July in 1787, the Framers debated the question whether the Chief Magistrate of the new government should be removable on impeachment. George Mason carried the day with a simple question: "Shall any man be above Justice?"

Mr. CANADY. Thank you, Mr. Cooper.

Judge Bell.

STATEMENT OF GRIFFIN B. BELL, ESQ., KING & SPALDING, ATLANTA, GA

Mr. BELL. Mr. Chairman and members——

Mr. CANADY. Judge, if you could pull the microphone towards you so that we can hear you.

Mr. BELL. Mr. Chairman and members, according to my research, there have only been 16 impeachments in the history of the Republic: one Senator, the Senator happened to be the first one; two Presidents; one Secretary of War; and 12 judges. The Constitution makes judges subject to something additional to what other of-

ficers have, and they must serve "during good behavior," so that is an extra qualification on judges that sometimes has been used.

As to the President, the Constitution provides that the Chief Justice has to preside at the trial of the President in the Senate. That is different, just for the President.

I went back and checked Blackstone, trying to find out what "high Crimes and Misdemeanors" means, and I find that maladministration was a crime against the king and was called a high misdemeanor. And that is what Madison said to Mason we can't put in the Constitution because the President would end up serving at the pleasure of the Senate if we have maladministration in. But that was a high misdemeanor.

Then Blackstone has a series of crimes that are called crimes against justice, and those kinds of crimes would be like perjury, obstruction of justice, dissuading a witness he calls it, but tampering with a witness. And I am of the opinion, my conclusion is that those crimes are high crimes within the meaning of the impeachment clause.

I am supported in that view by the fact that after saying what is "treason, bribery and other high Crimes and Misdemeanors," the very next thing is, this is in the Constitution, but "the party convicted shall nevertheless be liable and subject to indictment, trial and punishment according to law." That is serious crimes that they are talking about. You can be indicted for those crimes, and all the crimes that I mentioned, perjury, tampering with a witness and obstruction of justice, all are indictable felonies.

I think that the standard for impeachment has been evolving, like so many other things under the Constitution. Our law evolves. And since World War II there has not been a Federal judge indicted who was not charged with one of these serious crimes, like bribery or lying to a grand jury, making false statements about taxes, since World War II, so I think that has become the standard.

Now, President Nixon's case is confusing because one of the counts is what I would call a high crime and the others are not. The others seem to me to be lesser than these high crimes that I mentioned. But at least count one, in the way I read it, was a high crime.

President Johnson, on the other hand, was pure political. President Johnson was thought to favor the South during the reconstruction, and he was impeached for not following a statute which provided that he could not remove a member of his Cabinet unless the Senate agreed. He said that was unconstitutional and he wouldn't follow it, and he was impeached. He was also charged with putting the Congress in disrepute—I don't know if you could do that or not—and with using intemperate language, which would get us all probably. But that was a political case, and he should have been acquitted. Unfortunately, he was only acquitted by one vote.

I have thought about this a great deal. This is a serious matter. Trifling with the Federal courts is serious, and I guess I am biased because I used to be a Federal judge. But I cannot imagine that it wouldn't be a serious crime to lie in a Federal grand jury or to lie before a Federal judge, and that is where I come down.

I think about the years I was on the court and the fact that I was not on the court when this happened, but President Eisenhower sent the 82nd Airborne Division to Little Rock to enforce a Federal court order. And all the civil rights cases that I was in in the South depended on the integrity of the Federal court and the Federal court orders and people telling the truth and fairness.

Truth and fairness are the two essential elements in a justice system, and all of these statutes I mentioned, perjury, tampering with a witness, obstruction of justice, all in the interests of truth. If we don't have truth in the judicial process and in the court system in our country, we don't have anything. We don't have a system.

So this is a serious business. I don't envy the committee's work. And somehow or another it has to be resolved. It is too serious not to resolve it. It must be resolved.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Bell follows:]

PREPARED STATEMENT OF GRIFFIN B. BELL,* ESQ., KING & SPALDING, ATLANTA, GA.

I. Introduction

The impeachment clauses of the United States Constitution are broadly written and therefore leave much room for interpretation. They have been the subject of much debate over the years, and there is very little consensus about how they should be interpreted.

In addition, since the ratification of the Constitution, there have been fewer than 20 federal impeachment attempts, the vast majority of which have been brought against federal judges.[1] Only one impeachment has been brought against a United States Senator,[2] and only two have been brought against Presidents.[3] There is therefore very little precedent either as to the substantive law of impeachment or the "proper" way to handle impeachment proceedings.

When one carefully examines the language of the Constitution itself, however, in conjunction with a careful examination of earlier impeachment proceedings, it becomes clear that Presidential impeachment proceedings should only examine whether or not a President has committed serious criminal offenses that would be punishable in the courts. To examine "maladministration" on the part of the President in the context of impeachment proceedings is to introduce an element of political partisanship into proceedings that are so serious that they have the potential to undo a national election, cancel the votes of millions, and put the nation through a severe trauma.[4]

II. The Constitution

The Constitution vests the sole power of impeachment in the House of Representatives.[5] The Constitution vests the sole power to try impeachments in the Senate.[6] No person shall be convicted without the concurrence of two thirds of the Senate members present.[7] While these provisions have aroused much controversy among legal scholars, the most controversial impeachment provision of the Constitution, and the one most relevant to our discussion today, appears in Article II, Section 4. There the Constitution states:

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*I have received no federal grant, contract or subcontract in the current fiscal year or the preceding two fiscal years.

I am grateful to Professor Buckner F. Melton, Jr. and Ellen Armentrout, Esq., for their assistance with this paper.

[1] Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives,* 68 TEX. L. REV. 1, 10 (1989).

[2] *Id.*

[3] *Id.*

[4] Harvey Berkman, *Top Profs: Not Enough to Impeach,* NAT'L L.J., October 5, 1998, at A1, A19 (quoting Professor Akhil Reed Amar).

[5] U.S. CONST. art. I, § 2.

[6] *Id.* art. I, § 3.

[7] *Id.*

> 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.[8]

In particular, we need to understand the meaning of "high Crimes and Misdemeanors."

The Framers took the words "high crimes and misdemeanors" directly from English law.[9] The Constitutional Convention notes indicate that George Mason originally suggested the use of the word "maladministration" after "bribery."[10] "Maladministration" was rejected, however, as being too vague.[11] As James Madison said, "so vague a term [as maladministration] will be equivalent to tenure during the pleasure of the Senate."[12] "High crimes and misdemeanors" was therefore adopted instead, presumably because their meaning was more restrictive than the word "maladministration."[13]

What the phrase actually means, however, is subject to much debate. Some have suggested that the phrase was first used in 1368; others suggest as late as 1642.[14] Some have suggested that the phrase is merely solemn wording, with no substantive meaning.[15] Others have suggested that the words cover all political offenses.[16]

Some have argued that impeachment must rest upon a violation of existing criminal law.[17] Blackstone himself said that an impeachment "is a prosecution of the already known and established law."[18] Others have argued that the phrase "high Crimes and Misdemeanors" encompasses far more than specific criminal offenses.[19] It does not appear, however, that anyone would argue that specific indictable felonies would *not* fall under the rubric of "high Crimes and Misdemeanors." An impeaching body, therefore, is clearly well within the Constitutional limits when conducting impeachment proceedings to investigate allegations of felonious conduct. Indeed, the impeachment clause itself recognizes that impeachment does not absolve one of indictment and trial: "Judgment in Cases of Impeachment shall not extend further than to remove 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."[20]

III. Historical Impeachment Proceedings against Members of Congress

The first impeachment proceedings against a United States official occurred in 1797, against a Tennessee Senator named William Blount. He was accused of se-

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[8] *Id.* art. II, § 4.

[9] RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 54 (Harvard University Press, 1973). The Constitutional Convention delegates, however, put a "uniquely American stamp" on the Constitution's impeachment clauses. The delegates agreed to limit impeachment to officeholders, required a two-thirds vote of the Senate members present, and limited the punishments in the Constitution to those typically found in the state constitutions. Gerhardt, *supra* note 1, at 16–17.

[10] BERGER, *supra* note 9, at 74.

[11] *Id.*

[12] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 550 (Max Farrand ed., Yale University Press, 1966).

[13] *Id.*

[14] *See* BUCKNER F. MELTON, JR., THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT 40 (Mercer University Press, 1998).

[15] *See id.* at 40–41.

[16] *See id.*

[17] BERGER, *supra* note 9, at 55; *see also* WILLIAM REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 99–100 (William Morrow & Co., Inc., 1992) (recounting arguments of counsel in the Chase impeachment that only indictable crimes could be impeachable offenses); Theodore Dwight, *Trial by Impeachment,* 15 Am. L. Reg. (6 Am. L. Reg. (N.S.)) 257 (1867) (arguing that impeachment in England lay for indictable crimes only).

[18] *Id.* (quoting 4 William Blackstone 259).

[19] *Id.* at 56–58. commentators, however, seem to disagree with then-congressman Gerald Ford's assertion that an impeachable offense is whatever the House and Senate jointly "consider [it] to be." *See id.* at 86 (quoting 116 Cong. Rec. H3113–14 (daily ed. April 15, 1970)).

[20] U.S. CONST. art. I, § 3. for recent bibliographies of scholarly and government writings and sources on various aspects of the impeachment power, *see* 1 KERMIT L. HALL, A COMPREHENSIVE BIBLIOGRAPHY OF AMERICAN CONSTITUTIONAL LEGAL HISTORY, 1896–1979, at 445–49 (Kraus International Publications, 1984); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 217–27 (Princeton University Press, 1996); MELTON, *supra* note 14, at 278–319; Barrett Dick, *A Researcher's Guide to the "Watergate Affair" Part 1,* 71 LAW LIBR. J. 77 (1978); Barrett Dick, *A Researcher's Guide to the "Watergate Affair" Part 2,* 71 LAW LIBR. J. 266 (1978); Barrett Dick, *A Researcher's Guide to the "Watergate Affair" Part 3,* 71 LAW LIBR. J. 420 (1978).

cretly conspiring with British forces to liberate Spanish-controlled Louisiana.[21] The impeachment went on for eighteen months before its final resolution.[22] The House impeached Blount, but the Senate dismissed the charges on the grounds that it did not have jurisdiction over the impeachment.[23]

Since that time, no Senator or Representative has been impeached.[24]

IV. Historical Impeachment Proceedings against Judges

The next impeachment proceedings were brought six years later, in 1803, against Judge John Pickering, a U.S. District Court Judge for the District of New Hampshire. His articles of impeachment listed issuing an order in violation of a Congressional act, refusing to allow witnesses to testify in a case, refusing to allow an appeal of a case, as well as drunkenness and blasphemy.[25] It is commonly understood by historians that Pickering was "frequently drunk and mentally deranged."[26] This is clearly impeachable conduct on the part of a federal judge. Pickering was convicted by a vote of 19 to seven, and removed from office by a vote of 20 to six.[27] This was the beginning of an expansive reading of the standard for the impeachment of federal judges.[28]

One year later, in 1804, Samuel Chase, an associate justice of the U.S. Supreme Court, was tried under eight articles. He was accused of inappropriate treatment of attorneys, grand juries, juries, and witnesses, as well as violating the trial rights of defendants.[29] History tells us that Chase was roundly disliked,[30] and yet he was ultimately acquitted by the Senate.[31] As one scholar has noted, "the Senate balked at using impeachment as a tool to control judges who were merely errant, rather than criminal, corrupt, or incompetent."[32] This indicates that impeachment proceedings are not a tool to be used when Congress merely dislikes a particular judge; rather, impeachment and conviction should be used only for serious misbehavior or actual criminal activity.

Things were quiet for several years, until 1830 when Judge James H. Peck, U.S. District Court Judge for the District of Missouri, was brought up on charges of arbitrarily holding an attorney in contempt of court.[33] On January 31, 1831, Judge Peck was acquitted of the charges brought against him.[34] Here again, the Senate believed that judicial conduct did not warrant conviction.

In 1862, West H. Humphreys, U.S. District Judge for the Eastern, Middle, and Western Districts of Tennessee, had seven articles of impeachment brought against him for supporting secession and acting as a judge for the Confederacy.[35] These articles are clearly aimed at behavior contrary to what is acceptable for a federal judge. He was acquitted on one sub-part, but he was convicted on all other articles.[36] He was ousted from his office and prohibited from holding office again.[37]

Eleven years later, in 1873, Mark W. Delahay, U.S. District Judge for the District of Kansas, was almost impeached for "unsuitable personal habits" as well as drunkenness and questionable financial dealings.[38] Delahay resigned, however, before the articles could be drafted, so the House took no further action.[39]

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[21] Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Farmers' Intent,* 52 MD. L. REV. 437, 433 (1993).

[22] *Id.* at 444.

[23] MELTON, *supra* note 14, at 232; *See* Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny,* 10 REGENT U. L. REV. 111, 125 (1998).

[24] *See* Harold Baer, Jr., *How Serious is the Threat of Impeachment? and to Whom?,* 96 MICH. L. REV. 1598 (1998) (stating that the Constitutional language targets the Executive Branch and the Judicial Branch but not the Legislative Branch while reviewing Gerhardt's book).

[25] Fitschen, *supra* note 23, at 125 (citing 8 ANNALS OF CONG. 319–22 (1803–1804)).

[26] Barry Friedman, *"Things Forgotten" in the Debate Over Judicial Independence,* 14 GA. ST. U. L. REV. 737, 740 (1998).

[27] Baer, *supra* note 24; 8 ANNALS OF CONG. 367 (1803–1804).

[28] Baer, *supra* note 24.

[29] Fitschen, *supra* note 23, at 125 (citing 5 ANNALS OF CONGRESS 728–31 (1804)); *see* REHNQUIST, *supra* note 17, at 15–113 (comprising a recent history of the Chase impeachment).

[30] *See* Susanna Sherry, *Judicial Independence: Playing Politics with the Constitution,* 14 GA. ST. U. L. REV. 795, 805 (1998).

[31] *Id.*

[32] *Id.*

[33] Fitschen, *supra* note 23, at 125.

[34] ARTHUR J. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 474 (Hilliard, Gray and Co., 1833).

[35] Fitschen, *supra* note 23, at 125; *see* GERHARDT, *supra* note 20, at 53.

[36] Fitschen, *supra* note 23, at 125.

[37] *Id.*

[38] GERHARDT, *supra* note 20, at 53.

[39] Fitschen, *supra* note 23, at 125.

In 1904, U.S. District Judge for the Northern District of Florida, Charles Swayne, was accused of submitting false expense accounts, using a railroad car in the possession of a receiver appointed by him without permission, residing outside of his district, and holding attorneys in contempt unlawfully.[40] He was acquitted of all charges.[41]

In 1912, Commerce Court Judge Robert W. Archbald was brought up on 13 articles involving "influence peddling" with litigants.[42] He was acquitted on eight articles, convicted on five articles, removed from office and disqualified from ever holding office again.[43] Some have argued that while these offenses rise to the level of impeachment for Federal judges, they would not for the President.[44]

The next impeachment of a federal judge occurred in 1926 when U.S. District Judge for the Eastern District of Illinois, George W. English, was brought up on five articles of impeachment involving disbarring lawyers, summoning members of the press and state officials to court inappropriately, issuing threats to jurors, favoring bankruptcy referees for appointment, permitting referees also to act as attorneys in their cases, benefitting personally from collusion with referees, and using profanity.[45] English resigned before the Senate trial began. The House requested that the Senate put an end to the proceedings, and the Senate agreed.[46]

Seven years later, in 1933, U.S. District Judge Harold Louderback, for the Northern District of California, was brought up on charges of setting up a false residence in anticipation of his wife seeking a divorce, and improper conduct with regard to bankruptcy receiver.[47] He was acquitted of the charges.[48]

In 1936, Halstead L. Ritter, U.S. District Court Judge for the Southern District of Florida, was brought up on seven articles involving corruption, acting as a lawyer while serving as a federal judge, and income tax evasion.[49] He was acquitted of the first six articles which contained the specific allegations, but the story was different with the seventh.[50] The last article charged that the consequence of his conduct as spelled out in the first six articles was "to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice. . . ."[51] He was removed from office.[52] As stated by one scholar, "Thus misconduct which fell short of a specific criminal offense (for so the specific acquittals are to be understood) could yet constitute a 'high Crime and Misdemeanor' [for a judge] because it degraded the court."[53]

In 1986, four articles of impeachment were drafted against Judge Harry E. Claiborne, U.S. District Court Judge for the District of Nevada.[54] The judge had been convicted by a court of income tax evasion, but he refused to resign from his judgeship.[55] He was convicted on three articles, and then removed from office.[56]

In 1988, Alcee L. Hastings, U.S. District Court Judge for the Southern District of Florida, had 17 articles of impeachment drafted against him.[57] He was accused of accepting a bribe, telling lies and submitting untrue evidence during his criminal trial, and divulging wire tap information. He was acquitted on three of the articles, convicted on eight of the articles, and the Senate chose not to vote on six of the arti-

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[40] *Id.* (citing 39 CONG. REC. 214–49 (1904–1905)).

[41] *Id.* (citing 39 CONG. REC. 3,468–72 (1905)).

[42] Fitschen, *supra* note 23, at 125 (citing 48 CONG. REC. 8,904–34 (1912)); *see* GERHARDT, *supra* note 20, at 53.

[43] *Id.*

[44] *See* BERGER, *supra* note 9, at 93; *see infra* notes 68–75 and accompanying text (discussing different standards of impeachment for executive officers than for judges).

[45] Fitschen, *supra* note 23, at 125 (citing 67 CONG. REC. 6,283–87 (1926)); *see* GERHARDT, *supra* note 20, at 24.

[46] Fitschen, *supra* note 23, at 125 (citing 68 CONG. REC. 302, 348 (1926)).

[47] Fitschen, *supra* note 23, at 125 (citing 76 CONG. REC. 4,914–16 (1933)).

[48] *Id.* (citing 77 CONG. REC. 4,088 (1933)).

[49] *Id.* (citing 80 CONG. REC. 3,066–69 (1936)).

[50] BERGER, *supra* note 9, at 56.

[51] *Id.* (quoting the article of impeachment); *see* GERHARDT, *supra* note 20, at 53.

[52] Fitschen, *supra* note 23, at 125 (citing 80 CONG. REC. 5,602 (1936)); *see* GERHARDT, *supra* note 20, at 53.

[53] BERGER, *supra* note 9, at 56. Ritter was convicted of bringing his court "into scandal and disrepute" partly because he accepted substantial gifts from wealthy residents of his district. *Id.* at 92–93.

[54] Fitschen, *supra* note 23, at 125 (citing 132 CONG. REC. 17,294–95 (1986)).

[55] *Id.; see* GERHARDT, *supra* note 20, at 53.

[56] Fitschen, *supra* note 23, at 125 (citing 132 CONG. REC. 15,759–64 (1986)).

[57] *Id.* (citing 134 CONG. REC. 20,206–07 (1988)).

cles.[58] He was removed from office. He was not prohibited from ever holding future office, however, and he was elected to the House of Representatives in 1992.[59]

In 1989, U.S. District Court Judge Walter L. Nixon, Jr., for the Southern District of Mississippi, had three articles of impeachment drafted against him, for perjuring himself before a grand jury, a crime for which he had previously been convicted at trial.[60] He was acquitted by the Senate on one article, convicted on two of the perjury counts by votes of 89 to eight and 78 to 19,[61] and removed from office.

More recently, a District Judge for the Eastern District of Louisiana, Robert Collins, was convicted in a jury trial for bribery, obstruction of justice, and conspiracy to defraud the United States.[62] In late June of 1993, the United States Judicial Conference voted to issue a formal impeachment certificate to the House.[63] House impeachment resolutions were introduced against Judge Collins both before and after the House received the Judicial Conference certificate.[64] In that same month, the Speaker of the House, Tom Foley, officially recommended that the House Judiciary Committee begin an impeachment inquiry against Judge Collins.[65] Judge Collins resigned, in September 1993, from his federal prison cell in Florida.[66]

What does this list of impeachments tell us? It's hard to say.[67] One thing that it tells us is that only seven federal judges have actually been convicted. It also tells us that for a judge to be convicted requires serious misconduct, which can be anything from chronic drunkenness to conviction for criminal offenses.

The conclusion that one draws from the impeachment history of judges is that allegations of felonious conduct warrant impeachment and conviction while allegations of lesser conduct, termed lack of good behavior, have not always been found sufficient. I lean to limiting impeachment of judges to the concept developed in the last half of this century of requiring proof of a conduct tantamount to a serious crime as a basis for impeachment.[68] Behavioral excesses can generally be left to the several federal judicial councils under Title 29 of the United States Code.

While these cases involving federal judges give some guidance, they don't clearly delineate a path for Presidential impeachment proceedings.

Article III, Section 1 of the Constitution states in part, "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour. . . ."[69] Many questions arise regarding how to read this clause in connection with the impeachment clause in Article II. Some commentators maintain that the good behavior clause does not create a basis for removal other than those specified in the impeachment clauses.[70] These commentators believe that the good behavior clause merely provides federal judges with the special status of life tenure,[71] in contrast to the President or Vice President, who are elected for terms of years. They read the impeachment clause as adding that the life tenure of a federal judge may be interrupted or ended prematurely only by removal for an impeachable offense, not general "misbehavior."[72] In contrast, other commentators argue that the good behavior and impeachment clauses only make sense if they are read together as pro-

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[58] *Id.* (citing 134 CONG. REC. 25,330–35 (1989)).

[59] Baer, *supra* note 24.

[60] Fitschen, *supra* note 23, at 125 (citing 135 CONG. REC. 8,814–15 (1989)).

[61] Robert S. Peck, *Jurist Before the Bench,* 79 A.B.A. J. 56 (1993).

[62] Victor Williams, *Third Branch Independence and Integrity Threatened by Political Branch Irresponsibility: Reviewing the Report of the National Commission on Judicial Discipline and Removal,* 5 SETON HALL CONST. L.J. 851, 913 (1995).

[63] *Id.* at 915.

[64] *Id.*

[65] *Id.*

[66] *Id.* Even more recently district Judge Robert Aguilar of the Northern District of California tried to influence a fellow judge's decision on behalf of a relative, informed a relative of an FBI wiretap, and was recorded telling a lawyer the way to lie to a grand jury to cover up his relationship with the judge. "After being convicted for illegally disclosing a wiretap and attempting to obstruct a grand jury investigation, an *en banc* appeal reversed the conviction on the grounds that the wiretap had already expired when Judge Aguilar had disclosed its existence to his relative. Judge Aguilar remained on the bench, although his case load did not include criminal matters or civil matters involving the government, until he retired (with full benefits) in 1996, seven years after his indictment." Hon. Leif M. Clark and Douglas E. Deutsch, *The Delaware Gap: Exposing New Flaws in the Scheme of Bankruptcy Referrals*, 5 AM. BANKR. INST. L. REV. 257, n.235 (1997).

[67] *See* 67 CONG. REC. 6,283 (March 25, 1926) where the House of Representatives stated, "Each case of impeachment must necessarily stand upon its own facts. It can not, therefore, become a precedent or be on all fours with every other case."

[68] *See* GERHARDT, *supra* note 20, at 53.

[69] U.S. CONST. art. III, § 1.

[70] *See* GERHARDT, *supra* note 1, at 65.

[71] *See id.*

[72] *See id.*

viding that federal judges have life tenure, subject to removal for an impeachable misdeed *or* for having engaged in misbehavior.[73] "Essentially, these commentators maintain that federal judges are subject to a loose impeachment standard because they are removable for misbehavior while all other impeachable officials are removable—by impeachment—only for 'Treason, Bribery, or other high Crimes and Misdemeanors.'"[74]

This second view appears to me to be the only one that makes sense.[75] Judges have life tenure; this is one thing that distinguishes them from the President, Vice President, and other civil officers. Since they are not subject to elections, their behavioral standards while in office are more strict than those of the President, the Vice President, and other civil officers. *Judges* are removable for "misbehavior" as well as treason, bribery, or other high crimes and misdemeanors, whereas those who serve for limited terms are removable *only* for treason, bribery, or other high crimes and misdemeanors. It is clear that some federal judges have been removed for misbehavior—Pickering for drunkenness, Ritter for bringing the court into scandal. It is to be noted that more recently, it seems that Congress is only willing to bring impeachment proceedings against judges if there has been a conviction for a crime, as in the cases of Claiborne, Collins, and Walter Nixon.[76] In the case of Judge Hastings, he was acquitted by a jury, but impeached by the Senate for the same conduct.[77]

Because the standards for federal judges and the President are not the same, however, the articles of impeachment against federal judges don't tell us all we need to know about Presidential impeachment proceedings. We must therefore look to the only precedents that we have regarding Presidential impeachments to see if they enlighten us any further.

V. Historical Impeachment Proceedings against Members of the Executive Branch[78]

It is important to remember that no President has ever been convicted by the Senate and removed from office. In 1868, however, President Andrew Johnson had the dubious honor of coming very close. At that time, President Johnson was impeached by the House for the removal of his Secretary of War, Edwin M. Stanton, in violation of the Tenure of Office Act, which sought to make removal of the Secretary of War dependent upon the Senate's consent.[79] President Johnson believed that the Tenure of Office Act was unconstitutional with regard to the removal provision in that it invaded Presidential constitutional prerogatives.[80] He was also charged with attempting to bring into "disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States" and making and delivering "with a loud voice certain intemperate, inflammatory and scandalous harangues . . . amid the cries, jeers and laughter of the multitudes then assembled."[81]

At the time that the articles of impeachment were drafted against him, President Johnson had fallen out of favor with Congress: "When the impeachment finally arrived, every one accepted the fact that the breach of the Tenure of Office Act was not the real cause of the impeachment; it was necessary to prove a specific breach of the law but the reason was the need to demonstrate that a President could not pursue a policy rejected by the legislature."[82] As one commentator noted, in light of the bias against President Johnson, "the proceeding reeked with unfairness, with palpable prejudgment of guilt."[83]

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[73] *See id.* at 66.

[74] *Id.*

[75] It is interesting to note that frequently the House resolutions for impeachment say that a judge should be "impeached for misbehavior *and* for high crimes and misdemeanors." *See, e.g.,* 48 CONG. REC. 8,904 (July 12, 1912) (emphasis added).

[76] *See* GERHARDT, *supra* note 20, at 53.

[77] *See id.* at 60–62.

[78] In 1876, William W. Belknap, Secretary of War, became the second executive official to be brought up on articles of impeachment. He was accused of bribery. He was never convicted, however, because he resigned, and the Senate acquitted him for that reason. Fitschen, *supra* note 23, at 125.

[79] Fitschen, *supra* note 23, at 125; BERGER, *supra* note 9, at 260. Within 24 hours of the firing of Stanton, the House of Representatives had passed a resolution of impeachment against President Johnson. Jack Beaudon, *The Impeachment of a President,* 131 Scholastic Update 18 (1998); *see generally* MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (W.W. Norton & Co., 1973).

[80] *See* BERGER, *supra* note 9, at 252.

[81] Beaudon, *supra* note 79 (quoting 10th article of impeachment against President Andrew Johnson).

[82] BERGER, *supra* note 9, at 262–63 (quoting W.R. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION (Macmillan, 1963)).

[83] BERGER, *supra* note 9, at 264.

The House of Representatives agreed to the articles of impeachment on March 3, 1868, and presented them to the Senate on March 5th. The court was convened on March 13th.[84] President Johnson was not allowed the time that he requested to prepare, and was not given the time he requested when one of his defense counsel got sick.[85] Some have argued that the evidentiary rulings during the trial were biased against the President.[86] Ultimately, President Johnson escaped conviction when the Senate fell short of the two-thirds required by the Constitution by only one vote.[87] "Had [the impeachment] succeeded, no President, in the words of Senator Trumbull, would 'be safe who happens to differ' with the Congress 'on any measure deemed by them important.'"[88] Clearly, that is not what the Framers intended.

Perhaps the most famous of all impeachment proceedings are those against President Richard Nixon in 1974. The House Judiciary Committee approved three articles of impeachment against President Nixon on July 27, 1974, for obstructing justice, abusing his executive power, and refusing to comply with House Judiciary Committee subpoenas.[89] On August 8, 1974, however, President Nixon resigned. As a result, the impeachment inquiry ended.[90]

What do these Presidential impeachment inquiries tell us? They tell us that no President has ever been convicted. They tell us that impeachment inquiries are so serious that they've only been instituted twice against the Executive since the ratification of the Constitution. Clearly, this is not a process to be entered into lightly.

As I said when I reviewed Dr. Melton's recent book, *The First Impeachment: The Constitution's Framers and the Case of Senator William Blount*, unlike most other types of proceedings, there are no legal precedents as such for impeachment inquiries because the impeachment power is congressional and *sui generis.* The federal law of impeachment is all history, and with regard to the impeachment of presidents, the Johnson and Nixon cases are the only history that we have.

President Johnson was charged with overtly violating a specific statute, among other things. He was not convicted. President Nixon was charged with obstruction of justice, abuse of power, and refusal to comply with Committee subpoenas. He resigned before the Senate heard his case.

The charges against these Presidents were very serious in nature, and they related directly to these Presidents' exercise of executive power.[91] That is as it should be. "[T]he Founders were but reflecting English sentiment, as was well put by Solicitor General, later Lord Chancellor, Somers, who stated in Parliament in 1691 that 'the power of impeachment ought to be, like Goliath's sword, kept in the temple, and not used but on great occasions.'"[92] An impeachment inquiry should be used rarely, and when it is used, it should be limited to indictable crimes that relate to a President's ability to carry out his duties effectively. If the Framers had wanted to limit a President's term to "good behavior," they could have done so. That is the standard they imposed for judges, but it is not the standard they imposed for the President. To allow the impeachment of a President for "misbehavior" is to do exactly what the Framers feared: create an impeachment process that essentially amounts to "a tenure during the pleasure of the Senate."[93] Trying a President for misbehavior diminishes the gravity of the impeachment process, and opens the impeaching body up to criticism that it is biased and partisan. A President must only be impeached for treason, bribery, or other high crimes and misdemeanors. I believe that the best way to define "high crimes" is activity that is indictable as a felony.

VI. Conclusion

If the President were indicted and convicted of a felony, such as perjury or obstruction of justice or witness tampering, before impeachment proceedings began, would anyone argue that he should continue to be President? I don't think so. If the President were subsequently indicted and convicted of a felony, which the Con-

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[84] *Id.* at 267.
[85] *Id.* at 267–68.
[86] *Id.* at 268.
[87] *Id.* at 252.
[88] *Id.* at 295.
[89] Donald C. Smaltz, *The Independent Counsel: A View From Inside,* 86 GEO. L.J. 2307, 2319 (1998).
[90] *Id.* at 2320.
[91] *See* John F. Harris, *400 Historians Denounce Impeachment,* WASHINGTON POST, October 29, 1998, at A4 (quoting an open letter from 400 historians to say, "Although we do not condone President Clinton's private behavior or his subsequent attempts to deceive, the current charges against him depart from what the Framers saw as grounds for impeachment." The letter goes on to say that the drafters of the Constitution "explicitly reserved" impeachment for "high Crimes and Misdemeanors in the exercise of executive power.").
[92] BERGER, *supra* note 9, at 88 (quoting 5 New Parl. Hist. 678 (1691)).
[93] *See* Farrand, *supra* note 12, at 550.

stitution clearly allows, would anyone argue that he should continue to be President? I don't think so. A President cannot faithfully execute the laws if he himself is breaking them. Since this is such a fundamental concept, an impeaching body might well limit itself to inquiring into allegations of conduct that clearly constitutes a high crime. Without this limitation on the inquiry, the process could be viewed as politically driven and arguably outside the bounds of the Constitution. Congress should be at pains to spare the nation a debate over partisanship in assessing the validity of charges involving felonious conduct by the President.

The statutes against perjury, obstruction of justice and witness tampering rest on vouchsafing the element of truth in judicial proceedings—civil and criminal and particularly in the grand jury. Allegations of this kind are grave indeed. The nation will be well served if the proceedings in the House to determine whether there is a basis for trial of one or more of such allegations by the Senate can be conducted with the same solemnity that the founding fathers foresaw in the constitutional requirement that the Chief Justice of the United States preside at the trial in the Senate if the President is charged.

Mr. CANADY. Thank you, Judge Bell.

Professor Pollitt.

STATEMENT OF DANIEL H. POLLITT, GRAHAM KENAN PROFESSOR OF LAW EMERITUS, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

Mr. POLLITT. Thank you very much. I would like to thank——

Mr. CANADY. I think your microphone is not on. At the base there there is a switch.

Mr. POLLITT. Thank you. I would like to thank Mr. Hyde for the kind invitation to come here today, and I would like to thank Mr. Watt for making it possible. I had the best seat in the House for the earlier go-round and enjoyed listening to it very much. I submitted a 32-page statement, and as I listened, practically every sentence in my statement was stolen by somebody else. So I don't have much to add, so I am going to be short. I am doing that even though my wife and family are home expecting to watch as I pontificate.

I would just like to emphasize a few points. I do think that the concept of high Crimes and Misdemeanors has a meaning, has a meaning in the Constitution. It is not something, as Gerald Ford said, that depends upon the individual. And the meaning comes from the constitutional history, which started in 1776 when the colonies got their independence, and they had experienced imperial governors who sometimes were hostile. So they wrote into their early constitutions clauses similar to that of Virginia, which authorized the impeachment of the governor and those offending against the state by which the safety of the state may be endangered.

So the offense in the early 1776 constitutions consisted of offenses against the state, jeopardizing the safety of the state.

Then we move on to the Constitutional Convention where there were three disparate theories about impeachment. There were those who thought that the President should be impeachable by the Senate, willy-nilly. One thought was upon a petition of the executive, majority of the executives of the States. A similar one, but slightly different, was upon a petition by the legislative bodies of a majority of the States, and the third one in that was whenever the Senate wants to.

Well, this was abhorrent to some of the framers because this would make the executive a creature of the Senate. So they were

against impeachment for any reason. Their theory was that the President will be in office for 4 years; let the political process save us from any tyrants. And then there was a middle body which said, if the President really does something vicious and mean and endangers the safety of the state, he should be impeachable. And that was the ground which won out. The vote, the final vote, was 8-to-3 in favor of the language that the President and other civil officers shall be impeachable for treason, bribery and other high Crimes and Misdemeanors against the state. The words "against the state" were in the proposition which was adopted by the States. Then it went to the committee on style, and the committee on style was authorized to change the style, but not to change the substance. So the committee on style eliminated the phrase "against the state" believing that the substance still was there.

And then the third step was the ratification debate, and in the ratification, and in North Carolina, it was explained that again where treason, treachery, treachery and bribery was referred to in the debate in terms of Louis XIV of France putting Charles II of England on his payroll, and that was the treachery and that was the bribery that they were talking about at the Constitutional Convention.

But it was mentioned—in the North Carolina ratification debate, falsehoods was mentioned, and they said the President should be impeached if he deliberately misleads the Senate into action which is detrimental to the country. Now, that is the closest anybody came to perjury, but they talked about falsehoods, the President deliberately lying to the Senate to induce the Senate into conduct which is detrimental to the country.

Well, that's the background, and the impeachment is like the atom bomb. It is there, but it shouldn't be used very often, and as Judge Bell just indicated, it has not been used very often. And ever since 1808, it has only been used, except in the one case of treason, when there is easy money involved, somebody succumbs to the lure of easy money. That is when we impeach.

For example, we had two judges. One of them was indebted to a Senator, and he appointed the Senator's son to the lucrative bankruptcy posts. The other Senator gave the good bankruptcy assignments to his old law firm. The one who gave them to the Senator's son did not get any kickbacks, and he was not convicted. The one who gave it to his old law firm got kickbacks, and he was convicted. So money and bribery has been the root, the lure of money has been the root of all of our impeachments.

So to conclude this little section, an impeachable offense is a serious offense against the state. There are a few other things which were not mentioned, probably rightly so, but nobody has talked about sex yet, and I will just briefly.

Briefly, sexual impropriety is not an impeachable offense. We learned that very early on in the case of Alexander Hamilton. Alexander Hamilton was the Secretary of the Treasury. There were suggestions that he and a Mr. Reynolds were into some shenanigans involving money, because Hamilton had gotten Reynolds out of jail and had given him money. So it was suspicious. But Hamilton explained, no, no, no, nothing wrong, I am sleeping with his wife, and she told him about it, and I have to give him hush money

to shut him up. And they went to Washington and Vice President Adams and Secretary of State Jefferson, and they all agreed, let's hush it up. It has nothing to do with affairs—damages to the state.

Then we had Jefferson, and everybody now knows about Sally Hemings, but very few people know about the Walker affair. Jefferson tried to make out with Mrs. Walker, who was the wife of his best friend, and she told her husband, and Walker wrote to their mutual friends saying that Jefferson had sent notes to his wife suggesting, there is nothing wrong with a little dalliance, and waited for her in her bed chamber; and the accusations came to Jefferson, and he wrote, when young and single, I offered love to a handsome lady; I acknowledge its incorrectness.

And I think that is enough. Although I just found out in an obituary of Woodrow Wilson's doctor that he had had an extramarital affair with a lady named Mary Peck while he was the President. So it is not unique in our history.

The question was asked of the earlier panel, don't we need to know some more facts? And I think we do need to know some more facts. It has been assumed, I believe, in the questioning that we don't have sex here, we have perjury, perjury, perjury. Well, do we have perjury?

Perjury has been on the books since the 16th century under the Supreme Court who has said, the law has built a fence around the law of perjury to protect from vicious prosecutions. And one of the requirements, one of the parts of the fence we have is that there must be precise questioning. Precise questioning is imperative as a predicate for the offense of perjury.

Now, Clinton was asked, did you ever have sexual relations with Monica Lewinsky?

What do we mean by "sexual relations"? Is that a definite question? Could it include relations without sexual intercourse? So it is a little vague here.

Now, when you look at the answer, you must be willfully false, and there is no perjury when the witness, quote, "spoke his true belief."

Now, if Clinton interpreted sexual relations to include sexual contact, then he spoke his true belief when he said there was no perjury, and it must be material. And as indicated earlier, Judge Wright in Arkansas has ruled that the questioning about Monica Lewinsky was inadmissible because dalliance with other women was not material to the allegations of Paula Jones. Paula Jones alleged that she had been the victim of a quid pro quo, that she had been subjected to serious and erroneous and pervasive hostile conditions, and that she had suffered tremendous emotional disturbances as a consequence. And Judge Wright ruled that whatever the President did with Monica Lewinsky was totally irrelevant to what was going on with Paula Jones.

[The prepared statement of Mr. Pollitt follows:]

PREPARED STATEMENT OF DANIEL H. POLLITT, GRAHAM KENAN PROFESSOR OF LAW EMERITUS, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

On September 17,1998 President Clinton admitted on nationwide television to a "relationship with Ms. Lewinsky, that was not appropriate. In fact, it was wrong." He thereby gainsaid earlier statements to the contrary, a denial of an affair when

deposed in the Paula Jones lawsuit, on January 17, and a subsequent denial on television ("I did not have an affair with that woman").

Special Counsel Kenneth Starr reported to Congress that the President committed impeachable offenses for perjury in the Paula Jones deposition, and for "obstructing justice" when he concealed his sexual relationship with Ms. Lewinsky for this six month period.

Did Clinton commit an impeachable offense ("treason, bribery and other high Crimes and Misdemeanors") when he cheated on his wife and lied under oath about it?

Not if we follow our history.

The Early State Constitutions

The story begins in 1776 when the colonies declared their independence from Great Britain. They had felt the wrath of Imperial Royal Governors, and they wanted no more of it. They wrote impeachment clauses into their new constitutions authorizing the removal of officials for weighty crimes on high. Virginia provided that "The Governor and others offending against the state . . . by which the safety of the state may be endangered," shall be impeachable by the House of Delegates. Delaware authorized impeachment of high officials "offending against the state either by maladministration, corruption, or other means by which the safety of the Commonwealth may be endangered."

So it went, up and down the eastern seaboard. Massachusetts authorized the removal of officers "to prevent those who are vested with authority from becoming oppressors"; and North Carolina authorized impeachment of officials "offending against the state by violating any part of this Constitution, maladministration or corruption."

The common theme of the colonial impeachment clauses was grave abuse of official authority against the state, all to the detriment of the public peace and security.

The Constitutional Convention

This theme was continued when the Framers of our Constitution met in Philadelphia in the summer of 1787. The delegates argued fiercely whether the President should be impeachable at all, and if so, by what means and for what reasons.

Debate began on these issues on June 2, shortly after agreement that there should be one President (rather than three; one from the North, one from the South, and the third from the middle states) elected by the National Assembly.

John Dickenson (Delaware) opened the debate with the motion that the Executive be removable by the National Legislature on the request of "a majority of the legislatures of the Individual states." Roger Sherman (Connecticut) countered that the National Legislature should have authority to remove the President "at its pleasure."

George Mason (Virginia) was shocked at this proposal to make the "Executive the mere creature of the Legislature"; and Hugh Williamson (North Carolina) supported Mason with the proposal that the President be impeachable "only on conviction of mal-practice or neglect of duty."

Debate continued on June 15 on William Paterson's (New Jersey) proposal that the National executive be removable "on application by a majority of the Executives of the several states." Alexander Hamilton (New York) objected to this "rudderless" method of ousting a president and insisted on suitable grounds. He suggested "mal corrupt conduct" and a trial by a "court consisting of the Chief Judge of each State."

Debate continued on July 20 on the proposal that the Chief Executive be removable on "conviction for mal-practice or neglect of duty."

Charles Pinckey (South Carolina), Gouverneur Morris (Pennsylvania) and Rufus King (Massachusetts) objected to any impeachment clause whatsoever "fearing from the independence of the executive."

William Davie (North Carolina), James Wilson (Pennsylvania) and George Mason (Virginia) disagreed entirely, and spoke for the necessity of impeachment "*when great crimes were committed.*" James Madison (Virginia) though it indispensable for some provision for "defending the Community against the perfidy of the Chief Magistrate." Gouverneur Morris (Pennsylvania) was swayed by these arguments and became "sensible of the necessity of impeachments." He recalled that "Charles II (of England) was bribed by Louis XIV (of France)" and concluded that the "Executive ought therefore to be Impeachable *for treachery.*"

There was one last debate on this issue. On September 8 the Committee of Eleven (one from each State) recommended that the President be impeachable "for treason or bribery." George Mason (Virginia) thought this did not go far enough as "treason will not reach many *great and dangerous offenses.*" Primed by James Madison, Mason agreed to offer as a substitute for his initial, overly-vague suggestion of "mal-

administration" the phrase "Treason, bribery and other high Crimes and Misdemeanors *against the state.*"

The delegates adopted this proposal by vote of 8 to 3, and sent it to the Committee on Style and Arrangements. That committee had no authority to alter the substance of the agreement; and the deletion of the clause "against the state" can only mean that the Framers thought it redundant.

The Ratification Debates

The Constitution was then sent to the states for ratification or rejection. In North Carolina, James Iredall told the convention that the Impeachment Clause was meant to guard against "tyranny and oppression." He "supposed that the only instances in which the president would be liable to impeachment would be where he had received a bribe" or gave "false information to the Senate to induce them to enter into measures injurious to their Country."

Alexander Hamilton echoed this theme in New York. He explained that impeachable offenses are those "which proceed from abuse or violation of some public trust. They are of a nature" he said "which may with propriety be denominated POLITICAL."

Impeachment In Practice

Impeachment, like the atom bomb, is a weapon to be used only on very rare and very special occasions. The House has impeached a public official on only thirteen occasions, and the Senate has voted to convict only five.

Senator William Blount of Tennessee was impeached in 1797 by the House for violation of the Neutrality Act when he organized an army of frontiersmen and Creek Indians to drive the Spanish out of Florida. The Senate dismissed the impeachment, probably because it thought a Senator not to be a "civil officer," hence, not subject to impeachment proceedings. It had earlier expelled Blount pursuant to its authority to "punish its members for disorderly behaviour."

Secretary of War William Belknap was impeached by the House in 1876 for selling lucrative "post-trader" positions at Army Posts. He resigned hours after the impeachment vote. The Senate tried him anyway and voted to acquit. Many among those voting doubted the Senate's jurisdiction, Belknap no longer being a "civil officer."

The House has impeached eleven federal judges. The first, *John Pickering* in 1804, resulted from political spleen. He had used his position on the Bench to hurry the conviction under the Sedition Act of 1798 (which made it a crime to criticize a public official) of Jeffersonian office-seekers. When Jeffersonians won control of the House, the Senate, and the Presidency, it was pay back time. The Senate convicted him on the impeachment charge that he "acted contrary to his trust and duty" when he appeared on the Bench "in a state of intoxication and in a most profane and indecent manner invoked the name of the Supreme Being."

Not since 1804, not since the Pickering impeachment, has the Senate convicted a federal judge on charges ranging from "unjust, oppressive, and "arbitrary rulings" to "gross abuse of power"; see, e.g. *Samuel Chase,* 1804; *James H. Peck,* 1831; *Charles Swayne,* 1904; and *Harold Louderback,* 1932. Louderback, for example, owed his appointment to Senator Samuel Shortridge, and saw to it that the son of his benefactor got more then his share of the lucrative bankruptcy receiverships. The impeachment charged that he had brought the "administration of justice into disrepute" with "exorbitant allowances to personal and political friends." The Senator voted to acquit.

The situation differs when the impeachment charges "*treason*" (*West H. Humphreys* was removed from his federal judgeship in 1862 when he abandoned his federal post, without resigning it, to accept a similar position under the Confederacy). And the Senate is quick to convict when "bribery" goes to the heart of the matter, when federal judges succumb to the lure of easy money: *Robert W. Archbald* (1912) was charged by the House and convicted by the Senate when he used his judicial office "for his personal financial gain." A railroad currently in litigation before his court had financed a grand tour of Europe for the entire Archbald family. The judge subsequently approved the costs of the trip as part of the necessary expenses of operating the railroad. *Halsted Ritter,* 1936 (failed to report "kick backs" on his income tax return); *Alcee Hastings* (1989) (conspired to solicit a bribe); and *Walter L. Nixon,* 1989 (made false statement to a grand jury concealing a bribe). Andrew Johnson is the only President to have been impeached by the House and tried by the Senate. The Republicans selected him as the running mate for Lincoln in 1864, in the expectation that his being a Democrat from Tennessee would pull electoral votes. With Lincoln's assassination and war's end, the Reconstruction Congress and Reconciliation President were at loggerheads. Congress passed civil rights laws; Johnson ve-

toed them. Matters boiled over when Johnson sought to replace Secretary of War Edwin Stanton (tough on the South) with Lorenzo Thomas (forgiving of the South). It was a critical choice as the South was under military occupation. The House immediately impeached Johnson, alleging that he had violated the Tenure of Office Act, passed the previous year, which required enate approval for the removal of various executive officials. The House also charged Johnson with "failing to execute the laws" as required by the Constitution. The Senate voted to acquit, one vote short of the required two thirds majority to convict.

The Republicans selected Grant as their next Presidential nominee (not the incumbent Johnson), but Tennessee returned him to the Senate. When he died, pursuant to his orders, he was buried wrapped in the American flag and his head put to rest on the Constitution.

Clinton's enemies often draw a parallel between Nixon and Clinton. Each lied to the American people, and each stonewalled the lie. But here the parallel ends.

President Nixon resigned after the House Judiciary Committee voted articles of impeachment against him: these alleged that he acted in a manner "subversive of constitutional government"; that he had "repeatedly engaged in conduct violating the constitutional rights of citizens"; that he had impaired "the due and the proper administration of justice"; and that he had contravened "the laws governing agencies of the executive branch." In simple language, he burglarized, he wire tapped, he turned the IRS loose on political enemies, he misused the CIA and misled the FBI.

In contrast, Clinton cheated on his wife, lied about it; and did his best for six months to cover it up. Certainly, as even he admits, not an honorable course of conduct. Adultery, yes, possibly even perjury. But impeachable offenses?

Not if we recall the spirit that in 1776 motivated Virginia and the other states to authorize impeachment of those "offending against the state by which the safety of the state may be endangered."

Not if we recall the Constitutional Convention where our forefathers authorized impeachment when "great crimes were committed against the state."

Not if we recall the Ratification Debates where impeachable crimes were described as those "which may with propriety be denominated POLITICAL."

Not unless we overlook consistent practice wherein the Senate has refused to convict absent the clearest cases of treason and bribery.

Where, as in the Nixon Impeachment, is there conduct "subversive of constitutional government?"

Impeachment of President Clinton, simply put, would turn two hundred years of constitutional history on end.

Illicit Sex and Lying About It

The Framers of our Constitution, many of whom sat in the early Congressional bodies, did not consider illicit sex, or even lying about it, an impeachable offense.

The ink was hardly dry on the Constitution when the Congress, in 1792, investigated allegations that *Alexander Hamilton,* the Secretary of the Treasury, had engaged in "improper speculation" with one James Reynolds. The Treasury Department had authorized his release from prison, and Hamilton had doled out periodic payments to him.

Hamilton explained to the Investigating Committee (Representative Abraham Venable, Speaker Frederick Muhlenberg, and Senator James Monroe) that he had an on-going affair with Mrs. Reynolds, and was paying hush money to her husband. Hamilton's *Confession of Adultery* is in the current (November 1998) issue of *Harper's Magazine.*

The Investigating Committee concluded that the matter was private, not public, and should best be kept secret. President Washington, Vice President Adams and Secretary of State Jefferson agreed.

Some five years later James Callender, a muckraking journalist, got wind of the affair, and wrote that Hamilton's story was a lie, meant to cover up a darker entanglement. Hamilton responded with the *"Reynolds Pamphlet"* wherein he emphasized that there was "no darker entanglement," that the entire episode concerned only his illicit sexual affair.

There was no talk of impeachment, and his subsequent appointment to a high command post in the United States Army was speedily confirmed by the Senate.

Thomas Jefferson was the next notable target of James Callender. In 1802 Callender wrote in the Richmond, Virginia Recorder that "the President has kept, as his concubine one of his own slaves" and "by this wench Sally (Hemings) our president has had several children."

There was no impeachment, and Jefferson was reselected overwhelmingly in 1804. William Safire, *Spinning Jefferson in His Grave, Raleigh (N.C.) News and Observer, Nov. 3, 1998 p. 13.*

The subsequent Walker Affair outdid the Sally Hemings story in the way of a public scandal. John Walker and Thomas Jefferson were school mates, college chums, and best of friends, at least early on. But Jefferson made eyes at Mrs. Walker. She told her husband, who wrote a number of people that while he was away helping to negotiate a treaty with some Indians, Jefferson's conduct toward his wife was "entirely improper." "Jefferson," wrote Walker, tried to convince his wife "of the innocence of promiscuous love"; and on one occasion stole into her bedroom "where my wife was undressing or in bed." On another occasion Jefferson lay in wait in the passage way outside her bedroom "ready to seize her on her way from her chamber indecent in manner."

The Walker correspondence fell into the hands of James Callender who, in 1802, gave the story wide currency. Jefferson admitted "that when young and single I offered love to a handsome lady. I acknowledge its incorrectness."

That Jefferson made improper advance to his best friend's wife did not stand in his way to reselection. See Dumas Malone, *Jefferson and His Time* (Little Brown and Co., 1948, pp. 447 If.).

Some early Vice Presidents shocked Washington society with their illicit affairs.

Richard Mento Johnson (1837–41) of Kentucky was a "war hawk" during the war of 1812. He left his seat in Congress to lead a regiment of Kentucky back-woodsmen to battle the British and their Indian allies. He personally killed the famed Indian chief Tecumseh at the Battle of Detroit. This won him the admiration of the nation, and Andrew Jackson picked him as the running mate for Martin Van Buren in 1833.

But there was a dark side.

Johnson took a slave woman named Julia Chinn as his common-law wife. When she died, he took another slave as his next wife. She ran away. Johnson tracked her down, and sold her at auction on the slave block. He then took her sister at his next wife.

This did not sit well with Washington society, or with the electorate. Van Buren won the election hands down, but his running mate Johnson failed to garner a majority. Even his home state Kentucky failed to support him. For the only time in history the election of the vice president was decided in the Senate.

Johnson won the election, but barely. Shunned by Washington society, he spent most of the next four years in Kentucky operating a spa and hotel. The Democrats dropped him from the ticket in 1840, leaving the spot blank. They chose not to nominate anyone. See Steve Tally, *Bland Ambition.* (Harcourt Brace Javanovich 1992, pp. 71 ff.).

There is William Rufus De Vane King, the only bachelor Vice President. The Democrats in 1852 nominated Frankling Pierce of New Hampshire. They balanced the ticket with a southern slave holder. They hit upon King, the Senator from Alabama.

He was an unlikely choice; an alcoholic dying of tuberculosis, and thought to be a homosexual. There was continued rumors of sexual liaisons with male slaves on his plantation, and for years he shared quarters with future president James Buchanan. Andrew Jackson called him "Miss Nancy," his fellow senators "Aunt Fancy."

He died after six weeks in office. No one thought to fill the vacancy. See *Bland Ambition,* p. 101.

There is no need to continue through the decades.

Those we elect to office are not gods or saints, but flesh-and-blood humans. We do not think in terms of impeachment when they err; in their private sex lives for they are more to be pitied then censured.

Was It Perjury?

The constant refrain from Clinton baiters is perjury, perjury, perjury. Why? Because history demands it. To cheat on one's spouse is not an impeachable offense (a high Crime and Misdemeanor). Not since 1804 has the Senate upheld an impeachment charge absent violation of the criminal law, and a serious violation to boot. For example, the Nixon Impeachment Committee, under Chairman Rodino, was satisfied that Nixon had cheated on his income tax (by backdating a return to take advantage of an expired loophole), but concluded that criminal misconduct of a personal nature was not grounds for impeachment.

Impeachment must be predicated on conduct totally incompatible with the constitutional obligations of the Presidential Office; and it is doubtful that perjury in a civil suit reaches the onerous requirements of an impeachable offense. Moreover, there even is doubt that Clinton is guilty of perjury.

Detractors accuse President Clinton of hunkering down behind legalisms. Perhaps so. But if America is to comprehend the Presidential impeachment investigation (the third in our history), it is necessary to have a complete understanding of the commonly used legal terminology. The word "perjury" is at the top of this list.

Perjury law has roots going back to the Perjury Statute of 1503, *United States* v. *Dunnigan,* 507 U.S. 87, 94 (1993) and, as the Supreme Court noted, "has thrown a fence around a witness" to protect from "hasty and spiteful retaliation." *Bronston* v. *United States,* 409 U.S. 352, 359 (1973).

Let's examine some of the parameters and contours of the law in the Clinton situation.

Did he commit perjury on January 17, 1998 in the Paula Jones case when he answered "No" to the question, "Did you ever have sexual relations with Monica Lewinsky?" This negative response was not perjury for several overlapping reasons.

First, the question asked must be unambiguous. Witnesses simply cannot be left to guess at what the questioner has in mind. Thus, Owen Lattimore could not be convicted of perjury when he denied to the Senate Internal Security Committee that he had not been "a promoter of Communist interests," "a follower of the Communist line." These questions, like the questions asked Clinton, failed the first requirement that "precise questioning is imperative as a predicate for the offense of perjury."

Second, the testimony must not only be false, it must be wilfully false. There can be no perjury, wrote the Supreme Court, when the witness "spoke his true belief." *Bronston* v. *United States,* 409 U.S. 352, 355 Clinton asserts that in his mind, to have a "sexual relationship," a "sexual affair," one must have sexual intercourse, which was absent in the Clinton-Lewinsky relationship. With this understanding, Clinton "spoke his true belief" when he denied a "sexual affair."

Third, the falsehood must concern a "material" matter. *Bronston* v. *United States,* 409 U.S. 352, 357 In the Paula Jones case, Judge Wright ruled that the President's testimony regarding affairs with Ms. Lewinsky (or any other than Paula Jones) was "inadmissible." It simply was not "material," she wrote, to the core issues "whether plaintiff herself was the victim of alleged quid pro quo or hostile work environment sexual harassment, or whether she suffered emotional distress so severe that no reasonable person could be expected to endure it."

Did the President, later, on January 27 commit perjury when he assured a nationwide TV audience that he never had "sexual relations with that woman, Ms. Lewinsky." Again, we must return to the President's "true belief, that a "sexual affair" includes sexual intercourse. Moreover, perjury requires a false statement under oath, and the President was not under oath when he spoke to the nation.

Finally, was there perjury when the President testified to the grand jury on August 17, and was asked a number of questions.

First, the President was asked if he had committed perjury in his deposition in the Paula Jones case, and replied he had not. But if there was no perjury in the Jones case, as shown above, there was no perjury on this ground before the grand jury.

Second, the President was asked "whether Monica Lewinsky had performed oral sex on him." He replied: "I did have a relationship with Ms. Lewinsky that was not appropriate. In fact, it was wrong."

The perjury statute does not reach an answer that is literally true "even if it might be considered "unresponsive" and even if it might be "false by negative implication." *Bronston* v. *United States,* 409 U.S. 352, 360 (1973) Here, of course, the President's answer was "literally true." It also could well be considered "responsive," and certainly it was not "false by implication."

Third and Fourth, the Special Counsel thinks the president should be impeached from office because (1) Lewinsky said the President touched her breasts and the President said he didn't; and (2) Lewinsky said the affair began in November of 1995 and the President said it did not begin until 1996.

Were the President's answers "designed to substantially affect the outcome," as required by perjury law? See *United States* v. *Dunnigan,* 507 U.S. 87, at 95 (1993) One would not think so. In any event, the Special Counsel purports to forget the two witness rule, "deeply rooted in past centuries," that a conviction for perjury ought not to rest entirely upon an "oath against an oath." This special rule, which bars conviction for perjury solely upon the evidence of a single witness, rests on the fear that innocent witnesses might be "harassed or convicted" if a less stringent rule were adopted. *Weller* v. *United States,* 323 U.S. 606, 609 (1945)

Special Counsel Kenneth Starr seems to agree. Nowhere does he use the word "perjury" when he lists the "acts that may constitute grounds for impeachment." He contents himself with the allegation that President Clinton "lied under oath."

Why this lollygagging? Why not come straight out and first hand accuse the President of "perjury?" One probable answer: Starr knows there was no perjury and

hopes that a non-felonious "lie under oath" will suffice to unseat a president. This would create a novel "impeachable Offense" and hopefully will not win the day.

Clinton betrayed his wife, betrayed his friends, misled us all. But he did not commit perjury, did not violate the law, and above all, did not betray the Constitution.

The Twenty-Fifth Amendment

Professor Black, in his book on impeachment, suggests that impeachable acts need not be criminal acts, so long as they are public acts having public consequences. He gives as an illustration a situation where the President moves to Saudi Arabia "so he could have four wives," proposing "to conduct the Presidency by mail."

Others ask: suppose the President murders his wife; should he not be impeachable for this?

The complicated process of impeachment is not necessary to cope with such unlikely situations. There is a simpler and more direct constitutional route to handle such unlikely hypothetical. The Twenty-Fifth Amendment provides in pertinent part:

> Section 4. Whenever the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may be law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representative their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thank you very much. I hope I left some time.

Mr. CANADY. Well, as a matter of fact, you didn't. The red light has been on for several minutes there. But that's quite all right. We will now go to Professor McDonald.

STATEMENT OF FORREST MCDONALD, HISTORIAN AND DISTINGUISHED UNIVERSITY RESEARCH PROFESSOR, UNIVERSITY OF ALABAMA

Mr. MCDONALD. Thank you. I can believe that Professor Pollitt in his written statement covered all the bases, because he covered an awful lot of them there, but as a biographer of Alexander Hamilton, there is something I can't let go.

Hamilton did not get James Reynolds out of jail, all right, number one. Number two, when they took the evidence to somebody, they did not take it to George Washington or John Adams or Thomas Jefferson; they took it to three Congressmen—a Congressman Venable from Virginia, a Congressman named Muhlenberg, who was the Speaker of the House, from Pennsylvania, and a Congressman named James Monroe, who would appear on the pages of history later.

At the outset, let me say that I shall offer here no policy recommendations. Unlike the 400 historians who signed a recent statement in The New York Times and which we have heard about today, I recognize that historians have no more qualifications for advising statesmen on current issues than do, say, plumbers or radiologists. Our province is the past, not the present, and the past is what I, for one, am qualified to talk about.

I have been studying the origins and early evolution of the Constitution for half a century. I will have, as of next January, and on the basis of that study, I may be able to tell you something about the original understanding of the impeachment process that is not readily available in the published scholarship.

Let me begin, as Professor Pollitt did, with 1776. Americans were so dismayed by what they considered as betrayal by King George III that, in forming their new governments, they established almost

no executive branches at all. The Congress of the Confederation had no executive arm, and though most of the State constitutions provided for a governor or a president, none except New York vested him with substantive power, and most provided for impeachment for misconduct in several States; maladministration, several other States; corruption, other States; or any misdemeanor, the State of Pennsylvania. By the time the Federal Convention gathered in Philadelphia in 1787, they then had come to realize that government without an executive branch is no government at all. But their mistrust lingered, as is attested by the fact that a quarter to a third of the delegates supported a plural executive. The two most formidable obstacles to creating a viable executive were closely related: how to elect the President and how to get rid of him if he turned out badly.

Now, from our perspective, the question of how to choose the President might seem obvious: Have popular elections. Given the size of the country and the state of transportation and communication, however, that would have been impracticable. Election by the State legislatures or by the governors, both of which were proposed, was also generally regarded as unsatisfactory. That left some kind of centralized election which came down to a choice by Congress.

But if Congress elected the President, the executive would be dependent upon the legislative, and thus, a system of checks and balances would be impossible unless he was made ineligible for reelection; but if he cannot stand for reelection, he would have to be chosen for a long term, which the delegates thought would be dangerous.

The greatest danger posed by congressional election, however, was suggested by a recent horrible example of which the delegates were acutely aware. The only elected monarchy in Europe was that of Poland where the nobles chose the king, and the centralized electoral system there had enabled the crowned heads of Prussia, Russia and Austria to buy a king of their choice. Thereafter, they partitioned the country by dividing its territory among themselves. The prospect that that could happen in America was chilling.

So unsatisfactory were the options that the delegates were loathe to invest the executive with any genuine power. As late as the first week of September, that is, 2 weeks before the Convention adjourned, what had been agreed to was a government that would be entirely dominated by Congress, the President being little more than a figurehead.

The limited nature of presidential authority at that stage of the proceedings had a direct bearing on the impeachment process at that stage of the proceedings. It had been agreed at the outset that the executive was to be removable, and they soon settled on—I am sorry, removable upon impeachment and conviction.

The grounds for impeachment were two, treason and bribery. Including treason was a reflex action; treason had been involved in almost all the impeachments by the English from whom Americans derived the idea, though Americans guarded against their abuse by narrowly defining what constituted treason.

Providing for impeachment for bribery was another matter of the delegates' having in mind a horrible example. King Charles II of England had been bribed by Louis XIV of France, among the fruits

of which was France's acquisition of Dunkirk, which had long been an English possession. That was the way things stood at the beginning of September.

But then, on Tuesday, September the 4th, a catchall committee proposed a resolution, the brainchild of Pierce Butler of South Carolina, to establish the Electoral College. The system was cumbersome, even cockamamie, but it overcame every objection that had been raised to every other proposed method of choosing a President.

Now, having devised a decentralized method that would make it difficult, if not impossible, for foreign governments to sway American presidential elections by influence or money, the delegates were willing to endow the office with considerably more power. In the next few days, they did so.

Increasing the duties, responsibilities and powers of the presidency necessitated an enlargement of the grounds for impeachment, for treason and bribery no longer covered all the President's constitutional activities. It is a fundamental principle of the Constitution that to ensure balances and checks, the greater the power given, the greater the mechanism needed for enforcing accountability.

Accordingly, on September 8, George Mason of Virginia moved to add the words, "or maladministration." James Madison, as referred to several times today, objected that the term was too vague, so Mason withdrew his motion and substituted "other crimes and misdemeanors against the state." The words "against the state" were subsequently changed to "against the United States," but in the final draft, those words were dropped. The deletion was significant, for had that qualifier been retained, impeachable offenses would have been limited to actions taken in the performance of public duties.

We have heard several people comment that the Committee on Style would not have taken liberties with the resolutions to the Convention. They don't understand Gouverneur Morris, who wrote the final Constitution. He took a number of liberties with the resolutions to the Convention, and when he took too great a liberty, they checked him. In this instance, they said, okay, we will go along with it.

That left the grounds for impeachment as treason, bribery or other high Crimes and Misdemeanors. The phrase "high Crimes and Misdemeanors" had been the standard wording of English impeachments since the first such took place against the Earl of Suffolk in 1386, and that is doubtless why it came readily to mind. As for the word "misdemeanor," Raoul Berger had pointed out that at the time it was first used, it was not a legal term; as the Oxford English dictionary makes clear, it simply signified evil conduct or misbehavior.

Now, it is sometimes said that "high Crimes and Misdemeanors" was a term of art, but that is not so. A term of art is a phrase that, whatever it may mean to laymen, has a precise meaning to specialists. But "high Crimes and Misdemeanors" had, according to the leading commentators of the day, at least three different meanings. One was suggested by Sir William Blackstone's successor as the Viner lecturer at Oxford, Sir Richard Wooddeson, in his lengthy

analysis of impeachment, namely that "high" in that phrase meant crimes or misdemeanors of whatever seriousness committed by persons of high station. If a file clerk in the White House steals something, you don't impeach him, you just get rid of him.

The other readings turn upon whether the adjective "high" is meant to refer to both crimes and misdemeanors, or whether "high crimes" is one thing and "misdemeanor" is another, or "impeachable." In Federalist 69, indeed, "high crimes" are "misdemeanors," and that is the language used in the State constitutions adopted shortly after the United States Constitution was ratified.

Moreover, in the very first instance of impeachment, conviction and removal from office under the Constitution of the United States, that of District Judge John Pickering of New Hampshire in 1803, the high crimes and/or misdemeanors of which he was found guilty consisted of drunkenness in the courtroom.

The term "high misdemeanor" did exist, and it was, in fact, a term of art. For enlightenment, we turn to Blackstone's *Commentaries*, a work, as Madison said, was in every man's hand, and the one the framers documentably turned to when determining what legal phrases meant. Blackstone considers "high misdemeanors" in book IV, chapter 9, "of misprisons and contempt." The word "misprison" derives from the old French word, "mespris," meaning neglect or contempt. A "misprison," Blackstone tells us, was a neglect or contempt against the state; a "high misdemeanor" was a "positive misprison". He ranks the changes on what these were, such as displays of violence in the courtroom, and he closes by describing a "high misdemeanor" as an "endeavor to dissuade a witness from giving evidence or to advise a prisoner to stand mute."

Except in that restricted sense, a "high misdemeanor" is an oxymoron, for the definition of a "misdemeanor" is concerned with its minor quality. Again, we consult Blackstone. In chapter 1 of book IV he tells us that, properly speaking, "crimes" and "misdemeanors" are mere synonymous terms, but it goes on to say that in common usage, the word "crime" is made to denote such offenses as of a deeper and more atrocious dye, while smaller faults and omissions of less consequence are comprised under the gentler name of "misdemeanor" only.

The annotator of my 1793 edition of Blackstone, Edward Christian, adds the following note: "In the English law, misdemeanor is generally used in contradistinction to felony, and misdemeanors comprehend all indictable offenses which do not amount to felony." The first example he gives is perjury.

Thank you.

Mr. CANADY. Thank you.

[The prepared statement of Mr. McDonald follows:]

PREPARED STATEMENT OF FORREST MCDONALD, HISTORIAN AND DISTINGUISHED UNIVERSITY RESEARCH PROFESSOR, UNIVERSITY OF ALABAMA

Until September 8, 1787—little more than a week before the Constitutional Convention adjourned—the only grounds that had been provided for impeaching the president were treason and bribery. Nothing more seemed necessary, for the delegates had entrusted few powers to the office. But then the invention of the electoral college emboldened the Framers to give the president a great deal of additional power, which in turn necessitated additional precautions to prevent abuse. Accordingly, the words "and other high Crimes & Misdemeanors" were added.

The language could, according to contemporary authorities, be interpreted in three ways. The adjective "high" can be read as meaning high crimes and high misdemeanors. High misdemeanor was a term of art, referring (according to Blackstone) to neglects or contempts against the dignity of the state; examples of contempt were "to endeavour to dissuade a witness from giving evidence . . . or, to advise a prisoner to stand mute." Secondly, high crimes and misdemeanors can be read as meaning crimes *or* misdemeanors. Again, according to Blackstone, crimes were offences "of a deeper and more atrocious dye," whereas misdemeanors were "smaller faults, and omissions of less consequence." The annotator of the *Commentaries* adds some examples, including perjury. The third possible reading, suggested by Richard Wooddeson, Blackstone's successor as the Viner lecturer at Oxford, is that "high" refers only to people in high office: any crime or misdemeanor committed by such people.

In preparing myself to testify before this committee, I surveyed the literature on impeachment and was a bit surprised at the quantity and quality of it. In addition to numerous articles in law reviews and scholarly journals, there are Raoul Berger's *Impeachment: The Constitutional Problems*, a magisterial survey published in 1973, the book *High Crimes and Misdemeanors: Selected Materials on Impeachment*, compiled by the House Judiciary Committee with a Foreword by Chairman Peter W. Rodino, also in 1973, and John R. Labovitz' *Presidential Impeachment*, a 1978 book that grew out of the author's participation as a staffer on the Nixon hearings. Taken together, these sources, which are readily available to the committee and its staff, answer most of the questions that can be asked about the origin and development of the impeachment process.

Accordingly, I shall confine my observations largely to matters that are not covered in the published scholarship and are drawn from such understanding of the subject as I have been able to obtain during the half century I have been studying the Founding and early evolution of the Constitution.

Let me begin with 1776. Americans were so dismayed by what they considered as betrayal by King George III that, in forming their new governments, they established almost no executive branches at all. The Congress of the Confederation had no executive arm, and though most of the state constitutions provided for a governor or a president, none except New York vested him with substantive power, and most provided for impeachment for "misconduct or mal-administration" (Massachusetts 1780, New Hampshire 1784) or "mal- and corrupt conduct" (New York 1777, South Carolina 1778) or "maladministration or corruption" (Virginia and North Carolina, 1776), or simply "any misdemeanor" (Pennsylvania, 1790).

By the time the Federal Convention gathered in Philadelphia in 1787, most thinking men had come to realize that government without an executive branch is no government at all, but their mistrust lingered, as is attested by the fact that a quarter to a third of the delegates supported a plural executive. The most formidable obstacles to creating a viable executive were two: how to elect the president and how to get rid of him if he turned out badly. The two were closely related, as will become evident. From our perspective, the question of how to choose the president might seem obvious: simply have popular elections. Given the size of the country and the difficulties of transportation and communication, however, that would have been impracticable. Indeed, common Americans would have been hard-pressed even to name someone from another state, apart from Washington, Franklin, and possibly John Adams and Thomas Jefferson. For other reasons, election by the state legislatures or the governors, both of which were proposed, was generally regarded as unsatisfactory.

But that left some kind of centralized election, which came down to a choice by Congress, which in turn was fraught with problems. If Congress elected the president, the executive would be dependent upon the legislative, and thus a system of check and balances would be impossible—unless he was made ineligible for reelection, but if he could not stand for reelection, he would have to be chosen for a long term, say six or seven years, which delegates thought would be dangerous. The greatest danger of all posed by congressional election, however, was suggested by a recent horrible example from Europe of which the delegates were acutely aware. The only elective monarchy in Europe was that of Poland, where the nobles chose the king, and the centralized electoral system there had made it possible for the crowned heads of Prussia, Russia, and Austria to use their wealth to buy a king of their choice. Thereafter, they partitioned the country—divided its territory among themselves in—1773. The prospect that that could happen to America was chilling, to put it mildly.

So unsatisfactory were the options that the delegates were loath to invest the executive with genuine powers. As late as the first week in September two weeks before the Convention adjourned what had been agreed to was a government that

would be entirely dominated by Congress. The Senate, whose members would be elected by the state legislatures, would have most of what were called the federative powers—the conduct of foreign relations—including the sending of ambassadors and the negotiation of treaties. The other great federative power, the waging of war, was to be shared with the lower house, as were other traditional executive powers. The president was to be elected by the Congress in joint session, serving a seven-year term unless removed on impeachment by the House and conviction by the Supreme Court. He was to be ineligible for reelection and had virtually no power of appointment and none of removal. He was commander-in-chief, had a conditional veto of legislation, and had power to grant pardons and reprieves. Otherwise, he was to be little more than a figurehead.

The limited nature of presidential authority at that stage of the proceedings had a direct bearing on the impeachment process at that stage of the proceedings. It had been agreed at the outset that the executive and only the executive was to be removable upon impeachment and conviction. It was agreed early on that the grounds were to be two: treason and bribery. Providing for impeachment on the ground of treason was pretty much a reflex action, for treason had been involved in almost all the impeachments by the English, from whom Americans had derived the idea; though the Americans guarded against abuse by carefully and narrowly defining what constituted treason. Providing for impeachment on the ground of bribery was another matter of the delegates' having in mind a horrible example from history: as they were well aware, King Charles II of England had been bribed by Louis XIV of France, among the fruits of which was France's acquisition of Dunkirk, long an English possession.

As indicated, that was the way things stood at the beginning of September; but then, on Tuesday, September 4, a catch-all committee proposed a resolution, the brainchild of Pierce Butler of South Carolina, to establish the electoral college system. The scheme was cumbersome, even cockamamie, and it was greeted as such; but as the idea soaked in, the delegates came to realize that it overcame every objection that had been raised to every other proposed method of election, and with modification it was soon adopted.

Now, having devised a decentralized method of electing a president that they believed would make it difficult if not impossible for foreign governments to sway American presidential elections by influence or money, the delegates were willing to endow the office with considerably more power than before. In the next few days they did so.

Increasing the duties, responsibilities, and powers of the presidency necessitated an enlargement of the grounds for impeachment, for treason and bribery no longer covered all the president's constitutional activities. It is a fundamental principle of the Constitution, as articulated in *Federalist* 51, that to ensure balance and counterbalance, the greater the power given, the greater the mechanism needed for enforcing accountability. Accordingly, on September 8 George Mason of Virginia moved to add after "bribery" the words "or maladministration." Madison objected that the term was too vague, so Mason withdrew his motion and substituted "other crimes & misdemeanors against the state." The words "against the state" were subsequently changed to "against the United States," but in the final draft of the Constitution as drawn by the Committee of Style, those words were dropped entirely. That was a significant deletion, for had those qualifiers been retained, all impeachable offenses would have been limited to actions taken in the performance of public duties.

That left the grounds for impeachment as "Treason, Bribery, or other high Crimes and Misdemeanors." The phrase "high Crimes and Misdemeanors" had been the standard wording of English impeachments since the first such proceeding took place against the Earl of Suffolk in 1386, and that is doubtless why it readily came to Mason's mind on September 8, without thinking through precisely what it meant. As for the word misdemeanor, Raoul Berger had pointed out that at the time it was first used and for nearly a century thereafter, it was not a legal term: as the Oxford English Dictionary makes clear, it simply signified evil conduct or misbehavior.

It is sometimes said that "high Crimes and Misdemeanors" was a term of art, but that is not so. A term of art is a phrase that, whatever it may mean to laymen, has a precise and well understood meaning to practitioners of a particular art. By contrast, high crimes and misdemeanors had, according to the leading commentators, at least three different meanings. One was suggested by Sir William Blackstone's successor to the Viner lecturer at Oxford, Sir Richard Wooddeson, in his lengthy analysis of impeachment, namely that "high" meant crimes or misdemeanors of whatever seriousness committed by persons of a high station. The other readings turn upon whether the adjective "high" is meant to refer to both crimes and misdemeanors, or whether "high crimes" is one thing and "misdemeanors" is an-

other. If the latter is to be understood, then the sense of the clause is that the president is impeachable for Treason, Bribery, or other high crimes, as well as for misdemeanors. In *Federalist* 69, indeed, that is Hamilton's reading—he says high crimes *or* misdemeanors. That is also the reading I would give it, and my view seems to have been that of Americans in general at the time, as is attested by the fact that Delaware, which adopted a new constitution shortly after the United States Constitution was ratified, used the phrase high crimes *or* misdemeanors, and the new states that were soon admitted to the Union provided for impeachments for "any misdemeanor." Moreover, in the very first instance of impeachment, conviction, and removal from office of a federal official under the Constitution of the United States, that of District Judge John Pickering of New Hampshire in 1803, the high crimes and/or misdemeanors of which he was found guilty consisted of drunkenness in the courtroom.

But let us consider the matter more closely. The term High Misdemeanors did exist, and was in fact a term of art with a specific meaning. For enlightenment we must turn to Blackstone's *Commentaries on the Laws of England*, a work which as Madison said was "in every man's hand" and the one the Framers turned to when determining just what legal phrases meant. (Next to the Bible and Montesquieu, Blackstone was the most frequently quoted source in American political writing from 1760 to 1800.) Blackstone considers High Misdemeanor in Book IV, Chapter 9, "Of Misprisons and contempts." The word misprison derives from the Old French word mespris, meaning neglect or contempt; a misprison, Blackstone tells us, was a neglect or contempt against the state; a high misdemeanor was a positive misprison. He rings the changes on what these were, such as displays of violence in a courtroom, and he closes his chapter by describing a high misdemeanor as an "endeavor to dissuade a witness from giving evidence . . . or, to advise a prisoner to stand mute." At one point during the Convention in a different connection, it had been proposed to use the phrase high misdemeanor, but according to Madison's notes the words were struck out, "it being doubtful whether 'high misdemeanor' had not a technical meaning too limited."

Except in that restricted sense, to speak of a "high misdemeanor" is to speak nonsense: it is an oxymoron, for the definition of a misdemeanor is concerned with its minor quality. Again we may consult Blackstone. In Chapter 1 of Book IV he tells us that, "properly speaking," crimes and misdemeanors are "mere synonymous terms," but he goes on to say that "in common usage, the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprized under the gentler names of 'misdemeanors' only." The annotator of my 1793 edition of Blackstone, Edward Christian, adds the following note: "In the English law *misdemeanour* is generally used in contradistinction to felony, and misdemeanours comprehend all indictable offences, which do not amount to felony"; the first example he gives is perjury.

James Wilson, one of the Framers and a learned jurist, echoed Blackstone's definition. "A crime," he wrote in his *Lectures on Law*, 1790–1791, "is an injury, so atrocious in nature, or so dangerous in its example, that, besides the loss which it occasions to the individual who suffers by it, it affects, in its immediate operation or in its consequences, the interest, the peace, the dignity, or the security of the publick. Offences and misdemeanors denote inferiour crimes."

The eminent Supreme Court Justice Joseph Story, in his *Commentaries on the Constitution of the United States* (1833), went a step further, saying that impeachment "has a more enlarged operation" than merely high crimes and misdemeanors, "and reaches, what are aptly termed, political offences, growing out of personal misconduct."

Let me conclude with references to the observations of James Madison and Alexander Hamilton on the subject. Madison did not, of course, write of impeachment in the *Federalist Papers*; he left that to Hamilton. But Madison did speak to the subject in the First Congress, and his reading tends to bear out my own that high crimes was one thing and misdemeanors quite another. The context was a debate concerning the question, whether the approval of the Senate would be necessary for presidential removal of his appointees, as it was for their confirmation. Madison said on May 19, 1789, that "it was absolutely necessary that the President should have the power of removing from office: it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or [notice: or, not and] misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses." This also seems to broaden the grounds for impeachment to include misdeeds of one's subordinates.

As for Hamilton, his comments especially in *Federalist* 65 have been widely cited in the media and I shall not presume to recapitulate them here. But I would call

your attention to one passage. Impeachment, he wrote, was a political affair which "will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the preexisting factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of the parties, than by the real demonstrations of innocence or guilt."

Hamilton's words were prophetic, but in reviewing the impeachments that have actually occurred, I have been struck by how often large numbers of congressmen have been able to rise above partisanship and follow the dictates of reason and conscience. I pray that this committee and the House as a whole will follow that noble example.

Mr. CANADY. Professor Tribe.

STATEMENT OF LAURENCE H. TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD UNIVERSITY LAW SCHOOL

Mr. TRIBE. Thank you, Mr. Chairman, members of the subcommittee and committee. I certainly appreciate your invitation to testify, although I find this duty no more pleasurable than my friend Chuck Cooper does, given the subject.

Let me say, as a prefatory matter, that nothing I say here ought to be construed to reject the appropriateness of steps short of impeachment such as censure, about which I would be happy to answer any questions.

Nearly everyone who has studied the impeachment clause and its history, including, I think, every witness you have heard today, has concluded that criminal acts are neither necessary nor sufficient for impeachment, whose central purpose is not to punish, but to protect the functioning of our constitutional system from injury at the hands of Federal officials who turn against the Nation or who corrupt its processes. I think that much is clear from the constitutional text itself, "treason, bribery, or other high Crimes and Misdemeanors."

The decision to exemplify impeachable acts with two of the offenses most threatening to our system of government, treason and bribery, identifies the three great accuracies of impeachable conduct. The high level to which it must rise, and either the end, grave damage to the Nation, or the means, serious corruption of office and abuse of power, that it must entail.

I would like to digress just for a moment to address a beguiling, but I think fallacious, argument made by several witnesses today, including Richard Parker, Chuck McGinnis and Chuck Cooper. The argument was that if bribery is impeachable even when the official who made the bribe wasn't acting in an official capacity, as with an imaginary bribe paid by President Clinton to the judge presiding over the Paula Jones trial or made to Independent Counsel Starr, if you can imagine it, then perjury, for the same private purpose, should be impeachable, even when it occurs in an unofficial capacity.

The fallacy, I think, is that bribery always, by definition, involves the corrupt use of official government powers, the powers of whoever is getting bribed. The fact that the officer being impeached acted privately as the briber, and not publicly as the bribee, is irrelevant, because the person who bribes is a full partner in a grave corruption and abuse of government power.

I don't think that can be said of perjury, however serious. And I certainly think it is a serious offense, because if perjury succeeds, an indictable wrong has occurred, but it has occurred by concealing the truth from another government body and not by co-opting that body in a scheme to abuse power.

Now, returning to the impeachment clause itself, others have described how high crimes and misdemeanors entered the Constitution. The key point never to forget, I think, is that Delegate Mason offered that language specifically to meet James Madison's objection to the earlier proposal of Mason, the proposal to add "maladministration" to "treason" and "bribery. " And we shouldn't forget why he thought it necessary to add something; it was to reach what he called other attempts to subvert the Constitution. And Madison agreed that there were such other attempts, but objected that "maladministration" was too broad, too vague, and would make the President too much the creature of Congress.

Now, imagine how James Madison would have reacted to the brave new world of impeachment urged by Professors Parker, McGinnis and Presser. Treason, bribery, or conduct bearing negatively on the President's general fitness, his honor or his virtue. Those are wonderful aspirations; I share them. But to make them the basis for bringing down a President is to do exactly what the great Founder, James Madison, warned against.

Professor Parker urged you earlier today to be flexible, not to freeze-dry the impeachment standard into the mold of history. That may be wise advice when we are talking about broad limits on government power to protect private citizens like due process and equal protection. Many of you, I know, don't share my fidelity to an evolving, living Constitution even in that area, but surely, surely when that sort of laid-back jurisprudence of an amorphous Constitution is applied to the basic architecture of our government, it is a siren song for playing Russian roulette that protects us all from the perils of an enfeebled presidency. In that spirit, I don't think we can ignore what Professor Sunstein called "all the dogs that didn't bark," the things the House didn't impeach Presidents like Lincoln, Roosevelt, Truman, Johnson, Reagan and Bush for doing.

I also don't think we can ignore the pattern of impeachments voted by the House of Representatives from 1797 to the present. It is not hard to summarize them. There were only 15. One of a President, one of a Senator, one of a Secretary of War, 12 judges. Fourteen of those 15 cases involved either the gravest abuses of official power, like taking a bribe to use that power for personal benefit, or the most obscene attacks on our Nation and its system of government, like armed rebellion against the United States or military assault upon our allies. There were two cases of the 14 that involved perjury, but they actually dealt with perjury to cover up taking a bribe in a judge's official capacity.

The fifteenth case is the odd man out, I admit it. It involved Judge Claiborne's impeachment for perjury of the IRS—no bribery behind that one, no abuse of power, no demonstrable, wide-ranging attack on the country; but I think we have to listen to what Professor Gerhardt explained in the first panel.

The theme of that impeachment, its whole theory, was not that private improprieties can lead to impeachment whenever they cast a general cloud over the individual's fitness and virtue; it was that private improprieties can justify impeachment when it renders the individual fundamentally unable to carry out his or her official duties. It is not too hard to see, without opening a Pandora's box, that a judge convicted of perjury could not credibly preside over trials for the rest of his life, swearing in witnesses, imprisoning or sentencing to death some that he finds guilty.

Now, keep in mind, even if, as several have argued today, the standard for impeachment is the same for judges and for Presidents, and I believe it is, high crimes and misdemeanors, one form of which is gross abuse of power—even if the standard is the same, what constitutes an abuse of official power and what conduct cripples the officeholder's ability to discharge the duties and responsibilities of his or her office necessarily depends on what the office is. Letting partisan considerations affect one's decisions, for example, is always an impeachable abuse of power in a judge. Almost never would it be in a President.

So it is quite remarkable to me that after citing Judge Claiborne's impeachment for perjury before the IRS as a precedent for impeaching a President for perjury before a grand jury, the staff report makes only passing mention of the fact that the vote not to impeach President Nixon for perjury with the IRS included at least four votes by Members who reasoned that even if he were guilty of that felony, it wouldn't be impeachable because it did not involve an abuse of presidential power, grave injury to the Nation, or demonstrable obstruction of the President's ability to discharge the duties of his office. It would impair, surely, and shed negative light on his integrity, his believability, his virtue, but it would not make it impossible, the way it would have been for Judge Claiborne, for him to execute his office.

Now, of course, I will concede private offenses like murder would make continuation in office unthinkable for any official. But perjury unrelated to official duties isn't in that category.

Now, I take very seriously the President's oath to take care that the laws be faithfully executed. But that does not involve the hands-on presiding at trials where telling the truth under oath is the whole point. We have to remember that the President is unlike a judge who serves for life, but wields an authority that evaporates once his veracity can no longer be accepted. The President derives his legitimacy and his capacity to govern 4 years at a time from the electorate, and yes, some people did predict some months ago that a President could no longer lead the Nation or even govern if he had been caught lying under oath. Who would believe him? Knowing that he might, when he leaves office, be subject to prosecution for perjury, how could we govern?

The prediction seems to have been wrong, and I think that the American people, sophisticated or not, do compartmentalize lies about sex affairs and do not equate them with lies about affairs of state. The whole argument about the presidential oath and the Take-Care Clause of the rule of law which Chairman Hyde spoke about so eloquently a while ago, ultimately comes down to the proposition that if we let the Nation's chief law enforcer get away

with breaking the law, we will be unable to justify enforcing that law against anyone, and our whole legal system will break down. I call that, with all respect, the "chicken little" argument, "the sky is falling." I don't think any of us really believes it.

Keep in mind, as Representative Scott implied in questioning the first panel, everyone here agrees that not all felonies are impeachable. So it follows that the President's immunity from criminal prosecution while in office, if he is immune, would present the very same rule of law and take-care problems whether perjury and obstruction of justice by the President are deemed impeachable or not. And I don't think there is any basis to assume that the President would get away with it, that no one would bother to prosecute him at the end of his term. Even Judge Starr's jurisdiction would not necessarily have expired.

The idea, too, that what President Clinton has gone through could possibly inspire a rash of copycat perjuries seems wildly implausible to me, and if you buy that line of argument, let me underscore this. It would follow, since the theory would be that any law violation by a sitting President is a violation of his oath and of the take-care clause, it would follow that you can impeach the President of the United States more easily than any other civil officer of the government. And making the President uniquely vulnerable to removal, especially on a fuzzy standard like virtue, seems to me to be profoundly unwise. We have only one President at a time; we have 1,200 or 1,300 judges.

Removing a President, even just impeaching him, paralyzes the country. Removing him decapitates a coordinate branch. And remember that the President's limited term provides a kind of check, and if the check fails, he can be prosecuted when he leaves.

To impeach on the novel basis suggested here when we have impeached only one President in our history, and we have lived to see that action universally condemned; and when we have the wisdom not to impeach Presidents Reagan or Bush over Iran-Contra; and when we have come close to impeaching only one other President for the most wide-ranging abuse of presidential power subversive of the Constitution would lower the bar dramatically, would trivialize a vital check. It may be a caged lion, but it will lose its fangs if we use it too promiscuously and would permanently weaken the President and the Nation, leaving a legacy all of us in time would come to regret deeply.

And I apologize for not having quite managed the red light.

[The prepared statement of Mr. Tribe follows:]

PREPARED STATEMENT OF LAURENCE H. TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD UNIVERSITY LAW SCHOOL [1]

DEFINING "HIGH CRIMES AND MISDEMEANORS": BASIC PRINCIPLES

I am honored to have been invited to appear before this Subcommittee of the House Judiciary Committee to shed whatever light I can on the vitally important topic of "The Background and History of Impeachment." Although I will of course be willing to address whatever questions members may have regarding the application of my testimony to the particular case of President Clinton, I have understood my assignment to be a broader and antecedent one: to analyze how the Constitution requires Congress to approach the threshold issue of deciding what constitutes an

[1] For identification purposes only.

"impeachable" offense. Because so much has been written, and so much more has been said, about this topic, I have chosen to focus my comments on the basic principles that I believe should guide us in this endeavor, rather than to essay yet another detailed compilation of excerpts from the records of the 1787 Constitutional Convention, from accounts of the state ratification debates, from The Federalist Papers, from the commentaries of Blackstone and Story, from the 1974 Staff Report of the House Judiciary Committee on "Constitutional Grounds for Presidential Impeachment," and the like.

I begin with this historical note: Nearly a quarter of a century ago, the work of the House Judiciary Committee under the leadership of Representative Peter Rodino, in seeking to define impeachable offenses when dealing with a Republican President, set the stage on which the House Judiciary Committee under the leadership of Representative Henry Hyde plays out today's sober drama in dealing with a Democratic President. So too, what the Judiciary Committee does today in attempting to define impeachable offenses will set the stage on which future struggles over the possible impeachment of presidents to come, including presidents yet unborn, will be waged. Indeed, how this Subcommittee and ultimately the House of Representatives (and possibly the Senate) define impeachable offenses in this proceeding will play an important role not only on those occasions, hopefully rare, when the nation again focuses its energies and its attention on the possible impeachment and removal of a sitting president, but in the day-to-day life of the republic, shaped as it is by the strength or weakness of the presidential office, by the relationship between the executive and legislative branches, and by the kinds of people who feel called to public service and are willing to endure its rigors in whatever atmosphere of oversight—from the most positive to the most poisonous—awaits our public servants, including our presidents.

For this reason, it would be short-sighted indeed for any witness before this body, or for any member of Congress, to approach the task of defining "high crimes and misdemeanors" from a narrowly result-oriented perspective. To put it bluntly, anyone who would raise the bar on what constitutes an impeachable offense simply in an effort to save President Clinton, whether for partisan reasons or in a spirit of genuine patriotism, may live to regret the abuses by future presidents that might be unleashed were we to establish a precedent making it too difficult—more difficult than the Constitution, rightly understood, contemplated—to remove a president whose misuse of the awesome powers of that office endangers the republic. And, conversely, anyone who lowers the bar on what constitutes an impeachable offense simply in an effort to "get" President Clinton, whether for partisan reasons or in a spirit of equally genuine patriotism, may live to regret the abuses by future congresses, and the resulting incapacity of future presidents, that might just as easily be unleashed were we to establish a precedent making it too easy—easier than the Constitution contemplated—to remove a president simply because, as in a parliamentary system, the legislature has come to disagree profoundly with his or her public policies or personal proclivities and has thus lost confidence in the President's leadership.

For these reasons, and because I—like many others who have expressed grave doubts about the propriety of using the impeachment device to deal with what President Clinton is alleged to have done—hold no brief for the President's behavior and regard it as both inexcusable and worthy of condemnation, I believe the situation in which we find ourselves contains powerful, built-in safeguards—safeguards that ought to function well to prevent all people of good will from artificially making the category of impeachable offenses too narrow *or* too broad. Not knowing whose ox might be gored in the long run by an error in either direction, anyone who takes the task ahead with the seriousness its nature demands will necessarily proceed under what the philosopher John Rawls famously described as a veil of ignorance[2] that can help us all go forward in a manner sufficiently focused on the long run and insulated against the temptations of short-term rewards and punishments.

With that preface, I turn to the principles that I believe ought to guide the search for the appropriate definition of impeachable offenses.

1. Because Congress has the last word in defining what constitutes an impeachable offense, it is more important, not less, that Congress get it right

It appears to be common ground that judicial review would be unavailable to check the House or the Senate in their definitions of high crimes and misdemeanors under Article II, Section 4 of the Constitution. The Supreme Court held in *Nixon* v. *United States,* 506 U.S. 224 (1993)—in a case involving former federal judge Walter Nixon—that Article I, Section 3, clause 6, which says "[t]he Senate shall have

[2] *See* John Rawls, A Theory of Justice 12 (1971).

the sole Power to try all Impeachments," precludes Supreme Court review of whether the Senate, rather than sitting as a jury of 100, may instead delegate the task of hearing and reporting evidence to a committee. It would almost surely follow that Article I, Section 2, clause 5, which says "[t]he House of Representatives . . . shall have the sole Power of Impeachment," precludes Supreme Court review of whether the House has proceeded on a definition of impeachable offenses that is too lax or too strict. Nor is it at all plausible that the Chief Justice, who under Article I, Section 3, clause 6, "shall preside" when the "President of the United States is tried," would control the Senate's definition of an impeachable offense.

Thus, Congress is essentially on its own in this vital realm. But that is not to say that the deliberately political process of impeachment that the framers left unpoliced by judicial overseers is not bound by the Constitution—by what it says as to impeachable offenses, and by what it means by what it says. Article VI provides that all Senators and Representatives "shall be bound by Oath or Affirmation, to support this Constitution." That duty is not relaxed whenever the judiciary is not on guard; it is heightened. Any solace that members of either the House or the Senate may sometimes take, in voting for a measure of contested constitutionality, that the Supreme Court will step in and save them from constitutional error if they are wrong—solace that I have elsewhere argued is inappropriate even when judicial review is in fact available to conduct just such a rescue mission[3]—is manifestly unavailable here. Err here, and live forever with the consequences, for no judge will appear as a deus ex machina to set the constitutional system straight. Thus, the statements sometimes heard to the effect that an impeachable offense is whatever the House and Senate say it is[4] are true only in the most cynical and constitutionally faithless sense. If those statements mean that Congress can "get away with murder" in this sphere, they are literally correct. But there are consequences to be suffered from defying the Constitution, even if those consequences do not include being reversed by judges. And if those statements about impeachable offenses being a content-less category, a mere mirror for the preferences of members of the House and Senate, mean that Congress simply is not constrained by the Constitution in this matter, then those statements are flatly false. Congress is indeed constrained, even if the only enforcer of that constraint is its own conscience.

This first principle has one significant corollary. When we say it is important that Congress get it right, and even more important because no court stands guard to keep the balance true, we should realize that we are speaking not simply of the Senate, whose task it is to try impeachments brought to it by this body, but of the House as well. Some have suggested that, because it will fall to the Senate, in any case where this body returns a bill of impeachment, to make a final judgment as to whether something the House deems impeachable is in fact impeachable, the House is somehow relieved of the full burden of having to decide the issue for itself. Passing the buck to the Senate—impeaching because one thinks what the accused official did might well be deemed impeachable—would be a profoundly irresponsible breach of the duty laid upon this body by Article I.

The prospect of a trial in the United States Senate, regardless of which federal officer is in the dock, cannot be equated with the prospect of an ordinary trial, civil or criminal, in the courts of law. When the Senate is enlisted to perform this unique task, not even delegating part of its work to a committee can obscure the inevitable distraction from the Senate's normal and proper functions in the lawmaking process. And when the Senate is asked to perform this task in the special case of a sitting president, both the distractions from its legislative role and the consequences for the nation as a whole, internationally as well as domestically, are monumental. The one occasion on which the Senate sat in judgment on a president, in the trial of Andrew Johnson,[5] provided just a foretaste of the far greater distractions and divisions that such a trial in the modern era would entail, whatever its outcome.

This is not to say that the House should shrink from impeaching a president where impeachment is called for; it is to say, however, that the consequences of passing the matter off to the Senate in order to send a message of disapproval or otherwise to avoid seeming to condone presidential misbehavior are far too grave to make that an acceptable option. If members of this body believe the President should be censured, mechanisms to achieve that end are available. If members believe the President should be criminally prosecuted, that remains an option after he leaves office. But allowing uncertainty over whether these other modes of account-

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[3] *See, e.g.,* Laurence H. Tribe, *American Constitutional Law* 16 (2d ed. 1988).

[4] *See, e.g.,* 116 Cong. Rec. H11913 (daily ed. Apr. 15, 1970) (statement of Rep. Gerald Ford). But four years later, Gerald Ford, as Vice President, said he could find no valid grounds to impeach President Richard Nixon. *See* Philip Shabecoff, *N.Y. Times*, at 1 (Jan. 16, 1974).

[5] *See generally* William H. Rehnquist, *Grand Inquests* 143–274 (1992).

ability will be brought to bear in a timely and effective way to tempt one into voting to impeach where there has been no high crime or misdemeanor, taking refuge in the confidence that the Senate will not muster the requisite two-thirds vote to convict, would set a horrific precedent—and would punish the entire nation in order to administer punishment to the President. I would urge every member to focus not on what we should do to Bill Clinton but on what impeaching Bill Clinton would do to the country—and to the Constitution. To that end, it is vital that the House get it right, and not rely on the Senate to come to the rescue.

2. Getting it right means taking seriously exactly what the Constitution says on the subject, as well as the context in which the Constitution says it

When we look at the words of Article II, Section 4, telling us that the offenses for which presidents or any other civil officers of the United States may be impeached and, on conviction, removed from office, we encounter the curious phrase—familiar today only because we have all been steeped in this business for some time—"high Crimes and Misdemeanors." To take those words and their context seriously, it is essential that we not stop with the easy observation that they are theoretically capable of various definitions, that they have fuzzy boundaries, that not everybody agrees exactly on what they mean, and that they might indeed mean big crimes and little ones. Neither writing a constitution nor reading and applying one is a merely theoretical exercise. Yes, those words *could* mean any of a number of things, but the fact that this is the case with many, perhaps all, constitutional provisions does not give us license simply to fill in the meanings we find most pleasing.

We deal in the Impeachment Clause with one of the Constitution's architectural cornerstones. It identifies a key feature of the Constitution's structure, and of the form of government the Constitution created. As I, and many others, have argued in other settings, constitutional provisions of this structural sort are the least likely candidates for translation into open-textured, highly fluid, norms and ideals.[6] Unlike the Constitution's command that no state deprive anyone of "liberty" without "due process of law," for example—a command that is famously flexible and whose content has evolved, many of us think quite properly, with the changing times—the provision stating the circumstances in which federal officials, including presidents, may be impeached, convicted, and removed from office ought to be given as fixed and firm a reading as the logic of the situation permits. The basic criteria for what makes something a "high crime" or "misdemeanor" in the impeachment context should not be permitted to "morph" with the ebb and flow of attitude and opinion—although, of course, as times change the set of acts that might represent abuses of power or assaults upon the state might change as well.

Some, though not I, think that at least the criteria for what makes something fit into a given constitutional category should be constant over time for *every* part of the Constitution, properly construed;[7] for them, it should be true a fortiori for the Impeachment Clause. For the rest of us, the important point is that the clause defines not simply the rights of individuals but the very design of the government on which we must, in the end, rely to defend those rights. To raise or to lower the impeachment bar as time goes on is to move the nation closer to an imperial presidency or to a parliamentary system, depending entirely on which way the impeachment winds are blowing. But those are not changes we should make casually or as the accidental byproducts of steps taken for entirely different reasons. If it is a parliamentary system people want, or something closer to such a system than we have had for two centuries, then amending the Constitution to achieve such a system or an approximation thereto is the only constitutionally proper course. Weakening the presidency through watering down the basic meaning of "high Crimes and Misdemeanors" seems a singularly ill-conceived, even a somnambulistic, way of backing into a new—and, for us at least, untested—form of government.

What, then, did "high Crimes and Misdemeanors" mean when those words were inserted into the Constitution? The surrounding text gives us more than a slight clue, for the words are embedded in the larger phrase, "Treason, Bribery, or *other* high Crimes and Misdemeanors." The word "other" is a dead giveaway: high crimes and misdemeanors are offenses that bear some strong resemblance to the flagship offenses listed by the framers—treason and bribery. That the framers' choice of words here was entirely deliberate is most clearly shown by the fact that, when it came to the very different question of which offenses would be subject to interstate extradition, the framers began with the categories "treason, felony, or high mis-

[6] *See* Laurence H. Tribe, *Taking Text And Structure Seriously: Reflections On Free–Form Method In Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1245–1248 (1995).

[7] *See, e.g.*, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38–47, 133–43 (1997)(dialogue with L. Tribe).

demeanor,"[8] but ended by replacing the phrase "high misdemeanor" with the phrase "other crime,"[9] which evidently seemed more appropriate in a constitutional provision—Article IV, Section 2, clause 2—dealing not with abuse of power or subversion of the constitutional order but with ordinary common-law or statutory crime. That alone should tell us that reading Article II's reference to "high Crimes and Misdemeanors" as some sort of shorthand for major and minor criminal offenses, or even as shorthand for felonies—that is, for the most serious crimes—would be a mistake. When the Constitution's authors meant to identify a particularly serious category of crime, they knew just how to do it. Thus, not only does the Interstate Extradition Clause speak of persons "charged in any State with Treason, Felony, or other Crime," but the Privilege from Arrest Clause speaks of congressional immunity from arrest during attendance of a congressional session "in all Cases, except Treason, Felony and Breach of the Peace." Article I, Section 6, clause 1. And the Grand Jury Clause of Amendment V guarantees "a presentment or indictment of a Grand Jury," with certain military exceptions, whenever a person is "held to answer for a capital, or otherwise infamous crime."

It follows that "high Crimes and Misdemeanors" cannot be equated with mere crimes, however serious. Indeed, it appears to be all but universally agreed that an offense need not be a violation of criminal law at all in order for it to be impeachable as a high crime or misdemeanor. A president who completely neglects his duties by showing up at work intoxicated every day, or by lounging on the beach rather than signing bills or delivering a State of the Union address, would be guilty of no crime but would certainly have committed an impeachable offense. Similarly, a president who had oral sex with his or her spouse in the Lincoln Bedroom prior to May 23, 1995 (the date on which D.C. Code Ann. 22–3502 was repealed),[10] or in a hotel room in Georgia,[11] Louisiana,[12] or Virginia[13] at any time, would be guilty of a felony but surely would have committed no impeachable offense.

And that brings us back to the word "other." What distinguishes certain offenses as "high Crimes and Misdemeanors" must be *not* the fact that serious crimes are involved but the fact that those offenses are similar, in ways relevant to what the devices of impeachment and removal are for, to treason and bribery. But that in turn means that, like treason and bribery, high crimes and misdemeanors, as terms of art, must refer to major offenses against our very system of government, or serious abuses of the governmental power with which a public official has been entrusted (as in the case of a public official who accepts a bribe in order to turn his official powers to personal or otherwise corrupt ends), or grave wrongs in pursuit of governmental power (as in the case of someone who subverts democracy by using bribery or other nefarious means in order to secure government office and its powers, or in order to hold onto such office once attained). And, sure enough, even a cursory examination of the precise history of the phrase "high Crimes and Misdemeanors," and of the path that phrase took as it found its way from 14th century England into the Constitution of the United States in the summer of 1787, confirms that understanding of what the words meant.

3. Getting it right requires paying close attention to the historic evolution of the Impeachment Clause

The story is a lengthy one, but its relevant elements can be set forth briefly. The Constitutional Convention wrestled with various formulations of the grounds for impeaching and removing federal officials, starting out with phrases that focused on the abuse or non-use of official power—phrases like "malpractice and neglect of duty"[14] and oscillating between variants that would have precluded impeachment and removal altogether in the case of the president,[15] and variants that leading del-

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[8] 2 Max Farrand, *The Records of the Constitutional Convention of 1787* 174 (1911).

[9] *See id.* at 2:443.

[10] *See* D.C. Law 10–257, § 501(b), 42 DCR 53.

[11] *See* Ga. Code Ann. § 16–6–2 (criminalizing oral sex and expressly excluding marriage as a defense).

[12] *See* La. Rev. Stat. Ann. § 14:89 (criminalizing "unnatural carnal copulation" and making no exception for married couples); *State* v. *Phillips,* 365, So.2d 1304, 1308 (La. 1978) (holding that the statute includes oral sex).

[13] *See* Va. Code Ann. § 18.2–361 (criminalizing oral sex and making no exception for married couples).

[14] 1 Max Farrand, *The Records of the Constitutional Convention of 1787* 78 (1911).

[15] Although no surviving draft would have eliminated presidential impeachment altogether, that option was favored by Charles Pinckney of South Carolina, among other delegates. *See id.* at 2:64–69.

egates such as James Madison feared would reduce the president to a creature of the legislature.[16]

By late July 1787, the Committee of Detail had settled on "treason, bribery, or corruption" instead of "malpractice and neglect of duty,"[17] and shortly thereafter the reference to "corruption" was dropped.[18] On September 8, George Mason of Virginia objected that "treason and bribery" was too narrow.[19] That pair of words nicely captured the possibility that sufficiently grave assaults on the state, like high treason, might be carried out by a public official not through misuse of his official powers but in a traitorous sort of moonlighting—shades of Aaron Burr come to mind, and of Jonathan Fassett, the Vermont assemblyman impeached by a state legislature in the colonial period for leading a mob that attempted to shut down a county court.[20] What, then, was missing? Not, apparently, room to multiply the examples of conduct injurious to the state but not involving abuse of official power. For Mason's proposed remedy for the narrowness he perceived was the addition of the term "maladministration,"[21] a term clearly limited to conduct involving improper use of the powers entrusted to a public official. Mason's argument for adding maladministration to treason and bribery was straightforward: There might be "attempts to subvert the Constitution" that would not fit the definitions of treason or of bribery but would nonetheless imperil the republic.[22]

James Madison did not disagree with Mason's reason for going beyond treason and bribery; he objected only to Mason's proposed solution in the notion of maladministration. And he objected not because he thought that notion too narrow, believing that conduct other than abuse of power should be impeachable, but because he feared that the breadth and vagueness of Mason's proposed addition would reduce the Executive to serving "during the pleasure of the Senate."[23] Mason then countered with an alternative borrowed directly from 14th century England: "other high crimes and misdemeanors against the State," which passed without debate (at least without debate recorded by Madison) by a vote of 8–3.[24] Immediately thereafter, "State" was replaced by "United States,"[25] which was in turn dropped without explanation by the Committee of Style when, on September 12, it reported the final language of the Impeachment Clause: "Treason, Bribery, or other high Crimes and Misdemeanors."[26]

There is no evidence that the deletion of the phrase "against the United States" was meant to do anything but eliminate a redundancy; the deletion appears to have been not substantive but stylistic, inasmuch as the very concept of "high Crimes and Misdemeanors," which when first used as early as 1386[27] denoted political crimes against the state, contained within its four corners the requirement that the system of government itself be the target of the wrong. Blackstone notes that the use of the word "high" in the context of treason implied not simply a more significant offense—as in the notion of a major rather than a minor crime—but, rather, an injury to the crown, distinguishing it from "petit treason," which involved betrayal of a private person.[28] For sufficiently grave abuses of official power—abuses entailing encroachment on the prerogatives of another branch of government or usurpations of the power of popular consent and representation—serious injury to the state seems implicit in the abuses themselves. But such injury to the state or, what amounts to the same thing, to the constitutional structure, may in exceptional cases be brought about by means other than an abuse of power entrusted to a public official. The judge or private citizen who lends support to an enemy engaged in an attack on the nation, or who leads a private mob in an attempted coup, does not abuse official power but threatens grave injury to the state, either in an act of treason or in what is surely "[an]other high Crime[] and Misdemeanor[]."

Although in the English practice impeachment was not even restricted to officeholders, much less to official misdeeds, and although the English practice did not limit penalties to removal from office and disqualification from further officehold-

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[16] *See id.* at 2:550.
[17] *See id.* at 2:172.
[18] *See id.* at 2:495.
[19] *See id.* at 2:550.
[20] *See* Peter Charles Hoffer and N.E.H. Hull, *Impeachment in America, 1635–1805* 84–85 (1984).
[21] *See* 2 Max Farrand, *The Records of the Constitutional Convention of 1787* 550 (1911).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *See id.* at 2:545.
[26] *Id.* at 2:600.
[27] *See* 1 *Cobbett's Complete Collection of State Trials* 89–91 (1809).
[28] *See* 4 Sir William Blackstone, *Commentaries on the Laws of England* 75 (15th ed. 1809).

ing,[29] the American colonies, and later states, reacted against the enormous concentration of power in the legislature that borrowing these features of parliament's impeachment authority would entail. Influenced by the writings of John Adams and others, American states transformed impeachment by restricting it to officeholders, limiting it essentially to official misdeeds, and confining the punishment to removal and disqualification.[30]

Against this background, it apparently did not occur to the framers or ratifiers that some sufficiently monstrous but purely private crimes against individuals might require impeachment and removal of the criminal in order to safeguard the government and the people it serves. The ratification debates, like the debates at the Constitutional Convention, focused solely on high offenses against the state and on grave abuses of—or gravely culpable failures to use—official power. Thus, when Vice President Aaron Burr killed Alexander Hamilton in a duel in July 1804, leading to Burr's indictment for murder in New York and New Jersey,[31] Burr served out his term, which ended in early 1805, without any inquiry in the House of Representatives as to whether his murder of Hamilton might be an impeachable offense! Indeed, rather than urging their colleagues in the House to consider returning a bill of impeachment, eleven U.S. Senators wrote to the governor of New Jersey asking him to end the prosecution of the flamboyant Vice President, so as "to facilitate the public business by relieving the President of the Senate from the peculiar embarrassments of his present situation, and the Senate from the distressing imputation thrown on it, by holding up its President to the world as a common murderer.[32]

Today, I would suppose, the specter of being governed by "a common murderer"—and of the United States being held up to the world as a nation so governed—would lead at least some students of the English and colonial history to question whether the remedy of impeachment and removal must be withheld even from the most heinous of crimes, at least when committed by a sitting president, simply because the crime in question involved no abuse of presidential power and did not in itself endanger the nation as a polity. There may well be room to argue that the very continuation in office of a president who has committed a crime as heinous as murder, and who under widely accepted practice is deemed immune to criminal prosecution and incarceration as long as he holds that office, would itself so gravely injure the nation and its government that such a president's decision not to resign under the circumstances amounts to a culpable omission and thus an abuse of power and that, in any event, the fact that such a president's continuation in office was itself gravely injurious to the nation would transform his remaining in office, if not the murder he committed, into an impeachable offense.[33]

4. Exceptions to the general rule that an impeachable offense must itself severely threaten the system of government or constitute a grievous abuse of official power or both must not be permitted to swallow that rule

Both the text and the context we have examined, and the history of the phrase the framers used, preclude any casual movement from something like the example of murder committed by a sitting president to any broad notion that all serious crimes—say, felonies involving the administration of justice—are impeachable even if they are not committed through an abuse of the official powers entrusted to the alleged criminal, and even if their commission does not genuinely threaten the nation and its system of government.

It is always possible to argue, when confronted by a serious crime, that the system would crumble if everyone followed the wrongdoer's example. If everyone took President Richard Nixon's allegedly false filing of tax returns under oath, including backdating of documents, as a model to emulate, the nation's tax system, and thus its defenses, would crumble. Yet there was no realistic basis to suppose that the Nixon example would start any such stampede, and the simple proposition that, if all did as Nixon had done, the consequences would be catastrophic did not mislead the House Judiciary Committee into treating the President's alleged tax evasion as an impeachable offense: By a vote of 26–12, the Committee soundly declined to treat it as such.[34] Similarly, it is important to see the fallacy in the alluring argument that every instance of perjury, or of witness tampering, or of conspiracy to suppress

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[29] *See* Peter Charles Hoffer and N.E.H. Hull, *Impeachment in America, 1635–1805* 67 (1984).
[30] *See id.* at 64–67.
[31] *See* 1 Milton Lomask, *Aaron Burr: The Years from Princeton to Vice President, 1756–1805* 353–361 (1979). The New York murder indictment was quickly replaced, for want of jurisdiction, with the misdemeanor of uttering and sending a challenge. *See id.* at 357–58.
[32] Charles Biddle, *Autobiography of Charles Biddle* 308 (1883) (*quoting* the letter).
[33] *See* Charles L. Black, *Impeachment: A Handbook* 39 (1974) (advancing a similar argument).
[34] *See* Sam J. Ervin, Jr., *The Whole Truth: The Watergate Conspiracy* 282 (1980).

evidence relevant to a civil proceeding or to a grand jury, significantly injures the legal system itself and thus the nation because, if everyone did it, the system obviously could not function. It is no doubt true that, if perjury and witness tampering became the order of the day, our government would be severely hurt. But if that were the test—if an offense became impeachable even when it entailed no abuse of the offender's official position and caused no grave injury to the nation provided one could argue that such injury would ultimately occur if the offense became not exceptional but universal—then the carefully crafted safeguards against legislative hegemony and presidential weakness hammered out at the Constitutional Convention would amount to nothing. Find a sitting president guilty of some offense that, if universalized, would bring down the system—or maneuver the president into committing some such offense—and one would, under the hypothesized test, have a solid basis for removing that president from office. These "sky is falling" arguments disrespect not only the Constitution's text and history; they disrespect common sense.

5. The Take Care Clause and the Presidential Oath of Office cannot properly be invoked so as to make the President of the United States more vulnerable to impeachment, conviction, and removal from office than other federal officials

We have already seen that the commission of a crime, whether state or federal, is neither a sufficient nor a necessary element of an impeachable offense. Indeed, the words "high Crimes and Misdemeanors" had little or nothing to do with the criminal law at the time they were incorporated into Article II of our Constitution; the term "misdemeanor" was not even employed in the criminal context, where it now connotes a minor offense, until centuries after the English period from which the framers borrowed it.[35]

All of that is true, some say, but the presidency is unique. The President alone takes a special oath whose every word is prescribed by the Constitution, an oath "faithfully to execute the Office of President of the United States and . . . to the best of [his or her] Ability, preserve, protect and defend the Constitution of the United States." Article II, Section 1, clause 8. Beyond that oath, the President is enjoined by Article II, Section 3, clause 1 to "take Care that the Laws be faithfully executed." Thus, if the President should commit a federal crime—not, it might be noted, a crime like murder, which typically violates only state law—he or she will have failed to carry out the duty imposed by the Take Care Clause and, in a sense, will have violated his or her oath "faithfully to execute" the office.

Candor requires the concession that, for anyone who has not thought carefully about the Impeachment Clause and the consequences of this way of reading it, this line of argument has a beguiling simplicity and a down-to-earth appeal. But if this argument were to carry the day, it would follow that President Nixon should indeed have been impeached for filing a false tax return, and that presidents generally are in the unique position of being subject to impeachment and removal whenever it becomes possible to pin a federal offense—any federal offense—on them. Yet it simply cannot be the case under our Constitution that removing a sitting president should be easier, not harder, than removing a vice president, a cabinet officer, or a sitting federal judge. After all, the Constitution itself expressly recognizes the special gravity of what we do when we even *try*, much less remove, a president: It puts the Chief Justice of the United States in the chair to preside over the trial, something it does not do when any other federal officer, including the Vice President, is impeached and put on trial in the Senate. And, beyond this express recognition of how much is at stake, there is the brute fact that only when we put the President on trial are we placing one federal branch in a position to sit in judgment on another, empowering the Congress essentially to decapitate the Executive Branch in a single stroke—and without the safeguards of judicial review. Neither of the other two branches of the national government is embodied in a single individual, so the application of the Impeachment Clause to the President of the United States involves the uniquely solemn act of having one branch essentially overthrow another. Moreover, in doing so, the legislative branch essentially cancels the results of the most solemn collective act of which we as a constitutional democracy are capable: the national election of a president. To suggest that, having deliberately rejected parliamentary supremacy at the founding of our republic, we should now embrace a theory that would make the President the most vulnerable of all federal officials to the drastic remedy of impeachment and removal—truly the political equivalent of capital punishment—is preposterous.

None of this is to say that the Take Care Clause is unimportant, or that presidential abuse that rises to an impeachable level might not take the form of a viola-

[35] *See* 2 Sir William Holdsworth, *A History of English Law* 357, 365 (4th ed. 1982).

tion of that clause. Of course it might. Certainly, a president who ordered the IRS to stop collecting federal income taxes for six months as part of his reelection campaign, or the FDA to stop enforcing the laws against marijuana use because he was philosophically opposed to the regulation of marijuana or because he was widely known to have used it as a youth and feared accusations of hypocrisy, would have committed an impeachable high crime or misdemeanor of the most dramatic sort by shredding his obligation to execute the laws of the country. But that is a far cry from what occurs if a president personally violates several related federal criminal laws in the course of trying to cover up an embarrassing sexual affair, without turning any executive agency into an instrument of the president's wrongful conduct or otherwise abusing the powers of the presidency or working grave injury to the nation and its government.

APPLYING THESE PRINCIPLES

It may be useful to contrast the conclusion that presidential misconduct even involving such offenses as perjury may, depending upon the circumstances, involve no abuse of official power and no serious harm to the system of government and hence no impeachable offense, with the potentially impeachable offenses that might have been uncovered—and might yet be uncovered—in the areas of inquiry with which the Office of Independent Counsel began its investigations of President Clinton more than four years ago. Thus, it remains theoretically possible that the President might be found to have committed impeachable offenses if there were convincing proof that he was personally connected to the allegations involved in "Filegate," where it is said that the White House procured some 400 FBI files on members of the Reagan and Bush administrations.[36] Clearly, a president who deliberately uses an executive agency to seek "dirt" on political opponents is abusing presidential power to undermine the political processes established by the Constitution and thereby cause the most serious injury to our constitutional system. There might even be circumstances in which a president, by deliberately looking the other way with a wink and a nod while lower executive officials performed such nefarious work while maintaining maximum plausible deniability for their chief, would have committed an impeachable violation of the Take Care Clause.

Similarly, if President Clinton were responsible for the abuses alleged in Travelgate, in which seven members of the White House travel office were fired in 1993 apparently to make room for a distant cousin of the President,[37] one might at least make a forceful argument that, despite the absence of serious harm to the nation as a whole, such corrupt misuse of presidential power would be so close to bribery that it too should qualify as a high crime and misdemeanor. So too if President Clinton had induced the Pentagon or The White House to break the ordinary hiring rules for that agency in order to find a sinecure for a young intern in exchange for her willingness to file a false affidavit.

But none of these things, and nothing truly comparable, has been alleged against President Clinton. Even if, for example, he arranged a job for the young woman in question at a private firm in the expectation that she would then be less likely to contradict his denial of any improper sexual affair, neither an abuse of presidential power as such, nor conduct demonstrably injurious to the nation, would have occurred, and impeachment would accordingly be improper.

The strongest case for identifying an impeachable offense in the allegations currently pending against the President is probably to be found in the claim that he committed perjury before the grand jury or obstructed its work not simply to avoid personal embarrassment and indictment for a private wrong (in the form of prior false statements under oath in a civil deposition into which the President felt he had been trapped), but to avoid a constitutional check by staving off impeachment—even if the impeachment he sought to avoid would in fact have been unwarranted. If it could be shown that President Clinton deliberately sought to usurp the impeachment power of Congress—part of which had been delegated through the Independent Counsel Act to the grand jury in this matter—by preventing the referral called for in that Act from containing a full account of his own prior conduct, then at least the outlines of a high crime or misdemeanor might be visible.[38] But attrib-

[36] *See* John F. Harris & George Lardner, Jr., *Key White House Figure in FBI Files Case on Leave*, Wash. Post, at A1 (June 16, 1996).

[37] *See* Ann Devroy & Micheal Isikoff, *Clinton Staff Went Past Reno to FBI*, Wash. Post, at A1 (May 25, 1993).

[38] *See* Report of the House Judiciary Committee, *Impeachment of Richard M. Nixon, President of the United States,* Report No. 93–1305, at 188 (Aug. 20, 1974) (third article of impeachment)

Continued

uting to the President such a constitution-subverting program, rather than the more straightforward effort to minimize embarrassment and reduce the risk of criminal indictment, seems implausible and indeed unfair.[39] And, even assuming such an impeachment-triggering scheme, the threat of substantial harm to the nation that would be required to establish a high crime or misdemeanor is nowhere to be found.

Applying the principles set forth in this statement, therefore, I would be hard pressed to find in anything that has been alleged against President Clinton thus far a defensible basis to impeach and remove a president from office. What other options might be available to Congress in these circumstances, where the President himself has conceded that he behaved indefensibly, is beyond the scope of this statement. So too is the question whether, if indeed the public is tired of this whole matter and believes that the President has been made to suffer enough for his sins, Congress has some sort of obligation to let the matter rest.

One thing is clear in the latter regard: Anyone who insists that Congress has the converse obligation—an obligation, having taken up the impeachment cudgels and begun to wield them in a setting that might on reflection prove ill-suited to such drastic remedies, to pursue this course to the bitter end—is mistaken. Just as ordinary prosecutors have discretion not to push their power to the outer limits, and not to take to trial someone they believe it would serve no useful purpose to pursue further, so too the House of Representatives, entrusted by Article I, Section 2, clause 5, with the "sole Power of Impeachment," has discretion—even more clearly than does the average prosecutor—to cease and desist rather than pressing on. Article II, Section 4 contains only one mandatory provision: It mandates that the President or any other federal officer "*shall* be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." If the Senate convicts, there is no room for clemency; the convicted offender must be removed. But that is the only "must" in the picture.

Some argue that, at least if something that might technically fit the definition of a high crime or misdemeanor is believed to have been committed by the President, the House has a "duty" under the Constitution to impeach the president and hand him over to the Senate for trial. But there is no more in the Constitution to support that argument than there is to support the argument that, having begun a formal impeachment inquiry, the House must see the matter through. The Constitution, in this matter as in many others, leaves ample room for judgment, even for wisdom, in the deployment of power. What it leaves no room for is the impeachment of a president who has not committed "Treason, Bribery, or other high Crimes and Misdemeanors."

Mr. CANADY. Professor Bloch.

STATEMENT OF SUSAN LOW BLOCH, PROFESSOR OF CONSTITUTIONAL LAW, GEORGETOWN UNIVERSITY LAW CENTER

Ms. BLOCH. I want to start by thanking you for the privilege of being here on a very serious and solemn occasion, deciding on what basis the House of Representatives can impeach the President of the United States. In addressing this question, I think there are several fundamental principles on which I believe most constitutional scholars agree.

First, as has been stated, we obviously start with the Constitution, and I don't think that the phrase, what is a high crime and misdemeanor is whatever a majority of the House thinks it is, notwithstanding Gerald Ford's famous statement when he was in the House. The framers of the Constitution, as has been indicated, spent a considerable amount of time debating and formulating the

(alleging that Nixon had assumed "to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives").

[39] President Nixon's conduct in thwarting the work of the House Judiciary Committee involved efforts to conceal his own involvement in "actions demonstrated by other evidence to be substantial grounds for impeachment of the President," *id.*, something that could not be said of any possible thwarting of the grand jury's inquiry by President Clinton, and something for which no explanation extrinsic to the Executive-Legislative clash could be offered.

standard for impeachment and met the standard. They chose to have a limiting effect on the scope of impeachable conduct.

Before a Representative votes to impeach, he or she must determine whether the alleged misconduct in fact constitutes treason, bribery or other high crimes and misdemeanors. That does not mean that I believe the court will or should review the House's decision. I don't think courts would, or should, but I do think that the Members of the House, if they are acting constitutionally and conscientiously, should impeach not merely if they are offended by the President's conduct, but only if they conclude that, in fact, his actions constitute treason, bribery or high crimes and misdemeanors, and therefore warrant potential removal from office.

It seems to me clearly wrong to ask that the inquiry is not whether the President is fit or unfit for office. It is clearly not the terminology adopted by the Constitution, it is much too broad and amorphous. I agree that a President who does commit treason, bribery or other high crimes and misdemeanors is unfit for office, but those are the only actions for which he can be impeached and removed by the Congress. Any other transgressions which some believe might make him unfit for office are to be judged not by the Congress, but by the electorate.

I cannot stress enough the fact that the framers deliberately rejected a parliamentary system and that if we lower the bar of what constitutes and warrants impeachment, we will be moving unconstitutionally toward a parliamentary system. Obviously, if the country wants to move in that direction, it can do so, but only by a constitutional amendment, not by transforming the remedy of impeachment.

Second, I believe the decision to impeach that you are making here is enormous, and the precedential effects of whatever you do will be felt forever. For this reason, in deciding whether or not to vote out articles of impeachment, it is not enough for you to say, well, it is a close question, and let's just send it to the Senate and see if they decide to convict and remove the President. In my opinion, that would be an irresponsible vote.

Impeachment, as you know, is a monumental event. The vote to decide to impeach starts us down a track, the end result of which can be the removal of the President, the democratically elected head of one-third of the Federal Government. By giving the House the sole power to impeach, the Constitution anticipates not only that the House has discretion to decide whether to impeach, but that it will exercise that discretion responsibly, will exercise that responsibility carefully and conscientiously.

Third, in deciding whether particular actions constitute high crimes and misdemeanors, we have to pay close attention to the text, and you have heard a lot about that, and I will just summarize briefly. The fact that the Constitution specifically enumerates treason and bribery as the quintessential impeachable offenses suggests that impeachable wrongs are those that undermine the state or our constitutional system. As others have indicated, it is acts by which the President or another civil officer misuses his office to undermine the state or otherwise acts in a way to threaten the constitutional scheme that are the principal subjects of impeachment.

Fourth, I cannot emphasize enough how important it is to distinguish impeachment from criminal prosecution. I think that got a little lost sometimes this morning. The Constitution clearly distinguishes the two remedies. Article I, section 3, provides, "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor" later: "but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."

Now, criminal prosecution is the means by which we punish someone who has committed a crime, and President Clinton may, when he is out of office, face such punishment. Impeachment, by contrast, is not designed to be punishment. It is the means by which the American people can remove from office someone who, by his actions, can no longer serve. Impeachment, especially of the President, is a grave event and should be reserved for only the most serious misdeeds that in fact undermine the country.

In terms of procedure, I would suggest that before the House Judiciary Committee gets embroiled in trying to sort out the facts, that it make a threshold determination of whether the allegations in the Starr referral rise to the level of an impeachable offense and warrant impeachment. While I have substantial questions about the constitutionality of the referral provision in the Independent Counsel statute, the one good thing about the fact that the referral exists at this point is that it can allow the Judiciary Committee to, in essence, rule as a court would on a motion for summary judgment. Only if the committee concludes that the facts, as alleged—and I can't emphasize enough that they are still allegations—only if they conclude that the facts, as alleged, warrant going forward with impeachment should they embark on what is likely to be a prolonged and very unattractive search for the facts.

With that in mind, let me tell you that I believe the facts as alleged in the Starr referral do not warrant impeachment. Let me address briefly the arguments most frequently put forth by those who disagree with me. First, some argue that since we can and do impeach Federal judges for lying under oath or committing perjury, we should do the same for the President. I disagree. I agree that both are subjected to the same terms, "treason, bribery and other high crimes and misdemeanors," but it does not necessarily mean that the conduct that fits a high crime and misdemeanor for a judge should dictate that that fits for the President.

The distinctions between judges and Presidents are significant. Judges are appointed for good behavior; that means that unless they are impeached, they can serve for life. Presidents obviously have no such textural constraint and can serve only if the electorate supports them; they are accountable to the electorate. Moreover, if the quintessential offense is abuse of office or undermining the constitutional scheme, it makes sense that the ways in which judges can misuse their office can be different from how a President might do so.

In addition, judges accused of crimes can be criminally prosecuted while they are on the bench and that means we can, and have had, the spectacle of judges committed of a crime sitting in jail while collecting a paycheck as a Federal judge. It is important

that there is a way to remove such judges from office and the only way is impeachment; otherwise we will have convicted felons, both in jail and out, serving as Federal judges for life.

Finally, there are hundreds of Federal judges, and in impeaching and removing one or two now and then, while unfortunate, is not at all comparable to the wrenching effect of removing the President of the United States. Enduring such a wrenching effect is not necessary unless the misconduct undermines the constitutional scheme. Whoever the President is, we know under the Constitution that he will either be subject to the judgment of the electoral process or, given term limits, will be out of office shortly.

I think it is too simplistic that conduct that warrants impeaching a Federal judge necessarily warrants impeaching a President. Such a conclusion, in my opinion, ignores the text, the structure of the Constitution.

The second argument that we heard today, I think a few times, is that by failing to impeach the President for allegedly lying under oath will set a bad example and suggest that the President is above the law. Further, they argue that because he takes an oath to faithfully execute the Office of the President, including his responsibility to take care that the laws are faithfully executed, it follows that a crime committed by the President undermines the constitutional scheme.

Two responses to that argument: One, deciding not to impeach the President for lying under oath does not put him above the law. If he lied under oath in the Paula Jones case, he can be subjected to sanctions by Judge Wright. If he committed any crimes in the deposition or grand jury, he can face criminal prosecution when he is out of office. It is important to distinguish punishment, criminal punishment from impeachment.

Third, I think it just goes too far, too much of a bootstrap to say that any crime by a President as a violation of his oath will trigger others to violate the law and, therefore, undermines the law central to our constitutional scheme. Accepting such an argument makes every single potential crime that a President might commit an impeachable offense, and I think that goes too far.

In conclusion, I just wanted to emphasize that powers to write out articles of impeachment and possibly impeach, like a decision whether to indict, is discretionary; and it seems to me most of the comments I have heard today, I think agree with me on both sides. I can recommend that even if you believe that some of the allegations come close to being impeachable offenses or even are impeachable, that you exercise your discretion in this case to decide to terminate this proceeding without voting out any articles of impeachment. The reason I urge that is because I fear very dangerous consequences for proceeding with an impeachment on the facts as alleged so far.

In summarizing briefly, the consequences that I fear are, I fear the development of sexual witch-hunts in the future, subjecting other political figures to close examination of his or her sexual relations, which I would think would be a very unfortunate event and one that we should do whatever we can to avoid.

Second, if the House invokes the impeachment clause to readily lower the threshold and move us much closer to a parliamentary

system—and this danger is particularly aggravated if the process is partisan or perceived as too partisan—a weak President subject to recall by the Congress is not how our system of separation of powers is supposed to work, and we should do everything in our power to avoid that.

Finally, it is important to remember that even if President Clinton is impeached, and—but survives a trial in the Senate, merely subjecting the presidency to such a process weakens the office. When Andrew Johnson was impeached for what most scholars now believe were inappropriate charges, the fact that he was ultimately convicted by the Senate did not prevent the weakening of the office. On the contrary, most scholars believe that the process itself significantly weakened the office of the presidency for the rest of the century. That process should scare us, especially in our era. A weak President is a dangerous and frightening prospect.

Thank you. I am sorry I went a little over.

Mr. CANADY. Thank you, Professor Bloch.

[The statement of Ms. Bloch follows:]

PREPARED STATEMENT OF SUSAN LOW BLOCH, PROFESSOR OF CONSTITUTIONAL LAW, GEORGETOWN UNIVERSITY LAW CENTER

Obviously, we should start with the text of the Constitution. According to Article II, section 2, the President can be impeached, for "Treason, Bribery, or other high Crimes and Misdemeanors." Thus, we must ask two questions:

First, what does the phrase mean?
Second, does President Clinton's alleged conduct fall within that category?

I won't go through the entire history, but let me briefly summarize the events leading to adoption of the existing phrase. The question of whether the president should be removable during his term was carefully debated by the framers of the Constitution. Some of those at the Constitutional Convention thought the president should not be impeachable at all: He should be able to serve out his four-year term and be accountable only to the electorate. There was no reason to make him removable during his term. Others thought he should be removable by the Legislature at will, much as in a parliamentary system. Finally, there was a compromise position that ultimately carried the day: the President could be removed from office but only for a narrow category of offenses.

Those who believed there should be some grounds for impeachment and removal were worried about some extreme possibilities. What if the President had bribed electors to get into office? Shouldn't he be removable for that? Or what if we were at war, and he gave secret information to our enemy, would we have to wait until the end of his term to remove him? To deal with these egregious possibilities, the framers decided to provide for impeachment and removal for "treason or bribery."

But then some asked what if the president totally undermines the constitutional order by some other means; would we have to endure that for 4 years? So James Mason suggested adding as an additional impeachable offense the term "maladministration." But James Madison was concerned that the term was too vague. In response, Mason thereafter substituted the term "maladministration" with the phrase "or other high Crimes and Misdemeanors," a term taken from English law that appears to have referred to political offenses against the state.

Based on the text as well as its history, I think we can make several observations.

First, the question of what is a high crime and misdemeanor is not whatever a majority of the House thinks it is. Notwithstanding Gerald Ford's statement—when he was still in the House and before he became president—that the phrase means whatever a majority of the House thinks it means, he was wrong. Constitutionally, the House can only impeach for treason, bribery, or other high crimes and misdemeanors and the framers meant that phrase to have a limiting effect on the scope of impeachable conduct. The House must try to see whether the alleged action in fact falls within the category of treason, bribery, or other high crimes and misdemeanor.

That does not mean I believe the courts will or should review the House's decision. I do not think the courts would or should. But I do think that House members, if they are acting constitutionally and conscientiously, should impeach not merely

if they are offended by the President's conduct, but only if they conclude the actions, in fact, constitute treason, bribery, or other high crimes and misdemeanors.

In that connection, let me clarify a common misconception. The term "misdemeanors" as used in the Constitution does not mean what we think of as a misdemeanor today. It does not mean a minor crime such as jaywalking or speeding. It is an old English term that means serious offenses against the state.

Second, the fact that the Constitution specifically identifies treason and bribery as the quintessential impeachable offenses suggests that impeachable wrongs are those that undermine the state or our constitutional system. In particular, it is acts in which the president uses his office to undermine the state that are the principal subject of impeachment.

Third, it is important to distinguish impeachment from criminal prosecution. The Constitution clearly distinguishes the two remedies. Article I, Section 3 provides: "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." Criminal prosecution is the means by which we punish someone who has committed a crime. President Clinton may, when he is out of office, face such punishment. Impeachment is not a punishment. It is a means by which the American people can remove from office someone who by his actions can no longer serve; in the case of the president, impeachment is designed to remove someone who can no longer be commander in chief and chief executive. Impeachment of the president is a grave event. It undoes a national election, removes the embodiment of one of the three branches of government and therefore should be reserved for only the most serious misdeeds.

Fourth, simple crimes that ordinary people can commit should not be grounds for impeachment. The best evidence of that is that during Watergate, the Judiciary Committee refused to adopted an article of impeachment for Nixon's alleged tax fraud because tax fraud could be committed by anyone and was not considered an abuse of the president's office.

But, notwithstanding my understanding that the remedy of impeachment was designed principally to deal with serious abuses of office, I believe that very serious personal misconduct such as murder can also be grounds for impeachment. If the crime is so heinous that a person cannot be allowed to walk the streets, we do not have to wait until the next election to make him leave the White House.

Fifth, I want to emphasize that the House has discretion in deciding whether or not to impeach. Like a prosecutor's decision whether or not to indict, the House has discretion to decide, even if it believes the alleged conduct might be an impeachable offense, whether or not it *should* impeach. If you doubt that, ask yourself whether you think the House would be required to impeach a president in the middle of a war.

With this understanding of the constitutional phrase, let me address the various allegations raised against President Clinton. Different people have identified the allegations against President Clinton in different ways. The Independent Counsel identified eleven possible counts. Counsel Schippers alleged fifteen different counts. Chairman Hyde has suggested there might be two or three.

I see essentially three different possible allegations:

—Perjury or lying under oath

—Obstructing justice by getting others, including staff members, to lie to the public and maybe to the grand jury

—Invoking privileges and having staff members invoke privileges before the grand jury

1. Regarding perjury or lying under oath

To begin with, I would note that neither Starr nor Schippers alleges perjury. I suspect that is because perjury is difficult to prove and there are reasonable arguments that President Clinton did not, in fact, commit perjury.

But we still need to discuss whether perjury or lying under oath about a consensual sexual affair constitutes ground for impeachment. I do not believe it does. Some have argued that judges have been impeached and removed from office for perjury, but I would caution you not to equate what is an impeachable offense for a president with what is impeachable conduct for a judge.

While both judges and presidents are subject to the same provision of Article II regarding impeachment for treason, bribery or other high crimes and misdemeanors, judges are, in addition, governed by section 1 of Article III which provides that federal judges serve "during good Behaviour." We often say federal judges are appointed for life, but more accurately, they are appointed only during good behavior.

Moreover, judges never face the electorate, either to obtain their office initially or to retain their position. They are therefore very differently situated than presidents. The text of the Constitution does not provide that presidents serve only "during good behavior." The Constitution assumes that, in general, the electorate, not the Congress, will decide whether the president's behavior is acceptable. Thus, the fact that judges have been impeached for perjury does not tell us that presidents should also be removable for such behavior. While it makes sense to impeach and remove a "life-tenured" judge who commits perjury—who without impeachment will serve for life, it does not necessarily follow that we should remove a democratically elected president who is subject to electoral accountability and a fixed term for allegedly lying, even under oath, about a consensual sexual affair.

Some have argued that for the President to lie to the American people for 7 months should be an impeachable offense. Some lies, such as lying about whether or not we are bombing another country, could constitute a serious abuse of office. But if covering up a consensual sexual relation and pretending to the public that no such activity took place is an impeachable offense, I think we will be impeaching presidents and other officials much too often and too easily. Such conduct, while unfortunate, does not undermine our constitutional system and therefore should not be grounds for removing from office a democratically elected president.

2. Is obstructing justice impeachable, especially when it involves the arguable use of government officials to lie to the American people and maybe to the grand jury?

This is one of the more difficult questions. There clearly are situations where a president's using government officials to impede an investigation is an abuse of office that can undermine our constitutional scheme. I think the allegations that President Nixon tried to get the CIA to stop the FBI from investigating Watergate was an abuse of office that appropriately constituted one of the articles of impeachment by the Judiciary Committee in 1974.

But I believe what Clinton is alleged to have done does not constitute an abuse of office. Failing to confess to your staff that you had an inappropriate liaison with an intern is not an abuse of presidential power and does not undermine the constitutional scheme; it is an understandable reluctance to confess embarrassing personal misconduct.

Moreover, even if this allegation gets close to what is impeachable, I think the House in its discretion should decide that impeaching the President for this conduct is overkill and a bad precedent. I believe that impeaching the President for this conduct will provoke future, and I submit dangerous, sexual witch-hunts not only against future presidents but public officials generally.

3. Regarding the President's invocation of privileges, I think impeaching a president for invoking lawful privileges is a dangerous and ominous precedent.

When President Clinton invoked executive privilege and attorney client privilege, neither claim was frivolous. In both cases, some of the judges agreed with at least some of his reasoning. When President Clinton ultimately lost his argument, he complied with the judicial decision. Merely asking the judiciary to rule should not be an impeachable offense. When President Nixon invoked executive privilege in 1974, he did a great service for the office of the presidency. While Nixon ultimately was ordered to turn over his tapes, in the course of his argument he got the Supreme Court to assert that there was a constitutionally protected executive privilege. Asserting such a privilege was not an abuse. In fact, Nixon's argument strengthened the office of the presidency and that is something I think we want our presidents to do.

Finally, I would like to say a word about the importance of every step the House takes. In the same way that we today look back to the Watergate proceedings for precedent, future generations will look back on what you do for guidance and precedence. And I see several possible dangerous consequences in deciding to impeach President Clinton for what has been alleged so far.

First, as I suggested earlier, I fear the development of sexual witch-hunts in the future, subjecting every political figure to close examination of their sexual relations. I think such a development would be very unfortunate and I don't understand why politicians are not more worried about that.

Second, if we use impeachment too readily, we will lower the threshold and move us much closer to a parliamentary system where the president serves at the pleasure of the Congress. This danger is aggravated if the process is too partisan or perceived as too partisan. A weak president subject to recall by the Congress is not how our system of separation of powers is supposed to work and we should do everything in our power to avoid such a result.

Finally, it is important to remember that even if President Clinton is impeached by the House but survives a trial in the Senate, the mere fact of having subjected the president to such a trial can weaken the office. When President Andrew Johnson was impeached for what most scholars now believe were inappropriate charges, the fact that he was ultimately not convicted by the Senate did not prevent the weakening of the office. On the contrary, most scholars believe that the process itself significantly weakened the office of the Presidency for the next 40–50 years. That possibility should scare us and make the House think twice: a weak president in this modern era is a dangerous and frightening prospect.

I will be glad to answer any questions.

Mr. CANADY. Professor Van Alstyne.

STATEMENT OF WILLIAM VAN ALSTYNE, DUKE UNIVERSITY SCHOOL OF LAW

Mr. VAN ALSTYNE. Mr. Chairman, you have heard from so many, I hardly have a prepared statement, and I find myself actually almost midway in this panel now, having been educated by my colleagues. So I shall have remarks under 10 minutes to share. I think I can deliver them quite briefly.

First, I utterly disagree with those of my colleagues who would take the view that if the President of the United States commits the felony crime of perjury, as many as three times in his deposition in the civil proceeding, as was alleged to have done, and twice again later after 6 months' opportunity to soberly consider these matters before the grand jury for his appearing publicly indeed as President; and if this committee were likewise to believe that the Federal crime of tampering with a witness for which there was substantial and credible information in the 425-page report, a Federal crime currently punishable by 10 years in the Federal penitentiary; and if separately, you thought that if the President, in fact, committed a separate crime of obstructing justice, it is a separate statute with a separate 5-year penalty; and still another, a Federal statute making a 5-year term of imprisonment, so far as one even files false affidavits in Federal court; if you collectively concluded that though there were clear and substantial evidence of those crimes in the aggregate, overtly committed by the President, constantly denied, and using the power of his office to collude with others while President in concealing evidence and making false statements to induce even members of his cabinet to make false statements before a Federal grand jury, if you concluded that those added up to something less than that which could withstand scrutiny as articles of impeachment within the definition of high crimes and misdemeanors, then I would be both astonished and profoundly disappointed with each of you.

I cannot believe that that would be so.

It seems to me the presentation you have heard from Forrest McDonald, as well as many others, and by your own reading of Blackstone's *Commentaries* and a common understanding of high crimes and misdemeanors, that these multiple forms of serious criminal misconduct, while in office, and linked to his activities while President, linked to his lascivious conduct thought to be concealed in the Oval Office and in an attempt even to persuade his secretary probably to retrieve the evidence which would finally force his own acknowledgment in public of these disreputable activities, if you saw no connection with these, his malperformance in office or the abuse of his office, and you thought that there is

nothing here whatever that could colorably turn the color of legal litmus in Article I, Section 4, as high crimes and misdemeanors, then I would be very disappointed and quite surprised.

I think it is simply not so.

I think the combination of medically proven ingredients that the sum is indeed at least the total of the parts and not the parts dismembered and isolated one from another, collectively add up to a shabby treatment of the American judicial system in an effort to try to deprive a litigant of her civil rights by acts of perjury in the Federal courts, and then to attempt to cover it up even subsequently, then these are serious matters.

As I say, my one concern is not that you go forward necessarily to impeach this President. You may very well leave him to the judgment of the American people, such as it may be, for better or worse. But I would gravely regret a collective decision on your part that this combination of reprehensible behavior by the incumbent President of the United States could not possibly outfit a cause to have him removed from office for high crimes and misdemeanors.

I simply have no doubt that if you stack the evidence of one felony on top of another, and indeed do relate it to his conduct while President of the United States in order to deprive a person of a fair litigative opportunity under the civil rights laws of this country, having incidentally failed to claim absolute immunity from being sued at all, a position incidentally he was supported in by the preceding immediate witnesses and, they claim, where he found not a single vote of support in the Supreme Court of the United States on his exaggerated claim of immunity and specialness.

So my primary concern then is that you not reach that kind of conclusion and not feel the least bit that it has been a mistake or premature to invoke these hearings for this kind of review.

On the other hand, events have now so far transpired, I think that you and we as witnesses face a common dilemma as to how best to proceed. For in my own judgment, in all frankness, it is as though the nature of the wrongs that the President has committed, which I have no doubt technically will outfit the kind of articles of impeachment, Congressman Barr, that you had earlier sketched, but to a certain extent, the behavior in the aggregate now has struck me in retrospect as low crimes indeed. That is to say, behavior which in retrospect which is pusillanimous and reprehensible and hardly worth the time of the Nation to forward to the Senate for trial for the outcome would be very doubtful. Indeed, I think hardly any member of this committee, or among those sitting here as witnesses, expects the result in conviction rather than some kind of desultory process that will run a sad end.

So my counsel to you is twofold. First, please avoid the sort of arid advice I hear being given here as though you are now to set a precedent that the combination of Federal felonies of which there is substantial evidence involving the President of the United States should nonetheless be resolved by you as excluded by the Constitution as suitable grounds to remove the President who commits them. Please do not reach that conclusion at all.

On the other hand, to the extent that you can struggle to find a suitable means to express a sense of disappointment, if not despair or contempt for a President who, in my opinion, has com-

promised the integrity of his office in the manner in which he has lied to the public, disparaged other people and attempted to frustrate the processes of justice of this country, if you can find some other measure by means of which of acquitting yourself of your own sense of dignity and propriety, then I would urge you to that course—not being invited to advise you on how to do that, but I have no doubt at all, incidentally, that insofar as you could find a device to do so, you ought not then be cozened out of it on some rhetoric that that too is beyond your constitutional prerogative.

The prerogative of this Congress to express its dismay or despair or, indeed, condemnation of the contemptible conduct that has characterized Mr. Clinton's backing and filling in many ways is surely within your constitutional discretion, and I hope, by all means, you will find a suitable vehicle to manage to do it.

Thank you for your time.

Mr. CANADY. Thank you, Professor Van Alstyne.

[The statement of Mr. Van Alstyne follows:]

PREPARED STATEMENT OF WILLIAM VAN ALSTYNE, DUKE UNIVERSITY SCHOOL OF LAW

I

Article 1, §2, of the Constitution provides that "The House of Representatives . . . shall have the sole Power of Impeachment." In turn, Article 1, §3, of the Constitution next provides that "The Senate shall have the sole Power to try all Impeachments." And Article II, §4, in turn, provides: "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." Thus the division of responsibility is fixed in the Constitution between the House and the Senate, in respect to impeachment (by the House) and trial (by the Senate), of every civil officer of the United States (including the President), with respect to whom impeachment proceedings may be brought. Thus, also, is the President, just as any other civil officer, made answerable in the manner described in Article II, §4.

II

That the President and Vice President are encompassed by these provisions of the Constitution, *and* that they are encompassed in the *same* manner (and not in some different manner) as each other "civil officer" similarly subject to these same clauses,[1] moreover, is also equally clear simply from the respective clauses on their face. Thus, for example, whether it were acceptance of a bribe by or on behalf of the President (e.g., to grant a reprieve or pardon), rather than acceptance of a bribe by or on behalf of a federal judge (e.g., to suspend sentence of one convicted in a jury trial in his court), the difference would offer no distinction whatever respecting whether the one civil officer (the federal judge) but somehow *not* the other (the President) has brought himself within the impeachment clause, such as it is. The offense, that of "bribery,"[2] is obviously not treated differently (i.e., less consequentially) under the clause because of the "higher" or "lesser" status of the person holding federal civil office. That he or she may be elected (as may assuredly be true of the President or Vice President) rather than appointed to office (as may be true of a federal judge or a member of the President's cabinet), moreover, is likewise neither here nor there.

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[1] The sole uncertainty, in respect to "civil officers," involves Members of Congress. (In respect to Members of Congress, though they are certainly civil officers (as distinct from those in military service), the express provision in Article I, §5 (that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member") may establish an exclusivity of removal-from-office power respectively in each house.)

[2] [A term that plainly means to include "*acceptance* of a bribe," and not merely "*payment* of a bribe."]

III

Indeed, insofar as there are considerations that were felt sufficient to provide cause to identify the office of the President as different from any other civil office in respect to the impeachment provisions of the Constitution, such as they are, these provisions are easily discovered (e.g., in the provision describing who presides during an impeachment trial[3]). And quite expressly, none of these (there is really only one—the one just noted) presume in any manner whatever to modify or qualify the character or range of offenses encompassed by Article I, §4, so to exempt a President for offenses, or make him less subject to impeachment and trial for those offenses, than others, merely on account of who he is or on account of the nature of the office he holds.

Nor in this regard is it of any constitutional consequence that he—the President—is elected, moreover, while other civil officers subject to the clause (cabinet members, federal court judges), happen not to be elected but instead hold provisional tenure by some other means. Indeed, that the fact that he *is* elected, *but despite being elected brings himself to commit serious crimes,*[4] shall in *no* respect affect some special release, much less some exemption, or lesser degree of accountability of one who is President, under the impeachment clauses, is reflected by the special precaution explicit on the face of the impeachment clause itself. For it is, first of all, as the clause itself declares, precisely the "President, " and then, also, the "Vice President," and only then, as well, any other "civil officer" of the United States, who "shall be removed from Office" on determination of Congress, "on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[5] And it is

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[3] *See* the provision in Article I, §3 (though the Vice President "shall be President of the Senate," and thus will ordinarily preside (unless he is absent in which case an elected pro tempore President shall preside), if and *only* "when the President is tried, the Chief Justice shall preside").

[4] By "serious crimes," one might suggest a crime so regarded at common law and currently carrying a term of imprisonment up to five years (as perjury in any federal court proceeding does, including perjury by deposition); or another carrying a term of imprisonment even of ten years (as engaging in misleading conduct toward another with intent to influence their testimony in any official federal proceeding does); these would assuredly appear to qualify. *See also* ftnote 5, *infra.* When linked to one's behavior in office, moreover, the notion that neither perjury nor tampering with a witness nor subornation of perjury is any sort of "high crime [or] misdemeanor," when engaged in by the President of the United States, is, well, facetious at best.

[5] *See, e.g.,* as pertinent examples of "*other* high crimes and misdemeanors, " each of the following (and see discussion *supra* ftnote 4):

18 U.S.C. § 1621. Perjury

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years or both.

18 U.S.C. § 1622. Subornation of Perjury

Whoever procures another to commit any perjury is guilty of subordination of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1623. False declarations before grand jury or court.

(a) Whoever under oath (or in any declaration . . . or statement under penalty of perjury) in any proceedings before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1512. Tampering with a witness

(a) Whoever knowingly . . . engages in misleading conduct toward another person, with intent to—

(1) influence the testimony of any person in an official proceeding . . . shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 1515. Definitions for certain provisions

As used in section 1512 . . .

(1) the term "official proceeding" means—

(A) a proceeding before a judge or court of the United States . . . or a Federal grand jury;

18 U.S.C. § 1510. Obstruction of criminal investigations

Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the

noteworthy, too, consistent with this merely equal accountability in the President, that there likewise is no requirement or provision requiring a more substantial vote in the Senate, or any other procedural requirement respecting conviction in the case of a President, than that required in respect to any other civil officers subject to impeachment and to trial.[6] Pleas suggesting somehow that the President is "different" (i.e., meaning "not as answerable" in the *same* way, or to the *same* offenses,[7] or to the *same* degree as others subject to impeachment under the Constitution), ought not be readily entertained in this Congress. The President is *not* different, whether as to what constitutes an impeachable offense or as to whether it is to be passed over; nor does the distinction that he is elected (rather than appointed), grant him a latitude to engage in acts of perjury or other federal crimes, such as they may be, in proceedings pending in our courts of law.

IV

All of the preceding having been straightforwardly said, however, it does *not* mean that, *therefore,* the Judiciary Committee (and the House of Representatives) should or must vote certain articles of impeachment of the President. That grounds exist, as they may well exist[8] as these Hearings may (but need not) also determine, and that the evidence already received by the Committee may even now strongly support those proposed grounds, moreover, by no means per se compels the discretion of the House. Whether the House or this Committee may conclude, on political grounds or otherwise, that it does not care to pursue the evidence respecting the offenses provisionally reflected in the Report of the Special Counsel or otherwise, in brief, is entirely within its constitutional prerogative.[9] Nothing I have briefly reviewed here is meant to imply anything else.

What would be mistaken, however, would be any suggestion or report by this Committee that, even when linked directly with behavior in office, while President, such acts of criminal perjury, subornation of perjury, obstruction of justice, colluding to conceal evidence, or seeking to enlist others including cabinet members as well as White House employees to mislead both them and others—that such crimes as "merely" these (as evidence sufficient to persuade the Committee meeting a standard of evidence both clear and convincing in its sufficiency might show) as he may have committed, and committed for no better reason than to shelter himself from a mere civil suit a unanimous Supreme Court had determined was properly in federal court,[10] would nonetheless be, even each and all, added collectively,[11] crimes somehow beneath the reach of the impeachment provisions of the Constitution of the United States. They are surely not, nor will the country be well served by any Report that would itself now presume to lay down, for the first time, a suggestion to the contrary. I fervently hope it will not pursue any such course as that. The further impeachment pursuit of Mr. Clinton may well not now be particularly worth-

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United States by any person to a criminal investigator shall be fined not more than $5,000, or imprisoned not more than five years, or both.

[6] Note, for example, that the relevant constitutional provision on the requisite vote in the Senate necessary to convict (Art. II, §3) merely provides that "no Person [i.e., whether or not that person is the President] shall be convicted without the Concurrence of two thirds of the Members present," neither more nor less (i.e. regardless of who that person is). The vote does not vary with the status (or "importance") of the person under trial. Note, incidentally, that consistent with this provision, the necessary vote could amount to as few as a mere 34 votes for conviction, *and yet be sufficient so far as the Constitution is concerned.* (A simple majority of the Senate constitutes a quorum pursuant to Art. I, §5; and thirty-four votes would be two thirds of that number, i.e., two-thirds of fifty-one, and thus sufficient to convict.) Again, here, too, the requirement (of votes sufficient to convict) is no different for a President, than in respect to a "mere" federal district court judge or any other civil officer, subject to impeachment and conviction under the Constitution of the United States; rather, exactly as in respect to the definition of what constitutes an impeachable offense, the President receives no dispensation in his accountability pursuant to the impeachment clauses the Constitution provides.

[7] *See* text and footnotes at nn. 4 & 5 *supra.*

[8] *See* The Interim Report of The Special Counsel (The "Starr Report"), plus discussion in text and footnotes 4 & 5 *supra*, plus proposed outline of lines of inquiry framed by Majority Counsel to this Committee.

[9] It may do so for no better reason, indeed, that it now perceives no further benefit to the nation, and will, rather, leave the public to render such judgment of "their" President as they see fit to register, whatever that may be.

[10] *See Clinton* v. *Jones*, 117 S.Ct. 1636 (1997).

[11] It has been rightly observed that "the whole is sometimes greater than the mere sum of its parts," but in any event it is surely true that the whole is at least to be judged by the *total* sum of "the parts" (including among the relevant parts the extent to which the President knowingly disparages others who merely seek civil redress in our courts and who lies to the people as well).

while. Yet it will be of continuing constitutional importance that the Committee's resolution of that decision, if that should be its own judgment as well, be taken merely for what it is, and not at all as any "Advisory Opinion" by this agency of Congress that the impeachment clauses themselves foreclose this Committee from a full and complete review of what the President is alleged to have done. They do not foreclose that full and complete review. To the contrary, they fully sustain the authority of the House of Representatives to proceed with this inquiry to whatever extent it may decide it has an obligation to itself and to the Constitution, to pursue.

Mr. CANADY. Professor Rakove.

STATEMENT OF JACK N. RAKOVE, COE PROFESSOR OF HISTORY AND AMERICAN STUDIES, STANFORD UNIVERSITY

Mr. RAKOVE. Chairman Canady, all alumni, Chairman Hyde, my fellow Chicagoan, Mr. Scott, for inviting me here, thank you all.

Historians who spend their waking hours in the 18th century, as I do, have many opportunities to reflect on the way in which contemporary debates use and sometimes abuse the evidence from the past. But rarely do we have a chance to contribute to a debate as momentous as this committee's proceedings promise to be. Accordingly, I am very grateful to the committee for allowing me to add my perspective, which I hope will be different, to that of my colleagues on these panels.

Had presidential impeachment ever evolved into a familiar element of our constitutional system, there would be no need for today's hearing. By now we would either have abandoned the presidential system entirely, or at least developed something like a doctrine of impeachment similar to other doctrines to shape our constitutional practice. But clearly we have no real doctrine of that kind, because the circumstances in the impeachment proceedings involving Andrew Johnson and Richard Nixon differs as much from each other as they do for the misbehavior for which President Clinton is now accused, and they offer only modest guidance in defining the range of impeachable offenses.

We face other formidable difficulties when we attempt to interpret the crucial decisions taken by the Constitutional Convention in 1787. By now, we all know the basic narrative of the impeachment clause almost by heart and that means we are painfully aware of its limitations. For better or worse, other high Crimes and Misdemeanors is one of those many tantalizing phrases that enter the Constitution without adequate discussion. Its addition on September 8th was more than an afterthought, but neither was it the product of quite the sustained debate we would like to have. I would remind the committee that if you look at the records of the Federal Convention, here is where the phrase "high Crimes and Misdemeanors" is introduced and here is where it is approved and there is, in fact, no debate on its meaning, at least no debate that testifies directly as to what the framers exactly thought, precisely thought, they were doing.

Now, we know that that phrase has a venerable history, but we have several choices as how we go about interpreting its precise meaning. We could read it as it has been used during the heyday of impeachment in 1715, which is, in fact, how I think George Mason was probably inclined to read it, because if there is one member of the Federal Convention who was deeply vested in the history of 17th century England, it was certainly Mason. We could

read the key word "misdemeanor" as my distinguished colleague Forrest McDonald suggests we should, with special reference to the contemporary writing of Blackstone. Or perhaps we should examine the trial record of American impeachments and abrogate the kinds of offenses for which a variety of American officials, typically judges, if the justice of the peace were impeached.

In their state Constitution in 1776 "high Crimes and Misdemeanors" was not the phrase they used. Its revival in 1777 is therefore something of a puzzle. If George Mason was indeed reaching back into 17th century history when he summoned high Crimes and Misdemeanors from the annals of the English past, he was invoking a history and a structure of government very different from the one the framers were creating in 1787. English impeachment was essentially a political weapon used by the House of Commons in its struggles with the untrustworthy kings, ministers and lackeys of England. Whether the high crimes and misdemeanors for which they were accused would translate into American practice is indeed a fair question.

Now, as you might already sense, everybody wants clean answers. But here I think it is important to explain why it may be useful for us to play this role. Two points deserve special emphasis. First, the fact that Americans have not developed a true doctrine of presidential impeachment from the sketchy definition that the framers derived from almost more of an English practice may be significant in itself.

There must be compelling reasons why impeachment remains such a constitutional anomaly. Precedents suggest impeachment as a remedy to be deployed only in extremely serious and unequivocal cases where we have a high degree of confidence that the conduct in question falls squarely and unambiguously within the parameters of the persuasive definition, and where the insult to the constitutional system is grave indeed, and where indeed there would have to be a high degree of consensus on both sides of the aisle in Congress and in both Houses to proceed with impeachment.

Second, an historic observation: In including impeachment in the Constitution, the framers may have been responding to concerns that our history has largely dispelled. In the case of Federal judges, about whom we have heard a great deal, serving on good behavior, impeachment remains necessary on those rare occasions when gross misbehavior, especially of a criminal nature, requires their removal. But in the case of the President, where we now know that our system of elections works far better than the framers ever anticipated, we have good reason to question whether there is any compelling reason to lower the standard of impeachment in the radical way that these current proceedings may indeed, I believe, threaten to do.

In my view, the most valuable method of explaining the origin and scope of the impeachment clauses involves looking beyond the critical phrase "other high Crimes and Misdemeanors" to ask another question: Where does the impeachment clause fit within the larger structure of constitutional governance the framers were creating? For impeachment—and I stress this—for impeachment was never an issue that the framers considered for its own sake or in the abstract. It was always tied to their efforts to create the un-

precedented institution of a national, republican—lower case—executive. The presidency was the single most novel institution that was created in 1787, and understanding the problems it posed for them offers, I believe, the best way of explaining the scope and the limits of the impeachment power.

And let me summarize the three basic conclusions about the relationship between the structure of the presidency and the impeachment power which lie at the heart of my more extended statement.

First, in their efforts to describe the offenses for which impeachment would be warranted, the framers clearly moved from more general terms to more specific ones. As we all know by now, the operative words in the original clause proposed by Hugh Williamson and William Davie were "malpractice and the neglect of duty." Two months later, the Committee of Style replaced this phrase with "treason, bribery, or corruption." And then, further, we note that the committee on postponed parts deleted "corruption" from this list, so that only two fairly unambiguous offenses lay before the Convention.

When George Mason proposed the addition of "maladministration," it clearly harked back to the Williamson-Davie standard of malpractice and neglect of duty, which is exactly why Madison's objection led him to substitute "high Crimes and Misdemeanors against the state" instead.

Mason's amendment obviously enlarged the scope of impeachment beyond where it rested at that point, but Madison's creativity led to its being narrowed again. Whatever else they said about high crimes and misdemeanors, it is certainly a more open-ended term than malpractice or maladministration.

Second, in the one full debate on impeachment that occurred on July 20, the examples that delegates used all confirmed that they were thinking primarily, indeed exclusively, about a failure to perform the duties of the presidential office or blatant misuse of its powers which manifestly endangered the public good. They did not eliminate the possibility that reprehensible private acts might fall within the category of what we call a high misdemeanor. That only suggests that the framers were concerned with something more important and more dangerous. The obvious reason is they were preoccupied with the public performance of institutions and of office holders, not with the regulation of all of the human vices that every President other than George Washington might reasonably be expected to possess.

Third and most important, and really the blunt of my remarks, the framers were far more concerned with protecting the presidency from the encroachments of Congress or from what James Madison called the impetus vortex of the legislature than they were the potential abuse of executive power. This is one consideration that best enables us to understand why, after what Madison calls the tedious reiterated discussions of the presidency, the institution emerged at the end of the convention a potentially much stronger institution than it had first appeared.

This is also, I believe, the single most important consideration that points toward a restrictive way. The framers did not begin their deliberations on the presidency by rejecting either monarchy or parliamentary models of ministerial government because neither

were realistic alternatives for them to consider. Instead they began to reach quick agreement on two other principles: First, that the executive power should reside in a single person and, second, that the executive should be armed with a limited veto over legislation.

In Britain the veto had long since become obsolete, and in most American states the executive had been stripped of that prerogative. The fact that the framers restored it so quickly with so little debate offers the first important clue to their idea as to executive power. They wanted to arm the executive with a weapon that would enable it to protect itself against the encroachments of the legislature. But agreements on these points did not spare the convention substantial confusion and, as my colleague Professor McDowell has already suggested, were the disagreements about election, and I will skip over the need to go back through what those disagreements were with the exception of stressing the one point which I think matters most. The single consideration that best explains how the whole system of the electoral college came about, as strange as it certainly was, is that the framers were intent on making the President as politically independent of this institution, that is to say the Congress, as they possibly could.

That was the one overriding goal and concern which most clearly explains why the presidency took the form it did as it evolves over the course of the debates. As Professor McDowell noted, this was the single most perplexing subject. Madison said the whole subject was peculiarly embarrassing, a phrase which unfortunately continues to resonate today. This was the most embarrassing and most difficult subject that they had to face, and the one consideration which best explains the conclusions that they reached was the overriding concern to minimize the degree of executive dependence upon the legislative branch of Congress. It is this concern which suggests that we should look skeptically at any effort to radically expand impeachment power to a loose construction of other high crimes and misdemeanors.

If impeachment was a blunt weapon to be used in the great constitutional disputes in a regime where parliament was struggling to control the king and elections had little if any effect, indeed they had no effect on the control of government. In those struggles English impeachment virtually died out, to be revived by Americans as a hedge against the malfunctioning of the untested institution of the presidency. Because the framers were uncertain how well their electoral system would work, it made sense to retain impeachment. Nobody could really predict how the system would operate, and you certainly needed an out in case of gross abuse of power. But even with the addition of high crimes and misdemeanors on September the 8th, the direction in which the convention moved was clearly to enhance, not reduce executive independence. Impeachment is, therefore, obviously a mechanism of last resort, and the fact that we have resorted to presidential impeachment only twice suggests that it should remain a vestigial element of our constitutional system.

That a deliberate misleading of a grand jury warrants consideration as an impeachable offense cannot be denied. But neither does that simple fact, taken alone, provide a compelling or sufficient case to sustain an impeachment. Whatever insult the President's

conduct may have delivered to the legal system must be made against the palpable stretching of the boundaries of impeachable offenses that this inquiry risks entailing. The central fact remains that the President's misconduct remains tied to a legal suit that involved an incident occurring before his election to office and which involved behavior that was essentially private and nonofficial, even if subsequent proceedings gave it a legal and public character. Given the concern that the leading framers and ratifiers of the Constitution repeatedly voiced about the danger of subordinating the executive to legislative control and manipulation, full employment of the impeachment clause in this context would invert the basis of our Constitution.

I thank the Chair for the patience in allowing me to finish my statement.

[The statement of Mr. Rakove follows:]

PREPARED STATEMENT OF JACK N. RAKOVE, COE PROFESSOR OF HISTORY AND AMERICAN STUDIES, STANFORD UNIVERSITY

Historians who spend their waking hours in the eighteenth century, as I do, have many opportunities to reflect on the way in which contemporary political debate uses and abuses the evidence from the past. But we rarely have the chance to contribute to a debate potentially as momentous as this committee's proceedings promise to be. I am accordingly very grateful to the committee for giving me the opportunity to add my perspective to that of the other members of today's panels.

Any attempt to interpret the origins and scope of the impeachment clauses of the Constitution must begin with a few preliminary observations about the nature of the inquiry. Had presidential impeachment evolved into a common, often invoked element of our constitutional system, there would be no need to have anything like today's hearing. We would then have developed what might be called a doctrine of impeachment, in the same way that so many other aspects of our constitutional system—our constitutional law, or many of the working rules of Congress—can be said to embody constitutional doctrines. But clearly that is not the case in the realm of presidential impeachment. The proceedings involving Presidents Andrew Johnson and Richard Nixon offer precedents that may help Congress to set the procedures for proposing and trying an impeachment. They are far less helpful in resolving uncertainties about the range of offenses for which a president may be impeached. The circumstances in those two cases differ as much from each other as they do from the misbehavior for which President Clinton now faces impeachment. Two precedents set a century apart do not a doctrine make.

In such circumstances, it is inevitable that we have to return to the constitutional debates of the 1780s, and the larger history of which they were a part, and try to make some sense of why the framers included provisions for impeachment in the Constitution, and how they understood the key phrases that are most germane to our contemporary debate. Here we face other difficulties. The historical evidence relating to the "original meaning" of the key clause defining impeachable offenses nearly as full as we could wish. For better or worse, "other high Crimes and Misdemeanors" is one of those many tantalizing phrases than entered the Constitution without adequate discussion; its addition was more than an afterthought but something less than a decision taken only after careful efforts at definition had been scrupulously undertaken. It is of course true that the phrase did not appear from nowhere; its use in English impeachments dates to 1386. But it was not the term that the American revolutionaries had employed when they wrote impeachment clauses in some of the early state constitutions, and we may wonder how well the framers of the Constitution understood how that term had been used in England. We can also ask how useful any definition of "high crimes and misdemeanors" derived from English practice could be in an American setting. Impeachment had originated in the fourteenth century, but it had dropped out of English usage for roughly a century and a half before being revived in 1621. It flourished again for another century before largely lapsing again after 1715, and during this period—its great heyday—it was intimately involved with the ongoing constitutional struggles between Parliament and Crown that led to civil war in the 1640s, the execution of Charles I in 1649, near martial law in the 1650s, bitter partisan conflict in the 1670s, another revolution in 1689, and renewed partisan strife over the next quarter

century. During this era, in short, impeachment was a political weapon deployed under often extreme conditions. Whether any definition of "high crimes and misdemeanors" drawn from that violent history can apply to the processes of constitutional government we have followed since our own Revolution is, I think, a fair question.

I remind the committee of this history, because in examining the origins of the impeachment clause, the historian's first task is to explain why we should be cautious about ascribing too precise a meaning to this seemingly potent but admittedly obscure phrase. The fact that Americans have not had occasion to develop a true doctrine from the sketchy definition that the framers derived from a vestigial English practice is significant in itself. There must be compelling reasons why impeachment remains so infrequent. It took three years of repeated and embittered disputes over the most fundamental questions of policy—the Reconstruction of the defeated Confederacy—to bring about the impeachment of Andrew Johnson, and even then the pretext under which Congress acted was of doubtful constitutionality. In the case of Richard Nixon, it took the continual unraveling of a conspiracy to obstruct justice to produce the consensus in this committee to recommend impeachment. These precedents suggest that presidential impeachment should remain a remedy to be deployed only in extremely serious and unequivocal cases, where we have a high degree of confidence that the conduct in question falls squarely and unambiguously within the parameters of a persuasive definition, and where the insult to the constitutional system is grave indeed. Otherwise we do risk lowering the threshold for impeachment in a way that would genuinely threaten a transformation of our constitutional system.

Having reminded the committee of why this is a difficult subject, however, my greater obligation is to shed the best light on it that I can, from the vantage point of a scholar who has spent the last decade and a half trying to make sense of why the Constitution took the form it did. To do this, it is important to look beyond the controverted language of the impeachment clause, and to ask, Where does this clause fit within the larger framework of constitutional government the framers were erecting? For impeachment was never an issue that the framers truly considered for its own sake. It was only one problem among many that they faced in trying, with no useful precedents at hand, to design the institution of an elected national executive whose political influence and authority were almost impossible to anticipate. For of all the institutions the framers created in 1787, the most novel was the presidency.

Though some of the important changes in the language of the impeachment clause occurred in various committees of the Convention, for which we have no records of debate, the task of tracing its evolution is relatively easy. We can draw at least four significant conclusions about this process.

First, the decision to make the Senate the trial court for impeachments came only within the final fortnight of deliberation. Until then, the framers had assumed that task would lie with the Supreme Court. The most likely explanation for this belated change is that well into August, the framers assumed that the Senate, not the president, would be vested with the appointment- and the treaty-making powers, and these were two forms of power whose abuse impeachment was manifestly designed to reach and correct.

Second, in their efforts to characterize or list the offenses for which impeachment would be warranted, the framers moved from more general terms to more specific ones. In the original clause moved by the North Carolina delegates Hugh Williamson and William Davie on June 2, the operative words were "malpractice or neglect of duty" (language drawn from their own state's constitution). Two months later, the committee of style replaced this phrase with "treason, bribery, or corruption." In early September, the committee on postponed parts deleted "corruption" from this list, so that only two fairly unambiguous offenses lay before the Convention when George Mason proposed the addition of "maladministration" on September 8, arguing that there were other "great and dangerous offences" that might warrant impeachment, including "Attempts to subvert the Constitution." Mason's term was capacious enough to restore the original Williamson-Davie standard, and that is why James Madison immediately objected that "So vague a term will be equivalent to a tenure during pleasure of the Senate." Mason obliged by proposing "other high Crimes and Misdemeanors against the State." Madison still worried that "misdemeanor" was too expansive a term, but his effort to delete it failed. (The Convention also changed the formula "against the State" to "against the United States," but a few days later the committee of style silently deleted that phrase, presumably because they deemed the qualifying words redundant.) Mason's amendment obviously had the effect of enlarging the scope of impeachment, but Madison's objection again narrowed this shift beyond what Mason desired. "Other high crimes and mis-

demeanors" will always defy precise definition, but it is still less ambiguous or subjective than "malpractice" or "maladministration."

Third, the examples the delegates used to describe acts warranting impeachment (notably during the debate of July 20) all confirm that they were thinking primarily, indeed exclusively, about failure to perform the duties of office or a misuse of its powers, in ways that manifestly endangered the general public good. That does not, of course, eliminate the possibility that reprehensible private acts might fall within a category of "high misdemeanor"; it only suggests that such acts were not what they were actively concerned with. For obvious reasons they were preoccupied with the public performance of institutions and officeholders, not the regulation of all the human vices.

Fourth, while the framers obviously concluded that impeachment was a device the Constitution could not afford to discard, several of them argued that it would probably prove unnecessary, primarily because regularly held elections would offer an adequate method of removing misbehaving officials from power. Here, again, the contrast with seventeenth- and eighteenth-century English practice is both striking and instructive, for there elections rarely if ever affected the tenure of the royal officials who were the main targets of impeachment.

All of these points identify important considerations that any attempt to interpret the impeachment provisions must ponder. But isolated as they are from the larger debates of which they were only a small (and not especially important) part, they offer an incomplete picture of where impeachment fit in the larger constitutional scheme. From the beginning, impeachment was very much tied to the problem of the presidency. But that problem was the single most perplexing issue the framers confronted. The whole subject of the presidency was "peculiarly embarrassing," Madison complained, and the decisions the Convention reached came only after "tedious and reiterated discussions." Understanding why this was the case will illuminate the framers' notions of impeachment. More important, it will strongly suggest that any move to stretch the impeachment clause to cover acts of marginal relation to the official duties of the presidency risks violating the basic constitutional design.

It is often said that, in creating the presidency, the framers consciously rejected the parliamentary system we associate with Britain. Indeed, one stock argument against impeachment is that its casual or frequent use would turn our system of separated powers into something it was never meant to be. But in fact, a full blown model of parliamentary government was not yet available for the framers to reject. In the eighteenth century, the ministers who formed the Cabinet were still much more the servants of the king than Parliament. Kings had to pick men who enjoyed the confidence of Parliament, but they gained this confidence largely by forming alliances among cliques of the aristocracy who then used their own resources and those of the government to manage parliamentary majorities that were almost always stable and docile. Elections had almost no effect on the composition of government. Ministers often had to work much harder to maintain the confidence and favor of the king, who could pick and dismiss his ministers for entirely personal reasons, independent of parliamentary concern. Only rarely did cabinets act as closely unified bodies; more often they were shifting alliances depending on political agreements among the principal members.

The framers did not start their deliberations on the executive by rejecting parliamentary models of ministerial government. Instead, they began by reaching quick agreement on two other principles. The first was that the executive power should ultimately be vested in a single person (what might be called the Harry S Truman buck-stopping-here idea of presidential responsibility). And they further agreed that the president should be armed with at least a limited veto over legislation. In Britain the veto had long since become obsolete; and most of the American state constitutions had deprived the governor of that weapon. The fact that the framers restored it so quickly offers the first important clue to their idea of executive power; they wanted a president who would be able to resist the "encroachments" of the legislature, the branch of government they feared most—an officer capable of resisting what Madison called the "impetuous vortex" of legislative power.

After reaching agreement on these two points in early June 1787, however, the Convention found itself befuddled when it returned to the presidency in late July. The first problem was election. The framers simply had no idea which mode of electing a president would be most effective. Popular election seemed doubtful because the people would not have enough information to make an informed or conclusive choice among a plethora of candidates. The idea of an electoral college seemed attractive, until the framers began to doubt that electors would be persons of quality. The most objectionable mode of election was also the most practical: to let Congress, which would presumably be well informed, make the choice. But because the fram-

ers were intent on making the president as independent of Congress as possible, that mode of election meant giving the president a long term (because short-timers would not be able to stand up to Congress), and also restricting his tenure to a single term (because otherwise he would toady up to Congress). Thus when impeachment was seriously debated in late July, one argument for retaining this vestigial English practice was that it would enable the president to serve the seven-year term then favored, because it would provide a remedy in case he abused his trust. (Conversely, impeachment would be less necessary with a shorter term and reeligibility.)

The presidency took decisive shape only during the final weeks of debate. Two developments were critical. First, a reaction against the idea that the Senate should discharge certain executive powers (appointments and foreign relations) redounded to the advantage of the president. Second, a renewed discussion of congressional election of the president on August 24 found the Convention evenly divided, leading the whole question to be submitted to the committee on postponed parts. It in turn proposed reviving the electoral college, transferring the appointment and treaty-making powers to the president (acting with the advice and consent of the Senate), eliminating "corruption" as a basis for impeachment, and replacing the Supreme Court with the Senate as the trial court for impeachments. The Convention approved all these proposals between September 4–8, with only modest changes (the most important being the substitution of the House for the Senate in electing the president when the electoral college failed to produce a majority).

The one constant factor driving these decisions, it must be stressed, was the desire to make the president as independent of Congress as possible. That concern had been expressed since early June. It was not a reaction against the model of parliamentary government, because in Britain the Crown effectively controlled Parliament. It sprang instead from the concern, repeatedly voiced by Madison but echoed by others, that the legislature was the most dangerous branch of government. It was manifested in the continued jockeying to find some alternative—any alternative—to legislative election of the president. The framers had to spend three days agonizing over the electoral college because they were concerned that the committee's proposal to make the Senate the contingent electors would leave the president nothing more than a tool of an aristocratic upper house with which it was now to share power. By eventually hitting upon the idea of allowing the House (voting by states) to assume that duty, the Convention made it possible (they thought) to unite the Senate and the president, through their shared powers, against the House, the one institution which Madison thought most likely to upset the equilibrium of constitutional government.

It is this concern, which gathered force the longer the Convention sat, which suggests that any effort to expand the scope of the impeachment power by a broad construction of "high Crimes and Misdemeanors" should be viewed with some skepticism. Impeachment was a blunt weapon in the great English constitutional disputes of the seventeenth century that was retained in American practice after it had become nearly moribund in the country of its birth. In the colonies and the new American states, we know (from the work of Peter Hoffer and N.E.H. Hull) that it operated in a much less controversial way to discipline lesser executive and judicial officials who had misused their offices or otherwise acted corruptly. In theory it could have been used against governors, too, the highest executive officials in the states. But in the first revolutionary-era constitutions of the mid-1770s, those governors were regarded as distinctly subordinate officials with little independent authority or political influence of their own; typically serving one- year terms and elected by the state assemblies, their removal would have had little if any disruptive impact on the equilibrium of state government. But in 1787 the American presidency was constituted on very different assumptions. Preserving constitutional equilibrium between the three co-equal branches of the new federal constitution was important in a way that was not true in the early state constitutions, where the legislature was clearly supreme while the executive and judiciary were distinctly inferior. That is why any effort to alter the standards of impeachment in a case where the performance of presidential duty is implicated only indirectly must be viewed skeptically.

That a deliberate misleading of a grand jury performing its legal duty—even under rather exceptional circumstances—warrants careful consideration as an impeachable offense cannot be denied. But neither does that simple fact, taken alone, provide a compelling or sufficient case to sustain an impeachment. Here, as in other areas of constitutional governance, a balancing of competing concerns is necessary. Whatever insult the president's conduct may have delivered to the legal system—and the consequences of that insult remain both speculative and doubtful—must be weighed against the palpable stretching of the boundaries of impeachable offenses that this inquiry risks entailing. Whatever misconduct took place lies at the far

boundaries of what might be considered impeachable, primarily because it concerns an incident which took place well prior to the president's entrance into office, and which involved behavior that was essentially private and non-official even if subsequent proceedings gave it a legal and public character. Given the concern that leading framers of the Constitution voiced about the danger of subordinating the executive to legislative control and manipulation, an expansive reading of the impeachment clause in this context cannot, in my view, be sustained.

When the report of the independent counsel was first published in September, I wrote an essay for Chairman Hyde's and my own hometown newspaper, the *Chicago Tribune*, which took as its point of departure the Chairman's injunction that this committee, and members of Congress, must do what the Constitution requires. That injunction was not really as simple, I argued, as it first appears. Doing what the Constitution requires means, in the first instance, asking what duty has been passed on to you by the historic Constitution adopted in 1787–88, and that requires wrestling with the less than transparent language of the impeachment clause. It also means asking, what does our present Constitution require you to do—a statement which recognizes that members of Congress are products of a political party system which is essential to the real functioning of our constitutional system, even if it is not formally recognized in the constitutional text. But third, and most important, doing what the Constitution requires also means asking: What Constitution do we want to have when this controversy has ended? For make no mistake, a decision to proceed with impeachment in this matter would enlarge the impeachment clause well beyond its current boundaries, and in ways that threaten to distort the original constitutional design.

Mr. CANADY. Thank you, Professor.

For the last witness of this panel and of this long day, Professor Turley.

STATEMENT OF JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW

Mr. TURLEY. It has been a long day, Mr. Chairman. I thank you for your patience and my inclusion as a witness on this important subject.

You have assembled an array of different academics. They include law professors, historians, political scientists, and we all come from different perspectives and different backgrounds, and not surprisingly we come to different conclusions.

After all of the personal attacks and the heat and the fog and frenzy of a contemporary crisis, beneath all of our views is a collective concern about the standard that we create in the coming weeks and how it will affect our country and our constitutional system.

For my part I come to this question as a law professor who has litigated many of the constitutional issues in the area involving executive privilege and Article II authority. While I have taught the Madisonian democracy issues for years, I have been most influenced on the effect of decisions like we are making now on executive power.

Academic debates like the one you are watching can appear arcane and it can appear theoretical, but it has a direct effect in actual cases involving average citizens. Executive power exhibits the same physical properties as a gas in a confined space. When you expand the space, the gas will fill the space. You should not be misled. Your decision will define executive power and authority. If you decide that certain acts do not rise to impeachable offenses, you will expand the space for executive conduct and we will have to live with that expansion. The fact that it is done by negative inference

as opposed to a positive statement has no meaning. You will define executive conduct in the coming weeks.

Ultimately each of us comes to our own conclusions as to how serious this crisis is. Like many of my colleagues here today, I have reached my own conclusions which are a matter of public record. I have written on the subject as an academic on the House's role in the impeachment process, but each of us comes with different perspectives which are worth your consideration, but ultimately you will find that we are all relying on the same quotes.

In a 15-minute period or something of a similar length, the framers resolved this standard. At times you would think that we are channeling for the framers. There comes a point when we all speak for a favorite framer as if we are reaching behind hundreds of years and suddenly coming forward with George Mason's true idea.

With an 8-week-old baby and sleep deprivation, I, at points, thought that I was James Madison, but none of us are James Madison or George Mason, and frankly it doesn't matter.

I am not going to try to repeat 80 pages of testimony in 10 minutes, and I am sure you will be delighted to know that. Instead I am going to touch on one or two issues.

In my testimony I looked at three insular questions: First, whether there is textural support for a threshold exclusion of the conduct in this case from the definition of impeachable offenses.

The argument has been advanced that in the Constitution or in its history there is evidence that the conduct alleged committed by President Clinton is excluded from that definition. I examined the text of the Constitution. I think most of us agree there is no clear answer to that question in the text. There is some interesting omissions, the failure to put in differentiating terms, but there is no answer.

In history you will find that the record is equally mixed, as many of my colleagues today have noted. There were various views of impeachable offenses. Some people believed that a President should be impeached for any reason, some people believe that a President should be impeached at the will of Congress. Some, like Franklin, were so irascible it is hard to figure out where he came on that continuum. I personally find Franklin's words the most interesting and the most influential on my view.

Franklin at one point defines impeachment as a process by which we respond to conduct that he called obnoxious, conduct that would divide a nation. He viewed impeachment not as a process to remove a President, but a process by which the public could determine the legitimacy of a President to continue in office. He saw the Senate as the place in which a President would be removed or would receive honorable acquittal, but he saw the importance of that constitutional moment, and that is what I would like to talk to you about today.

You see in my view there are two different elements to impeachment which you have to consider, and I certainly don't envy your decision in the coming weeks.

First, impeachment serves a critical check and balance within our system. The framers often refer to impeachment as a deterrence of misconduct. It falls in a critical part of the tripartite sys-

tem. It is the only method by which a President can be removed for misconduct.

Second, I believe that the impeachment process serves a legitimacy function. It allows the public to address serious allegations of the legitimacy of a President to continue in office.

As to the check and balance function of the impeachment clause, I am afraid to report that the drafters thought little of this body. One would almost get a complex reading these records since they almost only talked about the Senate. The drafters seemed to believe that the Senate was the only discriminating body, and they often almost refer to the Senate as if it were synonymous with impeachment. It is interesting in the text and the history that very little is said about the House.

When they actually wrote these clauses, they went to great length to describe the environment of the Senate, who would be the presiding judge, what would be the standard of evidence, oath and affirmation, what would be the limits upon which punishment could be given, all of that is given in great detail. But when it comes to this House, there is virtually no reference to how you would reach your decision.

I believe that is because the founders wanted impeachment issues, serious questions to go to the Senate for resolution. They wanted it decided there. Does that mean that this House has no role? No. As an academic, I have to confess that I find the House role much more interesting than the Senate precisely because there is so little said about it.

I believe that the House has a critical role in defining presidential conduct, and it defines it by omission as well as defining it directly in an article of impeachment. It has an accusatory function in the tripartite system that I hope you will not ignore.

Many of the drafters referred to the House vote as being a guarantee to the holder of this office that there is conduct for which he will have to answer for. It is your function to detect such conduct, to deter it by your voice of condemnation. There is a censure provision in the Constitution. It is called Articles of Impeachment. It is where we define conduct that we find unacceptable in a President, and when we do that we don't just define what a President is, we define something about who we are. You don't have to worry about what the President's oath said, what he agreed to do. It is your oath that is at stake. You will define what we expect from a President. Regardless of whether the President is removed in the Senate, you will define it for future Presidents.

Now, when I refer to that structural role of your vote, I am referring to the Madisonian democracy. My students accuse me of being obsessed with James Madison. I have had pictures of James Madison drawn on my door in various outfits. I am obsessed with James Madison. I admit that.

I have the honor of teaching at an institute in Washington, D.C. and teaching on the Madisonian democracy, often to foreign delegations. We bring in delegations from Eastern Europe and nations that are in the same position as James Madison, nations that are trying to define who they are by their system of government. And I remember one time a delegation came in and they had just finished with the French, who have the same function going on over

there trying to convince them, and one of these delegates said the French referred to the Madisonian democracy as an ugly system, and I said that is true. It is also quintessentially French. I said it is ugly, but it has one thing to recommend it. It is still here. We didn't change the system in the streets of Paris with seasonal regularity. It is here.

I mention this story because when you sit in a hearing of this kind, I think the only thing that would bother Madison, if I may channel for him at this moment, is the view that we have such a fragile system, that the system is in danger by your decision. The system will last this hearing. It will last this crisis. It has lasted crises far worse than this.

The only thing that you can't do in a Madisonian system is grant an exception. If you stick with the process, it is not a pretty process, but it survives because what it does is it addresses factions, things that divide us, and it forces it into an open and deliberative process where we resolve it instead of letting it fester and letting it divide.

There is nothing more divisive than an allegation that a President lacks the political legal legitimacy to govern. That is when the Madisonian democracy and the process is so important. That is why you can't grant exceptions. There is a place in which that decision is made. It is that other body. Your function is to define conduct which we cannot tolerate. Conduct that is incompatible with the President's office.

Ultimately it doesn't matter if the President is removed. That is not a concern for this body. The President may not be removed. The drafters actually talked about a certain nullifying role of the Senate, that the Senate has to balance many things. The Senate was created to make it difficult to remove a President, but that is not your choice. It is not your function. You have a more important function than the Senate.

Your function is to help define what we expect from future Presidents, and they will look very carefully at your decision. If you say that a President can lie in a premeditated fashion to a Federal grand jury, then we will pay a very heavy price indeed.

Before this scandal I thought there was a bright line rule for Presidents. You can't commit crimes in office. We have had everything from drunkards to dullards in that office. I don't think Ulysses S. Grant had a sober moment in that office. But there was a bright line rule, you can't commit crimes in office. And when you do, you have to answer for it, and that is where I want to touch on the legitimacy question.

What Franklin said was that the Senate is the place in which a President cannot just simply be removed, but regain legitimacy. No matter how you feel about President Clinton, and I don't dislike President Clinton, I voted for President Clinton, no matter how you feel about President Clinton and no matter how you feel about the independent counsel, by his own conduct he has deprived himself of the perceived legitimacy to govern. You need both, political and legal legitimacy to govern in this nation because the President must be able to demand an absolute sacrifice from the public at a moment's notice, and when there is a question of legitimacy, it has to be resolved in a way that it doesn't divide, what Franklin re-

ferred to as irregular actions. That is why we created the Senate for this function.

When the President engages in conduct that deprives him of perceived legitimacy that divides a nation, that conduct will require him at times to stand in the well of the Senate and there he will regain the legitimacy that he lost. There is a difference between spiritual redemption and constitutional redemption. Spiritual redemption you can gain from a community of friends and family, but constitutional redemption is a little more difficult. Constitutional redemption occurs in the well of the Senate. It is when you stand there as a chief executive who by his own admission has taken reprehensible conduct in office, and you stand before the public and they will make a decision, and if you leave that body with your office intact, you have regained the legitimacy that you lost. That is constitutional redemption. That is what I believe the Madisonian system requires.

But I will end there, and I apologize for going on, and I appreciate the extension. Thank you.

[The statement of Mr. Turley follows:]

PREPARED STATEMENT OF JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

INTRODUCTION

Mr. Chairman, members of the Subcommittee on the Constitution, my name is Jonathan Turley. I am a professor at George Washington University Law School where I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law. I am honored to join you today in discussing the standards for impeachment. The Subcommittee has assembled an impressive array of law professors, lawyers, historians, and political scientists to assist you in exploring this fundamental question. We all come to the question from different disciplines, different backgrounds, and different perspectives. Regardless of our differences, however, we share a common concern that the standards applied in this crisis will have considerable ramifications for our country and our constitutional system of government.

For my part, I come to this question as a law professor who has litigated many of the constitutional issues involved in the current crisis. Although I have taught constitutional criminal procedure and lectured on the Madisonian Democracy for years, my views have been most influenced by my litigation in past cases dealing with the separation of powers doctrine, executive privilege, and Article II authority. While academic debates like today's can appear arcane and theoretical, these standards have concrete expression in cases involving the lives of average citizens and the conduct of executive branch officials. Executive power exhibits the same physical properties as a gas in a confined space: as the constitutional space expands, executive power expands to fill that space. The Framers were well aware of this tendency among all of the branches when they created a system of checks and balances. They sought to confine the space for expansion of one branch with the counter-pressure of the other branches. Congress should not be confused by the difference between a formal expansion of authority and an expansion of authority by negative inference. When Congress decides that certain criminal conduct does not rise to the level of impeachable offenses, it is defining a permissible parameter for future presidential conduct. Executive power will fill the space created by any decision of this body.

Before addressing the constitutional issues raised by this inquiry, I must acknowledge that, like some of my colleagues testifying today, I have reached personal conclusions as to the merits of this impeachment inquiry. My conclusions are a matter of public record. In addition to testifying in the Senate hearing on these issues, I have written many articles on the specific legal, historical, and constitutional questions facing Congress. While I clearly come to this question with some prior conclusions as to the basis for impeachment, my views on the standards for impeachment are entirely independent of this crisis or its underlying allegations. As an academic, I have a particular interest in the role of the House of Representatives in the impeachment process. *See* Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President,* 67 Geo. Wash. Law Review _____ (1999) (upcoming March issue).

I raise this issue because there has been a tendency in this crisis to define fundamental questions in terms of personalities. This has created an unfortunate tendency to judge impeachment standards depending on one's view of the President or the Independent Counsel. This is precisely why this hearing is so important. Long after this President, this Independent Counsel, and this crisis have faded into history, we will live with the standards that we articulate in the coming weeks. The standards for impeachment are not simply important for what they say about the government but what they say about the governed. We define something about ourselves in defining our expectations of our leaders. Academics cannot give an answer in such an inquiry. The most that we can do is help define the various dimensions of the question.

SUMMARY AND METHODOLOGY

Much of the recent debate over the standards for impeachment has focused on whether certain types of criminal acts or misdeeds are by definition outside the scope of Article II, Section 4. The White House has argued that a threshold definition of "high crimes and misdemeanors" excludes the conduct alleged as the basis for articles of impeachment in this inquiry. Some of the academics present today have endorsed variations of this theory. Accordingly, it is argued, the inquiry should be concluded without further action (beyond a possible censure) since, even if proven, the alleged misconduct could not fall under the clear meaning of impeachable acts. Additionally, it is argued that any impeachment based on the allegations of the Independent Counsel would actually undermine our constitutional system.

It is important to restate the specific context for this threshold argument. President Clinton stands accused of a series of knowing criminal acts in office, including perjury, obstruction of justice, witness tampering, and abuse of office. While I greatly respect the academics on the other side of this debate, I do not believe that there is a basis to exclude such conduct from potential articles of impeachment on any definitional, historical or policy basis. Far from it, I believe that the argument advanced by the White House would create extremely dangerous precedent for our country and would undermine fundamental guarantees of the Madisonian Democracy. It is my view that the allegations in this inquiry, if proven, would constitute clear and compelling grounds for impeachment and the submission of this matter to the United States Senate for a determination of the merits.

Before explaining the basis for this conclusion, a brief methodological point is warranted. You will note that many academics present today will rely on the same quotations from the Framers in advancing their rivaling conclusions. The literature in this area is rich with different theories of constitutional interpretation. The meaning of the impeachment standard is heavily influenced by the view of the individual academic. Many academics follow a variety of alternative interpretative approaches other than textualist or originalist interpretation. There is a danger when these theories are super-imposed on a sparse historical record to advance a claim of clear original intent or restrictive hidden meaning. They represent choices by academics as to the most vital factors or values within the constitutional system. They are choices that may be probative and informed but they are also highly personal choices. In reality, I expect that you will find at the end of this day that academics are divided much in the same way that the Framers were divided. You will be left with a personal judgment as to the seriousness of the President's conduct as considered by the standards and expectations of this generation.

One of my primary interests in the current debate is the repeated use of historical or originalist arguments to claim a restrictive definition of "high crimes and misdemeanors." In my opinion, there is no objective basis in the text or history of the Constitution to claim a clear answer to this question. There is no "dead-hand control" of the Framers on answering the question before this body. The Framers were more concerned with who would decide this question rather than what they would decide in a given circumstance.

Since this argument has been advanced on originalist and textualist grounds, three obvious questions should be addressed by this Subcommittee. First, Congress must examine the actual language of Article II to determine any textual meaning of the terms "other high crimes and misdemeanors." Second, if no clear textual definition in the language, Congress must look at the history and debates behind the language to determine any original intent of the Framers. Third, and finally, Congress must consider the meaning of "high crimes and misdemeanors" in relation to the function of impeachment within the Madisonian Democracy.

My formal testimony today will address each of these discrete inquiries.

TEXTUAL ANALYSIS

While (as will be shown below) impeachment was not a primary focus of the Framers, it was viewed as central to the structure of the tripartite system. Impeachment is mentioned in five different provisions of the Constitution. Although the critical language is found in Article II, it is useful to begin with the actual textual references to this process:

Article I, Section 2

> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment. U.S. Const. art. I, cl. 8.

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. U.S. Const. art. I, 3, cl. 6.

Article I, Section 3

> 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 the Law. U.S. Const. art. I, 3, cl. 7.

Article II, Section 2

> [The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment. U.S. Const., art. II, 2, cl. 1.

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. U.S. Const. art. II, 4.

These provisions yield primarily procedural limitations that were laid out with considerable specificity. They relate to the questions of who will decide impeachment issues and how that decision will be made. The two houses of Congress are given distinct and exclusive roles in the impeachment process. The Framers designated the specific voting requirements for each house in fulfilling these respective roles. The Framers further added such details as the identity of the presiding judge, the use of oaths or affirmations in impeachment trials, and limitations on the permissible punishment for committing impeachable offenses. After designating such procedural issues with specificity, however, the Framers left the actual standard for impeachment as an extremely general and potentially malleable phrase.

Interestingly, the phrase "high crimes and misdemeanors" was not made part of Article I and the limitations on the congressional impeachment authority. In defining the process by which Congress would carry out this duty, the Framers did not elect to add limiting language for areas of legitimate inquiry. Rather, the phrase appears as part of the description of executive authority in Article II where it defines the parameters for presidential conduct and conditions for removal.

The meaning of Article II, Section 4, is properly the focus of this hearing and the central issue for the House of Representatives in this crisis. The text of this provision, of course, yields little evidence of definitional intent. The language establishes three basic textual points. First, "other high crimes and misdemeanors" obviously refers to conduct other than treason and bribery. Second, it is generally accepted that "misdemeanors" encompasses non-criminal conduct in the sense of "misdeeds." Finally, in the description of the House impeachment authority, the Framers only designated a specific process by which such decisions are to be made rather than add any exclusionary or restrictive phraseology.

The text is most notable in its omission of certain distinctions. The text does not, for example, distinguish between the standard of impeachment as applied to the President, Vice-President or other civil officers (which include federal judges). There is no textual basis to claim that the Framers intended a lower standard to apply in the impeachment of federal judges than in the impeachment of presidents. The same standard of "other high crimes and misdemeanors" is stated as applicable to all of the subject officials regardless of their office. Likewise, the text does not limit

or restrict the impeachment standard to official acts or abuse of power. In fact, as will be shown below, words that would have restricted the standard to such misconduct were actually removed from the text.

Analyzing this language from an originalist or textualist viewpoint would lead to an extremely broad definition of "other high crimes and misdemeanors." While impeachment decisions are not reviewable by the federal courts, a judicial review of this language would produce a predictable result for judges who subscribe to a strict construction theory of interpretation. Such judges would conclude that, if the Framers intended a more restrictive definition or a different standard for presidents as opposed to judges, the text would reflect such an intent. Instead, the Framers defined the process of impeachment with specificity but not the standard applied in the respective inquiries or trials of either house.

An objective textualist reading reveals no conclusive definition of "other high crimes and misdemeanors." Both sides in this debate could claim some support in the text. The word "other" can be cited as evidence of the intent to include offenses of a similar magnitude as the identified offenses. Under the canon of construction "*ejusdem generis,*" the term "other high crimes and misdemeanors" can be read "as the same kind" as treason and bribery.[1] Conversely, the general and undifferentiated language can be legitimately cited as textual support for applying to presidents the same broad standard applied to judges. Under the interpretation given this phrase in past impeachment cases, the President's conduct would clearly fall within the meaning of "high crimes and misdemeanors." Absent the most ardent textualist approach, however, an objective reading of Article II leaves the question unresolved. The next interpretive step is to look to the historical evidence behind this language.

HISTORICAL ANALYSIS

A. The Constitutional Convention of 1787

It is not a particularly challenging task to review the original words of the Framers on this issue. Impeachment was not a central focus of the Constitutional Convention. *See generally* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and its Alternatives,* 68 Tex. L. Rev. 1 (1989). The Federalist Papers contain only limited discussion of this area. Likewise, the references in the debates over the language and ratification of this clause is quite sparse. The "legislative history" on this issue can be found in the debates in Philadelphia during the summer of 1787 and the later ratification debates in the various states. What these debates reveal is open division among the Framers resulting in a general compromise. It does not reveal a clear resolution for either side in this debate.

Most academics have used the same limited references to support either broad or restrictive definitions of impeachable offenses.[2] In the Constitutional Convention, only a small number of delegates spoke in any detail on this issue and the result was a general phrase incorporating a long-used English standard. There is evidence in the Constitutional Convention to support both sides of this debate. The only clear matter is that the delegates were divided on the standard for impeachment but resolved impeachment issues of greater concern.

There were two types of impeachment issues raised in the Constitutional Convention and state ratification debates. First, the delegates were concerned about institu-

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[1] This canon appears to underlie the analysis of a letter circulated by law professors supporting the narrow interpretation of "high crimes and misdemeanors" in this crisis. While certainly a legitimate interpretative point, this canon is primarily used in statutory construction and, even in the statutory context, rarely "impl[ies] that an *ejusdem generis* reading of the statute is constitutionally compelled to the exclusion of other reasonable interpretations." *Garner* v. *Louisiana,* 368 U.S. 157, 168 (1961). Even in such statutory cases, courts rarely apply the doctrine where "[n]o conflict between a general and a specific proposition of law is involved." *Campbell* v. *United States District Court,* 501 F.2d 196, 201 (9th Cir. 1974). When construing a constitution, courts tend to be more circumspect. The text of Article II can be easily read to mean what it states: the Framers wanted to identify two specific acts of impeachable offenses while allowing Congress to define additional impeachable acts within the established structure of Article 1. As will be shown below, there is a strong functional argument for such a standard without resorting to a canon of construction.

[2] The use of legislative history in actual cases has proven one of the most controversial and divisive among the courts. Jurists like Justice Anton Scalia have waged a furious war against the use of legislative sources in many statutory cases as inherently unreliable and opportunistic. *See* Frank Easterbrook, *Statute's Domain,* 50 U. Chi. L. Rev. 533, 541 (1983) ("The number of judges living at any time who can, with plausible claim to accuracy, 'think [themselves] . . . into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar,' may be counted on one hand.") (quoting Richard Posner, *Statutory Interpretation—in the Classroom and in the Courtroom,* 50 U. Chi. L. Rev. 800, 817 (1983)). For these jurists, reliance on the "legislative" record in this matter would be positively maddening.

tional issues related to the whether and how a president could be removed from office, particularly the proper "court" that would rule on impeachable offenses. Second, the delegates were concerned about the specific standard to be used in any removal. While the delegates were very clear as to the institutional issues, they did not to define the standard for removal beyond a highly generalized phrase. Instead, they spent considerable time defining the "jury" or "court" that would decide the merits of any impeachment.

There was debate on the very option of impeachment of a president. At the time, before the enactment of the twenty-fifth amendment in 1967, impeachment was the only method of removal for a President under the Constitution. Delegates often suggested standards contained in their own state constitutions, such as the "maladministration or corruption" standard used in such states as Delaware and North Carolina. Some delegates like Charles Pinckney of South Carolina, Gouverneur Morris of Pennsylvania, and Rufus King of Massachusetts struggled at various points with the notion of a chief executive who could be subject to removal on any ground. Delegate Gouverneur Morris initially believed that impeachment would place a president under the de facto control of the legislature.[3] William Davie of North Carolina, however, warned that impeachment was "essential security for the good behaviour of the Executive." 2 Records of the Federal Convention of 1887, at 64 (M. Farrand ed.) (rev. ed. 1937) [hereinafter *Records* vol. 2] Ultimately, delegates like Benjamin Franklin, George Mason, and James Wilson persuaded the Convention that impeachment was vital to the structural integrity of the system.[4]

The delegates divided more sharply on the appropriate mechanism and "court" for impeachments. Each of the delegates advanced plans that often reflected the conclusions of their state conventions. Some delegates, like Edmund Randolph and James Madison, advocated the "Virginia Plan," which would have given the federal courts the authority to try impeachments. Other delegates like William Paterson of New Jersey advanced the "New Jersey Plan," which would have placed the power of impeachment in the hands of the nation's other chief executives, the state governors. John Dickinson of Delaware recommended that the President "be removable by the national legislature upon request by a majority of the Legislatures of the individual States," 1 Records of the Federal Convention of 1787, at 78 (M. Farrand ed., 1937) [hereinafter *Records* vol. 1]. New York Delegate Alexander Hamilton advanced a plan similar to the New York impeachment process in which impeachments were tried by a court "to consist of the Chief or Judge of the superior Court of Law of each State." *Records* vol. 1, *supra,* at 292–93. Ultimately, with the Pennsylvania and Virginia delegates in continued opposition, the delegates agreed on leaving the impeachment decision to Congress. The delegates, however, divided the process between the houses and gave each house distinct roles in promulgating articles of impeachment and trying articles of impeachment.

While the debate over the proper court for impeachment and necessary vote was quite detailed, the issue of the standard for impeachment remained notably general throughout the debates. The delegates were again divided. On one end of this debate, delegates like Roger Sherman of Connecticut "contended that the National Legislature should have power to remove the Executive at pleasure." *Id.* at 85. Likewise, other delegates like George Mason of Virginia offered the standard to be "maladministration." *Records* vol. 2, *supra,* at 550. Conversely, as noted above, some delegates like Charles Pinckney believed that a president should not be subject to impeachment for any offense. In response to Mason's standard, James Madison objected that "maladministration" as too ambiguous but Madison also stated impeachment was a necessary precaution against "the incapacity, negligence or perfidy of the chief Magistrate." *Id.* at 65. For his part, 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." *The Federalist* No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Benjamin Franklin viewed impeachment as a process by which public concerns over presidential misconduct could be resolved and the legitimacy of a presidency restored. Franklin noted that there are times when a president's conduct is viewed "obnoxious" and demands a process of public review and decision. *Records* vol. 2, *supra,* at 550. The impeachment process, he concluded, is "the best way . . . to provide in the Constitution for the regular punishment of the Executive when his mis-

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[3] Morris favored a shorter term of office and impeachment of the "great officers of State" in the cabinet. *See generally,* Alexander Simpson, Jr., *Federal Impeachments,* 64 U. Pa. L. Rev. 651, 656 (1916).

[4] On July 20, 1787, the question was presented after a motion for postponement: "[s]hall the Executive be removable on impeachments?" The vote was eight to two with Massachusetts and South Carolina voting against the measure. *Records* vol. 1, *supra,* at 69.

conduct should deserve it, and for his honorable acquittal when he should be unjustly accused." *Id.* at 65. This point was also made during the state ratification debates by delegates like James Wilson who stressed a broad range of accountability for the Chief Executive:

> 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. We secure vigor. We will know what numerous executives are. We know there is neither vigor, decision, nor responsibility, in them. 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 his public character by impeachment.

The Debates in the Several State Conventions on the Adoption of the Federal Constitution 449 (Jonathan Elliot ed., 1941).

In the actual drafting, these views appeared and disappeared during the work of the Committee of the Whole, Committee of Eleven, the Committee of Detail, and the Committee of Style and Arrangements. At first, the delegates appeared to favor the standard, advocated by Hugh Williamson of North Carolina, of "malpractice or neglect of duty." *Records* vol. 1, *supra,* at 78. This standard, which first appeared in a resolution on May 29, 1787, was then slightly reworded by the Committee of Detail as "neglect of duty, malversation, or corruption." *Records* vol. 2, *supra,* at 337, 344.

On June 1, 1787, Gunning Bedford of Delaware referred to the impeachment standard as "reach[ing] malfeasance only, not incapacity." *Records* vol. 1, *supra,* at 69. On June 2, 1789, Delaware delegate Dickenson proposed a provision without a standard that would simply state that the president is "removable by the national legislature upon request by a majority of legislatures of the individual States." *Id.* at 78. While this motion was rejected, Mason (who opposed the measure) stated the need of impeachment because "some mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen." *Id.* at 86. Immediately following Mason's comments, Madison stated (with James Wilson of Pennsylvania) that he was concerned about any system that would prevent the majority from "remov[ing] . . . an officer who had rendered himself justly criminal in the eyes of a majority." *Id.*

These comments appear sporadically in the Convention records often within the discussion of the structure of the impeachment process. The standard continued to shift with the discussion. On July 20, 1787, the standard of "malpractice or neglect of duty" was under consideration. *Records* vol. 2, *supra,* at 64. Other members then substituted "treason, bribery, or corruption" while George Mason demanded that "maladministration" should be added. On September 8, 1787, the Committee of Eleven suggested a standard of "treason or bribery." Finally, delegates like James Madison successfully argued that they should use the English standard of "other high Crimes and Misdemeanors against the United States."[5] The standard of "other high Crimes and Misdemeanors against the United States" was then sent to the Committee on Detail. The Committee on Detail then decided to eliminate the words "against the United States." *Id.* at 600.

Thus, the requirement that "other high Crimes or Misdemeanors" refer to misconduct directed against the public was removed from the standard. This would seem to be the very distinction drawn by the White House in this debate, the notion that impeachable offenses must be forms of official misconduct or abuse of office. It is not clear, however, whether the Committee on Style and Arrangement simply viewed this language as redundant or, alternatively, too restrictive. The Committee on Style and Arrangement was not given authority to make major changes in such standards and most (but not all) changes in the Committee were made for cosmetic or consistency purposes. Nevertheless, there was no objection to the removal of a phrase that would clearly narrow the scope of impeachments. Regardless of the reason for this final change, the final version of "treason, bribery, and other high crimes and misdemeanors" emerged without the potentially restrictive phrase "against the United States."

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[5] During the debates, the delegates considered and rejected the term "high misdemeanor" in favor of other crimes "in order to comprehend all proper cases, it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." Simpson, *supra,* at 662.

Any academic could read most any original intention into such a record. For my part, I tend to view the record with a legisprudential perspective. In one sense, this record should look familiar to members of this Committee. As with modern legislative bodies, the Constitutional Convention often gravitated toward more general language when faced with deep division. This is precisely the phenomenon that leads to "legislative gaps" or ambiguities in modern legislation. The delegates were quite familiar with the English standard and the contemporary impeachments of individuals like Governor-General Warren Hastings. *See Impeachment Staff Inquiry, House Committee on the Judiciary, Memorandum: Constitutional Grounds for Presidential Impeachment* 11 (Feb. 20, 1974). It was an available basis for compromise to use such a well-known standard when presented with a legislative division.

Notably, the delegates did not opt for a specific list of offenses, which would have been entirely possible from their knowledge of English cases.[6] Instead, the delegates committed their time to defining the court and process by which an impeachment decision would be made. As will be shown below, I believe this approach was consistent with other areas of the Constitution. Consider the exchange between the main protagonists:

> 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 moved to add after "bribery" "or maladministration."
>
> Mr. Gerry second 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").[7]
>
> On the question thus altered [Ayes—8; Noes—3] [8]

Records vol. 2, *supra,* at 550.

Both sides in this debate can find support in this record. There were clearly delegates who were concerned that the standard for impeachment could be set so low or so ambiguously that the President would be subject to impeachment at the will of Congress. Likewise, the Framers do make occasional reference to abuses of office. Even Mason refers to a definition sufficient to cover "[a]ttempts to subvert the Constitution." *Records* vol. 2, *supra,* at 550. Conversely, delegates were also concerned about too narrow a definition. The reference to Hastings by Mason is particularly telling on this point. Governor General Warren Hastings was very much on the minds of the Framers because it was a contemporary impeachment case. Hastings, however, was not impeached for criminal acts alone but a variety of criminal and noncriminal acts, including "high crimes and misdemeanors in the form of gross maladministration, corruption in office, and cruelty toward the people of India." Impeachment Inquiry, *supra,* at 11 & n.19. When Mason objected that the language treason and bribery would not reach such conduct, he suggested a potentially broad definition to extend to different forms of misconduct in a Chief Executive.

Congress could certainly chose to give greater weight to one delegate or one statement over another. A more objective response, however, is to conclude that this record reveals the same division of opinion that we have today. Rather than create a more specific definition, the Framers created a specific process for reaching impeachment decisions.

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[6] Professor Raoul Berger has in fact assembled such a list of categories of impeachable offenses. These included "misapplication of funds;" "abuse of official power;" "neglect of duty;" "encroachment or contempts of Parliament prerogatives;" "corruption;" "betrayal of trust;" and "giving pernicious advice to the crown." Raoul Berger, *Impeachment: The Constitutional Problems* 70–71 (1973).

[7] After this language was added, Mason moved to change the words "against the State" to "against the United States." This was done "in order to remove ambiguity" and was approved unanimously. Then, the Committee of Style dropped "against the United States," producing our current language.

[8] The specific vote of 11 delegations was: New Hampshire (in favor); Massachusetts (in favor); New Jersey (against); Pennsylvania (against); Delaware (against); Maryland (in favor); Virginia (in favor); North Carolina (in favor); South Carolina (in favor); Georgia (in favor).

B. The Antecedent English History

Since the delegates applied a known English standard, it might be possible to find some evidence of intent from the historical meaning of the phrase "high crimes and misdemeanors." Certainly, the impeachment clauses were heavily influenced by the English model. *The Federalist* No. 65 at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the English experience was "[t]he model from which the idea of this institution has been borrowed"). Various alternative phrases used in English impeachments before "high crimes and misdemeanors" ranged from "treasons, felonies, and mischiefs done to our Lord, The King" to "divers deceits." *See generally* Leon R. Yankwich, *The Impeachment of Civil Officers Under the Federal Constitution,* 26 Geo. L. J. 849, 853 (1938).

The phrase "high crimes and misdemeanors" was first clearly applied in the trial of the Duke of Suffolk in 1386 who stood accused of a host of impeachable offenses including the appointment of incompetent officers and the use of appropriated funds for unapproved purposes.[9] After the trial of Suffolk, impeachment on the basis of high crimes and misdemeanors covered a range of noncriminal conduct, including the impeachment of Peter Pett for "loss of a ship through neglect to bring it to mooring." Likewise, the Earl of Oxford was tried for the high crime and misdemeanor of "giving pernicious advice to the Crown." 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.

2 Joseph Story, Commentaries of the Constitution of the United States § 798, at 268–69 (rev. ed. 1991).

As noted earlier, the Framers were most aware of contemporary impeachments like that of Governor General Warren Hastings of the East India Company. The articles of impeachment against Hastings were approved in 1787 and included "maladministration" and other noncriminal acts. Peter C. Hoffer & N.E.H. Hull, *Impeachment in America 1635–1805*, at 113 (1984). These charges included "cruelty" and a variety of conduct incompatible with a representative of the Crown. *Id.*

Notably, the delegates made few references to English impeachment cases or standards in the debate. As noted earlier, the delegates often advocated standards from their own state constitutions rather than the dimensions of the English standard, which was so fluid as to defy reliable definition in practice. Likewise, while taking the well-known English phrase, they did not reproduce the English model but instead made a series of important changes. Gerhardt, *supra,* 68 Tex. L. Rev. at 11 ("[F]rom the outset of the Convention, the delegates agreed to deviate from the English impeachment procedure.") (citing Hoffer & Hull, *supra,* at 96). For example, the bifurcation of roles between the two houses was taken from the English model "which assigned the role of the prosecutor to the Commons while the Lords sat in judgment." Raoul Berger, *Impeachment: The Constitutional Problems* 54 (1973). Nevertheless, the Framers made critical changes in the United States Constitution such as the imposition of a two-thirds vote in the Senate for conviction; the requirement of acting upon oath or affirmation; and the limitation of persons subject to impeachment.

Both sides can take support from this historical record. The historical use of this phrase clearly encompassed a very low threshold of conduct and subjected most any offensive conduct to possible impeachment. Moreover, there was no apparent interest in the scope of the phrase when it was introduced to resolve the division of opinion in the Convention.[10] On the other hand, charges were often loosely framed in terms of official misconduct or negligence in conducting affairs of office. While this is consistent with a legitimacy definition, discussed below in the functional analysis section, it can be claimed as some evidence of a public/private distinction. Once again, therefore, the historical value of this record can be best described as inconclu-

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[9] A precise date for the first English impeachment is a matter of academic debate. *See generally* Alexander Simpson, Jr., *Federal Impeachments,* 64 U. Pa. L. Rev. 651, 651 (1916) (noting that some academics trace impeachment to "David, brother of Llewellyn" in 1283). Reliable procedures were not put into place until 1399, by an act of Henry IV.

[10] As shown in the functional analysis section, the United States Congress has always applied an interpretation of "high crimes and misdemeanors" in judicial cases that encompasses nonpublic acts or conduct.

sive. There is little reason to argue that the Framers desired to transpose the English model on their new country when they made such significant procedural changes. The standard "high crimes and misdemeanors" was a convenient and known phrase in such cases. Rather than create a new standard, the Framers simply created a new process by which to apply it.

FUNCTIONAL ANALYSIS

Putting aside notions of binding textualist or originalist interpretations, we are left with a functional question. How we view the role of impeachment within the constitutional scheme will largely dictate our interpretation of the "high crimes and misdemeanors" standard. To answer this question, we must consider both the standard and the role of the House of Representatives in the impeachment process. In my view, the impeachment process has two consistent functions. First, impeachment serves as a unique counterbalance to presidential power as part of the checks and balances in the tripartite system. Second, the impeachment process serves to address public legitimacy issues in forcing serious allegations into the Senate for a resolution under strict procedural guarantees.

Under this constitutional scheme, both houses have distinct functions. I have always found the role of the House to be more interesting than the Senate because so little was actually stated about the House impeachment authority in the Constitutional Convention or the constitutional text. In my view, the impeachment clause is a critical check and balance on the Chief Executive and the House vote is the most critical component in preserving that deterrent.

A. The Institutional Function of the House of Representatives in Impeachment Proceedings: Static Constitutional Principles

The Constitution contains both static and evolutionary provisions. Static provisions are often structural in their function in the constitutional scheme. These provisions are unchanging and immutable. Article I, Article II and Article III were written to preserve checks and balances that remain constant regardless of the period or issues in controversy. The power of the veto in the Chief Executive and the power of the purse in the Legislative Branch are examples of static structural elements that preserve balance within the tripartite system.[11] These static provisions serve a structural function in preserving separation of powers and the system of checks and balances. As will be shown, the meaning of "high crimes and misdemeanors" is inextricably linked to this structural function of the House.

1. The House of Representatives as a Grand Jury

The Framers were obviously aware of the dangers of legislative encroachment in allowing the removal of a president by Congress. Their response to this concern, however, was to look to the institutional roles of the two houses and not to restrict the standard to certain areas or subject matters. As on many issues, the Framers applied the concept of bicameralism to moderate any improper legislative impulse. As the Supreme Court noted in *Nixon* v. *United States,* 506 U.S. 224, 236 (1993), "[the] split of authority [between the houses] guards against the danger of persecution from the prevalency of a factious spirit in either of those branches."

In crafting the static provisions of impeachment authority, the Framers primarily focused on the Senate. It was the Senate that would resolve any uncertainty over the fitness of a president to govern through a process that was weighted toward acquittal. It is interesting that the oft-used quote of Alexander Hamilton on the "political" nature of the impeachment process was actually a reference to the decision of the Senate:

> [T]he subjects [of Senate] jurisdiction [in an impeachment trial] are those offenses 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.

The Federalist No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The oft-cited reference to a political determination, therefore, expressly linked that function with the Senate and not the House. Such comments could indicate that the Framers foresaw a discretionary vote, even a "nullification" vote, to be more properly made in the Senate as opposed to the House. It was the Senate that was viewed as the body best suited to resolve such controversies in the long-term interests of the nation with either conviction or acquittal.

[11] Some non-structural provisions such as the age and citizenship requirements of Article I and Article II are static provisions establishing minimal qualifications for office.

Various Framers referred to the Senate's role exclusively when discussing impeachment. The Framers viewed the Senate as guaranteeing a more moderate and discriminating review of controversies surrounding a president. Alexander Hamilton observed: "What other body would be likely to feel confidence enough in its own situation to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused and the representatives of the people, his accusers?" *Id.* at 398.[12]

The different treatment given the House and Senate in both the language of the Constitution and the constitutional debates is telling. The Framers simply noted that the House "shall have the sole Power of impeachment." U.S. Const. art. I, § 2. There is no guidance as to how impeachment inquiries are to be raised, conducted, or concluded, including the absence of any requirement to conduct proceedings under oath. The Senate, on the other hand, is discussed repeatedly and carefully structured. The Framers specifically require that the Senate proceed "on Oath or Affirmation." U.S. Const. art. I, § 3. When the President is tried, the Senate is required to proceed with the Chief Justice of the Supreme Court as the presiding judge. The Framers mandate that the Senate may not impose any judgment "further than to removal from Office." *Id.* This emphasis on the Senate reflects the more procedural role of the House in bringing matters to the Senate where the substantive determination is made for removal.

The debates reflect the view that the Senate would be the forum for the appearance of witnesses and a comprehensive treatment of the allegations of misconduct against a president. The Framers did not appear to anticipate the type of hearing with witnesses and subpoenas used during the Nixon inquiry by the House Judiciary Committee.[13] For that reason, impeachment allegations can be raised in a variety of ways including referrals from state legislatures, grand juries, and individual members. While committees have routinely been used to address such allegations, the Constitution does not even require deliberations, let alone a committee hearing.

The voting roles of the House and Senate roughly resemble the classic grand jury and petit jury models. The Framers used criminal procedure terms like "convict" or "acquittal" or "punishment" in debating the process. Under the Constitution, the House functions much like a grand jury. Similar to a grand jury, the House does not rule on the merits of impeachment allegations, a function given exclusively to Senate under Article I, Section 3. Rather, articles of impeachment are a type of presidential indictment under Article I. Moreover, the vote of the House to impeach is a simple majority vote like a grand jury while the Senate requires a higher standard to find guilt (a two-thirds vote). Finally, the Framers specifically mandated that a trial be held in the Senate under specific conditions while leaving the House to impeach in any fashion that it chooses.

In my view, the Framers wanted impeachment issues to be handled by the Senate under the conditions set out in Article I, Section 4. This was the body that Hamilton described as the "court of impeachment." *The Federalist* No. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The House was not endowed with any of the features viewed as essential to a proper treatment of the merits.[14] The House function was, therefore, viewed as facilitating review in the Senate by articulating the

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[12] I have found the periodic references to Jefferson's view on impeachment to be interesting given his unease with the final procedural safeguards. This unease became apparent in the impeachment trial of Senator William Blount, a delegate to the Constitutional Convention, for secret dealings with England to take over a large portion of land of what is now Louisiana. During the debate, Jefferson's close friend, Virginia Senator Henry Tazewell, argued that a jury and not the Senate should judge impeachments. Jefferson clearly agreed. 7 *The Writings of Thomas Jefferson* at 195 (Paul L. Ford ed., 1896) (Letter from Thomas Jefferson to Henry Tazewell). Jefferson wrote to Madison on the issue, but Madison responded that he was not persuaded that there was a need for the added procedural protection. Madison simply responded that "[m]y impression has always been that impeachments were somewhat sui generis, and excluded the use of Juries." 17 *The Papers of James Madison* 88 (David B. Mattern *et al.* eds., 1991). For a discussion of this trial, *see* Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framer's Intent,* 52 Md. L. Rev. 437 (1993) (discussing the Jefferson and Madison letters)

[13] During the Nixon hearings, the House assumed many of the functions that the Framers described as part of the Senate process—a dangerous practice in a carefully divided and balanced system. The suggestion of a long hearing in the current inquiry is troubling given the existence of a comprehensive record by an officer appointed to gather such information. The only constitutional duty of the House in such a circumstance is to confirm the accuracy of the submitted record and to determine that these allegations, if true, would constitute "high crimes and misdemeanors." Since the Senate has sole authority to try all impeachments, the balancing of individual testimony or facts is properly a matter for the Senate. It would behoove the House to consider the constitutional foundations for the Nixon model before replicating such a quasi-Senate proceeding.

[14] This is significant since individuals like Jefferson had serious reservations with the Senate procedures (particularly the absence of a jury). They would likely have had even greater reservations with the House reaching the merits of cases, as was done in the Nixon hearings.

allegations against a president. While the Senate is not as protective over rights as a conventional trial,[15] the Senate's impeachment authority was specifically created to hear witnesses and to deliberate on such matters. For the House to take on a broader role of litigating the merits would be akin to a grand jury convicting an individual without benefit of the protections of a trial, including the rules of evidence. The House serves an accusatory not an adjudicatory function.

2. Impeachment as a Check on Presidential Power

The accusatory function of the House is essential to maintain a certain deterrence on presidential misconduct. Conversely, as will be shown below, the adjudicatory function of the Senate is essential to maintain a certain political integrity in the system.

There is a tendency to view the impeachment provisions as a type of negative "qualification" provision without any view to its role as part of the checks and balances between the branches. Clearly, the Framers wanted to create a vehicle for removal to avoid paralysis in office. However, they also viewed impeachment as a critical check on the conduct of the President, including a lingering threat for failure to supervise other executive branch officers. Madison explained that:

> [it is] indispensable that some provision should be made for defending the Community ag[ain]st the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression . . . In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more with the compass of probable events, and either of them might be fatal to the Republic.

Records vol. 2, *supra*, at 66; *see also* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 281 (Jonathan Elliot ed., 1941) (Pinckney) ("Under the new Constitution, the abuse of power was more effectually checked than under the old one. A proper body, immediately taken from the people, and returnable to the people every second year, are to impeach those who behave amiss, or betray their public trust."). While there may be a variety of disabilities that were not viewed in the 1700s as falling within "the compass of probable events," the impeachment process is the only provision imposing a direct threat on a president in the conduct of his office. This serves to deter misconduct and to encourage a president to maintain certain "virtues" in governance.

The accusatory function of the House of Representatives is central in the design of a check and balance system.[16] See John R. Labovitz, *Presidential Impeachment* 249 (1978) ("To avoid executive usurpation of power, the delegates sought to provide checks upon his conduct, including provision for his removal though impeachment.") Since impeachment is the only method by which a president can be removed from office for misconduct, it is the only check and balance on the personal conduct of the Chief Executive as opposed to the Executive Branch.

What is clear from the debates is that impeachment was first considered exclusively in terms of a limitation on the President. When the Framers first inserted a removal provision in the Constitutional Convention, the provision referred only to the removal of a president.[17] As a check and balance, any narrowing of the definition of impeachable conduct will have a corresponding expansion of the area for permissible conduct by the Chief Executive. For that reason, any limiting threshold test

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[15] The Senate is not required under the Constitution to follow the rules of evidence or allow for the sixth amendment rights of a criminal defendant such as confrontation or a jury. Nevertheless, it is required to proceeded under oath or affirmation; submit to the supervision of the Chief Justice; and satisfy a two-third vote for conviction. The required supervision of the Chief Justice would suggest an expectation that the Chief Justice would rule of evidentiary or procedural issues to guarantee minimal standards of adjudication, as was the case in the Johnson trial.

[16] The separation of powers is based on the static separation provisions defining the three branches and the system of checks and balances. The latter offer the great security against a gradual concentration of the several powers in the same department by applying the principle that [a]mbition must be made to counter ambition. *The Federalist* No. 51 at 321 (James Madison) (Clinton Rossiter ed., 1961); *see also The Federalist* No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

[17] It was later extended to the Vice-President and other civil officers without explanation. *See* Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 Geo. L. J. 2193, 2201 ("The scope of the [impeachment clause] was expanded, without recorded discussion, to include 'the vice-president and other Civil officers of the U.S.' only on September 8, after the Framers had discussed the necessity of impeachment and formulated the applicable impeachment standard.")

must not be endorsed without considerable care and caution. If the House endorses the view that the President can commit the alleged criminal acts without suffering impeachment, the House will be defining an area for permissible future conduct.[18] Likewise, there is great significance to where an impeachment process terminates. If the process terminates in the House, the underlying conduct becomes precedent of exclusion. If the process terminates in the Senate without conviction, no precedent is established for similar conduct in the future.[19] Both decisions may be acts of political nullification of criminal conduct by a president. However, when the House acts in this fashion, it has a greater influence on future presidential conduct.

By performing its accusatory function, the House plays the critical deterrent role for a president. This deterrence function was referenced by the Framers. When Elbridge Gerry of Massachusetts urged the necessity of impeachments, he further noted:

> A good magistrate should not fear them. A bad one ought to be kept in fear of them. [Gerry] hoped the maxim would never be adopted here that the chief magistrate could do [no] wrong.

Records vol. 1, *supra*, at 66. Likewise, other delegates in the state ratification debates expressed concerns over the need for deterrence with the system. For example, James Iredell (who would become the sixth appointment to the United States Supreme Court) spoke of the importance of the House impeachment authority as a deterrent in his remarks to the North Carolina Convention:

> Mr. Chairman, I was going to observe that this clause, vesting the power of impeachment in the House of Representatives, is one of the greatest securities for a due execution of all public offices. Every government requires it. Every man ought to be amenable for his conduct, and there are no persons so proper to complain of the public officers as the representatives of the people at large. . . . It will be not only the means of punishing misconduct, but it will prevent misconduct. A man in public office who knows that there is no tribunal to punish him, may be ready to deviate from his duty; but if he know there is a tribunal for that purpose, although *he may be a man of no principle, the very terror of punishment will perhaps deter him.*

4 Elliot, *supra*, at 32 (Iredell)(emphasis added).

When properly used, the mere threat of removal can produce the deterrence sought by these Framers. Academics often discuss deterrence as a relationship between detection and penalty. As detection increases, a penalty can decrease without undermining deterrence. *See generally* Richard A. Posner, *An Economic Theory of the Criminal Law,* Colum. L. Rev. 1193, 1209–14 (1985). In the same fashion, a higher penalty will often deter conduct with a lower level of detection. In this deterrence scheme, the House functions as the detecting body. By threatening detection and accusation, the House deters misconduct by exposing presidents to the uncertain outcome of a Senate trial. Because the Constitution is written to make a penalty less likely in the Senate, it is essential that the House fully perform its detection and accusation role to achieve deterrence under this system. The Senate may then choose to acquit but the standard of conduct for future presidents has not been lowered by the adoption a narrow threshold definition in the House.

Early in this process, I suggested that Congress should not view impeachment as requiring conviction and removal. I stated that there may be circumstances in which the proper penalty for a president is indictment in the House but not removal. Impeachment performs the very constitutional function that is sought in a censure. It defines conduct as sufficiently egregious to warrant removal. The actual removal of a president, however, depends on a variety of circumstances considered in the Senate. The Senate is expected to balance many factors in the interests of the public. In this sense, the Framers appeared to anticipate that the Senate could engage in jury nullification. The Senate has the authority to simply deny conviction on the ar-

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[18] A simple censure or condemnation offers little to a system of checks and balances which appears precisely why the Framers did not rely on such penalties in any part of the constitutional system. If a Chief Executive has already been the subject of a public controversy, a censure is little more than shaming him twice. An impeachment constitutes a more historical penalty for a president that formally identifies conduct as incompatible with the status of Chief Executive, while carrying the same repudiatory message as a censure vote.

[19] This is due to the fact that the Senate is expected to use its discretion to balance the various long-term needs of the country. Since a House vote would establish that some crimes in office are sufficient to expose a president to removal, a future Chief Executive could not be assured that a Senate vote would turn on the merits in his favor. The House defines improper conduct and the Senate establishes the penalty for that conduct.

ticles of impeachment. If criminal conduct committed in office is to be nullified,[20] however, the Senate is the designated body to make such a decision in the interests of the nation. In the Senate trial, a president will be called as a witness and placed under oath. Unlike the House, all three branches will be present by design in the Senate trial. With the members sitting as jury, the Chief Justice sitting as presiding judge, and the President as witness and accused, all three branches participate in the final outcome. If a President's crimes are to be excused, it is the Senate that should make that decision after the public has been given a fully defined set of allegations and allowed to hear sworn testimony of the President.

As will be shown below, this is essential to the view of the impeachment vote as a decision on the continued political and legal legitimacy of the President.

B. The Political Function of the Impeachment: Evolutionary Standards of Legitimacy

1. High Crimes and Misdemeanors as an Evolutionary Standard

The institutional or structural function of the House is distinct from the standard that it must apply as part of that function. While the separation of powers doctrine demands certain static provisions, the Framers also created some standards that are clearly evolutionary in meaning. *See Martin* v. *Hunter's Lessees*, 1 Wheaton 326 (1816) ("The Constitution unavoidably deals in general language. . . . The instrument was not intended to provide merely for exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence."). The relationship between static and evolutionary provisions is central to defining "high crimes and misdemeanors."

There are various examples of evolutionary standards within the constitutional framework. For example, Article I contains a prohibition on bills of attainders. The prohibition on bills of attainder in Article I were linked in the minds of some of the delegates to the Constitutional Convention to the impeachment clause. Like the impeachment clause, the English understanding of bills of attainder was different from the American version.[21] In the United States, the term "bill of attainder" covers both classic cases of attainder as well as "pains and penalties." Accordingly, as first made clear by Chief Justice Marshall in *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810), legislative punishments in the United States are not limited to criminal penalties. In *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866), the Court noted that even deprivation of "rights, civil or political, previously enjoyed" constitutes punishment under the United States Constitution. Likewise, in *United States* v. *Brown*, 381 U.S. 437 (1965), the Supreme Court stressed that "[i]t would be archaic to limit the definition of punishment to retribution."[22] *See id.* at 458. The view of the punitive purpose or effect of legislation is an evolving standard within the static prohibitory language of Article I.[23]

The eighth amendment also contains a prohibition on "cruel and unusual punishment" that the federal courts have treated as evolutionary within our society's values and norms. This evolutionary character was explained by the Supreme Court in *Weems* v. *United States*:

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[20] While I have personal reservations about nullifying evidence of serious criminal acts in office, each Senator must reach his or her own conclusion as to the interests of the nation when presented with such evidence. The Framers appeared to allow for nullification of some allegations in the Senate. The House, however, is not the appropriate body to engage in such decisions. This is precisely why the talk of censure is so disabling for the system. Much of the contemporary debate has described the House function as if the members would be voting on the merits before any trial occurred before the Senate. This creates not only a redundancy in the roles of the two houses but undermines the bicameral intentions of the Framers in giving distinct roles to each body. By articulating such allegations in articles of impeachment, the House facilitates an open and deliberative debate over the conduct of the President. This debate occurs in the Senate, which calls witnesses and reaches the merits of the issue. Applying exclusionary interpretations at the House stage short-circuits this process and deprives the nation of a public resolution of legitimacy issues.

[21] In England, a Bill of Attainder referred to sentences of death issued for individuals without the benefit of trial. Penalties other than death were referred to as "bills of pains and penalties."

[22] The Court has recognized that civil restrictions on employment and personal status can satisfy the punishment requirement of this test. *See, e.g., id.* (barring union membership); *United States* v. *Lovett*, 328 U.S. 303 (1946) (salary cuts), *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867) (barring practice as priest); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (barring practice as lawyer).

[23] The Supreme Court has repeatedly stressed that "punishment" for purposes of the bill of attainder go beyond the historical definition. The courts will often consider "the type and severity of burdens imposed" or, alternatively, whether the legislative record "evinces a congressional intent to punish."*Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 473, 475–76 (1977); *see also Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851 (1984). These are sometimes called the "functional" and "motivational" tests to distinguish them from the "traditional" or "historical" test for Bills of Attainder.

> Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it. The future is their case, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be . . . The meaning and vitality of the Constitution have developed against narrow and restrictive construction.

Weems v. *United States*, 217 U.S. 349, 373 (1910); *see also Herrara* v. *Collins*, 506 U.S. 390, 431 (1993) (noting the constitutional phrase "cruel and unusual punishments" is not static but rather reflects evolving standards of decency."). The federal courts, therefore, apply the constitutional standard with the assumption that "the words . . . are not precise, and . . . their scope is not static." *Trop* v. *Dulles*, 356 U.S. 86, 100–101 (1958); *see also Gregg* v. *Georgia*, 428 U.S. 153, 171 (1976) (noting that the constitutional phrase must be interpreted "in a flexible and dynamic manner.").

Likewise, the fourth amendment also contains such an evolutionary standard. The fourth amendment prohibits "unreasonable searches and seizures" but does not define those standards. The underlying phrases and standards under the fourth amendment are treated as "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *United States* v. *D.F.*, 115 F.3d 413, 413 (7th Cir. 1997). The federal courts have noted that "[the Supreme Court] discarded traditional property concepts in search and seizures cases where . . . those concepts seem no longer to reflect modern expectations." *United States* v. *Hunt*, 505 F.2d 931, 937 (5th Cir. 1974). Instead, the Supreme Court has defined the scope of the fourth amendment according to an evolutionary standard of "expectation of privacy" that changes with society and technology. *Katz* v. *United States*, 389 U.S. 347 (1967).

In my view, "high crimes and misdemeanors" is an evolutionary standard within a static, structural framework. Just as "unreasonable searches and seizures" was tied to an evolving "expectation of privacy," the impeachment clause imposes an evolving expectation standard on presidential conduct. The standard necessarily will evolve with society and its values. *See Impeachment Staff Inquiry, House Committee on the Judiciary, Memorandum: Constitutional Grounds for Presidential Impeachment* 4 (Feb. 20, 1974) (noting that "[t]he framers did not write a fixed standard. Instead they adopted from English history a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee.").

Alexander Hamilton seemed to acknowledge the need for an evolutionary standard in his explanation of why an impeachment decision should not be reviewed by the federal courts, which require clear parameters to avoid judicial activism in review:

> This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security.

The Federalist No. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This view was later reaffirmed by the Supreme Court in *Nixon* v. *United States*, 506 U.S. 224, 236 (1993), in the holding that the impeachment clause simply does not "provide an identifiable textual limit on the authority which is committed to the Senate."

An impeachment standard must be evolutionary to serve any meaningful function in this system. In the course of the last two hundred years, a significant degree of conduct has become subject to criminal and civil penalties, reflecting changes in contemporary standards. Many issues that were once considered "private" concerns, such as sexual harassment, are now considered public concerns. Each generation must consider the gravity of a criminal act or misdeed by a president. Today, a proven case of sexual harassment or racial discrimination would be viewed by many citizens as inherently incompatible with the office of the President. In the 1700s, it is doubtful that such conduct would be viewed as alarming, let alone impeachable. There are a variety of contemporary illegal or offensive acts that were simply not matters of concern in the eighteenth century. See H. Jefferson Powell, *Rules for Originalism*, 73 Va. L. Rev. 659, 669 (1987) (noting that "the founders thought, ar-

gued, reached decisions, and wrote about the issues that mattered to them, not about our contemporary problems.").

This does not mean that "high crimes and misdemeanors" is a completely indeterminate or arbitrary standard. In my view, serious crimes in office, such as lying under oath before a federal grand jury, have always been "malum in se" conduct for a president and sufficient for impeachment. Nevertheless, there are criminal acts which may not be viewed as sufficient to warrant submission to the Senate. A president may commit some crimes, like drunk driving, for which impeachment is not appropriate. The House does have a discretionary role in defining high crimes and misdemeanors to exclude minor criminal infractions which do not raise legitimacy concerns.[24] *Cf.* Gerhardt, *supra*, 68 Tex. L. Rev. at 87 (noting "there are certain statutory crimes that, if committed by public officials, reflect such lapses of judgment, such disregard for the welfare of the state, and such lack of respect for the law and the office held that the occupant may be impeached and removed, for lacking the minimal level of integrity and judgment sufficient to discharge the responsibilities of office."). The suggestion, however, that a threshold test can be articulated to exclude criminal acts due to their subject matter (as opposed to such issues as gravity or premeditation) is dangerous and unnecessary. The guarantees against legislative abuse is found, not in the Article II standard, but the static institutional provisions of Article I. Moreover, as shown below, there is a political value to having serious allegations of criminal conduct heard in the Senate rather than the House—regardless of the outcome.

2. Impeachment and the Legitimacy to Govern

As should be obvious, I view impeachment as a specific process rather than a specific standard by which public controversies could be resolved. There are both structural and political functions served by impeachment. The static impeachment process serves to protect the structural integrity of the system while the evolutionary impeachment standard serves to protect the political integrity of the system. The latter political function is vital when serious questions of legitimacy are raised with regard to the Chief Executive.

A President must have both legal and political legitimacy to lead a democratic nation. In times of crisis, a president must have sufficient legitimacy to demand the greatest sacrifice of citizens since a president cannot coerce a free nation. A president who is viewed as being without legitimacy suffers from a dangerous form of disability. Framers foresaw controversies in which "an officer . . . had rendered himself justly criminal in the eyes of a majority." *Records* vol. 1, *supra*, at 86 (Mason). The Framers created a process in which such questions of legitimacy could be resolved in an open and deliberative fashion. Alexander Hamilton described impeachment as "a method of national inquest into the conduct of public men." *The Federalist* No. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

This public inquiry into "the conduct of public men" allows a free people to respond to questions of illegitimacy rather than leave the system paralyzed or retarded by scandal.

Benjamin Franklin referred to this function in his view of the impeachment process:

> What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in [which] he was not only deprived of his life but of the opportunity of vindicating his character. It [would] be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.

Records vol. 2, *supra*, at 65. Franklin's words reflect a view of impeachment that is potentially redemptive. If a president stands before the Senate and answers allegations under oath, he can regain the legitimacy that he lost in the eyes of many Americans. If a president is justly accused, the Framers viewed the loss of legitimacy to be a permanent condition and specifically mandated that conviction would

[24] On this point, there appears to be agreement on one level with the law professors who signed the letter discussed in Subsection C below. Unlike the historians who signed a separate letter, the law professors agree that non-official conduct could be impeachable. The only difference is that these law professors would limit such conduct to "unspeakable heinousness" while I would view the standard as covering any serious offense that deprives a presidency of legitimacy due to its gravity, premeditation, or contempt for rule of law.

be accompanied with "disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States." U.S. Const. art. II, 3, c. 7.

Both Franklin and Randolph emphasized the need for the public to view the process as responding to questions of fitness to avoid "irregular[]" responses. *Records* vol. 2, *supra*, at 67 (Franklin) (noting that, absent a system of impeachment, citizens can resort to violent action); *Id.* at 67 (Randolph) ("The propriety of impeachments was a favorite principle with him; Guilt wherever found out to be punished. The Executive will have great opportunities of abusing his power . . . Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections."). Madison created a system by which such powerful pressures could be directed to allow some release within the legislative branch rather than resisted to the point of social explosion.

The brilliance of Madison was his recognition that factions and divisions within a nation can, if left unresolved, fester into open conflict or "convulse the society." *The Federalist* No. 10 at 80 (James Madison) (Clinton Rossiter ed. 1961). Madison saw the natural inclination of citizens to divide on issues of importance to a democratic system since "[t]he latent causes of faction are . . . sown in the nature of man." *Id.* at 79. Rather than emphasize only aspirational collective values,[25] Madison emphasized the importance of recognizing factional divisions and the need to force such divisions into the open for a majoritarian result. *Id.* at 80 ("The inference to which we are brought is that the causes of faction cannot be removed and that relief is only to be sought in the means of controlling its effects.") The bicameral system was a result of this approach.

Impeachment is at times essential to address factions produced by the misconduct of a Chief Executive. There is no more dangerous or divisive a question in a democratic system than the legitimacy of a president to govern. Alexander Hamilton warned that charges of impeachable conduct "will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused." *The Federalist* No. 65, at 396–97 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The test of the system was to create a process that could handle such intense pressures while protecting against majoritarian abuse. Impeachment provides a public forum to address these concerns and, when appropriate, subject a Chief Executive to a new vote of legitimacy. The bicameral structure of impeachment allows for serious questions of legitimacy in the Chief Executive to be raised in an open and deliberative fashion.[26] It was a process by which illegitimacy could be remedied by removal and legitimacy could be redeemed by acquittal.

"High crimes and misdemeanors" is a standard directed at conduct by a president that is so serious as to undermine his political and legal legitimacy to govern. *See* Charles L. Black, Jr., *Impeachment: A Handbook* 49 (1974) ("I think we can say that 'high Crimes and Misdemeanors,' in the constitutional sense, ought to be held to be those offenses which are rather obviously wrong, whether or not 'criminal,' and which so seriously threaten the order of political society as to make pestilent and DANGEROUS THE CONTINUANCE IN POWER OF THEIR PERPETRATOR.") (capitalization in original). Madison noted that there are times when the public should not have to wait for the termination of a term to remove a person unfit for the office. Madison explained that:

> [It is] indispensable that some provision should be made for defending the Community ag[ain]st the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression . . . In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more with the compass of probable events, and either of them might be fatal to the Republic.

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[25] Madison criticized previous philosophers for their assumptions about human interests and behavior. *The Federalist* No. 10, at 81 ("[t]heoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.").

[26] Certainly in the judicial impeachments, the notion of illegitimacy brought on by improper or offensive conduct was readily accepted in the eighteenth century under the Constitution. This illegitimacy basis for impeachment continued throughout our history with judges often charged with bringing "disrepute" upon their offices. *See, e.g.*, Impeachment of Halsted L. Ritter, 80 *Cong. Rec.* 5602–08 (1936); *see also* Wrisley Brown, *The Impeachment of the Federal Judiciary*, 26 *Harv. L. Rev.* 684, 692 (1913) (noting that impeachment was appropriate for "an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in its natural consequences, tends to bring an office into contempt and disrepute.").

While there may be a variety of disabilities that were not viewed in the 1700s as falling with "the compass of probable events," the impeachment process was available to the public to avoid the paralysis of a president serving in office with the title but not the legitimacy to govern.

Such legitimacy concerns are not confined to the Framers. Congress has previously emphasized legitimacy issues in impeachment inquiries of both presidents and other officers. In the presidential impeachment cases, Congress has often stressed conduct that undermined both the office of the President and the legitimacy of the President to govern.[27] Various presidents have been the subject of proposed articles of impeachment, including Presidents John Tyler, Andrew Johnson, Grover Cleveland; Herbert Hoover, Harry S. Truman, Richard Nixon, Ronald Reagan, George Bush, and now William Clinton. These proposed articles often included issues touching on fitness, character, or legitimacy. Most of these allegations were, however, clearly partisan, often abusive, and largely unsuccessful.

In the articles of impeachment against President Richard Nixon,[28] the House tied each specific act to the charge that the President's conduct was "contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States." 3 *Deschler's Precedents of the United States House of Representatives*, H. Doc. 94–661, 94th Cong., 2d Sess., Ch. 14, § 15.13, 638–643 (1974) (Article I through Article III). The use of impeachment to address legitimacy issues was made by the New York bar during the Nixon hearings:

> It is our conclusion, in summary, that the grounds for impeachment are not limited to or synonymous with crimes (indeed, acts constituting a crime may not be sufficient for the impeachment of an officeholder in all circumstances). Rather, we believe that acts which undermine the integrity of government are appropriate grounds whether or not they happen to constitute offenses under the general criminal law. In our view, the essential nexus to damaging the integrity of government may be found in acts which constitute corruption in, or flagrant abuse of the powers of, official position. It may also be found in acts which, without directly affecting governmental processes, undermine that degree of public confidence in the probity of executive and judicial officers that it essential to the effectiveness of government in a free society. . . . At the heart of the matter is the determination—committed by the Constitution to the sound judgment of the two House of Congress—that the officeholder has demonstrated by his actions that he is unfit to continue in the office in question.

Committee on Federal Legislation of the Bar Association of the City of New York, *The Law of Presidential Impeachment* 8 (1974).

While there is considerable debate over the relevance of the judicial impeachment standards to a presidential impeachment,[29] one aspect of the judicial impeachments

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[27] The first president to face an impeachment inquiry vote in the House was President John Tyler in 1843. President Tyler was charged with a variety of noncriminal acts including "shameless duplicity, equivocation, and falsehood with his late Cabinet and Congress." *Impeachment of the President of the United States*, Congressional Globe, vol. 12, Jan. 10, 1843, p. 144. The vote of the House was 127 to 83 against "the charges." *Id.*

[28] The articles of impeachment against President Johnson included various noncriminal (and clearly abusive) bases for removal, including the allegation that the President "with a loud voice, certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces . . . against Congress [and] the laws of the United States duly enacted thereby, amid the cries, jeers, and laughter of the multitudes then assembled and within hearing." Journal of the House of Representatives of the United States, 40th Cong., 2nd Sess. (Washington: GPO, 1868) pp. 440–450; *see also The Impeachment of the President,* Congressional Globe, vol. 39, March 2–3, 1868, pp. 1613–42.

[29] The effort to distinguish the roles of the President and judges to support an argument for a different standard is problematic. First, the argument that the impeachment of a judge will not reverse a popular election (as it would a President) ignores the fact that impeachment does not reverse an election since the Vice-President replaces the President in succession. The suggestion that this process is in any way analogous to a parliamentary system, where a government is replaced, is meritless. Second, comparisons to the other branches is not always to the benefit of the President. For example, some of the delegates appeared to favor impeachment to guarantee the removal of a president due to his special powers in comparison to Congress. Madison noted that impeachment was necessary in cases of "incapacity, negligence or perfidy" because a president guilty of such acts could not be relied upon to lead a government or foreign affairs. *Records* vol. 2, *supra*, at 65–66. Madison noted this makes the president more dangerous than legislative officers with the same failings:

> The case of the Executive Magistracy was very distinguishable, for that of the Legislative or of any other public body, holding offices of limited duration. It could not be presumed that all or even a majority of the members of an Assembly would either lose

is probative. After the ratification of the Constitution, judicial impeachments were commenced during the lifetime of many of the delegates. From these early cases to the present time, the House has included legitimacy articles that charged judicial officers with bringing disrepute upon their offices. There was no outcry at such noncriminal bases for impeachment or the right of the public to review conduct that is so offensive as to be viewed as incompatible with an office.[30]

This view of impeachment as addressing legitimacy issues is certainly present in modern impeachment trials where Congress has often sought removal based on such articles as "[b]y his conduct, raising substantial doubt as to his judicial integrity, undermining confidence in the integrity and impartiality of the judiciary, betraying the trust of the people of the United States; disobeying the laws of the United States, and bringing disrepute on the Federal courts and the administration of justice by the Federal courts." *Articles of Impeachment Against Judge Walter L. Nixon, Jr., as Amended*, S. Doc. 101–17, 101st Cong., 1st Sess. 21–27 (Oct. 5, 1989) (Article III); *see also Report of the Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings*, S. Rept. 101–156, 101 st. Cong., Sess, 3 (Oct. 2, 1989) (including Article XVII for "undermin[ing] the trust of the people of the United States."); *Congressional Impeachment Process and the Judiciary: Documents and Materials on the Removal of Federal District Judge Harry E. Claiborne*, 19; Document I, 1–6 (1987) (including Article IV which charges "betraying the trust of the people of the United States and reducing the confidence in the integrity and impartiality of the judiciary, thereby bringing the federal courts and administration of justice by the courts into disrepute.").

The view of the impeachment process as a vehicle for dealing with legitimacy questions reinforces the need of the House to submit credible evidence of serious crimes to the Senate. A president then will be given the opportunity to testify under "oath or affirmation" as to the allegations. If a president lies to Congress at that moment, there should be no further question about his unsuitability to continue in office. *Cf.* 4 Elliot, *supra*, at 127 (Iredell) (noting that, in the course of official dealings with Congress, the president "must certainly be punishable for giving false information to the Senate.") If a president testifies truthfully, however, the Senate may acquit even in the face of likely criminal acts. The difference is that this decision will have been made in a Senate trial specifically created for such review with representatives of all three branches. The President's conduct is reviewed by legislative figures designated by the Framers due to their length of term and special institutional characteristics. If a president leaves such a body with his office intact, he can claim a form of political legitimacy that was gained by exposing himself to removal by will of the public.

There are obviously some acts that do not raise serious questions of the legitimacy of a president as a person of "good virtue" or veracity. However, there are many criminal or noncriminal acts that seriously undermine such legitimacy in a person who must "take Care that the Laws be faithfully executed." U.S. Const. art. II, 3; *cf.* Gerhardt, *supra*, 68 Tex. L. Rev. at 88 ("The answer seems to be that someone who holds office also holds the people's trust, and an officeholder who violates that trust effectively loses the confidence of the people and, consequently, must forfeit the office.").

An allegation of criminal acts in office by a president represents the greatest threat to legitimacy and should ordinarily go to the Senate for review. The legitimacy of a president is seriously undermined when he has committed acts for which average citizens have been prosecuted. This anomaly creates the appearance that the President stands above the law. This was precisely the concern of Framers like George Mason when he argued for the need of impeachment by asking a relevant rhetorical question: "Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?" *Records* vol. 1, *supra*, at 66; *see also* 2 Story, *supra*, at 278–79 (noting that impeachment "holds out a deep and immediate responsibility, as a check upon arbitrary power; and compels the chief magistrate, as well as the humblest citizen, to bend to the majesty of the

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> their capacity for discharging, or be bribed to betray, their trust. Besides the restraints of their personal integrity & honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or few members only should be seduced, the soundness of the remaining members, would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administrated by a single man, loss of capacity or corruption was more within the compass of probable events and either of them might be fatal to the Republic.

Id. at 66.

[30] For example, recent impeachments of judicial officers include: Judge Harry Claiborne (income tax evasion); and Judge Walter Nixon (perjury). *See* Gerhardt, *supra*, 68 Tex. L. Rev. at 4 n.11.

laws."). The circumvention of a Senate trial creates an appearance of special extrajudicial status in the President and undermines the legitimacy of prosecution of average citizens by the Executive Branch. It also undermines the oath of the President that he will execute the federal laws that he himself has violated.

While criminal allegations should militate in favor of submission to the Senate, particular mitigating and aggravating factors will ordinarily be considered. The most important of these factors is premeditation. As with any prosecutor, Congress must inquire into the quality of the criminal act in terms of intent and premeditation. There is a considerable difference between an act committed under the influence of alcohol like drunk driving and a pre- meditated criminal act by a president. If the House believes that the President acted with full premeditation and knowledge of the criminal conduct, it would be difficult to justify a vote against submission to the Senate for a consideration under the procedures laid out by the Framers.

Articles I through III reflect the genius of the Madisonian Democracy to direct pressures that often tear apart other systems. Madison was particularly keen on the use of open and deliberative process to bring factions to the surface where they can be addressed. When a president stands accused of criminal acts in office, he creates a division among the public as to his legitimacy to serve as president. Rather than have such issues go unanswered, the Framers created a process by which a president would be called to defend his conduct and submit to will of the Senate as representatives of the citizens. This process is political and redemptive. The danger of threshold exclusions in the House is that the public is denied the value of this political judgment. This is why it is sometimes more important how we reach a decision than what we decide.

C. Inherent Dangers of a Threshold Exclusion Under Article II

The thrust of my testimony today is to refute any textual or originalist basis for a clear exclusion of alleged criminal conduct in this crisis from the scope of the impeachment clause. As an alternative, I have suggested a functional interpretation of the impeachment standard. The academics appearing today clearly have different views of these matters and I look forward to reading the testimony of academics with whom I disagree but for whom I have tremendous respect.

While I do not want to dwell on our differences, two letters have been circulated by law professors and historians, respectively. These letters advance different claims as to the basis of the threshold definition of impeachment. I would like to briefly comment on those letters since, like various other law professors, I obviously declined to sign the law professors' letter when it was circulated.

The two letters reach identical conclusions with significant differences in argument. The historians, identified collectively (and exclusively) as "Historians in Defense of the Constitution," leave no doubt as to the intent of the Framers. While I expect that the historians appearing as majority witnesses today can address their apparent *de facto* position as "historians in opposition to the Constitution," I found the sweeping originalist claims of the letter to be astonishing. The letter, signed by some of our most renowned historians, states categorically that "[t]he Framers *explicitly* reserved [impeachment] for high crimes and misdemeanors in the exercise of executive power." Furthermore, the historians add that the impeachment of President Clinton for these alleged crimes in office "will leave the Presidency permanently disfigured and diminished, at the mercy as never before of the caprices of any Congress."

I will not repeat my view of the textual or historical record to refute this claim beyond noting that I cannot find any explicit, clear, or compelling evidence of original intent in the debates. What is remarkable about this letter is the complete failure to consider the countervailing separation of powers issue: how a new precedent *excluding* certain crimes from the scope of impeachable conduct would "permanently disfigure[] and diminish[]" the Presidency. If the letter is advancing a functional argument, there should be some minimal attention to the long-term consequences of a new doctrine that a president may lie under oath and commit crimes with regard to some undefined subjects without facing impeachment. The casual dismissal of the alleged crimes committed by President Clinton as "private behavior" ignores the fact that criminal acts are routinely committed for the most personal and absurd reasons. If a president can lie in order to hide such personal behavior, what else may he lie about? If he can lie to the Judicial Branch, can he lie to the Legislative Branch on these subjects when the tripartite system demands reliable communication between all three branches? Can he commit other criminal acts in addition to lying under oath as part of such behavior without risk of impeachment? Casual assertions about criminal acts committed by presidents in office can provide catastrophic results for a constitutional system.

Not only does the record lack the "explicit" statements noted (but not quoted) by the historians, some of the Framers actually suggest impeachment as a method of applying the same laws to the Chief Executive that are applied to average citizens. For example, Hamilton stated that, when a president stands accused of criminal acts, he can be impeached and "[h]e may afterwards be tried & punished in the ordinary course of the law—His impeachment shall operate as a suspension from office under the determination thereof." Alexander Hamilton, Speech at the Convention (June 18, 1787), reprinted in William M. Goldsmith, *The Growth of Presidential Power: A Documented History* 99 (1974). Nevertheless, according to the historians, a president may commit any criminal act and remain in office so long as the criminal act is not "in the exercise of executive power." There is no suggested exception to this position in the letter. Thus, a president may openly commit molestation or murder without suffering impeachment. Such a principle would allow the system to be paralyzed by perceived illegitimacy in the Chief Magistrate based on the most artificial of distinctions. Since a President is constitutionally required to "faithfully execute" the laws of the United States, many would view the status of a presumed criminal actor to be incompatible with the "public" not the "personal" life of the Chief Executive.

My difference with the historians may reflect our different academic perspective and professional training. As a lawyer, the notion of excluding conduct based on a casual category of "private behavior" is stupefying. If adopted, we would have to apply this standard in a host of different circumstances and future presidents would rely on this standard to guide their actions. Until this crisis, many of us assumed that the line of conduct was a bright line: a president cannot commit crimes in office. Frankly, we have had every type of president in office from drunkards to dullards.[31] Their only limitation was that, if they committed criminal acts, they would have to answer for their conduct in the well of the Senate. There is no explanation why this minimal requirement of conduct is so debilitating for a president. Holding a president to the laws that he must faithfully execute does not diminish our system, it reaffirms our most sacred principle that no individual is above the law.

In prior commentary on this issue, various legal academics have advanced the same categorical exclusion of any acts that are not directly linked to use of executive authority. However, some of the same academics also insist that a president could never be indicted before impeachment. Thus, a president could openly commit a crime like child molestation and remain in office through two terms. In fact, according to this interpretation, the Framers accepted that a president could have remained immune from prosecution through multiple terms since the Constitution did not have limitations on terms in office. There is little basis in the historical record to support such a result.

The joint letter of the law professors takes a different approach from the historians. While some law professors have advanced original intent or textual arguments in commentary on the crisis, the letter of the law professors acknowledges that "[n]either history nor legal definitions provide a precise list of high crimes and misdemeanors. Reasonable persons have differed interpreting these words." The law professors then advance an argument that the definition of "high crimes and misdemeanors" must be tied to the exercise of executive authority. Yet, the law professors then state that they accept that president can be impeached for "private" conduct.[32] Thus, according to these law professors, the impeachment clause does not categorically limit impeachable offenses to official acts or use of executive authority. Thus, the only remaining test is that private conduct must be "heinous." The law

[31] There appears to be a sudden interest in the sexual habits of the Framers, who are now being politically exhumed and "spinned" as part of the crisis. This is particularly the case of Alexander Hamilton's affair with Maria Reynolds in the summer of 1791. This affair occurred while Hamilton was Treasury Secretary and commentators have stressed that the subsequent scandal involved allegations that Hamilton used this office to assist his lover's husband in illegal transactions. Since there was no call of impeachment or punishment, it is argued that the drafters and their contemporaries did not view such scandals to be matters of public concern. The facts of this matter have been grossly misrepresented. *See generally* Claude G. Bowers, *Jefferson and Hamilton* (1925). Hamilton was in fact confronted with these allegations by congressional leaders. Hamilton was able to present documents to show that there were no such illegal transactions and that his lover's husband was trying to blackmail him. When the Jeffersonians attacked Hamilton on this false charge in later years, he publicly admitted the affair and submitted the documents proving the allegations to be untrue. There was no action taken because there was no evidence of any conduct other than a consensual sexual relationship.

[32] Various signatories to the letter of law professors presumably have abandoned any claim that the language or history of the impeachment clauses categorically excludes private acts and must be limited to uses of executive authority.

professors, therefore, simply argue that in their judgment the alleged crimes committed by President Clinton are not sufficiently "heinous."

The suggestion that a president may commit perjury before a federal grand jury on some subjects produces rather troubling legitimacy issues. For example, a president will continue to serve as the Chief Executive enforcing laws that he appears to have violated. The law professors acknowledge that such issues as "perjury" "can without doubt be impeachable offenses": if the subject matter is right. This creates the challenging task of creating a list of subjects upon which a president may lie under oath. In an open democratic system, the public should certainly be informed of those subjects upon which a president can commit perjury. Last year, almost 100 people were prosecuted by the President's Justice Department for perjury.[33] These individuals were not given the option of permissible subject and impermissible subjects for perjury. Likewise, individuals have been prosecuted for obstruction based on the use of hypothetical suggestions for testimony.[34] As Chief Executive, the President stands as the ultimate authority over the Justice Department and the Administration's enforcement policies. It is unclear how prosecutors can legitimately threaten, let alone prosecute, citizens who have committed perjury or obstruction under circumstances nearly identical to the President's. Such inherent conflict will be even greater in the military cases and the President's role as Commander-in-Chief.[35]

If the President is a perjurer, the disabling condition extends beyond mere enforcement issues. A president is often called upon to give personal statements attesting to facts or binding statements to the two other branches of government. This creates a rather obvious concern. It is clear that the President lied under oath. There is no question that the President knowingly allowed false evidence (in the form of the Lewinsky affidavit) to be placed in a record with his agreement as to its content. Since there is little question that this President does lie under oath, the only question would be whether he would choose to lie again. The President can hardly delegate the responsibility to attest to facts to a subordinate free of a perjury allegations. In the same fashion, when the President communicates with Congress, does it matter that he clearly lied to another branch of government? These are questions of legitimacy that go directly to a president's ability to function as Chief Executive. The presumed status as a perjurer is hardly a matter that is confined to the President's private status.

The "heinous" requirement of the law professors only begs the question of definition. Some of us believe that premeditated and repeated acts of perjury before a federal grand jury is sufficiently serious conduct for impeachment. These law professors disagree. This, however, rapidly becomes a matter of personal disagreement and not constitutional interpretation. We all agree that some private conduct would justify impeachment but these professors believe that the separation of powers doctrine demands a narrow scope while other professors believe that it demands a broader scope. Neither group, however, is arguing an originalist or textualist claim that is dispositive when debating such issues. This is a far cry from the suggestion

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[33] In fact, the Justice Department prosecuted individuals like Bob Stephan, the former Republican Attorney General of Kansas. Stephan was charged with perjury for lying in a breach-of-contract case that was based on a sexual-harassment claim. Stephan's alleged perjury occurred in a civil case but he was still prosecuted for criminal perjury. Likewise, Millard McAfee was prosecuted by the Justice Department for perjury committed in a deposition in a civil case. This was a civil dispute over cattle hides that never went to court.

[34] Ex-Congressman Mario Biaggi who was convicted of obstruction in 1988 for using a similar type of hypothetical. In the Biaggi case, the ex-congressman anticipated that an associate might be asked about questionable trips to Florida. Biaggi helpfully suggested that "you didn't give it to me because I'm a member, member of Congress." *United States* v. *Biaggi*, 853 F.2d 89, 105 (2d Cir. 1988). The Justice Department convicted Biaggi on obstruction based on the hypothetical. Likewise, The Justice Department has prosecuted individuals like Barbara Battalino. Battalino was a psychiatrist employed by the Veterans Administration and was accused of having oral sex with a patient in violation of ethics rules. Battalino denied the relationship when she was questioned by investigators. Battalino was prosecuted for obstruction and received a sentence of six-months detention and a large fine.

[35] Large numbers of enlisted personnel and officers have been discharged for lying about "inappropriate relationships." Last year alone, President Clinton's Administration court-martialed 67 service personnel for simple adultery (without the added offense of lying). Likewise, numerous individuals have been punished for failing to tell the entire truth when questioned by superiors or investigators. In the case of Lieutenant Kelly Flynn, a female pilot was forced out of the service for adultery and lying about her relationship in a subsequent investigation. When Lt. Flynn was removed as a B–52 pilot for making false statements and acts of adultery, President Clinton's Air Force Chief of Staff, General Ronald Fogleman, explained that her removal from the service was the only option in such a case since it would be dangerous to entrust nuclear weapons to a person with such problems of character and veracity.

(echoed by the historians) that there is a threshold definitional standard excluding any criminal acts or misconduct not related to the misuse of executive authority.[36]

If these law professors are now recognizing that the impeachment standard does extend to some private conduct (and does not reflect a categorical exclusion of crimes or misconduct related to non-official matters), we would be simply debating gravity issues on a case-by-case basis. Ironically, I believe that the suggested "executive function" theory is only workable as an absolute threshold definition. Once there are recognized exceptions, the suggested arguments supporting the theory become far less compelling. For example, if academics wish to avoid a "chilling effect" on a president, only an absolute threshold exclusion would achieve the level of protection from legislative abuse. Once we argue case-by-case questions of "heinousness," presidents remain subject to the discretionary judgment of Congress.

I believe that the protections from legislative abuse in impeachment proceedings are contained in the structure of the impeachment clauses, which also contain critical checks and balances on presidential power. As for the standard itself, I believe that "high crimes and misdemeanors" must encompass crimes or misconduct that raise questions of legitimacy to govern. These questions of legitimacy are primarily raised by a president's open contempt for the law through criminal acts, which constitute the most likely basis for impeachment. When there is compelling evidence that a president has committed criminal acts in office, there should be an initial presumption that the matter will be submitted to the Senate for a public resolution of the question. This is particularly the case with criminal felonies committed with premeditation. Under a legitimacy test, it matters little whether a president displays open contempt for the law in the execution of a presidential as opposed to a personal function. The public injury is found in the open disregard of laws that the President is sworn to uphold. The public injury is the implied assertion that a president is beyond the reach of core criminal standards in a nation of laws, not men.

CONCLUSION

Any impeachment decision is obviously political in the sense that it is being made by political figures based on their view of the public interest. This does not mean, however, that the methodology and standards are political. Each member will have to reach a principled decision as to the conduct of this President. I hope that the members consider the value of the constitutional process in place for such divisive national issues. While the Framers had no idea of the contemporary issues that face our nation, they knew a great deal about factions and the need to resolve divisions as part of the political system.

There is a considerable difference between the House refusing to impeach a president over serious conduct and the Senate refusing to remove a president for such conduct. The House decision establishes the expectations of a people in the conduct of the Chief Executive and serves as a critical deterrent to presidential misconduct. While the Senate can decide not to remove a president in the interests of the nation for a variety of reasons, the House should not falter in maintaining a bright line for presidential conduct.

In my view, President Clinton's conduct demands an open and deliberative review under the conditions created for that purpose by the Framers. By his own admission, President Clinton has engaged in reprehensible conduct in office. Allegations of criminal acts in office by a president are perhaps the greatest threat to the perceived legitimacy of a government. When there is compelling evidence of criminal acts in the Chief Executive, an entire system of laws is undermined and demands some form corrective action. Justice Brandeis stressed this danger in *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (*quoted* in *Elkins* v. *United States*, 364 U.S. 206, 223 (1960), when he warned:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker;

[36] Even on the core category of misuse of executive authority, however, the law professors' letter raises more questions than it answers. For example, the law professors note that some "non-indictable" conduct may be impeachable. The example given is that "a President might be properly impeached if, as a result of drunkenness, he recklessly and repeatedly misused executive authority." This example leaves it unclear as to whether the President would be impeached as a drunkard or for his "reckless[] and repeated[] misuse" of executive power. If it is the former, it may be an incapacity issue. If it is the latter, it should not matter if the president is acting due to premeditation or inebriation.

> it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

The allegations against President Clinton go to the very heart of the legitimacy of his office and the integrity of the political system. As an individual, a president may seek spiritual redemption in the company of friends and family. Constitutional redemption, however, is found only in the company of representatives of all three branches in the well of the Senate. It is there that legitimacy, once recklessly lost, can be regained by a president.

Mr. CANADY. Thank you, Professor Turley. You were certainly not the first to transgress the time limitations.

Mr. Hyde is recognized.

Mr. HYDE. Yes. Mr. Pease, would you like some time to ask some questions?

Mr. PEASE. No.

Mr. HYDE. How about Mr. Chabot?

Mr. CHABOT. No.

Mr. HYDE. Mr. Buyer?

Mr. BUYER. Sure. I thank the chairman.

Mr. Turley, I think your statement was very good. It was very eloquent, and you took it to the proper plane of question that we have to deal with.

I spent many hours reading all of the testimony of everyone, and just to let you know how I not only by my reading but by the testimony, whenever statements are made that some of you may have said on TV and moved to rhetoric, I just want you to know that it brings discredit upon your statements, and I would ask you don't do that, whether it is sexual return, whether your comment of copy cat perjuries, this question that we have here is so serious and it is so grave about how we define this and how future generations will follow what we do here today. So let's be very careful and that is why for you to finish, Professor Turley, let me thank you because you took it to a very high plane.

You see, I will make this comment. When we move to this judgment, I think we have to be very aware that we have to defend the Constitution. Be obedient to the rule of law, define the truth, apply the law and serve also as a protectorate of our heritage. And while we do that, we then are defining our national character, and part of that heritage is that we learn very young that no one is above the law and we first learn that by testing our parents, right?

We say, why can you make this demand on me? We learn about double standards from our parents, very early. We then learn about equal protection under the law and due process and things like that.

The other thing about a protectorate of our heritage, what is unique about our judicial system, you are all professors, is that everyone in our society has equal access to the courtroom door, and we recognize in some places it doesn't, and we come down on the system when it doesn't, when we find that some escape justice or if the courthouse door is for the powerful or the wealthy.

The courthouse door is also for the poor, the needy and the powerless. That is what is unique about our society. So it is not to be manipulated by the powerful, and when it is manipulated by the powerful, it breeds contempt into our judiciary and has a coercive effect upon people in our society.

That is why I was uncomfortable about the copy cat perjuries. I am more concerned about the coercive effect. Where we find ourselves here is Paula Jones was seeking her day in court as a victim of an alleged sexual harassment and violation of Title VII of the Civil Rights Act. What you believe about that case, she brought that case. The Starr report raised allegations that the President may have lied, conspired to hide evidence, suborned perjury in an effort to deny Ms. Jones her due process right. And if the President as the chief law enforcement officer of the land deceived the courts, my question to you, Professor Turley, could that not be subversive to the judicial branch of government, to constitutional government doing great prejudice to the cause of law and justice, thus bringing injury to the people of the United States?

Mr. TURLEY. Well, the answer to that, as you might expect, in my view is yes. One of the problems that I have with the definition of impeachable offenses with regard to executive function is that line is rather hard to discern. In my view, when a President commits premeditated acts of perjury, there is a public injury, and the public injury is not simply to that individual case, it is not simply to the fact that you have the head of the executive branch who is committing perjury to another branch, but it is also to the idea that we are a nation of laws and not men. It is to a very special principle.

The reason that I have difficulty with the historians who signed that letter, in addition to the fact of the title of the letter, is that there is so little concern as they talk about diminishing the executive branch, of what would happen if we acknowledge this conduct as something other than impeachable. So yes, it subverts a system when the executive officer with the duties to faithfully execute the laws appears to have committed repeated and knowing acts of perjury. I can't imagine how you cannot see that as a public injury. It is certainly not a private matter.

Mr. BUYER. I yield back.

Mr. HYDE. I want to yield to Mr. Coble, but just before I do, Professor McDonald, who I had to miss part of his testimony, but the word "misdemeanor" has always fascinated me because "demeanor" without any scholarship, demeanor by a dictionary definition means how you conduct yourself, your demeanor. When they talk about a trial, they say the jury can observe the demeanor of the witness. So a misdemeanor is something like mal apropos. It isn't very good demeanor. You are not carrying yourself very well, but it doesn't define some towering, cataclysmic high crime. I look at misdemeanor as a much less significant word than high crime.

Mr. MCDONALD. All of the commentators said that it is a smaller thing. It is only in the case of a special point of law called a high misdemeanor which has a very narrow meaning. It is only in those cases, otherwise they are oxymorons. High misdemeanor, there is crime and there is misdemeanor.

Mr. HYDE. That is a contradiction in terms. Just two more points and then I will yield to you, Mr. Coble.

I was thinking of the other Presidents that may have committed impeachable offenses, Lincoln by asserting habeas corpus; Reagan by seeing that the Contras got helped; Roosevelt by Lend Lease, but all of those were policy judgments that they made.

They were decisions concerning—Lincoln was trying to keep the Union together. There was no personal gratification for him.

Reagan was trying to keep Castro from running Central America and getting the bridge to South America under his domination.

Roosevelt saw Hitler and the threat of the Nazis way ahead of his time, wrong probably the Lend Lease abuses, but they were policy, they weren't personal gratification. So I see that as a distinction.

And as far as the President being uniquely vulnerable, he has unique responsibilities and he has got a two-thirds vote to protect him in the Senate, which is formidable, as we are beginning to understand.

Mr. Coble.

Mr. COBLE. I thank the chairman. I am not a member of the Constitution Subcommittee and I have not spoken today, but I studied law under the able tutelage of Professor Pollitt some years ago—and I won't divulge the number of years—and, Professor Pollitt, if I may refer to your statement regarding Judge Wright's ruling that the President's testimony regarding affairs with Ms. Lewinsky were not material. Now, I believe that Judge Wright did not exclude that testimony as a result of immateriality but rather Rule 403.

Case law supports my belief that materiality is determined when the statement is made and Judge Wright's ruling to exclude the President's testimony occurred weeks after the statement was uttered.

Mr. POLLITT. I am very pleased to have a former student here, especially one of such note.

Mr. CANADY. Professor, please speak into the microphone.

Mr. COBLE. I see my red light has illuminated.

Mr. CANADY. I am going to recognize Mr. Inglis.

Mr. INGLIS. I will yield to Mr. Coble.

Mr. COBLE. Since I have not hogged the mike, I appreciate that from both sides. Continue, Professor Pollitt.

Mr. POLLITT. I have read the two opinions that the judge wrote, and the earlier one had to do with admissibility, and she wrote that the evidence was not admissible. Now, this was a pretrial deposition and the judge wasn't there. They were taking the depositions in a private office somewhere. Later on when she wrote her opinion dismissing the case, she had a special section on dismissing the testimony with Monica Lewinsky which reiterated her earlier decision to rule that the evidence was not admissible. So first she ruled it was not admissible, and she did it the first time it came to her attention, and then subsequently she ruled it was not material.

Mr. COBLE. I thank you, Professor. I just want to say, Mr. Chairman, in concluding, that it is my belief that the fact that the President's testimony was subsequently excluded is irrelevant to the fact of the testimony's materiality because it was material at the time it was uttered.

Let me yield back my time to Mr. Inglis.

Mr. NADLER. Would Mr. Inglis yield for a second?

Mr. INGLIS. 10 seconds.

Mr. NADLER. Professor, you said there were two decisions. The first was not admissible, and the second was not material. Wasn't it ruled not admissible because it was not material?

Mr. POLLITT. Yes.

Mr. NADLER. So it was not material, the first decision also?

Mr. POLLITT. That is true.

Mr. NADLER. Thank you.

Mr. INGLIS. I think we will have more on that later. Thank you, Mr. Chairman.

Professor Turley, I found it very interesting what you were talking about that the standard that we will create and how we are defining who we are as a people and how we can't grant an exception, and that really does mirror my understanding of where we are. We are creating a standard here.

I found it really interesting that some of your colleagues on the panel say that it doesn't—that a President could be a law breaker and remain in office. In fact, the Constitution, as I understand Professor Bloch and Professor Tribe to say, that the Constitution would not call for us to remove a law breaker from the presidency. In other words, the idea that you can actually commit crimes in office and that not every crime is an impeachable offense, which seems to me a most novel thought, that you can have a law breaker in the White House, supposedly the chief law enforcement officer of the country.

As I understand, the testimony of your colleagues is basically that that alone does not necessitate removal from office. So, for example, if the President turns out in the future to be a kleptomanic, for example, he or she is not necessarily removable for that, he or she can't resist going into a department store and lifting things, but they are not removable. So we have a most awkward situation where people across America are being prosecuted for shoplifting, and we have a President somewhere hence not removed.

And we have people sitting in jail right now, 115 of them in Federal prison right now for perjury, and we have a President who I understand it has admitted to lying under oath but who would maintain in a hair splitting way that it is not technically perjury. And so, therefore, we have a most unfortunate situation where we are creating a standard. We are creating a standard where somebody who admits to lying, I was talking earlier about a common sensical understanding of it, my 8-year-old daughter says to me, The President has lied, hasn't he?

I said, Yes, he has admitted to lying to the American people, and as I understand it, admitting to lying under oath, but he doesn't maintain that is perjury because he says, and in Mr. Coble's line of discussion, he is going to argue at trial, if it goes to trial, that it is not a material fact. So we are creating this standard that basically says that this President can lie under oath.

I wonder, is that creating that exception or are we just creating a standard that is a different standard for the President, in your view? If we take that position, that we leave him in office, we don't pursue any impeachment, we wait until later and see if some U.S. attorney hence wants to prosecute him for perjury? Is that a new standard, an exception that we are creating or a new standard?

Mr. TURLEY. In one sense it is a new standard in that you are establishing that for future Presidents that some acts of perjury can be committed knowingly in a Federal grand jury without rising to levels of impeachable offenses as a clear and obvious standard, and it leads to very interesting questions upon what subjects can a President lie about. Are we going to come up with a list? A President can lie about these issues, but not those items.

When does a private issue become a public issue. If a President can lie to hide a sexual relationship, can he do other crimes to hide a sexual relationship. When does that line end and when does a private act become a public injury. It is not only a new standard, it is an undefinable standard, and where there is ambiguity executive power will fill it in my view.

I respect my fellow academics on this. They have other views, but for me I think it is more important to keep a very simple bright line in this House, and then the Senate can balance many of the gravity issues that you are talking about. But for this House you will have a critical defining moment, and that is where a standard would apply, and that is why in a Madisonian democracy it is often more important how you reach a conclusion than what you conclude. It is more important where this issue ends as opposed to how it will end.

Mr. INGLIS. Picking up on Barbara Jordan saying in 1974 that the House's role is that of accuser, the Senate's role is that of judge, what you are saying then is if we fail to accuse this President of the breaking of this standard, then we are failing to fulfill our obligation here in the House. Now, in the Senate, they may decide as the judges that is not the outcome of the case.

Mr. TURLEY. I think that is the distinguishing line. My colleague Sue Bloch said in her view if you have a conclusion in this House that impeachable conduct has occurred, you should still not send it to the Senate. We disagree at that point because that is a vote of nullification. You will be nullifying evidence of impeachable conduct in this House. I think the drafters would not be bothered by a nullification vote in the Senate. They have to balance many things. But to nullify it in the House is like a grand jury nullifying an issue. The Senate was created with procedures specifically for that issue. This House was not.

Ms. BLOCH. May I respond.

Mr. INGLIS. Professor Van Alstyne, your advice was different; is that right?

Mr. VAN ALSTYNE. It wasn't quite as crisp, but between the two sides I would identify more closely with Professor Turley's last remarks if you are in doubt about the propriety of this.

I think if the House itself declares that these offenses, assuming they did occur and which you then do recite in some articulate fashion, clearly are within the Impeachment Clause of the Constitution, then that will guard the republic from some kind of negative pregnant precedent that could then be relied upon by charlatans in the future.

I think having done, however, I marginally disagree that if you conclude that these are impeachable offenses and that the evidence is credible, then you must necessarily, or default in your duty oth-

erwise, repair and vote up articles of impeachment. I modestly disagree with that.

I believe that the House has the political discretion to express its disappointment, recriminations, complete censure of presidential misconduct and still conclude that it does not think it appropriate to take up the time of the Senate or the rest of the country.

As I say, in some respects Schlesinger is correct, albeit with a sense of irony in my own feeling. I think these are serious crimes by the President. I think they are of such low order that to a certain extent you unnecessarily will flatter the President to submit him to trial in the Senate.

Mr. CANADY. The gentleman's time has expired.

Mr. SCOTT. Could you repeat the last phrase that you said.

Mr. VAN ALSTYNE. I said in my own opinion, I regard if the President did that which the special counsel report has declared, are crimes of such a low order that it would unduly flatter the President by submitting him to trial in the Senate. I would not bother to do it.

Mr. CANADY. The gentleman from Michigan, Mr. Conyers, is now recognized.

Mr. CONYERS. Thank you, Mr. Chairman. I would like to give Professor Bloch an opportunity to respond, but I would like first to yield to the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you. My question is to Professor Tribe, and it is really a twofold question because I have one question but I have also observed that he seemed anxious to reply to some of the last few questions. Let me ask you the following.

Professor Turley seemed to say that as a grand jury it is more important where it ends up than how it got there and we really have to pass this on to the Senate. I don't want to puts words in his mouth. As former Chief Judge Wachtler of the New York State Court of Appeals once said, any good prosecutor can get a grand jury to indict a ham sandwich. Is that really our role, to let the Senate sort it all out? Can we really proceed without hearing all the testimony?

The procedure that has been proposed by the Chairman is that the prosecutor should fill us in on his case, that we can rely on the truthfulness of the testimony before the grand jury because, after all, that testimony was under oath.

For the last 800 years or so it has been a hallmark of our legal system that you don't convict anyone until you give them an opportunity to confront the witnesses, to cross-examine the witnesses, you don't believe prosecution witnesses until they have been cross-examined, you give the defendant an opportunity to call witnesses on their own behalf and so forth, and that obviously is not being proposed to be done.

I said this morning that I thought that was a gross transducing of our due process and of fundamental fairness traditions, but one could argue that the House is in the function of a grand jury and the grand jury simply indicts once it has heard probable cause and so we don't have to care beyond that and we don't have to have the defense witnesses and cross-examination of the prosecution witnesses. And having heard the prosecution witnesses at the grand jury, and although without an opportunity for cross-examination,

that is sufficient because we can vote articles of impeachment against the President without the normal due process rights because we can leave that to the Senate. Can you comment on that?

Mr. TRIBE. Representative Nadler, it seems to me that exposes the fallacy in Professor Turley's suggestion that there is some kind of obligation if you conclude that the color of legal litmus paper, to use Professor Van Alstyne's formulation was simply to pass the buck to the Senate, essentially. I think the fallacy is that this is not, despite the loose analogies that some invoke, not like a grand jury. That is, I think, the unease everyone in this committee would surely feel, that without cross-examination, with the same degree of unilateral process that characterizes a grand jury, that one could subject any Federal officer, much less the President, but any Federal officer to the trauma of a trial in the United States Senate, because after all, all you guys are is accusers boggles the mind.

And if that is not the test, if in fact judgment, wisdom, discretion are called for, as everyone else on the panel today I think has testified, then it also follows, I think, that it would not be fair to subject anyone to a trial before the Senate with the possibility of removal and disqualification permanently from office on the basis of uncross-examined unilateral material that one simply presumes because it was under oath to have been truthful. After all, President Clinton was under oath as well, and I don't think that we are presuming that he was being truthful.

If I might just state regarding Mr. Inglis' interchange with Professor Turley, what I thought I was witnessing felt surrealistic. There is plenty of room for genuine disagreement here on whether the elaborate course, if the accusations are true, of perjury and orchestrated witness tampering involving the grand jury, whether that is a high crime and misdemeanor. You have already heard me say that I think not. There is room for disagreement about that.

I do not see frankly any room for disagreement about the proposition that you would have to rewrite our Constitution, amend it, to get the bright line that Mr. Inglis and Professor Turley seemed to be sharing in whatever channelling was going on. Their assumption seemed to be that the bright line is that you cannot have a President who has committed a crime in office. That just won't do, and that somehow those who are looking for whether there is a high crime and misdemeanor like treason or bribery, but perhaps something else, are creating exceptions.

No, it was the framers of the Constitution which clearly, unambiguously decided that not all crimes are impeachable. They decided that when, for example, in the impeachment clause they said treason, bribery and other high crimes and misdemeanors. They knew how to say treason, bribery or other crimes. Indeed when they wrote the extradition clause, they said that the governor would have to extradite someone to another state who was wanted for treason, felony or other crime. They knew how to say that.

And so it is not we who are creating an exception, it is you who are being, I hope not, but potentially seduced into violating your congressional oath by rewriting without Article V, rewriting the impeachment clause, and I could not be more serious about that.

It seems to me that it is common ground, always has been so far as I know, that the President, like other executive and judicial offi-

cers, is not automatically impeachable for committing a crime. You have to say whether it was a high crime and misdemeanor.

Mr. TURLEY. I didn't say he was, actually.

Mr. TRIBE. If I may just finish.

If the proposition is that when the President is a law breaker, has committed a crime, then the rule of law and the Take Care Clause requires that one impeach him, then we have rewritten the clause.

There is a deep concern here about equality under law. I have done a lot of fighting about access to court. I don't believe that some people should have an elevated status under our law. But one's complaint there is not with the framers and the way they wrote the Impeachment Clause. It is with the presumed, although never settled, immunity of a sitting President from criminal prosecution while in office.

You are immune for certain offenses while your sessions are in process. Those are defined as treason, felony and breach of the peace. Those are the ones that you are not immune from, and all other crime you are. That is written into the Constitution.

There is no parallel provision that says that a President can't be prosecuted. Most of us have simply assumed that is true. It is that assumption that is I think the target of the inequality concern, because if you remove that assumption, then it would follow if the President committed a crime, like anyone else, he could be prosecuted.

Until 1995, it was a crime in the District of Columbia for a husband and wife to have oral sex. Are we saying that because some Federal officials might have committed that crime that they should all be removed? I don't even think that the statute of limitations has run. I don't think that is the law, and that is why I was so exercised.

Mr. CONYERS. Could I ask you, Professor Bloch, about the circumstances under which this Office of Independent Counsel led by Kenneth W. Starr has operated? It is no secret that he is under a contempt order. He is under an investigation by the Department of Justice. There is an investigation in the internal audit unit of the Office of Independent Counsel. He ought and will be soon, I hope, reviewed here in this committee which has jurisdiction over the conduct of his office. And, the problem is not the leaks, but the fact that this is, by criminalizing the President's private behavior, by him not being able to back off of his initial position, the manufacturing of a crime. Is that very difficult to figure out? I mean, this isn't something that he set out to do. He was led into that. Is that something that anybody on this panel, distinguished as you are, can see as a reality and not an accusation of unfairness against the Independent Counsel's Office?

Mr. TRIBE. I am not sure that I am of one mind with you about this. I have long liked the independent counsel as a person, as a friend. I have been dismayed by much of what he did. I would not go quite so far as to say that this entire course of conduct is wholly the responsibility——

Mr. CONYERS. Well, neither will I. I won't go that far. But the Office of Independent Counsel knew what his position was and that it was mistaken, and they simply heightened it by bringing him be-

fore the grand jury. He fell into it. They didn't manufacture it, but they set it up so that it happened that way.

Professor Bloch.

Ms. BLOCH. I think that one of the lessons that I have drawn from the past few months is that I hope when the independent counsel statute comes up again for renewal next year that you seriously consider it because I think the position itself is a dangerous position, and I think we have seen some of those effects. I guess the red light means that is it.

Mr. CONYERS. We are the ones that are going to face Kenneth Starr, not you. I mean, for goodness sake, we have a very serious problem here, but my time has expired and I thank the chairman for his indulgence.

Mr. CANADY. Mr. Bryant from Tennessee is now recognized.

Mr. BRYANT. Let's give the independent counsel the same promise that we won't prejudge his case as we did the President, and let's wait until all of the facts get in until we make any final determination as to whether or not he has violated any court orders. Certainly you will have an opportunity to show cause or prove one way or the other that fact.

Let me point out if I can while we were talking, Professor Tribe, on that last—not the last question but the one before that we were talking about—you and I think Professor Turley were maybe debating a point. I did want to make clear, and I think it has been read by Mr. Smith earlier, that your opinion on this issue of the impeachment inquiry of President Nixon, in that case Barbara Jordan said that it is wrong, I suggest it is a misreading of the Constitution for any member of the Congress to assert for a member to vote for the article of impeachment means that the member must be convinced that the President should be removed from office. The Constitution doesn't say that. The powers relating to impeachment are an essential check in the hands of this body, the House, the legislature, against the encroachment of the executive in establishing the division between the two branches of the legislature of the House and the Senate, assigning the right to one the right to accuse and to the other the right to judge. The framers of the Constitution were very astute. They did not make the accusers and the judges the same person. I wanted to point that out.

Mr. TRIBE. May I speak to that?

Mr. BRYANT. You have an opposite opinion.

Mr. TRIBE. I don't. I agree with every word. I wanted to explain why that is entirely consistent with my point.

I do not think that the decision to impeach is the same as the decision that an offense has been committed that you might technically regard as an impeachable offense. The decision to impeach is a separate decision. The decision, however, does not include the notion that removal is automatic. The decision to impeach is the decision to subject someone to a trial in the Senate, which is a very extraordinary thing.

All I was saying was that I see three stops along this railroad. Point one, do we think that technically there has been what might be called a high crime and misdemeanor. If yes, then we get to question two. Do we think that all things considered it is an appropriate and wise thing to have this person tried before the Senate.

It seems to me for example that Professor Van Alstyne gets off the train at station 2, but for the odd reason that he thinks that this high crime and misdemeanor is too trivial and low to dignify with a Senate trial, and I don't quite get that.

Then step three, which only the Senate can take, is the step of deciding whether the person should be convicted and, if so, whether anybody beyond removal from office is appropriate. So I don't disagree with Barbara Jordan at all.

Mr. BRYANT. Let me go back to Professor Turley.

Mr. TURLEY. Just about the train which I think derailed a few minutes back, and that is with reference to the standard, I put 80 pages into testimony about the standard, which is the House reviewed crimes. I have never suggested that this House would automatically send any matter to the Senate. This matter is too serious for those types of generalities, and I wouldn't suggest it and I think the assumption is that none of us would engage in that type of generality.

Rather, we are debating what the standard should be. One of the concerns I have is the degree to which this House must send to the Senate issues found to be impeachable, Issues that are high crimes and misdemeanors. On that we do have this train going in different directions.

I believe if this body does find high crimes and misdemeanors, it should submit it to the Senate for the benefit of the system which is designed to handle that.

I would also note that there are were three views presented today as to what the standard should be. The historians believe that there should be no crime that should fall within the scope of impeachable conduct that is not directly related to executive powers. That would exclude things like murder and molestation, and if you combine that view with the view that the President cannot be indicted in office, it would mean that he could continue in office despite that open criminality.

Now, Professor Tribe and Professor Bloch have signed a letter that has a modification of that rule, that uses a standard of unspeakable heinousness as being an exception to that executive function. That is, they agree that there is not a threshold exclusion of matters unrelated to executive function, that there are some exceptions, and that exception will be defined by unspeakable heinousness.

I simply believe that standard is not workable and it connects the definition to the wrong place where I would place it on legitimacy. I just wanted to be clear about that.

Mr. BRYANT. Let me get to Mr. Cooper down there. Were you present to see the film that we showed at the very beginning of this hearing?

Mr. COOPER. Yes, I was.

Mr. BRYANT. I believe it was Representative Mann, a Democrat, who spoke near the end and raised the question that we somewhat confront in this Congress over this matter, and that is some degree of public statement that it is just politics or let he without sin cast the first stone.

What is your reaction to that? As Members of Congress, should we take into consideration and back away from that because there

may be some of us up here without sin, but I don't know that we do, or that the standard issue of politics. How should we deal with that?

Mr. COOPER. Well, Congressman, I certainly do not think that the standard for this committee's deliberations should be whether or not every member of this committee is without sin. I don't think the process can go forward after today if that is the standard.

If there is anyone on this committee who has been charged credibly with lying under oath in a civil proceeding, a civil proceeding that is investigating into that individual's own conduct and in which gross allegations of misconduct have been made, and if any member of this committee has been credibly accused of lying before a grand jury under oath in order to conceal or deceive those proceedings about that individual's own possible criminal conduct, or beyond that with organizing some kind of a larger effort to obstruct justice, then surely that individual perhaps may not be qualified to sit and consider these issues.

Mr. BRYANT. Let me, if I can, come back to Professor Tribe on another question I raised maybe on the first panel on the issue of bribery. I used the example of bribery of where a high official, a President, let's say, bribes another private individual who is going to be a witness, not the judge that you referred to in referring to other people's examples, but two private citizens, one being a high figure, to bribe a witness by paying money or finding a job to testify wrongly in a court, there you don't have that connection that you have with the judge being bribed, and yet in the end you still have the institution, the court, deprived of the truth, which damages that institution.

So would that not be an impeachable offense?

Mr. TRIBE. I think you have put your finger, Representative Bryant, on one of the questions in this area that has troubled me the most and the longest. I do have a very hard time, apart from the escape valve of the literal text of Article 2 of the Impeachment Clause answers your question directly, treason, bribery or other high crimes and misdemeanors, and perhaps the theory in part was that bribery is so distinctive that to begin drawing distinctions between whether the person that you are bribing is a regular public official or simply performing a temporary public function, like a juror or a witness, would be pointless, and therefore there is a flat bright line rule written right into the Constitution, automatically an impeachable offense. But I don't know how I would analyze it exactly if we did not have the word "bribery" in the Impeachment Clause.

Mr. BRYANT. But we do.

Mr. TRIBE. We do. That makes it a kind of "else I" question. The reason I still worry about it is I am interested in having the whole analysis happening together so it makes sense. It is important that it parse in terms of logic and common sense, and I find it a struggle.

Mr. COOPER. Congressman Bryant, I hope you will not be accepting the ingenious response of my friend Larry Tribe to the beguiling hypothetical, as I think he called it, that was offered by Professor Parker, McGinnis and myself, because I think that answer is just a little too ingenious. I mean, the issue concerning the high

crime and misdemeanor, when a President in a perfectly private encounter with the civil justice system bribes a Federal judge, is whether the judicial process itself has been corrupted, not so much the powers of that particular judicial officer. And if that is the issue, if I am right about that, then perjury really corrupts the judicial process in precisely the same way. The search for truth at the end of the day is corrupted and it really does not matter whether you look at the President as some kind of a full partner in the corruption of the judicial process, the judicial power, or not. The fact of the matter is the judicial process has been corrupted.

Mr. CANADY. The gentleman's time has expired. Does the gentlewoman from California——

Mr. NADLER. Don't yield, just recognize me.

Mr. CANADY. The gentleman from New York, Mr. Nadler, is now recognized.

Mr. NADLER. Thank you, Mr. Chairman. I have a short statement for the record. I simply want to indicate that contrary to the repeated statements by the gentleman from South Carolina, Mr. Inglis, the President has not admitted to committing perjury, he has specifically denied committing perjury, and one of the questions in any impeachment proceeding will have to be before we could impeach him, assuming we decide it is an impeachable offense, is to determine whether there is any evidence that he did in fact commit perjury, and that is why we will need an evidentiary proceeding if we proceed.

Having said that, I yield the balance of my time to the distinguished ranking member, Mr. Conyers.

Mr. CONYERS. Thank you very much. Are there members here that seek time? Let me first recognize the gentlewoman from California, who I neglected earlier, Zoe Lofgren, for an unlimited amount of time, not to exceed 2 minutes.

Ms. LOFGREN. Thank you, Mr. Conyers. I have found this very interesting, and as I have listened to the debate on whether false statements should result in impeachment—no matter what those false statements are about—if they are in a judicial proceeding, it strains credulity, frankly, that that could be what the founders meant.

To take an extreme example, if you lied about your golf score in front of the grand jury and it was material, that that would be cause to put the country through impeachment. It just cannot possibly be, it seems to me. Which drew me back to the testimony of our Stanford Professor, Mr. Rakove. I found your testimony very interesting, especially since you talked about the fact that the Founding Fathers were not really opposed to a parliamentary system because that had not yet fully developed yet. However, I was intrigued by your final statement on the last page of your statement that a decision to proceed with impeachment in this matter would enlarge the Impeachment Clause well beyond its current boundaries and in ways that threaten to distort the constitutional design.

I am wondering if that relates to the "any-lie-disrupts" theory, or exactly in what way would proceeding with impeachment in this matter enlarge the Impeachment Clause beyond its current boundaries? Some have suggested otherwise.

Mr. RAKOVE. Well, Congresswoman Lofgren, I start with the basic position that impeachment has obviously been a very rare exercise, presidential impeachment in particular, in American history. Most historians and I think legal scholars think President Johnson, as terrible a President as he was in many ways, probably should not have been impeached at all in 1868, but that Richard Nixon's prospective impeachment was the one bona fide case that we have.

My basic concern, and I think this is the concern of the other historians who signed the famous October Surprise statement that we issued, is that in fact without parsing perjury finally, because I am not an attorney and I couldn't possibly do it with as much art as any of my colleagues on this panel, that to us and certainly to me the crucial distinction here is that the entire sequence of events for which President Clinton is now blamed emanates from an incident that took place prior to his accession to office.

We now know because of the Supreme Court's decision it is potentially quite possible that all kinds of litigation could be directed against the President in years to come. Whether or not the Court could retreat from that decision, having staked it out and brought the consequences upon the Nation, is an interesting question itself to speculate about.

So all I am trying to suggest is without downplaying by any means the potential gravity of the discussion of a perjury issue, which I can't judge, the opening up of multiple new pathways to bring a President into legal proceedings where he might fall into a trap or whatever, where he might be allocated for offenses not clearly related to his official discharge of functions, is very dangerous.

Ms. LOFGREN. With the ability now for political opponents to file numerous lawsuits against future Presidents, the opportunity to trip someone up in the multiple depositions and lawsuits that will be filed for every subsequent President is widely expanded, and, therefore, the Judiciary Committee may become the standing committee on impeachment.

Mr. RAKOVE. I would have said we need not worry all that much about creating a bright line standard for future Presidents, because what future President would possibly ever again put himself in the terrible position that President Clinton has placed himself?

Ms. LOFGREN. I am going to yield back to Mr. Conyers. Thank you very much. Thank you, Mr. Conyers.

Mr. CONYERS. You are more than welcome. We have used 4 minutes. 2 minutes to the gentlewoman from Texas, 2 minutes to the gentleman from Massachusetts, Mr. Delahunt, 2 minutes to the gentleman from New Jersey, Mr. Rothman.

Ms. JACKSON LEE. Mr. Conyers, thank you very much. The discussion has filled me with a sense and a high degree of frustration. Though I commend Professor Turley for the intensity of his commitment to his views, I must take issue with the self-righteousness of his posture, particularly when he calls upon us, regardless of how we ultimately reason this through, to do whatever it takes to cast a vote——

Mr. CANADY. Would the gentlewoman suspend for a moment. I would encourage the members of the committee not to attack the motives of the witnesses.

Ms. JACKSON LEE. Mr. Chairman, you are taking up my time. There are others who have made similar comments and you have not in any way interrupted their debate and conversation. I would appreciate the same respect. We are in a discourse here and as long as I am not doing anything out of order, I would respectfully ask you not to interrupt my inquiry at this time.

Professor Turley, I take great issue with your comments about encouraging us to cast a vote because impeachment is a serious issue. Your statement said impeachment was created as a process by which the public could address serious questions of legitimacy in the chief executive and other officers. If we look at the statistical polling that has been published, it seems the public has said enough is enough.

Professor Rakove, could you expand upon the point you made very eloquently about a consensus, about the need for a consensus on this issue? I don't see a consensus here in this room, but the fact that impeachment is so important that you would hope that if we ever went in that direction, even a vote in this committee, that it would be important for there to be some sort of consensus on the fact that the President's actions were impeachable? Would you comment on your earlier point about a consensus before going forward with these proceedings?

Mr. RAKOVE. You are trying to think about impeachment as a political process. As a political historian, it seems to me to go almost without saying that absent the capacity to produce a high level of consensus that would necessarily have to have a strong measure of bipartisanship, no impeachment proceeding will be very successful either in the House or Senate.

In the case of Richard Nixon it seems to me from my own memory, that in the end that is what this committee indeed managed to produce, because the evidence was so flagrant. At least one can say in the case of Andrew Johnson that the radical Republicans in Congress had gone to the polls in 1866, had come away with a fairly strong victory, believed they had the country behind them, they had much more political legitimacy than Johnson as a Vice President from another party who would replace the assassinated heroic figure from Illinois and was sympathizing with the South excessively could ever possibly muster.

Just as a political historian, as a citizen, as a realist, it just seems to me that conditions are lacking in the Nation today that would really provide the consensus necessary to make impeachment successful, even if one accepts the kind of theories or the kinds of arguments that my distinguished colleague on my left here said so eloquently.

Mr. CONYERS. I yield now to the gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. I would like to inquire of the Chair, do I have 2 minutes?

Mr. CONYERS. Roughly, more or less.

Mr. DELAHUNT. There are just two quick points I want to make. I think you stated it, Professor Tribe, just stated it differently. The

President is not above the law. The law we are talking about is the criminal laws. If he violated the criminal perjury statutes in this Nation, he could very well go to trial, be convicted, and join 115 other United States citizens. That has not changed. What is different here is in terms of impeachment, he is the only President that we have, and that is why we are talking about this procedure. It is not above the rule of law. He is the only single one.

I want to get to the point of discretion. Everybody has touched upon this, and I think Professor Van Alstyne's observation was fascinating. In terms of discretion, it would appear he would suggest that we should balance the relative costs of impeachment against the costs of allowing the President to complete his term. I guess my question is what factors would be appropriate for us to take into account whether we should exercise our discretion before we move or if we move to the issue of what constitutes an impeachable offense? Give us some ideas and give us some help.

Mr. TRIBE. It seems to me, Congressman, that is the place where I would, I think, join the spirit of Representative Conyers' question. It seems to me that one of the central factors to consider in this case is whether we are really dealing, as some of the descriptions would suggest, with a rogue President who was out to deprive an American citizen of her day in court and of her rights, who schemed in a Machiavellian way to deprive her of evidence that he believed was relevant, or whether we are instead dealing with someone who was, as I think someone this morning from the majority effectively acknowledged, somewhat ambushed, and in the first instance did a wrong thing, answered the questions untruthfully. He was ambushed I think the evidence will show, though I don't know and I don't want to prejudge it, by an independent counsel who had independent evidence before even getting permission to extend the inquiry. It was a setup of sorts.

Of course the President made a terrible mistake when caught not to confess, a terrible mistake then to compound what went wrong in the grand jury. But it seems to me that a contextualized discretionary judgment about what to do if you think this crosses the threshold of impeachable offenses could not in good conscience exclude that interactive picture, because it bears, it bears on the relative costs and benefits.

How dangerous is this President? How dangerous is the situation that would be created if similar lawsuits coming out of the woodwork in the future in the light of Clinton v. Jones were to spawn similar circumstances, making this, as Representative Lofgren suggested, a kind of sitting committee on impeachment? Those are the kind of factors that would be important.

Mr. CANADY. The gentleman's time has expired. The gentleman from Tennessee is now recognized.

Mr. JENKINS. Thank you, Mr. Chairman. I would like to yield 2 minutes to the gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. I thank the gentleman for yielding. My question is for Professor Turley. Professor, assuming that there is sufficient evidence to determine that this President committed perjury or obstructed justice or tampered with witnesses, if this committee or this House ultimately takes no action, what do you believe would be the long-term impact on this Nation?

Mr. TURLEY. Well, first of all, Congressman, let me state that it is not my intention to be self-righteous, just to respond to that. We can be passionate in debate without being personal, and all of us have reached conclusions on one level or another, whether the President should stand before the Senate. But if something looks self-righteous, it may be passion, but I don't presume to say that I have the only answer. All I am suggesting is that I believe one standard should be applicable.

But in terms of what that standard should be and what happens if the House does not move forward, I think that there is a terrible lesson that will be learned. Here we have a President who stands accused of committing perjury in a Federal grand jury. It is completely correct that we have to determine the truth of that matter. Absolutely. And we cannot assume any fact of that kind.

The question for this House, however, is if the members of this body are convinced that there is credible evidence there that that criminal act occurred by this President, what is your institutional role?

Now, from my standpoint, I believe that the role at that point should be the submission to the Senate, because the Constitution says that the Senate shall have sole authority to try all impeachments. It was a body created to reach the merits of impeachable allegations.

So to answer your question, Congressman, I think it would be an enormous mistake for this matter to end in the House with some form of extra-constitutional means like censure and to end this with some type of exception to the impeachment process.

Mr. CHABOT. I yield back to the gentleman from Tennessee.

Mr. JENKINS. Mr. Chairman, I would like to yield 2 minutes to the gentleman from Florida, Mr. McCollum, and the balance of my time to the gentleman from Illinois, Chairman Hyde.

Mr. MCCOLLUM. Thank you. If I might, Mr. Cooper, I want to ask you quickly a question. This morning Professor Gerhardt stated his opinion that integrity is an indispensable criteria for someone to continue to function as a Federal judge, and therefore the issue of the tax evasion question with Claiborne was perfectly impeachable, or the perjury charges against Nixon or Hastings. But he said while integrity is obviously important for a President, it is not necessarily a sina qua non, especially given all the checks that exist; in other words, that an impeachable offense may arise for perjury for a judge, but not for a President.

Do you see the fallacy in that argument? Do you agree or disagree with that?

Mr. COOPER. I very firmly disagree with that, Congressman McCollum. I think for the very same reasons in fact that integrity is such an important and integral component of the judicial role and for the outlook of any judicial officer, it is equally, if not more important, for the President of the United States, particularly insofar as the President of the United States' involvement and connection with the judicial process is concerned. Because the President, after all, is the chief executive, the chief law enforcement officer, in the country. The Attorney General speaks with the President's voice. All U.S. Attorneys speak with the President's voice. Their authorities to impartially and vigorously and with integrity enforce

the laws of this country derive exclusively from the President's responsibility to take care that the laws be faithfully executed. A prosecutor, a U.S. attorney who lacked integrity, would no more be qualified for his office or her office than would a judge, and certainly that must be true of the official from whom that responsibility and authority flows, the President of the United States.

Mr. MCCOLLUM. Professor Tribe argues that that argument is alluring, but it is a "sky is falling" argument, that it is by example the President will cause things to fall if we go a different direction. In other words, if we fail to impeach the President for perjury, then there will be a problem because of the example. That is what you are talking about here, the President is the chief law enforcement officer. What do you say in response to Professor Tribe's saying that trivializes the Constitution to take that position?

Mr. COOPER. A couple of things. First, I think it will serve as an example to future chief executives, future civil officers of every kind, that perjury in a civil proceeding where the individual is a party or otherwise, and certainly before a grand jury investigating the offender's prior, potential prior criminal activity, that perjury and obstruction of justice are indeed unacceptable in any civil officer, whether we are talking about a Federal judge or the President of the United States.

I think that in an earlier exchange, the issue on which my friend Professor Tribe was exorcised, there is no reason for this committee to be exorcised, and that is whether or not there is room for disagreement about the bright line regarding whether any crime satisfies any—any Federal crime, I guess—satisfies the standard for an impeachable offense. There is no need for this body to resolve or be concerned about that issue, because in my view, taking the text of the Constitution, its history and the recent precedents, these crimes, these crimes that have been credibly alleged, perjury and obstruction of justice, lie very close to the core of the concept of high crimes and misdemeanors. They are not on the fringe of it, they are at the core of it. At least if it is true that high crimes and misdemeanors are primarily concerned with injuries to the body politic, as Alexander Hamilton put it, to injuries to the Commonwealth, to the people itself, that is all. After all, why is perjury a crime? Why is obstruction of justice a crime? It is not—certainly if committed in the grand jury it is not because any particular individual has been harmed, such as murder. It is because the government itself, the people themselves, the judicial process itself, has been harmed in a way that if we permit it, we have no process. We have no rule of law.

Mr. MCCOLLUM. Thank you, Mr. Jenkins, for yielding.

Mr. JENKINS. Mr. Chairman, I yield the balance of my time to Mr. Bryant.

Mr. BRYANT. Professor Bloch, let me ask you a question. You alluded to in your statement about the fact that if you impeach a President that does not prevent a later criminal trial. Likewise, the fact that you have that process but the fact that you can later try somebody should not be the sole reason that you don't impeach a President who needs to be impeached, is that correct? Let me ask you the question. Are there not public policy considerations that might really require the President be impeached, rather than sim-

ply waiting for a later criminal trial, such as if he were, if legally you could indict that person, you would actually have a President, convicted, you would have a President maybe that was a felon?

Ms. BLOCH. It might turn out later after he is out of office.

Mr. BRYANT. If you can't later try one, you have the prospect of a weakened, wounded person, waiting for someone to be tried. Are there other public policy considerations that would forestall this solution to our problem that we have to either impeach now or not impeach?

Ms. BLOCH. Well, what I think is really important to remember is that impeachment is not a punishment and it is not set out as a punishment, and it is important to distinguish that from what we use the criminal prosecution for. I agree there are going to be situations where the President or someone, another civil officer, can commit an offense that is both impeachable and indictable. That happens, fortunately not often, but one can imagine lots of situations like that.

But what I was saying is that even though people are upset with President Clinton's conduct, and even though arguably they are right, is it a crime? Incidentally, Schippers and Starr I don't think use the word "perjury" in their reports. But if there is an allegation of perjury, that clearly is a crime, but that doesn't tell us it is what we call for impeachment a high crime and misdemeanor. I think that my point was just to keep those inquiries separate and to know that the Constitution very clearly keeps them separate, because it says you can impeach for a high crime or misdemeanor, and then and also you can have a criminal prosecution. The remedy for impeachment is removal from office and it is basically not to punish the person that did wrong; it is so we save the country from having someone in office who has committed a high crime or misdemeanor. One is a remedy for the country and the other is punishment for the individual.

I was saying it is important in your inquiry that you keep those separate. Merely the fact he might have committed a crime is not the end of the questioning at all.

Mr. CANADY. The gentleman's time has expired. The gentlewoman from California, Ms. Waters, is now recognized.

Ms. WATERS. Thank you very much. I yield 2 minutes to Mr. Rothman.

Mr. ROTHMAN. Thank you, Ms. Waters. I am wrestling with two problems today. One is the notion that I have heard that new standards for impeachment, aside from treason, bribery or other high crimes or misdemeanors, are now applicable: lack of virtue, lack of integrity, unfitness for the office, conduct offensive, lack of trustworthiness. I think that has been addressed. Many say it is inappropriate to amend the Constitution to add these standards without going to the States and the people to amend the Constitution, to make that part of the presidential impeachment standard.

The other problem I am wrestling with is the notion that perjury, obstruction of justice and abuse of powers are proven, and they are deemed to be high crimes and misdemeanors, that members of the panel from both sides of the spectrum have said not every commission of an impeachable offense requires impeachment, that there is some discretion. Just as in a criminal case if someone is convicted

of an offense, let's say, burglary or some other crime like rape or murder, there is in a sentencing phase where the crime has been proven, the sentence then has to be determined based on the context of a whole bunch of things, with many considerations.

Some have suggested, Professor Turley, that the sentencing phase is not appropriately a part of the House or this committee's role and it is strictly in the hands of the Senate.

Professor Tribe and others, do you agree with that notion, or can this committee and the House get involved in the sentencing role, so to speak, if we do find perjury, obstruction of justice, or abuse of power, and if we determine they are a high crime and misdemeanor?

Mr. TRIBE. The way I would answer that, I think, is to separate the role of deciding whether to submit someone to a trial before the Senate from the role of deciding what sentence is appropriate after there is an actual conviction. The Constitution is very clear on the fact that if someone is impeached and convicted of treason, bribery, or other high crimes and misdemeanors, that person shall be removed. So in a sense, the Senate has no sentencing discretion at the bottom end, though it does have discretion whether on top of removal it should permanently disqualify the person from office.

But the Constitution I think is equally clear in not imposing any such mandate upon the House. The House is given the power to impeach and the Senate the power to try.

Mr. ROTHMAN. Does that mean this committee can say an impeachable offense was committed but they don't recommend impeachment?

Mr. TRIBE. I certainly think one could do that. I was going to say something about censure——

Ms. WATERS. Thank you very much. Let me just say before I leave that, given everything that we have heard today and everything we have read and studied and trying to determine what was meant by high crimes and misdemeanors, it is clear that it is open to some interpretation. It is clear that the framers of the Constitution knew and understood that and they didn't try and list a whole bunch of things that would meet that test.

But I do believe that they thought that people who are elected to office would be wise enough, compassionate enough and sensible enough on a case-by-case basis to make a determination about whether or not certain offenses could fall in the category of subversion of the Constitution or great and dangerous offenses that would cause a decision to impeach.

We are left with that responsibility. I have heard some reaching today, as one of my colleagues attempted to describe bribery by the President. There has been no finding that the President bribed anybody. And what is so scary about the fact that we have people who have reached some conclusions is we are not designing a hearing by which we can get evidence or challenge the allegations of the prosecutor. It has been determined by the chairman of this committee that we are going to bring in the independent counsel, and he is going to take this platform and tell us whatever he wants to tell us. And he claims he is doing this because he wants to expedite this hearing. For what? To get it on to the Senate? To shut it down?

This process really bothers me, and it boggles the mind. I think the American people are way beyond where we are sitting in this room today. They have made some decisions. The American people who have to deal in the real world out there, where they have to reconcile the weaknesses and the indiscretions of their children and their mates, et cetera, et cetera, are doing that. They know the difference. They understand the difference between this husband, who is guilty obviously of some type of infidelity, and a President who has undermined or not undermined this country in any way. And they say let's move on with this.

And I want to tell you, in this maturing of this country and these families, they don't like the fact that we will not allow them to get on with life and to have healing and forgiveness and all of that. We are pushing the envelope and we are saying to the American people, we don't care what you think. This man has lied or he has done something and we want you to feel that it is of such a nature and it is so big and so huge that we have got to do something radical and revolutionary.

Well, I think we are on the wrong course, and I think we ought to be more concerned about an attempt to get the President by any means necessary. I am going to—if I have to—spend my time on the connections and the relationships of people who obviously have been on this track for a long time to get Bill Clinton, even some people who came into this room today, who I dare say, and I would love to have asked, I don't have the opportunity, if they had spoken with Ken Starr before coming here today and what had been—what had that conversation been about.

I am more concerned about abuse of power. I am more concerned about the fact that Ken Starr may have sought to expand his powers and either lied or left out information when he talked with the Attorney General of the United States of America, or perhaps knew that Linda Tripp was still illegally taping and accepted the continuance of that, as he offered immunity.

I am more concerned that Monica Lewinsky was sequestered in a shopping center and held and literally discouraged from calling her parents or an attorney. I want to tell you something: When I talk about the members of the Congressional Black Caucus being the fairness cops, when I talk about us, this being the critical issue of the civil rights movement and what we have fought for, it is about abuse of power. And I want to tell you, we see little Ken Starrs all over America abusing power, and we see prisons filling up and we see people without the ability to have their day in court.

I would hope that we are sensible enough and wise enough to get this behind us. If there needs to be an exit strategy, it is not going to be done in a partisan way, it is going to be because people of good will get together and decide how they are going to free us and America of this debacle.

I really don't have anything more to ask the people who came here today. I think they have done a pretty good job of saying who they are and where they come from and what they believe in, but in the final analysis, I don't care how learned you may be, I don't care how much you have studied the Constitution, high crimes and misdemeanors fall within the interpretation of people who are supposed to be sensible enough, wise enough, and logical enough, to

determine the difference between whether or not someone is trying to bring down this country or simply doing what makes do when they don't want people to know that they have been out having an affair and lied.

That may be all the President is guilty of. And then you have got to ask yourself, is there a difference between lies? I think so. And ask yourself about your own lives. And the members of this committee must ask themselves about their own lives and ask when have you lied when you wanted to just protect yourself from the horrors of breaking up your families, et cetera, et cetera?

I dare say if we are honest and if we are true to trying to do our best, we will answer that question in a way that will help us to know what we must do. But I think more than anything else, and I am going to conclude with this, Mr. Chairman.

You talk about spiritual healing, Professor Turley. Spiritual healing is not about putting yourself down in the well of Congress and being berated and being beaten across the head and forced into submission. Spiritual healing is knowing when to remove yourself and allow people to grow and develop and be the best that they can be. I think most Americans want to do that, and we should darn well let them try and do that and get out of this mess.

Mr. CANADY. The gentleman from Virginia, Mr. Goodlatte, is now recognized.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Turley, I was interested in your suggestion that the act of the House in voting out articles of impeachment is a separate process from the Senate. Obviously the Senate, being a different body, can make a different decision. Do you view that as the equivalent of a very strong form of censure, if the House did that and the Senate chose not to?

Mr. TURLEY. I do. I think it is a very meaningful form of censure. When people talk about the need to have censure, they want to express some contempt for the President's conduct in a way that would register, that the alleged perjury in a grand jury is conduct that we will not tolerate.

In my view, if the effort is not just repudiation but deterrence, to keep other Presidents from doing that, then articles of impeachment accomplish that, because future Presidents will know we may have this type of reaction. If I were in the Senate, I voted for the man once, I might vote for him again, I might not remove him, frankly. But by his appearance in the Senate, future Presidents understand that this is conduct that is so incompatible with your office that when you commit it, you will have to submit yourself to the will of the public. That is when the view of the public as we want to go beyond this, that is when the public's idea that we don't want him removed comes fully into force, because the drafters were absolutely clear that it is in that body that those voices will be heard.

Mr. GOODLATTE. Is it your understanding that the Senate could choose not to even take up the articles of impeachment?

Mr. TURLEY. That is a difficult question. I will confess to you I am sort of unresolved on that. I believe that the Senate should pick up the question because of the submission from the House. I believe that there is an institutional responsibility. I do not believe there is an institutional responsibility for the Senate to do more

than accept the submission of articles of impeachment and act in some fashion under the Constitution.

Mr. GOODLATTE. Professor Tribe, what is your opinion about whether the Senate would have to act?

Mr. TRIBE. I think it would not. There are a number of cases in which the Senate has decided, in some of them for rather straightforward reasons, such as the resignation of the impeached individual, not to pursue him, even though it has the technical power, I believe, to convict even someone who has resigned. I think that the Senate would have discretion, and I also think that this body would have discretion to do any number of things short of the form of censure that Professor Turley is suggesting, which I think is going right up to the precipice.

In 1933, for example, the House Judiciary Committee conducted an impeachment inquiry into a judge who I guess basically lined his pockets out of a case he was dealing with, concluded that the evidence didn't quite warrant impeachment, added a censure, the committee itself added a censure but recommended no impeachment. The full House decided to override the committee and impeached and the Senate acquitted. But then there was on the record a censure from the House Judiciary Committee. I think there are a number of things that are entirely consistent with the Constitution and that do not play with dynamite by triggering a possible Senate trial when one doesn't need to have one.

Mr. GOODLATTE. Let me back off from punishment and talk about impeachable offenses for a moment. I agree with you that not every crime is an impeachable offense and anybody who maintains otherwise I think is being a little unrealistic about that. But let me, and I am not sure anybody here maintains that, by the way, but nonetheless, let me ask you, do you agree with Professor Schlesinger this morning that some forms of perjury may well be impeachable offenses? He gave the example of perjurious testimony that caused somebody to go to the electric chair.

Mr. TRIBE. Yes, I certainly do. I think that perjury can indeed be a form of abuse of power, that is one can use one's official power, as I think Mr. Cooper seems to think that the President here may have done that and others have suggested that the President, because, and I think maybe it was Professor Van Alstyne, because he used his staff to repeat his story, that was a kind of abuse of the power of the presidency. I think that trivializes the concept.

Mr. GOODLATTE. Let me fine tune it a little more, if I may. You had an exchange, I think it was perhaps with Congresswoman Lofgren, regarding this issue in which you said if the President engaged in some Machiavellian activity to line up witnesses in support of his perjurious statement and knew ahead of time that this was going to take place or suspected that it would, and attempted to derail the civil proceeding for that purpose, and not just for the purpose of covering up his personal embarrassment, is that an impeachable offense?

Mr. TRIBE. I think it might well be. That is the deliberate violation of the constitutional rights of citizens, whether by Richard Nixon using the IRS, or the FBI, or by a litigant like William Jefferson Clinton, if he set out to, for example, cover up the fact that perhaps as Governor he had in fact arranged to prevent Ms. Jones

from getting various employment benefits because she didn't succumb——

Mr. GOODLATTE. Suppose he knew that evidence of his other behavior was evidence of a pattern of behavior that would suggest that Ms. Jones' allegations were true. Would that be——

Mr. TRIBE. I think it would be a difficult and delicate matter to make impeachment rest wholly in an inquiry into the state of mind. I do think there is a basic difference between a President who says I know that she is probably entitled to this information under the law and I am going to try to prevent her from getting it because I want her to lose, and a President that says this is completely irrelevant, it has nothing to do with it. I have been hoodwinked into this forum in which I am now being asked questions that I should not be asked, and that are not really part of her entitlement.

Now, I do think there is a problem with anyone, including a President, taking the law into his own hands and making that decision rather than letting the judge make it, so I don't think any of this is trivial or easy. But I do think there is a basic difference there.

Mr. GOODLATTE. Let me take you a step further and ask you do multiple felonies enhance the likelihood, multiple instances of perjury, subordination of perjury, et cetera, as alleged in this matter, do those raise the likelihood that the President may have committed offenses which would justify removal from office?

Mr. TRIBE. I think the answer depends on whether the multiplicity is produced by slicing the pie up into ever-smaller slivers, which prosecutors know how to do all the time and independent counsels, too, and counsels to this committee, though here it was nice to cut it back from 15 to 11. I think there is multiplicity of that kind which does not really suggest a far flung pattern and practice of flagrant law violation.

Mr. GOODLATTE. Let's move 6 or 7 months ahead to a separate proceeding before a criminal grand jury or a grand jury constituted by the independent counsel and the court for the purpose of receiving his testimony, where it is clear by this time the President knows or intends to make known moments after the testimony that he has done something embarrassing and the purpose of his testimony may be, if it is perjurious, to avoid criminal prosecution, either while in office or after office, depending on one's interpretation of the law, by trying to define his activities along such lines that he could justify his previous testimony.

Is that an impeachable offense? Is that an extension of the behavior beyond the original perhaps surprise testimony, or perhaps not surprise testimony, in the original proceeding?

Mr. TRIBE. I think it certainly does add something. The question of whether it adds nearly enough to make this one of the great and dangerous offenses against the country is where we might part company. It seems to me that in a sense, it is a kind of pathetic performance obviously that we were witnessing. He wasn't fooling anybody at the ultimate level. He was following some bizarre legal advice, that if he sliced it thin enough, maybe he wouldn't really be guilty of anything. That seems to me more stupidity, frankly, from a brilliant man, than an attempt to pull the wool over the

eyes of the Nation or frustrate the traditional process. That may be my own assessment of what is going on, but that is one of the reasons that I don't think even adding the grand jury to the equation puts one anywhere close to the ultimate line of an impeachable offense.

Mr. GOODLATTE. If I might, Mr. Chairman, let me ask you about the punishment here. When we don't have, as you believe, and as I think a majority of the folks who have testified today believe, any authority, certainly Congress doesn't, but the judicial branch and the U.S. Attorney's offices do, to prosecute the President while he is in office, where does that leave us relative to a whole host of other people who have committed very similar offenses? And we have received documentation of folks who are in prison right now for having as Federal Government employees lied about relationships with subordinates and found to have committed perjury, and in one instance a person is serving 13 months in prison, another 7 months in prison. Where do we draw the line here with regard to the President of the United States, who may be in office for years and the statute of limitations may run, that would prevent his future prosecution, and this person who has obviously damaged himself remains in office during all of that time?

Mr. TRIBE. Let me say that if it were anyone other than the President, and if one concluded that this was not a high crime and misdemeanor for such a person, it would be very strange to say but for the President, we will treat it that way as an offset against the presumed rule of presidential temporary immunity.

Mr. GOODLATTE. Right now you are saying that but for him being President, he would lose his job if he committed that offense in another capacity.

Mr. TRIBE. That is right. But that is because we assume, and I stress it is not an assumption that has been tested judicially, and I sometimes express my doubts about its correctness, we assume a sitting President cannot be criminally prosecuted. If there is a problem, it is with that rule or assumption. It is not with the boundaries of high crimes and misdemeanors. And I do think that there is a solution in part to some of the concerns you have raised about statute of limitations or undue publicity, any number of things that the President might in theory interpose as a defense not on the merits, but as a kind of evasion of an ultimate perjury prosecution. I would think that as part of any censure and a decision to proceed no further with impeachment, if I were engaged in negotiations with the White House, I would certainly want a waiver of any statute of limitations argument, a commitment not to seek a pardon, a commitment not to invoke arguments about undue publicity. I do not think the President's temporary immunity, if he has it, from criminal prosecution, should carry with it this kind of halo effect that would really put him above other people once someone else has taken the oath on January 21, 2001. But I think it would be very wrong to take an institutional judgment that we have made for better or for worse about not prosecuting Presidents while they are in office, and use that judgment and the lament it gives us about the inequity between that President then and other people who could be prosecuted as a way of racheting down the bar, the definition of a high crime and misdemeanor for a President.

Mr. GOODLATTE. Mr. Chairman, let me conclude by just saying that my fundamental disagreement with that rests in the fact that if he were subject to the prosecution and were prosecuted and were imprisoned while he were President of the United States, he clearly then in my opinion should be removed from office using the impeachment powers for exactly the same offenses Mr. Tribe and others have argued against using the impeachment powers to remove him from office.

Mr. CANADY. The gentleman's time has expired. We have other members who have been patiently waiting. I am sure you will have another chance to talk.

Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I would like to yield 2½ minutes to Mr. Barrett and 2½ minutes to Mr. Meehan and reserve the 5 minutes. If you can set your 5-minute clock, I sure would appreciate it.

Mr. BARRETT. Professor Turley, what is the standard of proof that the Senate should apply?

Mr. TURLEY. My gosh, we have 5 minutes.

Mr. BARRETT. Beyond a reasonable doubt, credible evidence, sufficiency?

Mr. TURLEY. There has been a lot of literature written on that.

Mr. BARRETT. Which one?

Mr. TURLEY. I don't think they fit any of those definitions, because I believe the Senate was given a role by the framers to balance a variety of political issues. One of the interesting things about the quote——

Mr. BARRETT. We don't have a lot of time, and I apologize. What should our standard be in the House? Credible evidence? What is the standard we should apply in deciding whether to move forward?

Mr. TURLEY. I think you have to decide whether there is credible evidence in your views that certain crimes were committed. I don't believe all crimes should be submitted to the Senate. I make that point in my formal statement. The difference that we have is not that we see clarity in language. Professor Tribe and Professor Bloch are suggesting a heinous standard.

Mr. BARRETT. Let me continue, please. What would be your opinion of a prosecutor who would bring a case knowing or believing that a jury would not convict?

Mr. TURLEY. A grand jury or a trial jury?

Mr. BARRETT. He would obviously be able to get a grand jury to indict an individual. But if he believed that a jury in a criminal case would not convict?

Mr. TURLEY. I believe there are times when a prosecutor must leave it to a jury to decide. That is the community. I believe if the prosecutor believes the case is frivolous, there is no basis upon which a jury could essentially go against a defendant, then I don't think that is an appropriate case. But there are times when a prosecutor must allow the community to decide. The community in this case is the United States Senate.

Mr. BARRETT. But if he believed the jury would not convict, you would think that would be ethical?

Mr. TURLEY. I am not sure how he would believe that. In terms of a Senate proceeding with the President——

Mr. BARRETT. I am not asking that. I am asking in a criminal case.

Mr. TURLEY. If a prosecutor was completely convinced that a jury would only acquit a defendant, I would have to ask upon what basis he believed that. If he believes the person is innocent and that is why there would be no acquittal, most certainly I would say that would be inappropriate. If he believes the jury would engage until jury nullification, I believe he may still want to bring the case because he may not agree with the nullifying role.

Mr. MEEHAN. Professor Bloch, I guess Mr. Schippers didn't use perjury either. I assume he didn't use perjury because the independent counsel didn't. Why do you suppose he didn't use perjury?

Ms. BLOCH. I don't know. My impression is perjury is very hard to prove.

Mr. MEEHAN. A specific intent crime.

Ms. BLOCH. That is right. In this case you would have to show the President knew he was saying something false, and it is not clear to me—I think he believes he wasn't, from what I have read. And then you have to prove materiality, which I agree you have to measure materiality at the point the statement is made and not later on.

Mr. MEEHAN. So a prosecutor who actually had to prove perjury would be much more hesitant to kick it around than the way we do in this committee back and forth.

Ms. BLOCH. That is right.

Mr. MEEHAN. Professor Tribe, do you think it was a good idea for this committee and the Congress to release the independent counsel's report before we even read it?

Mr. TRIBE. No.

Mr. MEEHAN. Do you think it was a good idea to release the boxes of information, including grand jury testimony, to the public before the President's lawyers got a chance to look at it?

Mr. TRIBE. No, although I think it was more of a problem that the full committee hadn't read it, and I guess the whole idea, to echo Representative Waters, the whole idea of trying to stir up the public so it will share the outrage that one already feels, needs to be something of a hope for self-fulfilling policy that didn't pan out.

Mr. MEEHAN. Has this process been fair to the President?

Mr. TRIBE. Probably not.

Mr. MEEHAN. Has the process, as a constitutional scholar, been a credit to our Constitution and the constitutional principles of fairness and due process?

Mr. TRIBE. Do I detect a leading question? No, I don't think——

Mr. MEEHAN. We can lead.

Mr. TRIBE. I don't think it has been a credit.

Mr. MEEHAN. We can lead in this committee.

Mr. TRIBE. I don't think it is a credit.

Mr. MEEHAN. Very few of the rules that have been followed here are the rules that would be used in a court of law. Many of us have made determinations based on the facts alleged by the independent counsel that perhaps the facts, even if they are true, don't rise to impeachable conduct. Let's assume there are some that do feel it

rises to impeachable conduct and assume those people intend to vote for impeachment. What would you think if they didn't call a single material witness before they voted to impeach the President of the United States in a constitutional context?

Mr. WATT. Reclaiming my time, that is really going to the point I want to make on my time, too. You are going to get a chance to answer that.

Mr. CANADY. Your first 5 minutes have expired.

Mr. WATT. I understand. That is why I am reclaiming my time. Before I go to that, I want to extend a special thanks to Professor Pollitt and, if Professor Van Alstyne were still here, I would extend the same thanks to him. Both of them are from my State, and I definitely want to just thank them for being here.

Let me go back to Professor Tribe's reference to the train and there being three stops. It seems to me, although I am distressed by it, that the chairman of our subcommittee in his opening statement is already beyond the first stop, and if I read between the lines, everybody on the other side is already beyond the first stop and we are at least at the second stop, and they are going to vote to take us to the second stop.

With that, if you assume that is true, and I really would like to have the response of Professor Pollitt, Professor Tribe, Professor Bloch and Professor Turley in particular to this, if it is true, can we stop simply by calling the independent counsel? Is that enough? And second, if it is not enough, who else ought this committee be calling to get us from the second stop on the train track to the third stop?

Mr. TRIBE. I cannot assume that Chairman Hyde, in enunciating that the committee was going to call only the independent counsel, intended to foreclose those who were not yet fully with the program and on the train by calling other witnesses.

Mr. WATT. The chairman of our subcommittee here, not Mr. Hyde, but I think Mr. Hyde is on the second stop, too.

Mr. TRIBE. In any event, I think it is fairly clear, I hope it is generally agreed, that when there is great dispute over material facts about the gifts and about any number of things that bear on obstruction and witness tampering and even deliberate lying under oath, when all of those things are still in dispute, notwithstanding the President's quasi confessions, that it would be unconscionable to take the step of returning a bill of impeachment and serving the matter to the Senate without having a full ventilation, perhaps in closed session, of the relevant witnesses, the percipient witnesses. They would surely include Vernon Jordan and they would include the President's secretary and they would include Monica Lewinsky and Ms. Tripp. It would be quite a scene. I don't think one could credibly go forward without it, unless the President were somehow to stipulate to many of the things in the list of 81 questions, which seems to me rather unlikely.

Mr. WATT. Before I come back to Professor Bloch, let me hear Professor Turley's response to that. How do you get from the second stop to the third stop?

Mr. TURLEY. Congressman, I think, as with many things in the Constitution, you are left with a spectrum of possibilities and——

Mr. WATT. What I want to know is what witnesses do we need to get from the second stop to the third stop.

Mr. TURLEY. What I was going to stress is it depends upon your view as to the substance and credibility of the evidence. In the grand jury you had various people appear who were very capable; the judges of the evidence given to you as to, you know, that you were convinced that you know the merits, for your decision, not the merits of ultimate guilt, but if I could—I will explain if I could just have one more second.

Mr. WATT. All right. Go ahead.

Mr. TURLEY. The reason the spectrum is important is because at some point, a House hearing becomes redundant with the Senate function. I had some difficulty with the Nixon model for that reason.

Mr. WATT. Well, I don't want to go to the Nixon model. I am talking about this model right now. What I hear you saying is, it wouldn't be responsible of me to call the independent counsel in here, put him under oath about things that he knows nothing about firsthand, that he has already given us his evidence about, so we got to call some other witnesses in due diligence, I take it, and I am trying to figure out who those other witnesses are. Maybe Professor Bloch can help me with this.

Ms. BLOCH. Well, I think at a minimum you would need Lewinsky and I guess probably Tripp and Vernon Jordan, I guess. A little bit would depend on how you are going to frame the articles of impeachment, but yeah, I don't think you can just take Starr's reporting of what the grand jury heard which was uncross-examined and unrepresented. That seems like a very weird procedure to me.

Mr. WATT. Professor Pollitt, you get the last word on this issue, from North Carolina.

Mr. POLLITT. Thank you very much.

Everyone that talked about it today have said, if it's true, they always added if it is true, or they say there might be credible evidence which would require some action, if it is true. Well, no one knows what is true. Monica Lewinsky said that nobody offered her a job. She said so many denials at the last minute of her testimony, so I don't know why anyone should assume that there is any offenses. Why should there be an impeachable offense when nobody has looked into it? We just have Kenneth Starr, and the question was, what do you think of Starr? I don't think much of him. I wouldn't believe him for a minute. Anybody who does Mrs. McDougall, calling her back from California in chains, to say the same thing, refuse to say the same thing she said before, I don't think he is credible.

Mr. WATT. Well, I believe him to be honest with you, but I just don't think he has any evidence that is relevant to this case. He has already given us his evidence, and to bring him in here and put him under oath to say that the boxes are there, what else can he say? To say that, you know, he can prosecute a case, but you don't prosecute a case under oath. He can't give any evidence that I can discern, and that is why I was so shocked when I heard that our next step in the process, after having given the public all of this evidence that was sent over here, our next step in the process

is to bring the person who sent it over here and put him under oath, and let him testify about the stuff that we didn't think was reliable or might not have been reliable in the first place. And then stop and say, okay, we have done our responsibility now.

So I yield back.

Mr. CANADY. There is no time remaining to yield; the gentleman's time has expired.

The gentleman from Georgia, Mr. Barr, is now recognized.

Mr. BARR. If I could have the two articles that we discussed earlier, the Article I of the Nixon impeachment and the draft article of impeachment against William Jefferson Clinton, distributed.

Before I ask a couple of questions of a couple of witnesses, there was some reference earlier to perjury being a fuzzy standard. I am not sure that it is. It is a difficult statute sometimes to prosecute, but I don't know that it is a fuzzy standard. It has been used many times against public officials who appeared before grand juries. I also think that there is something that can be said for, I think the term was copycat perjurers. I think we are also seeing some problems develop as a result of the perjury that appears to have been committed by this President, perjury very broadly defined as subversion of our judicial system and obstruction of justice, which can encompass perjury in a sense also.

For example, there was a memo that was sent to all DEA, Drug Enforcement Administration, personnel about 6 or 8 weeks ago by the Acting Administrator, I believe it was, and this that memo the DEA had felt the need, obviously because problems had cropped up, to state explicitly something that has always been presumed to be so self-evident you don't have to state it to law enforcement officers who have taken an oath of office and who take one regularly in courts of law and before magistrates. The head of DEA instructed very explicitly DEA personnel that they are not to lie, that they are not to testify falsely, and that cleverly worded statements or answers in an attempt to avoid stating the truth will not be tolerated. The fact that the head of DEA felt the need to send such a memo to me illustrates that we already do have a serious problem. In ivy towers that may not be obvious, but in the real world people do pay attention. Criminals pay attention to what goes on in our court system, children pay attention to what they see on television, they pay attention to what they see happening in the world. Students pay attention to it. I have already been approached by teachers who have said that the sort of activity, sexual activity in which the President and Ms. Lewinsky engaged has already become more pronounced among high school students, and in a number of cases already, when confronted with this after they have been caught, the students, as related to me, are very indignant because after all, they tell the professors, teachers, this is not sex, therefore, why is it bad? So we are already reaping the problems that we have sown by allowing this problem to fester and to develop the way it has. So I think we do have an obligation to get a handle on it.

First of all, Mr. Turley, if you could, just answer very briefly, is there any way that a person can be entrapped into committing perjury?

Mr. TURLEY. Well, the essential ingredient of a perjury trap is perjury. Without perjury, there is no trap, and I find it somewhat

astonishing that there is this idea that the President was a victim of this nefarious effort to get him to commit an act which is criminal. He just needs not commit the act and he avoids any trap.

Mr. BARR. When I was a U.S. Attorney, sometimes defendants would try to raise this also, that they were entrapped into perjury, and Federal courts have consistently maintained that that is a non sequitur. You cannot be entrapped into perjury because you can never be forced to lie. That is one of the more nonsensical aspects of some of the defenses that have been raised here, one of which was struck down or two of which were struck down today by the Supreme Court, I believe. They ruled again on the so-called Secret Service privilege and the attorney-client privilege, which the administration has been trying to make applicable to government attorneys.

The letter dated November 6, and I think, Mr. Cooper, you referred to this letter in your opening remarks on the legal experts or lawyers or law professors or whatever, it is really quite, in a sense, a humorous letter. What they are trying to do is they are trying to dance around, trying to exonerate Clinton and convict Nixon. They start out by trying to say that of course the only thing that is impeachable is something that is, you know, an exercise of the executive function of the President. He is acting as President, conducting an act as President or what not, but then I think they sort of realized well, now, wait a minute. If you look at the article against President Nixon, there was nothing in there that provided a predicate for the Article I impeachment against him; therefore, they better sort of, you know, try and find a Clintonesque way of dancing around this, and I am not sure they have really done it very well, but I think that it was more a PR type thing. It is kind of a humorous letter, I think, and you pointed out some of the inconsistencies in it.

If you could, Mr. Cooper, taking a look at the draft article of impeachment against President William Jefferson Clinton which you have before you and Article I as voted by the Judiciary Committee against President Nixon in 1974, and if you would, sort of give me your reaction to these two documents, basing it, as I think is legitimate, the underlying act, in both cases, the original underlying predicate act in both of these articles has nothing to do with the official functions, so-called executive functions of the President, whether it is Nixon or Clinton, and the offending behavior which everybody I believe on this panel, as well as the previous panel, it did provide a proper substantive, historical and constitutional basis for the impeachment of Mr. Nixon, is essentially the same as the allegations which are set forward in this draft article and which I think are clearly sustainable, based on the evidence, with the exception, as I indicated earlier, in Article I regarding President Nixon, his use of the CIA. We don't have any information at this point that President Clinton enlisted the support of the CIA in his endeavors to subvert justice and probably item number 7 as well would not have been applicable.

But other than that, is it not your position, or would it be your position, that these two documents are both constitutionally sound, constitutionally based, and would provide a proper legal and constitutional basis for the impeachment of both Presidents, notwith-

standing the contorted efforts or the contortions of the learned legal scholars, however many signed this letter, to try and draw a distinction so they would not entrap themselves in any consistency, which I think is obvious in what they are saying here, that President Nixon could be impeached, but President Clinton not.

Mr. COOPER. I think these articles, the draft article and the article number 1 in the Nixon case, both outline what are high crimes and misdemeanors. There are obviously parallels in terms of the efforts to conceal information and evidence and testimony from the authorities appropriately charged with looking into those things, and in particular, the judicial authorities, the judicial process. For reasons that I have already stated, I simply have no doubt that these kinds of crimes are and do constitute impeachable offenses.

Mr. BARR. Do you have any problem with that analysis, Professor Turley?

Mr. TURLEY. Well, no. I think that the articles against Richard Nixon reflect the sort of legitimacy issues that were brought up in the prepared statement that I gave. That is, they reflect this idea that where the President is believed to be a lawbreaker, it creates a series of hidden fissures within the system and you are left with rather difficult choices. If, for example, this House believes that President Clinton is a perjurer, they have decided that he has committed perjury as opposed to just this lying under oath, then the question is what do we do after that for the remaining 2 years? Do we stop prosecuting perjury cases? Do we give them an option not to if they can have a prayer breakfast or something that could be an alternative to prosecution?

The question is, when we talk about the dangers of all of this, one of the dangers that we don't talk about a lot is the danger of establishing this difference in treatment. No one is suggesting that we are talking about the indictment of William Jefferson Clinton. We are talking about what is the appropriate expression of Congress if they do believe that the President is a perjurer, and there may be some difference in that view, and I want to acknowledge that. But if you do believe it, then you cannot get beyond it by simply saying that well, the public believes that this should go away. As many of us question, it is not simply whether it should go away, but how, and how to do that without doing some hidden damage to the system.

Mr. BARR. And it would be hard, would it not, to argue that the remedy that was exercised with regard to Article I against President Nixon should not be the same and only remedy that we have before us to correct the abuse of office personified as set forth in the draft article against William Jefferson Clinton.

Mr. TURLEY. Well, I think that is true. I won't read a bunch of statements from history, but the drafters did talk about the need to have language that would meet the time, and there are obviously innumerable ways in which Presidents can commit criminal acts for a host of different reasons, from the personal to the absurd to the public reasons. We can hardly make a distinction, I think with any confidence, by labeling some things as motivated by personal purpose as opposed to a public purpose, or using executive means or personal means. I think we are stuck with the question that is very difficult and that is what do we do with a President

who has committed crimes in office? I think we have to be honest about that. I think there are very few things you can do to harm the system as long as you are honest with the questions, and if you do that, I think the system can take anything.

Mr. TRIBE. Since you insulted the authors of the letter by calling it humorous and contorted, I wonder if I just might say a brief word.

Mr. BARR. It is fine with me. What I was particularly interested in is on your page 3, your efforts—Filegate notwithstanding about using the FBI, your efforts to really try and bring Nixon within the parameters of what you believe would be impeachable, yet keep Clinton out.

Mr. TRIBE. Right, and I would defend that without any hesitation. I can't believe that you say this little thing about misusing the CIA and other agencies, with the exception of that they are identical. That is like saying Mrs. Lincoln, with the exception of that, how did you like the play?

This article of impeachment——

Mr. BARR. Are you saying that the only reason that President Nixon would have been impeached on Article I is simply because he used the CIA? Because he used the CIA?

Mr. TRIBE. Absolutely.

Mr. BARR. So without that, he would not have voted for the impeachment?

Mr. TRIBE. No, it is not just the CIA. I am just looking at what you handed out. It says in the second paragraph that he is using the powers of high office to obstruct the investigation. Then, in numbered part 4, he is interfering in his role as President. That is what gave him the ability to do it, with investigations of DOJ, FBI and the office of Watergate special prosecution force and congressional committees. This is a classic boilerplate instance of gross abuse of the official powers of the presidency, and we would have been derelict if we had equated——

Mr. BARR. So a President, for example, going to other executive branch employees at the White House, for example, and suborning their perjury, instructing them to tamper with witnesses and evidence, that would not be. It has to be some other executive branch agency. Is that the fine line you are drawing?

Mr. TRIBE. No, not at all. If he instructed his subordinates to tamper with evidence, and there has not been any suggestion that that was done, that would be different.

Mr. BARR. Surely there has been.

Mr. TRIBE. I don't think so. I read the report. There has been a suggestion that they asked him to say that they believed him, because they had no firsthand evidence. That is nothing like an orchestrated plan to distort the process by getting either other agencies or your own employees to obstruct justice. He just asked them to be his mouthpieces. Is that not the same as this?

Mr. BARR. That is not what I am talking about. I am talking about Betty Currie, and so forth.

Mr. CANADY. The time of the gentleman has expired.

The gentleman from Virginia, Mr. Scott, is now recognized.

Mr. SCOTT. Thank you, Mr. Chairman. Since this is the last time I am going to have an opportunity to speak, I would like to thank

you for the way you have conducted this hearing. Everyone knows that this is a very contentious subcommittee and committee, and you have been extremely patient in the way you have conducted the hearing, and I think the Nation owes a debt of gratitude, because we have learned a lot from the witnesses, to a large extent because of the way you have conducted the hearing. I know we had a little rocky road getting here and I didn't want the record to reflect anything other than the appreciation that I wanted to express about the way you have conducted the hearing.

Professor Bloch, did you seem a little strained to try to come up with a witness list for charges that had not been ascertained?

Ms. BLOCH. I am sorry, I didn't understand the question.

Mr. SCOTT. You were asked to recite witnesses that would be appropriate. Were you a little strained in that response when you didn't know what the charges were?

Ms. BLOCH. I think someone is trying to help me give the answer.

Mr. TURLEY. It's James Madison.

Ms. BLOCH. Yes, I think it is hard to answer in the abstract, and I think that was the point here, is to try and flesh out what the appropriate charges might be and whether they rise to the level of an impeachable offense.

Mr. SCOTT. A lot has been said about people in jail for perjury. Did I understand you to say that perjury had not been alleged?

Ms. BLOCH. I did, and I also didn't say it was fuzzy. I said it was hard to prove, but not fuzzy.

Mr. SCOTT. Let me just read some of the allegations, and I want to know if anyone thinks that these would constitute impeachable offenses. 11A, count 11A in the Starr report says that beginning on January 21st, 1998, the President misled the American people and Congress regarding the truth of his relationship with Ms. Lewinsky. Does anybody think that he ought to be impeached for that?

Mr. TURLEY. Actually, Congressman, I am not prepared to rule that out, and I will tell you the reason why, is simply that——

Mr. SCOTT. Let me ask another question and you can probably get it at the end. The First Lady and members of the Cabinet and the President's staff publicly emphasized the President's denials. Is that, too, something that you would want to have us investigate to determine whether or not the First Lady publicly emphasized the President's denials and we ought to spend time looking into that?

Mr. TURLEY. Congressman, I don't want this to be taken as evasive, because the reason I can't rule that out is I believe that if you look at past impeachments there is a tendency for impeachments to generalize when they get to the floor and encompass a scope of conduct——

Mr. SCOTT. The President repeatedly and unlawfully invoked executive privilege to conceal evidence of his personal misconduct from the grand jury. Invoking executive privilege and complying with the court orders after the court has ruled, should we investigate that to determine whether or not he ought to be impeached on that count?

Ms. BLOCH. I don't believe so.

Mr. SCOTT. He is the only one that thinks that we ought to look into it. Does anybody else think we ought to look into it?

Mr. COOPER. I do not think that invoking executive privilege, even if frivolously, and I believe it was frivolous in this circumstance, but that does not constitute an impeachable offense, even though it ultimately did lead to the delay of lawful proceedings of the court.

Mr. TURLEY. Congressman, can I clarify one thing, and that is, I am not saying that these are individual counts or that they ultimately should be put into impeachment. All I am saying is that the obligation of this body is to investigate a scope of conduct and determine whether it is such that it is incompatible with the office. I also agree that an executive privilege claim should not normally be, and I expect would not be in this case, an impeachable offense.

Mr. SCOTT. The point I am making is that I think most people, and you appear to be the only one raising the question, that some of the allegations do not constitute impeachable offenses and the first order of business ought to be to narrow it down to those that could conceivably be impeachable offenses, and I think most people have commented on it and have suggested that invoking executive privilege doesn't pass the laugh test and we should not waste time investigating that count.

Mr. TURLEY. Congressman, the only caveat I have, I don't think we disagree on this, because I don't like that count very much, but the only caveat I have is that you cannot rule out these types of privilege assertions as a categorical matter. There will be times when the President uses lawful means in a way that is inappropriate for his office.

Mr. SCOTT. As you understand the factual basis, no one else has a question about that.

Let me go on to others. We have kind of gotten away from the meaning of high crimes and misdemeanors. How do you know—what kind of measure do you—what kind of standard or measure do you have for an allegation to determine whether or not it is a high misdemeanor? We know what a crime is, but how do you determine whether a misdemeanor would constitute a high misdemeanor and would constitute a high misdemeanor in the context of treason, bribery and other?

Mr. TRIBE. I think it would be a mistake to parse that unit phrase, high crimes and misdemeanors. There is simply no evidence that would enable us to choose among the various alternative grammatical and syntactic interpretations. We do know that the phrase was plucked from around the year 1386 and that it wasn't until a couple hundred years later that misdemeanor had anything to do with crime, and so perhaps a culpable omission and failure to perform the duties of office, whether because you are on the beaches of Rio or because you are in jail, if there had not been immunity from prosecution, would be a misdemeanor, but I think rather than parsing it that way, I think of it as a unit and then try to define it functionally in terms of abuse of power and/or injury to the system.

Mr. SCOTT. The only person that we have heard of at this hearing that was not abusing official powers was Mr. Claiborne, and it

is my understanding that the exception to be used is when the behavior is such that the person can't do his job.

Mr. TRIBE. That is my understanding.

Mr. SCOTT. Is there any question as to whether Judge Claiborne could perform his function as a judge, having been sentenced to Federal prison?

Mr. TRIBE. Well, the sentence I think was 2 years and there is I suppose a technical question. Once he was out, could he be a judge, and I think that the judgment of the House and I think it was shared by the Senate was that that would be laughable, that he couldn't possibly be sentencing people for perjury having been a convicted perjurer.

Mr. COOPER. Mr. Scott, I think there is a flaw in the premise of your point, if I may interject. In addition to Judge Claiborne, Judge Nixon committed perjury before a grand jury, and he was ultimately impeached and convicted. His perjury had nothing to do with the exercise of his judicial power.

Mr. TRIBE. I am sorry, it did.

Mr. SCOTT. Let me say this.

Mr. COOPER. Actually, I don't believe it does.

Mr. SCOTT. The title of the offense, is the title of the offense all you look at or do you look at the effect the behavior has had on the function of his official duties or the effect it has had on the State.

Mr. TRIBE. You certainly focus on the effect, but you also look behind the title to ask what it was perjury about, and the reason that I am afraid I rudely interrupted Chuck Cooper a moment ago was that my understanding was the perjury in that case was related to covering up the acceptance of a bribe connected with using his power as a Federal judge to persuade a State prosecutor to avoid proceeding with the son of the person who had provided the money, and that is not exactly unrelated to his official position.

Mr. COOPER. It is a real stretch, however.

Mr. SCOTT. Is there any precedence for a person being impeached for private activity that does not go to the question of whether he can do the job?

Mr. TRIBE. Not in the 15 impeachments in the 201 years that we have been having Federal impeachments.

Mr. COOPER. Nobody in connection with the Claiborne impeachment or in connection with the Nixon impeachment suggested that the only reason these men should be removed is because they are disabled from service. Mr. Tribe's comment regarding other types of disabilities, it seems to me, would obtain in that context, whether they were impeached because they committed high crimes and misdemeanors.

Mr. TRIBE. The House of Representatives, in its brief in opposition to Judge Claiborne's motion to dismiss, elaborately set forth the reasons for believing that notwithstanding the fact that this was not exactly murder, and notwithstanding the fact that this was not an abuse of his power, it would, in fact, relate to his official position by making it impossible for him credibly to perform it, and that was in the principal brief submitted by the House of Representatives.

Mr. COOPER. Certainly that would have that effect on a judge.

Mr. SCOTT. Obviously there are crimes that do not constitute treason, bribery, high crimes and misdemeanors. If a President has committed such a crime, what can we do, and is sending a message with an impeachment resolution the appropriate thing to do?

Mr. TRIBE. Well, if you want to send a message, a resolution, not an impeachment resolution, but a resolution, call it censure, call it what you will, I think sends it. But it seems to me that to use the triggering of a Senate trial as an exercise in getting something off your chest and communicating to the Nation would be a terrible abuse of power.

Mr. TURLEY. Congressman, I obviously beg to disagree. There is a good reason I think in all of the debates of the framers that the word "censure" of this type of reprimand was not even raised as a viable option. I think that there is a good reason for that. If a President has been shamed by controversy, the idea of shaming him twice certainly would not satisfy a deterrent value, and so I think the reason a censure is not—should not be used as an alternative is because it is of a wholly different kind, and no one is suggesting, no one is suggesting that impeachment in this case should be something to get off your chest. I think that that type of framing of the issue belittles the motivations and frankly the view of people on the other side of this debate. There are serious issues here.

Mr. SCOTT. If someone has committed—if a person that has committed a serious crime that is not technically treason, bribery or other high crime and misdemeanor, what should we do?

Mr. TURLEY. I think you should do nothing. If you believe that the President has committed a crime that is not a high crime and misdemeanor, then your function is over. But that is the rub, isn't it, that the question is what is a high crime and misdemeanor?

The reason I said I would not exclude executive privilege, I probably would drop that out of this case, but if you believe abuse of power is an issue for which this House must look at, then you cannot categorically dismiss areas of inquiry.

Mr. SCOTT. So if we don't find treason, bribery or other high crimes and misdemeanors in the President's actions, based on the precedents, then we should do nothing.

Mr. TURLEY. In such case you are no longer an Article 2 and you are looking at some type of disagreement that falls outside the impeachment process.

Mr. CANADY. Thank you, Mr. Scott.

I now recognize myself for 10 minutes, and I may not take all the 10 minutes. I will be the first person today not to take more, and you will be pleased to know that I don't intend to ask more than one question. I am going to make some statements after that, so that may not please you as much.

Mr. Scott.

Mr. SCOTT. Could I ask unanimous consent to have certain information submitted for the record? The historian's letter, the law professors' letter, another law professor's letter, the National Association of Criminal Defense Lawyers' statement, the Rodino article and the National Law Journal article.

Mr. CANADY. Without objection.

[The material referred to is in the Appendix.]

Mr. CANADY. I want to start off by asking Mr. Cooper a question about the fairness of the proceedings in the House on this matter. There has been some criticism of the way the House has proceeded, which I believe is unwarranted, and I would like to ask Mr. Cooper his view about whether we have in this House and in this committee followed a process that you believe is fair.

Mr. COOPER. Mr. Canady, I certainly associate myself with the remarks that Mr. Scott made with respect to the conduct of these proceedings. They seem to me to have been entirely fair, and to have accorded everyone an ample opportunity to be heard and have accorded everybody the respect that I think that their strongly held views deserve. I think as well, certainly my own sense of propriety and fairness has not at all been offended by the previous procedures employed by the committee in terms of making available to the public the information that the independent counsel has made available to this committee. It seems to me that is an entirely appropriate and proper course. And I have no difficulty with the timing of that decision.

Mr. CANADY. Okay. Thank you.

I will hasten to add that the procedures that we have followed have been procedures established by the House, and we have been acting within a framework that was initially established by an overwhelming bipartisan majority in the House.

Now, with that let me move on to making a couple of points. It strikes me that a major element of the defense of the President in this context hinges on a distinction between the corrupt use of governmental power, which the President's defenders would contend is conduct that could lead to high crimes and misdemeanors, and the corrupt interference with the proper discharge of governmental powers, and the proper functioning of government, in this case the judicial system and the criminal justice system. I find that distinction very troubling, because I believe that the same sort of harm that can be done to our system from the corrupt use of governmental powers can also be done to our system by the corrupt interference with the proper functioning of the judicial branch of our government and the prosecutorial authorities. We have a major divide on that, and I understand that the position that Professor Tribe and others have expressed in that regard is a position that they hold in good faith, but I think we all need to step back and ask ourselves, do we want to have our decision in this matter hinge on that distinction? Because I believe that is really what it comes down to. There are other arguments, there are other elements, I don't want to oversimplify the point that has been made here, but I think that is central to this. And I don't think that distinction really withstands analysis.

Now I would like to turn back to Professor Schlesinger, and I am sorry he is not here. I wish I could have asked him to respond to this, but I just want to read something that Professor Schlesinger has written some time ago in his book, *The Imperial Presidency*, because I think it puts some of these issues in the proper context. We have heard many concerns and many fears expressed about the processes taking place here, and I think what Professor Schlesinger said then very directly responds to some of the concerns that have been raised.

Professor Schlesinger wrote, "Impeachment was part of the original foundation of the American state. The Founding Fathers had placed the blunt instrument in the Constitution with every expectation that it would be used, and used most especially against Presidents. 'No point is of more importance,' George Mason told the Convention, than that the right of impeachment should be continued. Shall any man be above Justice? Above all, shall that man be above it, who as President can commit the most extensive injustice?' Benjamin Franklin pointed out that if there were no provision for impeachment, the only recourse would be assassination, in which case a President would be 'not only deprived of his life but of the opportunity of vindicating his character.' Corruption or loss of capacity in a President, said Madison, was 'within the compass of probable events . . . Either of them might be fatal to the Republic.'

"The genius of impeachment lay in the fact that it could punish the man without punishing the office. For, in the Presidency, as elsewhere, power was ambiguous: the power to do good meant also the power to do harm, the power to serve the republic also the power to demean and defile it."

The professor goes on to write, "History had turned impeachment into a weapon of last resort—more so probably than the Founding Fathers would have anticipated. Still, it was possible to exaggerate its impact on the country. It had taken less than three months to impeach and try Andrew Johnson, nor was the nation—in a favorite apprehension of 1868 as well as of 1974—torn apart in the process."

If you will indulge me, I will read one more passage concerning Watergate, of which Professor Schlesinger wrote, "Watergate was potentially the best thing to have happened to the Presidency in a long time. If the trails were followed to their end, many, many years would pass before another White House staff would dare take the liberties with the Constitution and the laws the Nixon White House had taken. And if the Nation wanted to work its way back to a constitutional Presidency, there was only one way to begin. That was by showing Presidents that, when their closest associates place themselves above the law and the Constitution, such transgressions would be, not forgiven or forgotten for the sake of the Presidency, but exposed and punished for the sake of the Presidency.

"If the Nixon White House escaped the legal consequences of its illegal behavior, why would future Presidents and their associates not suppose themselves entitled to do what the Nixon White House had done? Only condign punishment would restore popular faith in the Presidency and deter future Presidents from illegal conduct."

That is what Professor Schlesinger wrote in *The Imperial Presidency*, a book that I read many years ago. I think there is a message there that we should listen to, even today as we consider the matters that are before the committee.

I would like to now close by quoting one of the Founding Fathers, one of the framers of the Constitution. This is a quotation I have previously read to the committee in our earlier deliberations, but I believe it bears repeating. Alexander Hamilton, in this statement, demonstrates the connection between respect for law and the pres-

ervation of our Constitution. He demonstrates the connection between respect for law and the preservation of our freedom as Americans, and he points to the fact that examples which subvert the law are very harmful. Hamilton wrote, "If it were to be asked what is the most sacred duty and the greatest source of security in a republic, the answer would be, an inviolable respect for the Constitution and laws, the first growing out of the last. Those, therefore, who set examples which undermine or subvert the authority of the laws lead us from freedom to slavery. They incapacitate us for a government of laws."

It would be my hope that all of the members of this committee and all of the Members of the House would reflect on these words. The decisions we will make will have an impact on the respect for the laws, and we are not only considering here the example which President Clinton has set in his conduct, but I believe that history will judge the example that we set by the decisions that we make in these proceedings.

Mr. SCOTT. Just before you end, I would like to enter the Paula Jones order into the record. A lot was said about what the judge said and what they didn't say, and I think the exact language ought to be a part of the record.

Mr. CANADY. Without objection.

[The information follows:]

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
JAN 29 1998
JAMES W. McCORMACK, CLERK
By: _____ DEP. CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PAULA CORBIN JONES,

Plaintiff,

vs. No. LR-C-94-290

WILLIAM JEFFERSON CLINTON
and DANNY FERGUSON,

Defendants.

ORDER

Before the Court is a motion by the United States, through the Office of the Independent Counsel ("OIC"), for limited intervention and a stay of discovery in the suit of *Jones v. Clinton*, No. LR-C-94-290 (E.D.Ark.). The Court held a telephone conference on this motion on the morning of January 29, 1998, during which the views of counsel for the plaintiff, counsel for the defendants, and the OIC were expressed. Having considered the matter, the Court hereby grants in part and denies in part OIC's motion.

In seeking limited intervention and a stay of discovery, OIC states that counsel for the plaintiff, in a deliberate and calculated manner, are shadowing the grand jury's investigation of the Monica Lewinsky matter. Motion of OIC, at 2. OIC states that "the pending criminal investigation is of such gravity and paramount importance that this Court would do disservice to the Nation if it were to permit the unfettered – and extraordinarily aggressive – discovery

efforts currently underway to proceed unabated. "Id. at 3.[1] OSC's motion comes with less than 48 hours left in the period for conducting discovery, the cutoff date being January 30, 1998. Given the timing of OSC's motion and the possible impact that this motion could have on the proceedings in this matter, the Court is required to rule at this time on the admissibility at trial of evidence concerning Monica Lewinsky.

Rule 403 of the Federal Rules of Evidence provides that evidence, although relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This weighing process compels the conclusion that evidence concerning Monica Lewinsky should be excluded from the trial of this matter.

The Court acknowledges that evidence concerning Monica Lewinsky might be relevant to the issues in this case. This Court would await resolution of the criminal investigation currently underway if the Lewinsky evidence were essential to the plaintiffs case. The Court determines, however, that it is not essential to the core issues in this case. In fact, some of this evidence might even be inadmissible as extrinsic evidence under Rule 608(b) of the Federal Rules of Evidence. Admitting any evidence of the Lewinsky matter would frustrate the timely resolution of this case and would undoubtedly cause undue expense and delay.

This Court's ruling today does not preclude admission of any other evidence of alleged improper conduct occurring in the White House.

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[1] For the record, counsel for the plaintiff take great issue with OSC's characterization of their discovery efforts.

In addition, and perhaps more importantly, the substantial interests of the Presidency militate against any undue delay in this matter that would be occasioned by allowing plaintiff to pursue the Monica Lewinsky matter. Under the Supreme Court's ruling in *Clinton v. Jones*, 117 S.Ct. 1636, 1651 (1997), "[t]he high respect that is owed to the Office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." There can be no doubt that a speedy resolution of this case is in everyone's best interests, including that of the Office of the President, and the Court will therefore direct that the case stay on course.

One final basis for the Court's ruling is the integrity of the criminal investigation. This Court must consider the fact that the government's proceedings could be impaired and prejudiced were the Court to permit inquiry into the Lewinsky matter by the parties in this civil case. See, e.g., *Anderson Wise Associates v. Ivan F. Boesky*, 660 F.Supp. 1494 (S.D.N.Y. 1987). In that regard, it would not be proper for this Court, given that it must generally yield to the interests of an ongoing grand jury investigation, to give counsel for the plaintiff or the defendants access to witnesses' statements in the government's criminal investigation. See Fed.R.Crim.P. 16(a)(2), which generally prohibits the discovery of government witnesses. That being so, and because this case can in any event proceed without evidence concerning Monica Lewinsky, the Court will exclude evidence concerning her from the trial of this matter.

In sum, the plaintiff and defendants may not continue with discovery of those matters that concern Monica Lewinsky. In that regard, OIC's motion for limited intervention and stay of discovery is granted. Further, any evidence concerning Ms. Lewinsky shall be excluded

from the trial of this matter. With respect to matters that do not involve Monica Lewinsky, OIC's motion is denied and the parties may continue with discovery. Because the telephone conference underlying today's ruling involved a discussion of discovery matters, the transcript of the conference shall remain under seal in accordance with the Court's Confidentiality Order on Consent of all Parties.

IT IS SO ORDERED this 29th day of January 1998.

UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN
COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP
ON 1/30/98 BY

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS,
U.S. POST OFFICE AND COURT HOUSE, 600 WEST CAPITOL, SUITE 402,
LITTLE ROCK, ARKANSAS 72201–3325,

January 29, 1998.

* * MAILING CERTIFICATE OF CLERK * *

Re: 4:94–CV–00290.

True and correct copies of the attached were mailed by the clerk to the following:

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Date: January 29, 1998.

JAMES W. MCCORMACK, CLERK
BY: VICK TURNER

Mr. CANADY. The subcommittee is adjourned.

[Whereupon, at 7:40 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING

[From The Washington Post, Oct. 2, 1998.]

THE IMPEACHMENT INQUIRY

The limits that House Judiciary Committee Democrats have suggested imposing on the panel's forthcoming impeachment inquiry are mostly bad ideas that the Republicans are right to resist. The Democrats say their only goal is to keep the inquiry from being turned into a fishing expedition. No doubt that is a risk, but with one possible exception, the limits they were still discussing yesterday would create greater risks in the opposite direction of obfuscation and delay. The Republicans, if they abuse the impeachment process, will suffer mightily—and deservedly—in terms of precisely the public opinion that they seek to influence. Our guess is that the gravity of the task will be a greater discipline on them than any rule.

The Democrats' first idea is to put a time limit on the committee's deliberations. We favor as quick a resolution of this matter as the committee can achieve, but experience suggests a time limit could encourage delaying tactics instead. The Senate Governmental Affairs Committee conducted a time-limited investigation of fundraising abuses in the 1996 presidential campaign and was foiled in part by witnesses who simply ran the clock. Better than any artificial deadline would be a simple commitment on the part of the Judiciary Committee to work nonstop until the inquiry is complete.

Some Democrats also want the panel to decide in advance what constitutes an impeachable offense, and only then begin an inquiry into the president's behavior if the two seem to match up. Judiciary Chairman Henry Hyde is correct to resist that as well. It's true that in eventually deciding whether the president's conduct constituted an impeachable offense, the committee will have to decide, if only implicitly, how serious such an offense must be. But that kind of judgment is all but impossible to make in the abstract, outside the context of facts that are still emerging and that almost daily paint President Clinton's behavior in slightly different hues.

The White House says an inquiry is unnecessary, that the basic facts are known and it's already clear they don't amount to an impeachable offense. But that's *not* clear. Plainly there are offenses so minor as to permit a before-the-fact judgment that, even assuming the worst, they are not impeachable. Perjury and obstruction of justice, however, are not among them. The committee needs to find the facts.

The Democrats suggest, finally, that the scope of the proposed inquiry is too broad. Absent a further report from the independent counsel, they would limit it to the charges arising out of the Monica Lewinsky affair, and thereby rule out expeditions of the kind some Republicans have threatened into other areas—the FBI files issue or the long-ago White House travel office flap, for example. We agree that without good cause, which does not now exist, the committee ought not venture into such areas. Will a rule or an understanding be a better way of achieving such restraint?

The Watergate parallel keeps being invoked in this connection, wrongly, we believe. Mr. Hyde has based his open-ended resolution of inquiry on the one used by the Judiciary Committee in investigating Richard Nixon's behavior 25 years ago. That has touched off a mostly partisan squabble as to whether the offenses in the two cases are comparable. They aren't, but even if they were, comparison is not the issue. The issue is whether the rules are fair and the inquiry produces a credible result. It won't if the inquiry is artificially constrained, and it won't if it is artificially extended, either. The parties, both of them, need to understand that; this is not one that either side should try to game in advance.

[From the New York Times, Oct. 4, 1998.]

THE JUDICIARY VOTE

This week, for just the second time this century, the House of Representatives is likely to approve an impeachment inquiry into the conduct of a President. Given the serious charges leveled against Bill Clinton by Kenneth Starr—and the need to have those charges resolved in an open, orderly way—that decision is justified and will be supported by many Democrats. But how the inquiry is conducted is a matter that requires very careful consideration by the American people and their representatives.

With midterm elections just a month away, the political conflict promises to be intense. But it need not be disabling, if sensible rules are adopted and followed. The plan proposed by the Republican majority looks sound and fair.

It is essentially the model used 24 years ago by a Democratically controlled House in examining the conduct of Richard Nixon in the Watergate case. It sets no limits on the duration or dimensions of the inquiry. Democratic leaders on Friday urged the House to set a late-November deadline for completion of the Judiciary Committee's work, and to limit the investigation to the Monica Lewinsky case.

Though this page favors the expeditious handling of this case, and believes it could eventually be resolved through a censure that would allow Mr. Clinton to remain in office, an artificial timetable serves no useful purpose. It only invites the White House to stall and forces the committee to rush its work. Though Americans are impatient with the Lewinsky scandal, a snap inquiry would be a disservice to the rule of law.

There is also no reason for the committee to fence off Whitewater, the dismissal of staff at the White House travel office and the White House misuse of Federal Bureau of Investigation background files, matters still being investigated by Mr. Starr. Those who complain that Mr. Starr has spent too much time and money investigating Mr. Clinton cannot now argue that the results of that work should be denied to Congress, if they are germane. But Mr. Starr must tell the Judiciary Committee right away if he has additional evidence of impeachable offenses by Mr. Clinton. The committee, for its part, must assure that marginal matters are not added to its investigation. Nor should the 1996 campaign-finance abuses be included in this inquiry, since Attorney General Janet Reno seems to be moving toward the long overdue appointment of an independent counsel in that area.

The natural contours of an impeachment inquiry accommodate two converging avenues of work, one dealing with the evidence, the other with the constitutional question of what constitutes an impeachable offense. The Judiciary Committee has wisely chosen to consider these in tandem, with the expectation that each inquiry will inform the other. Representative Henry Hyde, the chairman of the committee, has proposed other sensible rules, including subpoena power for the democrats, public hearings and ample opportunity for the White House to defend the President and to contest the committee's work. He has also authorized a bipartisan group of members to review Mr. Starr's files for exculpatory evidence.

In the end, both constitutional and practical considerations argue for keeping the process moving under clear rules. On the first point, the charges against Mr. Clinton cannot now be ignored or allowed to linger. They must be resolved in the way described by the Constitution. On the practical side, gearing up this somber constitutional process will provide incentive for the Republican Congressional leadership and the White House to try to find a settlement that respects both political continuity and the rule of law.

[From the Wall Street Journal, Oct. 1, 1998.]

ONE THING BLOCKS A CLINTON DEAL: THE CONSTITUTION

(By John O. McGinnis)

Some politicians and commentators are suggesting that Congress should abort the impeachment process and instead censure President Clinton and make him pay a fine. Such a deal has its allures. It would immediately end Kenneth Starr's referral without lengthy hearings. It would allow members of Congress to go on record condemning Mr. Clinton's behavior, while avoiding any real consequences that might annoy voters.

But such a scheme is unconstitutional. It flouts the separation of powers that is the keystone of our republic. By allowing Congress to punish the president outside the bounds of impeachment, this precedent would establish a new avenue of legisla-

tive political assault against the executive. Any such action would weaken the presidency while permitting Congress to avoid its responsibility to render considered judgments on the integrity of our highest officers.

The Constitution clearly contemplates a single procedure for Congress to punish the president—impeachment by the House and subsequent trial by the Senate. Article II specifies the penalty: "The president shall be removed from Office on Impeachment for, and, Conviction of, Treason, Bribery or other high Crimes and Misdemeanors." Article I states that "Judgment in cases of Impeachment will not extend further than to removal from office, and disqualification to hold and enjoy any Office of honor, Profit or Trust under the United States."

Neither provision authorizes Congress to impose legislative punishments short of removal. Read together, the impeachment clauses require removal upon conviction and allow the Senate, at its discretion, to impose a single additional penalty—disqualification from future office. As Michael Gerhardt of William and Mary Law School has noted in his magisterial study of impeachment, the Senate itself has consistently adopted this interpretation. The Senate's vote to convict on an impeachment count brings automatic removal without any further action on its part. It occasionally then votes also to disqualify the official from future office.

The Framers' decision to confine legislative punishment of executive officials in this way was carefully considered. By forcing the House and Senate to act as a tribunal and trial jury rather than merely as a legislative body, they infused impeachment with notions of due process so that it would not become a common tool of party politics. The requirement of removal upon conviction accentuates the awesomeness of the procedure, encouraging serious deliberation among members of Congress.

Besides perverting the Framers' design for impeachment, a resolution imposing punitive censure with a fine would violate two express constitutional prohibitions. First, the Constitution forbids bills of attainder. Such bills were the legislative acts by which the British Parliament punished executive officials with death or forfeiture of property. Second, the Constitution prevents Congress from "diminishing" the president's compensation during his term. Both prohibitions underscore that Congress's power to punish the president is limited to impeachment.

As always in moments of crisis, some will attempt to stretch the Constitution to fit their current political expedient. Censure alone, they will argue, is not a bill of attainder because it is merely an expression of strong disapproval without real penalties. True, nothing in the Constitution precludes any member of Congress from denouncing anyone. A resolution condemning the president may be justified legally as a loud collective shout from the floor. But this justification exposes the emptiness of such an act. Wrongdoing among legislators may be curbed by the censure of their peers. But when the admonishment concerns a member of another branch, it represents cheap talk and a flight from accountability that only encourages future lawlessness.

The self-evident insufficiency of joint fulmination has generated the demand for a substantial fine. It will be argued that even if Congress has no legal power to impose a fine, Congress can surely "suggest" one. The president then can voluntarily pay that amount because the Treasury's miscellaneous-receipts account stands ready to accept gifts. But such a "voluntary" payment is a legal fiction, for Mr. Clinton would be paying a fine under the shadow of impeachment. Congress would be using its impeachment powers as a club to impose bills of attainder.

This would represent a truly disastrous precedent. Congress could then establish a schedule of legislative fines for the perceived offenses of other branches. The going price for an attorney general who refuses to turn over a document might be $100,000. Life-tenured judges might be required to pay fines for unpopular opinions. Congress will have created a new power to enable it to harass the other branches and yet escape its constitutional duty to hold officials to ultimate account.

The push for a quick fix to this scandal tells us something deeply troubling about the attitude of many toward constitutional governance. Many Americans believe that impeachment distracts both the president and Congress from their "real business." This sentiment cannot be squared with the Framers' paramount concern for the integrity of public officials.

They recognized that the prosperity and stability of the nation ultimately rest on the people's trust in their rulers. They designed the threat of removal from office to restrain the inevitable tendency of rulers to abuse that trust. But this constitutional restraint can work only if citizens have the self-restraint to allow its processes to unfold solemnly, majestically and without concern for their own short-term gains and losses.

[From The National Journal, Sept. 19, 1998.]

THE PRESIDENT AND EQUAL JUSTICE UNDER LAW

(By Stuart Taylor, Jr.)

Perhaps the greatest danger presented by the apparent willingness of so much of the public (up to now) to let President Clinton escape impeachment and trial for his credibly alleged felonies is that this would tear at the already-frayed bonds of the law.

What would it say about our commitment to equal justice under law if the elected official charged by the Constitution with executing the laws was free to commit felony crimes (perjury, obstruction of justice) with virtual impunity? What would it say, for instance, to all the people who are currently serving long prison terms for relatively minor offenses, thanks to the draconian mandatory drug sentences so favored by this president?

A civilized society depends heavily on voluntary compliance, especially concerning the obligation to provide truthful testimony. Law's insidious enemy is the cynicism that spreads when little people get the message that big people—and who is bigger than the president?—can get away with lawless conduct. Here are three ways in which the rule of law will suffer if Clinton skates:

Undermining sexual harassment law. If a boss such as Clinton can have sex with a low-level subordinate, lie under oath about it in a sexual harassment lawsuit, and then escape punishment, victims of sexual harassment will be the losers in the long run.

A three-year consensual affair—which the female subordinate claimed, after being fired, to have carried on for the sake of job security—was at the heart of the 1986 Supreme Court decision that first recognized sexual harassment as a legally actionable form of sex discrimination, *Meritor Savings Bank* v. *Vinson.*

This is not to say that Monica Lewinsky, who was Clinton's more-than-willing sex toy, is a victim of sexual harassment. But she could certainly make the claim: She had an affair with the boss, he got tired of her and dumped her, she got fired. And you could certainly make the case that people like Clinton-defender Gloria Steinem would be crying "sexual harassment" if Clinton were a Republican. And it is a given that the commander in chief would be drummed out of public life for this had he been a mere general.

And Paula Jones *has* sued Clinton, claiming that, one day in 1991, while she was working as a state employee, then Gov. Clinton exposed his penis to her and suggested she "kiss it" after she had rebuffed less bold advances. Jones stands a fair chance of getting at least part of her lawsuit reinstated on appeal. Meanwhile, Kathleen Willey accuses Clinton of an unwelcome groping in 1993, when she went to the Oval Office to ask for a job.

Who still doubts that Clinton importuned Jones? Who still doubts that he groped Willey? Who still doubts that he lied about both events?

Clinton's lies in his Jan. 17 deposition about Lewinsky came after he had been explicitly ordered by Judge Susan Webber Wright to answer questions about any sexual contacts with women who had worked under him. The judge held such questions relevant to Jones' claim that Clinton had used his official powers to reward women who gave him sex, while punishing those who wouldn't.

If the president can dodge a discrimination claim by lying and encouraging others to lie, then other defendants will feel justified in doing the same. They may also be excused for doing so.

And if we want to allow people like Clinton and Lewinsky to refuse on privacy grounds to answer such questions, we should pass a new law for the benefit of all similarly situated people.

I have proposed such a law (*see NJ, 9/12/98, p. 2076*), because I think the privacy benefits to us all would outweigh the costs to sexual harassment victims. But I doubt that pro-Clinton feminists of the Steinem stripe would agree.

What they seem to want is a double standard: a vast leniency for men they like, such as Bill Clinton; summary execution for men they do not, such as Clarence Thomas. And that is the very antithesis of law.

Legitimizing perjury. Penalties for perjury are the glue that holds the law together. The more that people feel free to lie in legal proceedings, the more the law itself distintegrates.

The Framers of the Constitution understood this. They knew the Eighth Commandment: "Thou shalt not bear false witness against thy neighbor." Their legal training included W. Hawkins' *Treatise of the Pleas of the Crown,* which called perjury "the most infamous and detestable" of crimes.

More broadly, Ralph Waldo Emerson wrote: "Every violation of the truth is not only a sort of suicide in the liar, but is a stab at the health of human society." Lying is integral to almost all white-collar crime and fraud, and to many forms of race and sex discrimination.

It's true that lying is common in today's society, and that most false testimony goes unproven and unpunished. But if lying *under oath* is legitimized—as it will be if the president's proven perjuries go unpunished—that will shred the rule of law.

If the president can perjure without legal consequence, why should any witness feel bound to tell the truth? How could the Justice Department justify prosecuting other perjurers? How could jurors, especially those who had taken the leave-Clinton-alone approach, justify convicting them?

It is argued, of course, that mere lying about sex should not be treated as perjury, because we should all be allowed to lie a bit about sex to protect against governmental intrusion into the most private of spheres.

Some sex lies *are* mitigated by privacy concerns. But sex lies under oath are perjury nonetheless. And Clinton had alternatives. He could have settled the Paula Jones lawsuit. Or he could have refused on principle to testify about his sex life and appealed the judge's order that he do so.

Moreover, Clinton's second round of perjuries—on Aug. 17, in the criminal grand jury—were *not* mitigated by any privacy interest. He *admitted* his relationship with Lewinsky. (The DNA dress left him no choice.) But he swore he'd been a passive recipient of oral sex, and had never touched her in intimate places. The sole purpose of this incredible claim—contradicted by Lewinsky in copious, self-corroborating detail—was to avoid admitting his previous perjuries.

The rest of Clinton's defense against Starr's charges of lying under oath rests on elaborate semantic evasions, to the point of self-parody. Such disingenuous word-twisting is not only Bill Clinton's trademark. It is the stock-in-trade of many prestigious law firms—where high-priced hairsplitting to hide the truth is seen as a noble calling—and of many law professors of Bill Clinton's generation.

These are people who mask their politics as law by pretending that all law is really just politics, and mask their prejudices as politics by pretending that logic is an illusion, consistency a conceit, and language itself incoherent. They are, in short, a lot like Bill Clinton. And that helps explain why they (and their journalistic counterparts) are so alarmed by the disgrace descending on him.

Mocking accountability. Most people caught in serious crimes are sent to prison. But it's unthinkable to lock up a sitting president. So the only real remedy for presidential crimes is impeachment and removal. While the Constitution allows for criminal prosecution after the president leaves office, we should all hope that that never becomes necessary.

The notion that Congress should simply stop, or administer a wrist-slap censure—while Clinton wallows in contrition and embarks on a healing "journey" deep into the land of psychobabble—is another effort to put the president above the law.

Contrition and forgiveness are matters between individuals. They are almost never a basis for dropping criminal investigations and prosecutions, and are accorded only a small role—as a marginal sentencing consideration—in the calculus of legal accountability. Clinton's apologies are thus virtually irrelevant to the impeachment question.

"The nation's prisons are full of people sorry in exactly the way he is: sorry they got caught," as George Will puts it. Should we let them all go? Or just those who can put on impressive masks of contrition?

In any event, Clinton's grudgingly given, inch-by-inch, let's-see-how-this-flies succession of apologies does not seem very sincere. In his otherwise masterful performance at a Sept. 11 prayer breakfast, for example, his apology for having hurt "Monica Lewinsky and her family" was followed by a vow "to mount a vigorous defense." Clinton knew something his listeners did not: that this defense rested upon smearing Lewinsky as a liar.

Can the semiotics of sincerity be stretched to cover saying you're sorry for hurting someone while plotting to hurt her again? Or was this apology just another lie?

DECLARATION CONCERNING RELIGION, ETHICS, AND THE CRISIS IN THE CLINTON PRESIDENCY

As scholars interested in religion and public life, we protest the manipulation of religion and the debasing of moral language in the discussion about presidential responsibility. We believe that serious misunderstandings of repentance and forgiveness are being exploited for political advantage. The resulting moral confusion is a threat to the integrity of American religion and to the foundations of a civil society.

In the conviction that politics and morality cannot be separated, we consider the current crisis to be a critical moment in the life of our country and, therefore, offer the following points for consideration:

1. Many of us worry about the political misuse of religion and religious symbols even as we endorse the public mission of our churches, synagogues, and mosques. In particular we are concerned about the distortion that can come by association with presidential power in events like the Presidential Prayer Breakfast on September 11. We fear the religious community is in danger of being called upon to provide authentication for a politically motivated and incomplete repentance that seeks to avert serious consequences for wrongful acts. While we affirm that pastoral counseling sessions are an appropriate, confidential arena to address these issues, we fear that announcing such meetings to convince the public of the President's sincerity compromises the integrity of religion.

2. We challenge the widespread assumption that forgiveness relieves a person of further responsibility and serious consequences. We are convinced that forgiveness is a relational term that does not function easily within the sphere of constitutional accountability. A wronged party chooses forgiveness instead of revenge and antagonism, but this does not relieve the wrong-doer of consequences. When the President continues to deny any liability for the sins he has confessed, this suggests that the public display of repentance was intended to avoid political disfavor.

3. We are aware that certain moral qualities are central to the survival of our political system, among which are truthfulness, integrity, respect for the law, respect for the dignity of others, adherence to the constitutional process, and a willingness to avoid the abuse of power. We reject the premise that violations of these ethical standards should be excused so long as a leader remains loyal to a particular political agenda and the nation is blessed by a strong economy. Elected leaders are accountable to the Constitution and to the people who elected them. By his own admission the President has departed from ethical standards by abusing his presidential office, by his ill use of women, and by his knowing manipulation of truth for indefensible ends. We are particularly troubled about the debasing of the language of public discourse with the aim of avoiding responsibility for one's actions.

4. We are concerned about the impact of this crisis on our children and on our students. Some of them feel betrayed by a President in whom they set their hopes while others are troubled by his misuse of others, by which many in the administration, the political system, and the media were implicated in patterns of deceit and abuse. Neither our students nor we demand perfection. Many of us believe that extreme dangers sometimes require a political leader to engage in morally problematic actions. But we maintain that in general there is a reasonable threshold of behavior beneath which our public leaders should not fall, because the moral character of a people is more important than the tenure of a particular politician or the protection of a particular political agenda. Political and religious history indicate that violations and misunderstandings of such moral issues may have grave consequences. The widespread desire to "get this behind us" does not take seriously enough the nature of transgressions and their social effects.

5. We urge the society as a whole to take account of the ethical commitments necessary for a civil society and to seek the integrity of both public and private morality. While partisan conflicts have usually dominated past debates over public morality, we now confront a much deeper crisis, whether the moral basis of the constitutional system itself will be lost. In the present impeachment discussions, we call for national courage in deliberation that avoids ideological division and engages the process as a constitutional and ethical imperative. We ask Congress to discharge its current duty in a manner mindful of its solemn constitutional and political responsibilities. Only in this way can the process serve the good of the nation as a whole and avoid further sensationalism.

6. While some of us think that a presidential resignation or impeachment would be appropriate and others envision less drastic consequences, we are all convinced that extended discussion about constitutional, ethical, and religious issues will be required to clarify the situation and to enable a wise decision to be made. We hope to provide an arena in which such discussion can occur in an atmosphere of scholarly integrity and civility without partisan bias.

The following scholars subscribe to the Declaration:

1. P. Mark Achtemeier (University of Dubuque Theological Seminary)
2. Paul J. Achtemeier (Union Theological Seminary in Virginia)
3. LeRoy Aden (Lutheran Theological Seminary in Philadelphia)
4. Diogenes Allen (Princeton Theological Seminary)
5. Joseph Alulis (North Park University)
6. Charles L. Bartow (Princeton Theological Seminary)

7. Jeffrey P. Bjorck (Fuller Theological Seminary)
8. Donald G. Bloesch (University of Dubuque Theological Seminary)
9. Carl Braaten (Center for Catholic and Evangelical Theology)
10. Manfred Brauch (Eastern Baptist Theological Seminary)
11. Robert L. Brawley (McCormick Theological Seminary)
12. William P. Brown (Union Theological Seminary in Virginia)
13. Don S. Browning (University of Chicago)
14. Frederick S. Carney (Southern Methodist University)
15. Ellen T. Charry (Princeton Theological Seminary)
16. Karl Paul Donfried (Smith College)
17. Richard Drummond (University of Dubuque Theological Seminary)
18. Jean Bethke Elshtain (University of Chicago)
19. Edward E. Ericson, Jr. (Calvin College)
20. Gabriel J. Fackre (Andover Newton Theological School)
21. Robert A.J. Gagnon (Pittsburgh Theological Seminary)
22. Larry T. Geraty (La Sierra University)
23. Thomas W. Gillespie (Princeton Theological Seminary)
24. Joel B. Green (Asbury Theological Seminary)
25. Robert H. Gundry (Westmont College)
26. Scott J. Hafemann (Wheaton College)
27. Stanley S. Harakas (Holy Cross Greek Orthodox School of Theology)
28. Roy A. Harrisville (Luther Theological Seminary)
29. Stanley M. Hauerwas (The Divinity School, Duke University)
30. Gerald F. Hawthorne (Wheaton College)
31. David M. Hay (Coe College)
32. Richard B. Hays (The Divinity School, Duke University)
33. S. Mark Heim (Andover Newton Theological School)
34. Christopher Thomas Hodgkins (University of North Carolina at Greensboro)
35. Frank Witt Hughes (Codrington College)
36. Robert Peter Imbelli (Boston College)
37. Robert W. Jenson (Center for Theological Inquiry)
38. Robert Jewett (Garrett-Evangelical Theological Seminary)
39. Thomas F. Johnson (George Fox University)
40. Robert M. Johnston (Andrews University)
41. L. Gregory Jones (The Divinity School, Duke University)
42. Jack Dean Kingsbury (Union Theological Seminary in Virginia)
43. Paul Koptak (North Park Theological Seminary)
44. John S. Lawrence (Morningside College)
45. Walter L. Liefeld (Trinity Evangelical Divinity School)
46. Duane Stephen Long (Garrett-Evangelical Theological Seminary)
47. Newton Malony (School of Psychology, Fuller Theological Seminary)
48. Troy W. Martin (Saint Xavier University)
49. James L. Mays (Union Theological Seminary in Virginia)
50. S. Dean McBride, Jr. (Union Theological Seminary in Virginia)
51. Sheila E. McGinn (John Carroll University)
52. John R. McRay (Wheaton College)
53. John McVay (Andrews University)
54. Robert P. Meye (Fuller Theological Seminary)
55. David Moessner (University of Dubuque Theological Seminary)
56. Robert Mounce (Western Kentucky University)
57. Carol M. Norén (North Park Theological Seminary)
58. Grant R. Osborne (Trinity Evangelical Divinity School)
59. Carroll D. Osburn (Abilene Christian University)
60. William A. Pannell (Fuller Theological Seminary)
61. Jon Paulien (Andrews University)
62. John Piper (Bethlehem Baptist Church)
63. Stephen J. Pope (Boston College)
64. J.E. Powers (Hope College)
65. Mark Reasoner (Bethel College)
66. John Reumann (Lutheran Theological Seminary at Philadelphia)
67. David M. Rhoads (Lutheran School of Theology at Chicago)
68. David Rhoads (Lutheran School of Theology at Chicago)
69. W. Larry Richards (Andrews University)
70. Daniel E. Ritchie (Bethel College)
71. Joel Samuels (University of Dubuque Theological Seminary)
72. David M. Scholer (Fuller Theological Seminary)
73. Keith Norman Schoville (University of Wisconsin)
74. J. Julius Scott (Wheaton College)

75. Mark A. Seifrid (Southern Baptist Theological Seminary)
76. Christopher R. Seitz (St. Andrews University)
77. Larry D. Shinn (Berea College)
78. Klyne Snodgrass (North Park Theological Seminary)
79. Max L. Stackhouse (Princeton Theological Seminary)
80. Calvin Stapert (Calvin College)
81. W. Richard Stegner (Garrett-Evangelical Theological Seminary)
82. K. James Stein (Garrett-Evangelical Theological Seminary)
83. Jeanne Stevenson-Moessner (University of Dubuque Theological Seminary)
84. R. Franklin Terry (Morningside College)
85. Reinder Van Til (Eerdmans Publishing Company)
86. Warren Wade (North Park University)
87. J. Ross Wagner (Princeton Theological Seminary)
88. David H. Wallace (American Baptist Seminary of the West)
89. Timothy P. Weber (Northern Baptist Theological Seminary)
90. Merold Westphal (Fordham University)
91. Jonathan R. Wilson (Westmont College)
92. Anne Streaty Wimberly (Interdenominational Theological Center)
93. Edward P. Wimberly (Interdenominational Theological Center)
94. Harry Yeide (George Washington University)
95. Carl E. Zylstra (Dordt College)

Judge Wright's Memorandum and Order

Tuesday, September 1, 1998

Following is the text of Judge Susan Webber Wright's September 1 memorandum and order regarding the unsealing of documents from the Paula Jones sexual harassment lawsuit against President Clinton. In footnote 5, *Wright expresses "concerns" about the president's testimony about Monica Lewinsky. See the* Post story.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PAULA CORBIN JONES,
Plaintiff,

vs.

WILLIAM JEFFERSON CLINTON and DANNY FERGUSON,
Defendants.

MEMORANDUM AND ORDER

On May 6th, 1994, the plaintiff in this case, Paula Corbin Jones, filed suit against William Jefferson Clinton, President of the United States, and Danny Ferguson, a former Arkansas State Police Officer, seeking damages for alleged actions beginning with an incident that is said to have occurred in a hotel suite in Little Rock, Arkansas, on May 8th, 1991. The case ultimately made its way to the Supreme Court of the United States where it was determined that plaintiff's lawsuit could proceed while the President is in office. *See Clinton* v. *Jones,* 117 S.Ct. 1636 (1997). Following that decision, and following this Court's partial denial of the President's and Ferguson's subsequent motion for judgment on the pleadings, *see Jones* v. *Clinton,* 974 F. Supp. 712 (E.D. Ark. 1997), formal discovery commenced. Because of the salacious nature of much of the discovery and the media's intense and often inaccurate coverage of this case, this Court, on October 30th, 1997, entered a Confidentiality Order on Consent of all Parties, thereby imposing limits on the dissemination of information concerning a large portion of discovery and placing under seal court filings dealing with discovery. The Court took this action to help ensure that a fair and impartial jury could be selected in the event this matter went to trial by limiting prejudicial pre-trial publicity. Following entry of the Confidentiality Order, various media entities filed a Motion for Leave to Intervene, Motion to Modify and/or Rescind Confidentiality Order and Motion for Access to Court Records and Discov-

ery.[1] Other parties also sought recission of the Confidentiality Order and for access to Court records and discovery.

By Memorandum and Order dated March 9th, 1998, this Court denied the motions seeking to rescind and/or modify the Confidentiality Order. In its Memorandum and Order, the Court pointed out the need to ensure a fair trial and, further, that there existed a need to protect the privacy interests of third-party witnesses pursuant to Fed.R.Civ.P. 26(c).[2] The media entities appealed. Following the filing of the notice of appeal but before the Court of Appeals for the Eighth Circuit could issue an opinion on the matter, this Court granted the President's and Ferguson's motions for summary judgment and entered judgment dismissing this case. *See Jones* v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998). The Eighth Circuit subsequently issued an order dismissing the media entities' appeal and directing this Court to consider on remand the need for keeping its Confidentiality Order in place in view of the grant of summary judgment. *See Jones* v. *Clinton,* 138 F.3d 758 (8th Cir. 1998). The Eighth Circuit's mandate was filed in this Court on June 3rd, 1998. In accordance with the Order of the Eighth Circuit, this Court, by Order dated June 9th, 1998, asked the parties to file briefs setting forth their positions, if any, on the need for keeping in place the Confidentiality Order. Following submission of the briefs outlining the parties' respective views, this Court, by Memorandum and Order dated June 30th, 1998, vacated in large part the Confidentiality Order and directed that a substantial portion of the record in this matter be unsealed. In so ruling, the Court determined that the Confidentiality Order shall remain in effect with respect to the identities of any Jane Does who may be revealed in the Court record, in any materials in possession of the parties that have not been filed of record, and in any public statements. In addition, the Court determined that all videotapes of depositions taken in connection with this lawsuit shall remain under seal. Now before the Court is a motion by the President for reconsideration of this Court's decision to partially unseal the record and to stay the June 30th Memorandum and Order. The plaintiff and the media have responded to the President's motion and the President has filed a reply to the plaintiff's and the media's responses. Having considered the matter, the Court grants in part and denies in part the President's motion for reconsideration.

I.

The President argues that this Court should reconsider the June 30th, 1998 Memorandum and Order because this Court may not have been aware of all the discovery material that remains under seal, much of which he says was not filed with the Court or attached to any motion; there is no right of access to the material at issue; the parties' fair trial interests would be prejudiced and that prejudice cannot be mitigated by the passage of time; the privacy interests protected are too narrow; and unsealing would permit plaintiff, the media and others to misuse the Court's processes and Court files for profit or political gain.

In response, the media entities argue that the President's motion raises no new issues and should be denied for that reason alone. They further argue that this Court's order represented a proper exercise of its discretion in balancing privacy rights against the interest of the media and the public in full and accurate disclosure of the history of this case and the course of the discovery process, and that there is no basis for the President's contention that much of the record in this litigation over serious allegations of official misconduct should be concealed from public view long after any circumstances require it.

For her part, the plaintiff has altered her previous position on the matter and now argues for the complete unsealing of the record.[3] She argues that it is in the best interests of all parties concerned, as well as the rights of the public and media, to

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[1] The media entities that joined in this motion are as follows: Pulitzer Publishing Company; The New York Times Company; Associated Press; USA Today, a division of Gannett Satellite Information Network, Inc.; Cable News Network, Inc.; Newsday, Inc.; National Broadcasting Company, Inc.; CBS, Inc.; American Broadcasting Companies, Inc.; Time Inc.; Little Rock Newspapers, Inc.; and The Reporters Committee for Freedom of the Press. Following the filing of this motion, two additional media entities, Fox News Network, LLC, and The Society of Professional Journalists, filed a motion seeking the same relief.

[2] Rule 26(e) provides that "[u]pon motion by a party or by the person from whom discover is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."

[3] Plaintiff initially took no position on the unsealing of the record but later submitted a pleading that argued for the need to keep in place the Confidentiality Order. In her most recent pleading, plaintiff withdraws her consent to the Confidentiality Order and argues for the complete unsealing of the record.

disclose all the discovery and evidence relating to the case at this time, with the single exception of the identifying testimony relating to a certain Jane Doe. Plaintiff further argues that this Court has enunciated no rational justification for retaining the seal on videotapes of deposition testimony and that the Court's Order with regard to the videotapes constitutes a taking of her property without just compensation or due process pursuant to the Fifth and Fourteenth Amendments.

II.

At issue are three categories of materials: (1) court filings that are under seal; (2) discovery materials in the hands of the parties that are not filed with the Court but are nevertheless under seal as subject to the Confidentiality Order, and (3) videotaped and transcribed depositions.[4] The Court will address these categories in turn.

1.

With respect to the first category of materials—court filings that are under seal—the Court has determined that there are contained in the Court's files matters under seal which do not at this time impact upon the parties' rights to a fair trial or the interests of the Jane Does in maintaining privacy, two interests for implementation of the Confidentiality Order. In that regard, the Court will review all materials on file with the Court and will release on a periodic basis such materials, either in whole or as redacted, that the Court determines will not (1) impact upon the parties' rights to a fair trial and/or (2) do not adversely affect the privacy interests of any Jane Does. In releasing such materials, the Court will attempt to ascertain the negative inferences any such materials may have on one party or the other and will attempt, where possible, to coordinate the release of such materials on an equal basis. The Court will not, however, release any materials involving Jane Does, whether in whole or as redacted, without first giving those Jane Does and the parties an opportunity to object to their release. While the President may be correct that such review and/or redaction of the record prior to release may prove to be a burdensome task, this Court must follow its duty notwithstanding the difficulty of any particular course of action.

2.

With respect to the second category of materials—discovery materials in the hands of parties that are not filed with the Court but are nevertheless under seal as subject to the Confidentiality Order—the Court directs that no such materials in the hands of the parties be released or otherwise disclosed without first obtaining Court approval. In approving the release of any materials, whether in whole or as redacted, the Court will utilize the test previously enunciated, i.e. whether the release of any such materials impacts upon the parties' rights to a fair trial and/or whether such materials adversely affect the privacy interests, of any Jane Does.

3.

With respect to the third and final category of materials—the videotaped and transcribed depositions of the parties—the Court will maintain under seal the videotapes of any depositions taken in connection with this lawsuit, whether they be videotapes of the parties or of non-party witnesses. As the Court has previously noted, the videotapes of the depositions are not judicial records to which any common law right of public access attaches and, with respect to the President, there is a strong judicial tradition of proscribing public access to recordings of testimony given by a sitting President. *See United States* v. *McDougal,* 103 F.3d 651, 656–659 (8th Cir. 1996), *cert. denied,* 118 S. Ct. 49 (1997).

With respect to transcripts of the depositions of the parties, however, the Court will permit these transcripts to be released in their entirety provided, however, that all identifying information of any Jane Does has been redacted and the redaction has been approved by the Court. It should be noted that the plaintiff and Ferguson do not object to their depositions being released in their entirety. Although the President does object, his deposition has largely been made public and has been the subject of intense scrutiny in the wake of his public admission that he was "mislead-

[4] Portions of the transcribed depositions of parties and various witnesses have been made part of the Court record by virtue of the briefing on the President's and Ferguson's motions for summary judgement, or by the motions involving discovery issues. The latter motions currently remain under seal pursuant to the Confidentiality Order.

ing" with regard to his relationship with Monica Lewinsky.[5] That being the case, the Court determines that no fair trial interests are implicated by the release, as redacted and approved by this Court, of the transcripts of his or the other parties' depositions.

III.

Having set forth the procedure this Court will utilize in unsealing a large part of the record, the Court now addresses plaintiff's claim that she has a Fifth Amendment property interest in discovery materials, namely the videotapes of deposition which she noticed. Plaintiff cites no authority for such a proposition and, as correctly noted by the President, the Supreme Court has held that "[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." *Seattle Times Co.* v. *Rhinehart,* 467 U.S. 20, 34 (1994). Indeed, as a general matter, plaintiff would not have any right to the material at issue but for the discovery procedures set forth in the Federal Rules of Civil Procedure. The Court thus rules that plaintiff has no property interest in the discovery materials she has amassed.

Likewise, the Court rejects any assertion by plaintiff that this Court is impeding upon First Amendment interests in the discovery materials she has amassed in this case. *See Seattle Times,* 467 U.S. at 33–37 (holding that "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information," and that "where a protective order is entered on a showing of good cause as required by Rule 26(c) [of the Federal Rules of Civil Procedure], is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment").

IV.

One final matter concerns motions by two Jane Does to intervene and to reconsider the Court's June 30th, 1998 Memorandum and Order, both of which were filed for purposes of protecting their privacy interests, a motion by non-party deponent Dolly Kyle Browning for a Protective Order in which she requests that certain portions of her deposition transcript and exhibits remain sealed to protect the privacy of persons with little or no connection with the facts underlying this action and to preserve proprietary information, and a motion by the Office of Independent Counsel ("OIC") to maintain the confidentiality of its March 27th, 1998 filing, *i.e.,* "In Camera Submission of the United States in Support of [the United States'] Motion for Limited Intervention and a Stay of Kathleen Willey's Further Deposition." The motions of the two Jane Does to intervene are granted.[6] Those portions of their motions to reconsider are granted to the extent set forth in today's Memorandum and Order. The motion of Dolly Kyle Browning for a Protective Order is granted as well. If and/or when the record in this matter is unsealed (either in whole or part),[7] the Court will address the concerns set forth in Ms. Browning's motion at that time. Finally, the Court grants OIC's motion and will maintain the confidentiality of its March 27th, 1998 filing, *i.e.,* "In Camera Submission of the United States in Support of [the United States'] Motion for Limited Intervention and a Stay of Kathleen Willey's Further Deposition."

V.

The parties are hereby given until and including Tuesday, September 15th 1998, in which to file a notice of appeal from today's decision. Assuming an appeal is filed, today's decision will be stayed in its entirety pending the resolution of any such appeal. If no appeal is filed the Court will proceed to unseal the record as set forth above. All court filings unsealed in accordance with today's decision will be posted on the Court's website beginning on Monday, September 28th, 1998, at the following address: *www.are.uscourts.gov.* Future documents unsealed in accordance with today's decision will be posted at the same address. Because it may be necessary for

[5] Although the Court has concerns about the nature of the President's January 17th, 1998 deposition testimony given his recent public statements, the Court makes no findings at this time regarding whether the President may be in contempt.

[6] Because the Court is allowing all Jane Does the opportunity to object to the release of information which may affect their interests, the Court hereby sue sponte grants leave of all other Jane Does permission to intervene in this matter.

[7] Assuming an appeal is filed, the Court will, of course, await the resolution of any such appeal prior to unsealing any part of the record in this case. *See* Section v. *infra.*

the Court to periodically have phone conferences to address any objections that may be raised to the release of a particular document, the Court cannot provide a precise schedule setting forth the times that any documents will be released. Accordingly, the Court will not announce any such postings in advance, and neither the Court nor the Clerk's Office will answer media inquires about the timing of any such postings. The Court will be reviewing documents for possible unsealing and a barrage of calls could interfere with this process.

VI.

For the foregoing reasons, the Court grants in part and denies in part the President's motion for reconsideration. The Confidentiality Order is hereby modified as set forth above. The motions of the Jane Does to intervene and to reconsider are granted to the extent set forth above, and the motions of Dolly Kyle Browning and OIC are granted as well.

IT IS SO ORDERED this 1st day of September, 1998

Susan Webber Wright
UNITED STATES DISTRICT COURT
CHIEF JUDGE

[From the Washington Post, Nov. 1, 1998]

THE HISTORIANS' COMPLAINT

(By David S. Broder)

When academics decide to become activists, they sometimes bring badly needed wisdom and perspective to raging political debates. But when they plunge in heedlessly, they risk looking ridiculous.

Both sides were on display last week at a hotel ballroom where three noted American historians—speaking for more than 400 of their profession—unloaded a broadside condemnation of the impeachment proceedings the House has voted to begin against President Clinton.

The rhetoric of their statement, read by Arthur M. Schlesinger Jr. of City University of New York, began on a relatively calm note and built to a tantrum.

"Although we do not condone President Clinton's private behavior or his subsequent attempts to deceive, the current charges against him depart from what the Framers saw as grounds for impeachment. The vote of the House of Representatives to conduct an open-ended inquiry creates a novel, all-purpose search for any offense by which to remove a President from office," it declared.

The "unprecedented" steps of beginning a formal inquiry "are extremely ominous for the future of our political institutions. If carried forward, they will leave the Presidency permanently disfigured and diminished, at the mercy as never before of the caprices of any Congress. . . . We face a choice between preserving or undermining our Constitution. Do we want to establish a precedent for the future harassment of presidents and to tie up our government with a protracted national agony of search and accusation?"

Sean Wilentz of Princeton, who drafted the statement with Schlesinger, said it was "extraordinary" that so many of their colleagues had signed on as soon as it was e-mailed or faxed to them. It was not partisan, Wilentz assured reporters, but "a statement by historians speaking as historians."

Schlesinger, who served in the Kennedy White House, struggled to maintain that dispassionate tone, but wound up sounding at times like James Carville in cap and grown. Accusing independent counsel Kenneth Starr of being "America's No. 1 pornographer," he said, "We all lie all the time. Ronald Reagan lied repeatedly on Iran-Contra. . . . Why should this president be held more accountable than anyone else?"

The one person clearly speaking as a scholar was the 89-year-old dean of American historians, Yale professor emeritus C. Vann Woodward. He readily conceded that "there can be honest disagreement" about the Framers' intent when they said impeachment should be reserved for bribery, treason and other "high crimes and misdemeanors." But, he said, if it applied to illicit sex during White House tenure, more than half our presidents would have faced removal from office.

What the historians seemed notably reluctant to recognize was that the charges the Judiciary Committee will consider are not the sexual misconduct which Clinton has acknowledged but the accusations, which he vehemently denies, that he commit-

ted perjury in his deposition before a federal judge and in his federal grand jury testimony, suborned perjury by others and obstructed justice.

Are those—if proved—impeachable offenses? Yale Law School professor Charles L. Black, Jr., whose 1974 book on impeachment is a good layman's guide to the issue, says sex is not enough. In one of his hypothetical scenarios, he wrote that it was "preposterous" to imagine the impeachment threshold is low enough to catch a president for transporting a women, "so the Mann Act reads, from one point to another within the District of Columbia for what is quaintly called 'an immoral purpose.'"

But Black displays an intellectual modesty far removed from the historians' assertion that they know with certainty what the Framers meant by "high crimes and misdemeanors." He says that neither English legal usage from which the words came nor American precedents provide "unequivocal validation of any very precise view of the exact boundaries of the phrase's meaning."

"What the history really says is that no historical impediment exists to a sensible, reasoned treatment, right now, of the problem of the meaning of 'high crimes and misdemeanors,'" Black writes.

The Founders clearly left that determination to the members of the House, and in all our history, they have voted bills of impeachment against only two presidents and 14 others, mainly federal judges. No president has ever been convicted and removed by the Senate, and there is little reason to believe, at this juncture, Clinton will be the first.

But the House is following the process set forth in the Constitution. This tenured trashing of Congress for meeting its responsibility says more about the state of the history profession than about the law of the land.

Class dismissed.

[From The Washington Times, Nov. 3, 1998.]

HISTORIANS FLUNK IMPEACHMENT HISTORY

(By Bruce Fein)

It is persuasive evidence of educational malpractice. It makes a strong case for more and better history teachers. But it has no other salvational dimension.

It is the politically timed polemic issued by "Historians in Defense of the Constitution" last Wednesday deploring the House Judiciary Committee inquiry into the impeachment of President William Jefferson Clinton.

More than 400 self-anointed impeachment experts, sporting such luminaries as Arthur M. Schlesinger Jr. of the City University of New York and C. Vann Woodward of Yale University, maintain that, "The Framers explicitly reserved [impeachment of the president] for high crimes and misdemeanors in the exercise of executive power." But that standard fits the outstanding impeachment allegations against Mr. Clinton like a glove. Article II, section 3 of the Constitution expressly obligates the president to take care that the laws be faithfully executed, even if he is the defendant in a civil suit or a target of a grand jury investigation. It is said that President Clinton dishonored that grave executive duty by lying under oath, tampering with witnesses, and otherwise seeking to corrupt justice before a federal court and grand jury. Moreover, it is said that the chief executive enlisted government employees to further his corrupt endeavor, such as Betty Currie and a host of senior White House aides who were manipulated to repeat Mr. Clinton's lies.

Perhaps the 400 devotees of the Muse Clio meant that only executive malfeasance, but not nonfeasance, is impeachable. But that proposition seems manifestly unsound, unsupported by either the language, history, or purpose of the impeachment power. It would permit the president, for instance, to decline to enforce federal laws against any Democrat, yet escape impeachment for placing such a stiletto in the rule of law and evenhanded justice.

The historians also indict the House of Representatives for voting "to conduct an open-ended [impeachment] inquiry" because it "creates a novel, all-purpose search for any offense by which to remove a president from office." That indictment seems twice-flawed. The House authorized its Judiciary Committee to inquire into impeachable offenses allegedly committed by President Clinton, not any trivial misconduct, for instance, underpaying his income taxes by 1 penny. The impeachment resolution made the wrongdoing disclosed in the Starr report the staple of the inquiry, but wisely declined to rule out the possibility that other evidence of high crimes and misdemeanors might surface. In other words, the resolution does not au-

thorize an "all-purpose search" of the Clinton presidency in the hopes of discovering some embarrassing peccadillo.

The resolution of inquiry, moreover, walks away from novelty. It scrupulously follows the precedent set 24 years ago in the Democrat-controlled Watergate impeachment inquiry targeting President Richard M. Nixon. Then Judiciary Committee Chairman, Peter Rodino, New Jersey Democrat, rejected the idea that high crimes and misdemeanors must be defined by consensus with exactitude before the impeachment investigation of President Nixon could commence. The eminent C. Vann Woodward, who authored a 1974 report to the Judiciary Committee on the historical basis and background of impeachment, surely must have remembered the precedent set by his own impeachment boss, yet he endorsed the false accusation of novelty in last Wednesday's statement. Perhaps the Yale professor intended the adjective "novel" to mean a first for a Republican-controlled Judiciary Committee. Semantical hair-splitting is an infectious political disease.

The honorable historians also fret that if the Judiciary Committee's inquiry moves forward pursuant to the procedures celebrated in the Nixon impeachment investigation, the presidency will be left "permanently disfigured and diminished, at the mercy as never before of the caprices of any Congress." Even giving ample room for hyperbole, the charge seems manifestly counterhistorical. Nixon's resignation forced by an impending impeachment vote did not disfigure or diminish the presidency. Indeed, an imperial presidency is in the saddle today through the conduct of foreign affairs, the issuance of executive orders, and a unique ability to command a national audience. Further, the impeachment charges against Mr. Clinton are unique in the annals of the presidency. None of his predecessors were ever accused with substantial and credible evidence of repeatedly lying under oath before a federal court and grand jury and otherwise seeking to corrupt justice to benefit himself directly. An impeachment standard that trips up a president less than once in two centuries does not make the office a limp appendage of Congress.

The centurions of history scholars additionally sermonize that the impeachment of Mr. Clinton for attempting to corrupt justice in civil litigation and grand jury proceedings would "mangl[e] the [constitutional] system of checks and balances that is our chief safeguard against abuses of public power." But that sermon turns logic on its head. The checking power of the judiciary against executive and legislative abuses would be reduced to a shadow if courts were impotent to command truthful testimony under oath by the threat of stiff sanctions for falsehoods. That is why federal district judge Susan Webber Wright is contemplating sanctions against President Clinton for lying under oath in the Paula Jones lawsuit. If he is left undisturbed in the presidency despite his orchestrated contamination of judicial proceedings with lies, witness tampering, and sister schemes to corrupt justice, that precedent would shatter the judicial truth-finding backbone beyond repair.

Finally, what is to be made of the fact that Professor Schlesinger, the marquee name among historians and co-sponsor of the impeachment statement, is slated to receive a coveted Humanities Medal from President Clinton for "lifetime achievement" on Nov. 5? You decide.

STATEMENT AGAINST INQUIRY

The following is the full statement signed by more than 400 historians.

HISTORIANS IN DEFENSE OF THE CONSTITUTION

As historians as well as citizens, we deplore the present drive to impeach the President. We believe that this drive, if successful, will have the most serious implications for our constitutional order.

Under our Constitution, impeachment of the President is a grave and momentous step. The Framers explicitly reserved that step for high crimes and misdemeanors in the exercise of executive power. Impeachment for anything else would, according to James Madison, leave the President to serve "during pleasure of the Senate," thereby mangling the system of checks and balances that is our chief safeguard against abuses of public power.

Although we do not condone President Clinton's private behavior or his subsequent attempts to deceive, the current charges against him depart from what the Framers saw as grounds for impeachment. The vote of the House of Representatives to conduct an open-ended inquiry creates a novel, all-purpose search for any offense by which to remove a President from office.

The theory of impeachment underlying these efforts is unprecedented in our history. The new processes are extremely ominous for the future of our political institutions. If carried forward, they will leave the Presidency permanently disfigured and

diminished, at the mercy as never before of the caprices of any Congress. The Presidency, historically the center of leadership during our great national ordeals, will be crippled in meeting the inevitable challenges of the future.

We face a choice between preserving or undermining our Constitution. Do we want to establish a precedent for the future harassment of presidents and to tie up our government with a protracted national agony of search and accusation? Or do we want to protect the Constitution and get back to the public business?

We urge you, whether you are a Republican, a Democrat, or an Independent, to oppose the dangerous new theory of impeachment, and to demand the restoration of the normal operations of our federal government.

The following historians signed a statement deploring the House's decision to conduct an impeachment inquiry.

Co-Sponsors:
Arthur M. Schlesinger Jr., City University of New York
Sean Wilentz, Princeton University
C. Vann Woodward, Yale University

Signatories:

Richard M. Abrams, University of California, Berkely
Robert H. Abzug, University of Texas, Austin
Jean-Christophe Agnew, Yale University
Anthony Agostino, San Francisco State University
John M. Allswang, California State University, Los Angeles
John Andrew, Franklin & Marshall College
Dee E. Andrews, California State University, Hayward
Ronald R. Atkinson, University of South Carolina
Edward L. Ayres, University of Virginia
Holly Baggett, Southwest Missouri State University
Beth Bailey, University of New Mexico
Jean H. Baker, Goucher College
Francisco E. Balderrama, California State University, Los Angeles
Brian H. Balogh, University of Virginia
Charles Banner-Haley, Colgate University
Lucy Barber, University of California, Davis
Peter Bardaglio, Goucher College
Ava Baron, Rider University
Beatrice S. Bartlett, Yale University
Norma Basch, Rutgers University, Newark
Gail Bederman, University of Notre Dame
F.E. Beemon, Middle Tennessee State University
Samuel H. Beer, Harvard University
Thomas Bender, New York University
Carol Berkin, Baruch College
Gordon M. Berger, University of Southern California
Ira Berlin, University of Maryland
Iver Bernstein, Washington University
Michael A. Bernstein, University of California, San Diego
Chad Berry, Maryville College
Lindy Biggs, Auburn University
Casey Blake, Washington, University
David W. Blight, Amherst College
John Morton Blum, Yale University
Stuart Blumin, Cornell University
Rebecca Boehling, University of Maryland, Baltimore County
Julian Bond, University of Virginia
Robert Bonner, Carleton College
Eileen Boris, University of Virginia
Jeanne Boydston, University of Wisconsin, Madison
Taylor Branch, Goucher College
Ann Braude, Harvard Divinity School
Richard Breitman, American University
Alan Brinkley, Columbia University
Douglas Brinkley, University of New Orleans
Joshua Brown, Graduate Center, City University of New York
Kathleen M. Brown, University of Pennsylvania
W. Elliott Brownlee, University of California, Santa Barbara
Rowland Brucken, Northern Kentucky University
Joan Jacobs Brumberg, Cornell University
Mari Jo Buhle, Brown University
James MacGregor Burns, University of Maryland
Vernon Burton, University of Illinois, Urbana-Champaign
Jon Butler, Yale University
Albert Camarillo, Stanford University
Charles Capper, University of North Carolina, Chapel Hill
Andrew R.L. Cayton, Miami University of Ohio
Marty Kupiec Cayton, Miami University of Ohio
Jane Turner Censer, George Mason University
Gordon H. Chang, Stanford University
Herrick Chapman, New York University
George Chauncey, University of Chicago
Robert W. Cherny, San Francisco State University
Clifford E. Clark, Jr., Carleton College
Geoffrey Clark, Emory University
Kendrick Clements, University of South Carolina

Lizabeth Cohen, Harvard University
Miriam Cohen, Vassar College
Jerald A. Combs, San Francisco State University
Rebecca Conrad, Middle Tennessee State University
Steve Conn, Ohio State University
Carolyn C. Cooper, Yale University
John Milton Cooper, University of Wisconsin, Madison
George Cotkin, California Polytechnic State University
Nancy F. Cott, Yale University
Francis G. Couvares, Amherst College
George Craft, California State University, Sacramento
Paul Jerome Croce, Stetson University
Robert D. Cross, University of Virginia
Jane Dailey, Rice University
Robert Dallek, Boston University
Kathleen Dalton, Harvard University
David Brion Davis, Yale University
Alan Dawley, The College of New Jersey
Gary B. Deason, St. Olaf College
Arif Dirlik, Duke University
Colleen A. Dunlavy, University of Wisconsin, Madison
Victoria de Grazia, Columbia University
Carl N. Degler, Stanford University
Jane S. DeHart, University of California, Santa Barbara
Matthew Dennis, University of Oregon
Sarah Deutsch, Clark University
David H. Donald, Harvard University
Bruce Dorsey, Swarthmore College
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Joseph J. Ellis, Mount Holyoke College
John A. Emilio, Guggenheim Fellow
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Maureen A. Flanagan, Michigan State University
Stephen Fox, Humboldt State University
Jimmie Franklin, Vanderbilt University
John Hope Franklin, Duke University
George M. Fredrickson, Stanford University
Kari A. Fredrickson, University of Central Florida
Estelle Freedman, Stanford University
Jean E. Friedman, University of Georgia
Sylvia Frey, Tulane University
Jennifer Frost, University of Northern Colorado
Kevin Gaines, University of Texas, Austin
Brett Gary, Drew University
Paul Gaston, University of Virginia
Henry Louis Gates, Jr., Harvard University
Rochelle Gatlin, City College of San Francisco
Edith Gelles, Stanford University
Gary Gerstle, Catholic University of America
James B. Gilbert, University of Maryland
John S. Gilkeson, Arizona State University, West
Glenda Gilmore, Yale University
Todd Gitlin, New York University
Susan Glenn, University of Washington
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Marie Helene Gold, Schlesinger Library, Radcliffe College
Michael Lewis Goldberg, University of Washington, Bothell
Jan Goldstein, University of Chicago
Margaret Goodart, California State University, Sacramento
James Goodman, Rutgers University
Doris Kearns Goodwin
Linda Gordon, University of Wisconsin, Madison
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Hugh Davis Graham, Vanderbilt University
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James N. Gregory, University of Washington
Katherine Grier, University of South Carolina
Carol Groneman, John Jay College of Criminal Justice
Ariela Gross, University of Southern California
James Grossman, The Newberry Library
Joan R. Gunderson, Elon College
Melanie Gustafson, University of Vermont
Ramon Gutierrez, University of California, San Diego
Malachi Hacohen, Duke University
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Timothy Haggerty, Middle Tennessee State University
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William H. Harbaugh, University of Virginia
Leslie M. Harris, Emory University
Cynthia Harrison, George Washington University
Hendrik Hartog, Princeton University
Robert Haskett, University of Oregon
Robert J. Haws, University of Mississippi
Jeffrey Herf, Ohio University
Ellen Herman, University of Oregon
William B. Hixson, Jr., Michigan State University
Martha Hodes, New York University
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David A. Hollinger, University of California, Berkeley
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June Hopkins, Armstrong Atlantic State University
James Oliver Horton, George Washington University
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Joseph Illick, San Francisco State University
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William Issel, San Francisco State University
Maurice Isserman, Hamilton College
Julie Roy Jeffrey, Goucher College
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Ira Katznelson, Columbia University
Michael Kammen, Cornell University
Michael Kazin, American University
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David M. Kennedy, Stanford University
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Thomas Robisheaux, Duke University
Daniel T. Rodgers, Princeton University
Aron Rodrigue, Stanford University
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Ruth Rosen, University of California, Davis
Charles Rosenberg, University of Pennsylvania
Barbara Rosenkrantz, Harvard Univeristy
Roy Rosenzweig, George Mason University
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Mary Logan Rothschild, Arizona State University
Andrew J. Rotter, Colgate University
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Steven Ruggles, University of Minnesota
Vicki Ruiz, Arizona State University
Margaret Rung, Roosevelt University
Leila J. Rupp, Ohio State University
Nancy E. Rupprecht, Middle Tennessee State University
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Peter Sigal, California State University, Los Angeles
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Henry Silverman, Michigan State University
Sheila Skemp, University of Mississippi
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Thaddeus Smith, Middle Tennessee State University
Mitchell Snay, Denison University
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Diane Sommerville, Lafayette College
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Richard White, University of Washington
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Barbara Winslow, Brooklyn College
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Jonathan Zeitlin, University of Wisconsin, Madison
Oliver Zunz, University of Virginia

[From The Wall Street Journal, Sept. 18, 1998.]

SECRET SERVICE GETS TROOPER TREATMENT

(By Paul A. Gigot)

"I was just in the Oval Office with the president and he wants somebody's ass out here."

Thus did Secret Service Captain Jeffrey Purdie follow orders that turned President Clinton's private scandal into an abuse of a public institution. Whatever one thinks of his sex life, Mr. Clinton's willingness to treat Secret Service officers like Arkansas state troopers deserves scrutiny as an impeachable offense.

The president was furious that a Secret Service officer had told Monica Lewinsky, at the Northwest White House Gate, that Eleanor Mondale was already in the building. The jealous mistress correctly assumed the glamorous daughter of Walter Mondale was meeting with Mr. Clinton, and she threw a fit.

She called presidential secretary Betty Currie, who, "hands shaking and almost crying," then told other officers that the president was "irate" and that "someone could be fired."

Later that same day, last Dec. 6, Ms. Currie told a ranking officer that if the Secret Service stayed mum about the incident, "then nothing would happen." If they kept quiet, in short, the men who promise to take a bullet for the president could keep their jobs.

"Whatever just happened," Captain Purdie then told his officers, "didn't happen."

This episode, buried too deep in Kenneth Starr's report, sums up why Mr. Clinton's sexual affair can't be dismissed as a private matter. Instead of serving the presidency, these public officers were told to cover up this president's secrets.

"According to Secret Service uniformed officers," says the Starr referral, "Ms. Currie sometimes tried to persuade them to admit Ms. Lewinsky to the White House compound without making a record of it." Ms. Currie says she doesn't recall doing this. But Mr. Starr was able to pin down "clear evidence that Ms. Lewinsky was in the White House on days for which no records show her entry or exit."

Last Sunday, Mr. Clinton's attorney said the president told the grand jury that the Northwest Gate episode "did not happen." But Mr. Starr's report cites numerous witnesses, including Ms. Currie, who say it did. Another perjury?

All of this is doubly despicable when combined with the Clinton team's dishonestly high-minded campaign this year to shield the Secret Service from testifying to Mr. Starr's grand jury.

Only days after the Lewinsky story broke, Secret Service Director Lewis Merletti was fighting Mr. Starr's attempts to interview his officers. A respected career agent promoted by Mr. Clinton, Mr. Merletti invoked his Service's most solemn duty by calling the risk nothing short of "assassination." Mr. Starr, the president's chorus chimed in, was so reckless he'd even endanger a president's life.

Treasury Secretary Robert Rubin threw his own credibility behind this demand for a previously unheard of "protective function privilege." Attorney General Janet Reno fought for it all the way to the Supreme Court. Even former President George Bush, ever the naive non-partisan, was inveigled to bless this legal invention. But in court, not a single judge, not even a Clinton appointee, supported the preposterous claim, and the officers finally had to tell what they knew.

The Starr report shows that the real effect of Mr. Merletti's claim was to protect an assignation, not against assassination. Mr. Merletti is dodging interviews this week. But a Secret Service official assures reporters on background that his boss had no idea any of this was going on. He read about Monica and the Northwest Gate incident just like the rest of us last Friday, he says.

That's hard to believe and deserves attention under oath from Congress. But even if it is true, Mr. Clinton still let Mr. Merletti make a fool of himself by invoking his public trust on behalf of a tryst. Why should anyone take seriously Mr. Merktti's next solemn request regarding presidential security? Mr. Rubin also should be asked what he knew and when he knew it.

Mr. Starr has been attacked for going too far in calling the president's many privilege claims an abuse of power. But regarding the Secret Service, he didn't go far enough.

In Arkansas, Mr. Clinton turned state troopers into sexual procurers. In Washington, he settled for making the great institution of the Secret Service part of his coverup. The job of enabling Monica fell to Betty Currie. Thus did the troopers who were so much maligned turn out to be prophets of his behavior as president.

All of which supports the argument that Mr. Clinton deserves impeachment not because of his sex but because of our standards. To cover up his affair, he was willing to abuse not just his friends but our laws and institutions. He now begs forgiveness even as his lawyers insist there's nothing to forgive.

His aides and defenders are busy lobbying Congress to agree to a plea-bargain that would end in censure. But that isn't enough to cleanse our politics of Clintonism, which is best defined as the culture of political lying. This president has earned the restorative agony of impeachment for trying to make all of us complicit in his lies.

[From The Chicago Tribune, Sept. 15, 1998.]

SURE CLINTON'S TRYST IS A PRIVATE MATTER—JUST LIKE WAR IS

(By John Kass)

President Clinton's defenders keep making their case that his private life has no bearing on how he does his job.

They prattle on about his job approval ratings, which actually track how fat our wallets have become, not whether he can lead this country in a serious crisis.

Maybe you think that Independent Counsel Ken Starr's report is about Clinton, the lothario. But, if you want to learn something about Clinton as a leader, I refer you to the part about the pizza date with Monica Lewinsky at the White House.

That was also the night that Clinton was on the phone with a powerful Alabama Republican congressman, H.L. "Sonny" Callahan. What we didn't know is what they were talking about.

Now it's emerging that they were discussing sending American troops into harm's way in Bosnia—putting our sons and daughters into a dangerous place that is full of death.

The president needed a vote from Callahan—chairman of an appropriations subcommittee that controls billions of dollars in foreign aid—for the peacekeeping mission, which would augment an international accord being developed in Dayton, Ohio.

But while he was on the phone, Clinton was simultaneously occupied. White House intern Monica Lewinsky was performing oral sex in the Oval Office.

Imagine someone receiving those favors while they're talking to you on the phone.

Now imagine that the subject you're talking about is literally about life and death.

At issue was the fate of American troops. And also the fate of the Balkans, one of the bloodiest killing grounds in the world. What's going on there threatens to spill over into Greece and Turkey, while Russia continues to crumble.

I called the White House on Monday on the chance they would dispute the facts as presented by Starr and Callahan on that night, Nov. 17, 1995. And as they have done in the past few days, officials declined.

Callahan, meanwhile, is issuing this statement: "I do recall talking to the president during which time he was seeking my assistance for the American mission in Bosnia. But I do not have any recollection of any inappropriate behavior or comments from the president during my conversation. . . .

"I had no knowledge that I was sharing the president's time or attention with anyone else."

That night, Callahan and a handful of other Republicans voted with the president's side in opposing a move to prevent funds from being spent to send those troops overseas. They lost.

Eventually, the Dayton Peace Accords were signed. The president sent thousands and thousands of soldiers to Bosnia. He promised he'd bring them back by the end of 1996. They're still there.

I called Callahan's office on Monday and talked with his chief of staff, Jo Bonner

"Sonny has very mixed emotions about this," said Bonner, who added that Callahan was considering a critical public address about Clinton on the House floor. "He could be voting on this (impeachment) issue, and he's not trying to grandstand.

"But the president says it's a personal matter. It became a public matter when he lobbied the congressman, talking about sending men and women overseas, even as he was being entertained by Miss Lewinsky. . . . You could say it is an insult. And worse."

A White House official said on background that the president has great respect for those who serve their country overseas.

Yeah. Sure. He proved it.

According to her grand jury testimony, Lewinsky said that Clinton suggested she bring him some slices of pizza. When she arrived, she was immediately welcomed and ushered inside.

But during their loving caress, Clinton had a telephone call. She recalled that the caller was a member of Congress with a nickname.

While Clinton was on the telephone with the congressman, she testified that Clinton unzipped himself and she did her duty. She was at the White House that evening from 9:38 to 10:39 p.m.

White House phone records confirm, according to the Starr report, that Clinton had only one telephone conversation with a member of Congress. From 9:53 to 10:14 p.m., he spoke with "Sonny" Callahan.

While the House vote took place, diplomats anguished about whether the peace process would collapse. Muslims, Serbs and Croats, along with diplomats from America and other countries huddled in Dayton.

The people of the former Yugoslavia were desperate for relief from terror. American soldiers drilled. Their commanders planned, and most likely worried about their troops, as good officers always do.

Across this country, the mothers and fathers of soldiers worried and prayed. Some surely lit candles. U.S. representatives with opposing views fought it out with each other.

And the commander in chief, the president of the United States, his mouth full of pizza, entertained himself with a groupie in the Oval Office.

He is without shame.

STATEMENT OF FRANK O. BOWMAN, III, PROFESSOR, AND STEPHEN L. SEPINUCK, PROFESSOR, GONZAGA UNIVERSITY OF SCHOOL OF LAW

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The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 10,000 direct members—and 80 state and local affiliate organizations with another 28,000 members—include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. NACDL is a non-partisan, non-profit organization, with no Political Action Committee (PAC).

Neither Professor Bowman, Professor Sepinuck, nor the National Association of Criminal Defense Lawyers has received any federal grant, contract or subcontract in the current and preceding two fiscal years.

I. INTRODUCTION

When then-Congressman Gerald Ford famously remarked that an impeachable offense "is whatever a majority of the House of Representatives considers it to be at a given moment in history,"[1] as a political realist he spoke no more than the plain truth. The Constitution confers on the House of Representatives the sole power of impeaching a president (and other "civil Officers of the United States"), and grants the Senate the sole power to remove a President upon a finding by two-thirds of its members that the president has committed "treason, bribery, or other high

[1] 116 Cong. Rec. H3113–3114 (daily ed. Apr. 15, 1970) (statement of Rep. Gerald Ford). The comment was made in the course of debate over whether to initiate impeachment proceedings against Supreme Court Justice William O. Douglas.

crimes and misdemeanors."[2] The decisions to impeach and to convict and remove from office are almost certainly not reviewable by any courts.[3] Therefore, a Congress disposed to do so can indeed displace a president for any reason that will garner sufficient votes, and can act without fear that its decision will be overridden by any other governmental body.

Nonetheless, to acknowledge that Congress has the final word on what constitutes a proper ground for impeaching a president is not to concede that Congress is unconstrained by the Constitution when it makes its choice for or against impeachment. The language of the Constitution limits the instrument of impeachment to a very particular class of cases—"treason, bribery, or other high crimes and misdemeanors"—and that language is no more rendered meaningless by the congressional monopoly on its interpretation than is the remainder of the Constitution by the fact that the Supreme Court customarily has the last word on its meaning. Both the Court and the Congress have an obligation of fidelity to the fundamental design of the Republic embodied in the written Constitution. We think history supports our assumption that Members of Congress take their obligation of faithful interpretation of the constitutional text no less seriously than do judges.

The occasion for submitting this paper to the Judiciary Committee is the Committee's consideration of allegations of impeachable behavior by President William Jefferson Clinton, in particular the allegations contained in the report to Congress of the Office of Independent Counsel. This paper does not advance a definitive answer to the question of whether any or all of the proposed grounds for impeachment listed in the report of the Independent Counsel are impeachable offenses. Rather, it seeks to assist Members of Congress by discussing the meaning of the constitutional phrase "treason, bribery, or other high crimes and misdemeanors," with particular emphasis on five interpretive questions implicit in the nature of the specifications by the Independent Counsel:

1. Must an Impeachable Offense be a Crime?
2. If Non-criminal Conduct is Impeachable, What Distinguishes Impeachable From Non-impeachable Non-criminal Conduct?
3. Is *All* Criminal Conduct a Proper Ground for Impeachment?
4. If Not All Crimes Are Impeachable Offenses, What Distinguishes Impeachable Crimes From Non-impeachable Crimes?
5. Finally, Is There a Category of Impeach*able* Offenses for which the Congress Should Nonetheless Not Impeach?

II. SOURCES OF AUTHORITY

To what sources should one look in picking out the limits of the rather inscrutable constitutional phrase "treason, bribery, or other high crimes and misdemeanors"? This paper conforms to the historical practice of relying on the same sources one would consult in construing other constitutional provisions: (1) the language of the constitution itself; (2) the intentions of the founding generation as revealed in the debates of the convention and thereafter in the debates on ratification; (3) the body of precedent created by prior American impeachment proceedings; (4) the views of scholars and other commentators; and (5) considerations of reason, common sense, and sound public policy. The third of the these categories—precedent—may merit some brief additional comment because the concept of "precedent" in impeachments differs in important respects from its usage in the more familiar judicial setting.

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[2] There are five constitutional provisions dealing with impeachment, four of which are applicable to impeachment of a president:

"The House of Representatives shall . . . have the sole Power of Impeachment." (U.S. Const., art. I, § 2, cl. 5.)

"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." (U.S. Const., art. I, § 3, cl. 6.)

"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 nonetheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." (U.S. Const., art. I, § 3, cl. 7.)

"The 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." (U.S. Const., art. II, § 4.)

[3] *See Walter Nixon* v. *United States,* 113 S.Ct. 732 (1993); *Rifler* v. *United States,* 84 Ct. Cl. 293 (1936), *cert. denied,* 300 U.S. 668 (1937) (rejecting as nonjusticiable the claim of Judge Halstead Ritter that the Senate convicted and removed him for non-impeachable offenses). *See generally,* Michael J. Gerhardt, THE FEDERAL IMPEACHMENT PROCESS 143–46 (1996).

In the first place, there are few impeachment precedents because there have been very few impeachments. In over two hundred years, only fifteen federal officials have actually been impeached. Of these fifteen cases, twelve have been judges, one was a Senator, one a Secretary of War, and one was President Andrew Johnson. Several other federal officers, including President Richard Nixon, have resigned or retired under threat of imminent impeachment. Thus, there are very few cases involving impeachment of executive branch officials, and as we will discuss below, the standard for impeaching judges is arguably quite different than the standard that should be applied when removing a President. *(Attached to this Statement is an Appendix prepared by Professor Sepinuck describing the articles of impeachment in and disposition of all fifteen actual impeachments, as well as four near-impeachments.)*

Second, the "decisions" in impeachment cases are merely statements of result. The officeholder was impeached or not impeached on this ground, convicted or acquitted on that ground. Although individual representatives or senators, and on occasion the prevailing or dissenting faction of a committee, may have given statements of their reasons for voting as they did, such statements represent only the views of the Members who subscribe to them, not the collective opinion of the legislature as a whole. Most importantly, no explanation of result from a congressional source is the equivalent of a judicial opinion because there is no legislative equivalent of the doctrine of *stare decisis* binding future congresses to abide by either the choices or the rationales of their predecessors.

It is true that some impeachments have been treated as "deciding" certain questions. For example, in 1789, Senator William Blount was expelled by the Senate and then impeached by the House. The Senate then dismissed the impeachment proceedings for lack of jurisdiction.[4] The dismissal has been said to stand for the proposition that impeachment may not be used against legislators. Similarly, in 1876, Secretary of War William W. Belknap was impeached for bribery. He resigned and was then acquitted in the Senate.[5] The acquittal is said to establish that impeachment may not be used against persons no longer in office. In truth, neither of these propositions is beyond question and either could probably be ignored with impunity by a Congress determined to do so.[6]

The biggest problem may be knowing what use to make of even those impeachment precedents where both the result and the contemporary reasons for reaching it are fairly clear. The best example of this difficulty is the impeachment of President Andrew Johnson. Although President Johnson was acquitted in the Senate, the fact remains that the House approved eleven articles of impeachment. Does the House vote, standing alone, constitute precedent upon which succeeding Congresses may rely, to the effect that offenses of the type charged against President Johnson are properly impeachable? Does the Senate's vote represent a judgment that none of the eleven articles charged were impeachable offenses, or a judgment that the offenses charged were not proven? Or is it fair to conclude that the Senate vote meant either of those things in light of the fact that Johnson was acquitted by only one vote and thus a clear majority of the senators cast votes *for* impeachment on Articles 2, 3, and 11, thus rendering an opinion that those charges were both impeachable and proven? The Johnson case raises in particularly acute form the question of whether we should give greater weight to the judgment of Congress or the judgment of history. How should one think about what Congress actually did in 1868 in light of the nearly universal conclusion of later commentators that the Johnson impeachment effort was a misuse of the impeachment power?

In the end, we believe that prior impeachment actions by Congress are best viewed as a form of "persuasive authority." That is, the members of this Committee are not bound by the actions of their congressional predecessors, but should view prior impeachment proceedings as a valuable source of information about the proper and improper exercise of the impeachment power.

III. FIVE INTERPRETIVE QUESTIONS PRESENTED

A. *Must an Impeachable Offense be a Crime?*

It has from time to time been argued that impeachment may be based only on conduct that is technically and legally a crime. Notably, congressional opponents of impeachment in the cases of Andrew Johnson and Richard Nixon hewed to this

[4] *See Appendix,* at A–1.
[5] *See Appendix,* at A–11–12.
[6] *See, e.g.* Raoul Berger, IMPEACHMENT 214–223 (1973) (suggesting that legislators are amenable to impeachment despite the contrary precedent).

line.[7] However, the weight of authority is to the contrary. In the first place, the Framers almost certainly intended that presidents be impeachable for conduct not technically criminal. During the debates of the Constitutional Convention in July of 1787, the delegates twice voted in favor of the general proposition that the president should be removable for "malpractice or neglect of duty."[8] Many delegates spoke of a body of offenses outside the common law crimes for which presidents and other federal officials could be impeached, using terms such as "maladministration," "corrupt administration," "neglect of duty," and "misconduct in office."[9] On August 20, 1787, the Committee on Detail reported to the convention that federal officers shall be liable to impeachment and removal from office for neglect of duty, malversation,[10] or corruption."[11]

Despite the tenor of these earlier discussions in the convention, in its report of September 4, 1787, the Committee of Eleven proposed that the President be removable only on conviction of "treason or bribery."[12] On September 8, George Mason made a motion the effect of which was to restore the thrust of the general proposals previously assented to by adding "maladministration" as a third ground for impeachment.[13] Madison objected to removal of a President "for any act which might be called a misdemeanor [sic],[14] observing that, "So vague a term will be equivalent to a tenure during pleasure of the Senate."[15] Mason withdrew "maladministration," substituting "other high crimes and misdemeanors against the State."[16] The phrase "against the State" was later amended to "against the United States,"[17] and then deleted altogether in the final draft of the Constitution.

It is plain that Mason's substitution of "high crimes and misdemeanors" in the face of objections by Madison and others to "maladministration" represented an effort to limit the reach of the original proposal.[18] Regrettably, however, neither Mason nor anyone else at the Convention offered any particular views on what "high crimes and misdemeanors" meant. Raoul Berger has argued that the phrase was a "technical term" derived from English practice, with which the Framers would have been familiar, and therefore that its technical meaning "furnishes the boundary of the [impeachment] power."[19] Among the various kinds of official misconduct that fell within the English usage of "high misdemeanors" were such non-criminal behavior as abuse of power, neglect of duty, encroachment on the prerogatives of Parliament, and betrayal of trust.[20] Both Berger's factual premise that all, or even very many, of the Framers were intimately familiar with the details of English impeachment precedents, and his conclusion that the Framers were thus conscious of having adopted those precedents by reference through Mason's amendment seem to us somewhat doubtful. Both premise and conclusion become still more doubtful when applied to the several thousand ratifiers who debated and approved the Constitution in the state conventions. Berger is certainly correct, however, that most delegates to the Philadelphia and ratification conventions would have been sufficiently familiar with English constitutional history to recognize "high crimes and misdemeanors" as a phrase that embraced territory broader than indictable crime, but more restricted than mere poor performance in office.

The conclusion that criminality is not a prerequisite for impeachment is supported by the historical record of a consistent pattern of impeachment for non-criminal con-

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[7] *See, e.g.* Minority Views of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti and Latta, in Impeachment of Richard M. Nixon, President of the United States, Report of the Committee on the Judiciary, House of Representatives, H.R. Rep. No. 1035, 93d Cong., 2d Sess., 359 (1974) (hereinafter *Nixon Impeachment Report*) ("The language of the Constitution indicates that impeachment can lie only for serious criminal offenses."); Statement of Senator Johnson, TRIAL OF ANDREW JOHNSON, Vol. III, p. 51 (1868) (explaining his vote against impeachment in part on the ground that, "the terms crimes and misdemeanors in the [constitution] mean legal crimes and misdemeanors . . .").

[8] The first vote came on July 19, 1787, and the second on July 26, 1787. Max Ferrand, RECORDS OF THE FEDERAL CONVENTION OF 1787 (hereinafter *Records*), 2:61, 69, 116.

[9] *Id.,* at 2:64–69. *See also,* Gerhardt, *supra* note 3, at 7–9.

[10] "Malversation" means "corrupt conduct or fraudulent practices, as in public office." WEBSTER'S NEW WORLD DICTIONARY (2d Coll. Ed. 1986), at 858.

[11] *Records,* at 2:337.

[12] *Id.* at 2:495.

[13] *Id.* at 2:550

[14] *Id.* at 2:551.

[15] *Id.* at 2:550.

[16] *Id.*

[17] *Id.* at 2:551.

[18] *See,* Berger, *supra* note 6, at 86.

[19] *Id.* at 71, 86–87.

[20] *Id.* at 70–71.

duct.[21] For example, Justice Samuel Chase was impeached (though not convicted) for exhibitions of judicial bias and making improper rulings.[22] Judge Halstead Ritter was impeached by the House on six charges of taking kickbacks and tax evasion, as well as a seventh of bringing his court "into scandal and disrepute." The Senate acquitted him of all six of the articles charging criminal offenses, but nonetheless convicted and removed him on the seventh article.[23] President Andrew Johnson was impeached by the House for, among other things, giving speeches casting aspersions on Congress.[24] The second and third articles of impeachment approved by the House Judiciary Committee against President Richard Nixon charged misuse of government agencies for improper purposes and refusal to comply with lawful subpoenas of the Committee.[25]

In sum, a showing of criminality is not necessary to establish an impeachable offense.[26] It may nonetheless be important to remember that the historical evidence of the Founders' intentions must be viewed in the context of their time when there were by modern reckoning very few criminal laws. The sprawling federal and state criminal codes of the late twentieth century would have seemed quite foreign to our eighteenth century forbearers. Much of the official misconduct, particularly "corruption" and misapplication of public funds, with which the Framers were concerned when they debated the impeachment clauses, may have violated no criminal law in their day, but would fall squarely within a battery of modern federal statutes.[27] One may well wonder whether Mason, Madison, or Franklin, if aware of the reach of modern criminal law, would conclude that there was much, if any, non-criminal conduct that would now merit impeachment.

B. *If Non-criminal Conduct is Impeachable, What Distinguishes Impeachable From Non-impeachable Non-criminal Conduct?*

1. *General Observations*

To define the scope of impeachable non-criminal offenses, one must begin by examining both the text of the impeachment clauses and the place of the impeachment mechanism within the structure of the Constitution. The text says that a President may be impeached only for the commission of "treason, bribery, or *other* high crimes and misdemeanors." It is a cardinal error to abbreviate this passage and speak of "high crimes and misdemeanors" in isolation, and so to ignore the fact that the Constitution gives two concrete examples of the type of offense the Framers intended to be proper grounds for impeachment. When the Constitution authorizes impeachment for "treason, bribery, or other high crimes and misdemeanors," it is saying that a President may be removed if he commits treason, takes or gives bribes, or commits other acts similar both in type and seriousness to bribery and treason.[28]

Thus, we can fairly infer two things from the constitutional text. First, a "high crime or misdemeanor" is an offense of the most serious kind. Treason is and always has been punishable by death. And bribery is everywhere thought of as among the

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[21] *See Appendix,* at A–22–23.

[22] *See Appendix,* at A–3–4.

[23] *Ritter* v. *United States,* 84 Ct. Cl. 293 (1936), *cert. denied,* 300 U.S. 668 (1937) (rejecting as nonjusticiable the claim of Judge Halstead Ritter that the Senate convicted and removed him for non-impeachable offenses).

[24] TRIAL OF ANDREW JOHNSON, Vol. I, pp. 8–10 (1868) (Articles X and XI of the Articles of Impeachment against President Johnson).

[25] *See* Impeachment of Richard M. Nixon, President of the United States, Report of the Committee on the Judiciary, House of Representatives, H.R. Rep. No. 1035, 93d Cong., 2d Sess., 3–4 (1974).

[26] This view is virtually universal among commentators. For example, Justice Story wrote: "Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct. *** In the few cases of impeachment which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanor." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 5th ed., § 799 (1905). *See also,* Gerhardt, *supra* note 3, at 103; Berger, supra note 6, at 56–57; C. Black, IMPEACHMENT: A HANDBOOK 33–35 (1974).

[27] Such modern innovations include the wire and mail fraud statutes, 18 U.S.C. §§ 1341 and 1343; the RICO statute, 18 U.S.C. § 1962, et seq., the federal false statements statute, 18 U.S.C. § 1001, and many others.

[28] The canon of statutory construction bearing the Latin title *ejusdem generis* which holds that "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." BLACK'S LAW DICTIONARY (5th ed.), at 464. Applied here, *ejusdem generis* suggests that the phrase "high crimes and misdemeanors" should be construed as applying only to offenses of the same general class as treason and bribery. In the present case, ordinary rules of English usage produce the same conclusion. The use of the word "other" is an unequivocal statement that treason and bribery are merely two examples of the general category of high crimes and misdemeanors.

gravest of non-violent crimes.[29] Second, impeachable offenses are public offenses, offenses that strike at the heart of the democratic order. As Alexander Hamilton said in Number 65 of "The Federalist," they are "of a nature which may with peculiar propriety be denominated POLITICAL [capitalization in the original], as they relate chiefly to the injuries done to the society itself."

Over the centuries, observers have used a variety of formulations in an effort to capture the essence of transgressions meriting removal of a head of state (or in England, of his chief ministers). The common law called them "great offenses."[30] An English Solicitor General stated in Parliament in 1691 that "the power of impeachment ought to be, like Goliath's sword, kept in the temple, and not used but on great occasions."[31] In America, James Iredell told the North Carolina ratification convention that the "occasion for its exercise [impeachment] will arise from acts of great injury to the community."[32] Shortly after ratification, in 1790–91, Supreme Court Justice James Wilson described impeachments in the United States as "confined to political characters, to political crimes and misdemeanors, and to political punishment."[33] Justice Story wrote that impeachment is "intended for occasional and extraordinary cases, where a superior power, acting for the whole people, is put into operation to protect their rights, and to rescue their liberties from violation."[34]

More recently, Raoul Berger concluded that the Founders intended to "preclude resort to impeachment of the President for petty misconduct,"[35] and that they "conceived that the President would be impeachable for 'great offenses' such as corruption [or] perfidy."[36] And in the most recent comprehensive treatment of impeachment, Professor Michael Gerhardt observed that the ratification debates support the conclusion that high crimes and misdemeanors "were not limited to indictable offenses, but rather included great offenses against the federal government."[37]

The proposition that impeachment of a President should result only from "great" offenses seems born out by the actual conduct of the impeachment proceedings against Presidents Johnson and Nixon. Whatever may be said of the merits of the particular charges against Andrew Johnson, the true occasion for the effort to remove him was an irreconcilable conflict between the President and the dominant forces of the party that had elected him over the issue that would define America for the next century and more—how to treat the states of the defeated rebellion and how to regulate the way those states treated their large populations of recently emancipated African-American slaves. Through the lenses of hindsight, the Johnson impeachment effort has come to be viewed as an exercise in congressional overreaching by a vengeful group of radicals against a President acting within his rights. Whether or not this a correct view of history, the key point for our purposes is that, *at the time,* the majority of both houses of Congress perceived Johnson's policy of liberality towards rebels and seeming indifference to the political and economic status of freed slaves as a treasonous betrayal of the cause in which several million northern men fought and hundreds of thousands became casualties. The particular charges on which Johnson was impeached, almost all of which involved the President's removal of Secretary of War Stanton in defiance of the Tenure of Office Act, seem to modern eyes both specious and rather trivial. But for his contemporaries, Johnson's true offenses were quintessential "great crimes."

The impeachment of Richard Nixon likewise turned on "great" questions of constitutional governance. As with the case of Andrew Johnson, not far removed from the impeachment effort was a deeply divisive quarrel about the conduct of a war and its aftermath. One of the five articles of impeachment proposed, but not adopted by the Judiciary Committee, charged the President with concealing the bombing of Cambodia from Congress through the creation of false military records and the repeated submission to Congress of overtly false official reports.[38] Unlike the case of Andrew Johnson, the specific charges approved by the House Judiciary Committee in the Articles of Impeachment against Richard Nixon themselves concerned grave

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[29] Interestingly, however, bribery was not designated by statute as a federal crime until 1790. *See,* Act of April 30, 1790, ch. 9, § 21, 1 Stat. 112 (1845).

[30] George Mason, the originator of the phrase "high crimes and misdemeanors," said earlier in the Convention that he favored impeachment for "great crimes." *Proceedings,* 2:65.

[31] Berger, *supra* note 6, at 88.

[32] Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 2d ed., Vol. 4, p. 113 (1836).

[33] James Wilson, *Lectures in Law,* in 1 THE WORKS OF JAMES WILSON 426 (R. McCloskey ed. 1967).

[34] Story, *supra* note 26, § 751.

[35] Berger, *supra* note 6, at 90.

[36] *Id.* at 298.

[37] Gerhardt, *supra* note 3, at 104–05.

[38] *Nixon Impeachment Report,* at 217–219, 338.

abuses of executive power. Article 1 charged criminal obstruction of the investigation of a burglary carried out by paid agents of the President's re-election committee to gather political intelligence on the President's opponents.[39] Article 2 alleged pervasive misuse of federal law enforcement and intelligence agencies for political purposes, notably to collect information on or to discredit persons opposed to the President's general political aims or his conduct of the Vietnam War.[40] Article 3 sought impeachment based on the President's refusal to comply with the Judiciary Committee's own subpoenas.[41]

The near-universal theme of the Judiciary Committee report and of formal supplemental statements by Committee Members from both parties was that a President should be impeached only for offenses that go to the heart of his constitutional responsibilities, and not for any transient or venal personal failings. The Judiciary Committee staff prepared a report entitled, Constitutional Grounds for Presidential Impeachment," portions of which were incorporated into the Committee's final report. In one such portion, the staff concluded:

> Impeachment is a constitutional remedy addressed to serious offenses against the system of government. * * * It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are "high" offenses in the sense the word was used in English impeachments.
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> Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.[42]

Among those who voted for impeachment, Congressman Conyers wrote that the impeachment remedy "was framed with the intention that it be used only as a last constitutional resort against the danger of executive tyranny.[43] Another group of Members declared that, "In these proceedings we have sought to return to the fundamental limitations on Presidential power contained in the Constitution and to reassert the right of the people to self-government through their elected representatives within that Constitutional framework."[44] Congressman Waldie said. "Impeachment of a President should not be undertaken to punish a President, but to constitutionally redefine and to constitutionally limit the powers of the Presidency when those powers have been dangerously extended and abused."[45] Several Members who voted for impeachment did so because the President's conduct, in their view, "violated our guarantees of liberty,"[46] or was a "grave threat to the liberties of the American people."[47] Referring in particular to Article 3 concerning President's defiance of congressional subpoenas, Congressman McClory observed that, "The power of impeachment is the Constitution's paramount power of self-preservation."[48]

The minority report endorsed by those who voted against all of the Nixon articles of impeachment concluded that impeachment was constitutionally permissible only for the commission of crimes, and then only for "extremely grave crimes."[49] Congressman Hutchinson wrote separately to emphasize that, "Impeachment of a President is a drastic remedy and should be resorted to only in cases where the offenses committed by him are so grave as to make his continuance in office intolerable."

In the Nixon impeachment, the rhetoric of the Judiciary Committee was matched by its actions. Confronted with evidence that President Nixon may have committed the essentially private crime of criminal income tax fraud and may have illegally received government money to pay for improvements on his private estates at San

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[39] *Id.* at 1–2.
[40] *Id.* at 3–4.
[41] *Id.* at 4.
[42] *Id.* at 7–8.
[44] *Id.* at 327 (Statement of Congresswoman Holtzman, joined by Congressmen Kastenmeier, Edwards, Hungate, Conyers, Waldie, Drinan, Rangel, Owens, and Mezvinsky).
[45] *Id.* at 297.
[46] *Id.* at 341 (Statement of Congressman Wayne Owens).
[47] *Id.* at 287 (Supplemental Views of Congressman Don Edwards).
[48] *Id.* at 349. McClory was joined by Congressmen Danielson and Fish.
[49] *Id.* at 363.

Clemente, California, and Key Biscayne, Florida, the Committee voted 26–12 against impeaching the President on these grounds.

Thus, both the phrase "treason, bribery, or other high crimes and misdemeanors" and the precedent of the two previous presidential impeachment proceedings strongly suggest that presidents are to be impeached only for "great" transgressions characterized by some conflation of moral gravity and danger to the constitutional order. This conclusion is also implicit in the role of the Executive in our Constitution. The President is co-equal with the Congress and the courts. The office is attained by direct grant of the people, and does not rest on any delegation of power from the legislature. Thus, any dramatic lowering of the impeachment threshold in the direction of converting impeachment into a mechanism for legislative removal of the chief executive on a vote of no confidence is antithetical to the design of this Constitution.[50]

2. *Judicial Impeachment Precedents*

It might be argued that the history of the most numerous class of impeachments, those of federal judges, supports the removal of federal officers for non-criminal conduct far different and less grave than the "great" offenses. As the attached *Appendix* details, judges have been impeached for drunkenness, blasphemy, and entering improper judicial orders,[51] bias in charging a grand jury,[52] improperly holding in contempt a lawyer who had criticized the court's rulings,[53] habitual malperformance,[54] using favoritism in appointing receivers,[55] and bringing the court into scandal and disrepute.[56] On balance, however, we join with those commentators who have concluded that the constitutional text and sound considerations of policy dictate a different impeachment standard for judges than for the President.[57]

First, the constitutional text creates some ambiguity about the proper impeachment standard for judges. Article II authorizes impeachment of the "President, Vice President and *all civil Officers*" for "Treason, Bribery, or other high Crimes and Misdemeanors." In contrast, Article III provides that federal judges "shall hold their Offices during good Behavior." While the impeachment standard in Article II apparently does apply to judges, the additional language in Article III suggests an additional basis for their impeachment and removal.

Second, the rather limited debates in the Constitutional Convention regarding impeachment were focused on the President and the most senior officers of his government. Little thought was devoted to removal of judges.

Third, in marked contrast to the profound political questions and great occasions that precipitated the impeachment efforts against Presidents Johnson and Nixon, impeachments of judges seem rather tawdry affairs generally revolving around charges of personal incapacity,[58] political or personal bias,[59] or, most commonly, financial dishonesty.[60] This sense that presidential impeachments necessarily involve grander issues arises in part, of course, because any effort to depose a President precipitates a constitutional crisis even if the charges against the President are not themselves of constitutional magnitude. A change in Presidents requires, or at least permits, a reordering of the executive branch and unforeseeable changes in national

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[50] This point was made forcefully by the dissenting members of the Judiciary Committee in the Nixon impeachment: "We have never had a British parliamentary system in this country, and we have never adopted the device of a parliamentary vote of no-confidence in the chief executive. If it is thought desirable to adopt such a system of government, the proper way to do so is by amending our written Constitution—not by removing the President." (Minority Views of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti and Latta, *id.* at 365.)

[51] *See Appendix,* at A–2; Gerhardt, *supra* note 3, at 50 (describing impeachment of Judge John Pickering.)

[52] *See Appendix,* at A–3–4 (describing impeachment of Supreme Court Justice Samuel Chase).

[53] *See Appendix,* at A–5 (describing impeachment of Judge James H. Peck).

[54] *See Appendix,* at A–18–19 (describing impeachment of Judge George English).

[55] *See Appendix,* at A–20–21 (describing impeachment of Judge Harold Louderback).

[56] *See Appendix,* at A–22–23 (describing impeachment of Judge Halstead L. Ritter).

[57] *See, e.g.* Berger, *supra* note 6, at 122–180; Gerhardt, *supra* note 3.

[58] *See Appendix* for descriptions of impeachment of Judges Pickering (drunkenness, blasphemy, senility, and improper rulings) and English (habitual malperformance).

[59] *See Appendix* for descriptions of impeachment of Judges Chase (bias in charging grand jury and delivering inflammatory political harangue to grand jury), Peck (improperly holding in contempt lawyer who criticized his rulings), and Louderback (using favoritism in appointing receivers).

[60] *See Appendix* for descriptions of impeachment of Judges Swayne (falsifying expense accounts and using property held in a receivership); Archbald (bribery and hearing cases in which he had a financial interest); Ritter (taking kickbacks and tax evasion); Claiborne (tax evasion); Hastings (conspiracy to solicit a bribe). In addition, two judges who resigned to avoid impeachment, Judge Mark W. Delahay and Judge Robert Collins, were charged with questionable financial dealings and bribery respectively. *See also,* Gerhardt, *supra* note 3, at 23, 30 n. 36.

policy. The removal of a lower federal court judge has no necessary consequence outside his or her own district or circuit, and only modest effects even there. Even the removal of a Supreme Court Justice may have no noticeable impact on the court's decisions. It bears emphasis, however, that the Nixon and Johnson impeachment efforts differ from the body of judicial impeachments not merely because of the profound *effect* of presidential removal. With the repeated caution that it is dangerous to over-interpret sparse impeachment precedents, comparative analysis suggests that Congress has applied a discernibly different standard to the removal of judges.

No president has been impeached for general failure or incapacity to perform his duties. Several judges have been. No president has been impeached for being politically biased or for favoring his friends in the exercise of his official. Several judges have been. Two judges have been impeached and one convicted of tax evasion, yet the House Judiciary Committee declined to impeach Richard Nixon for income tax violations. At least three apparent distinctions arise from these and other comparisons:

First, Congress properly seems more disposed to impeach judges than presidents for incapacity or fundamental unsuitability for office, perhaps because judges continue in office until death unless removed, while presidential tenure is limited to four years without a re-endorsement by the people. Second, as the differential treatment of presidential and judicial tax evasion suggests, Congress has, in general, set the bar for presidential impeachment higher than for judicial impeachment. Third, and we think most importantly, the nature of an impeachable offense under the constitution depends largely on the nature of the office from which the subject is to be removed.[61] For example, judges are expected to be apolitical and impartial. Exercising the powers of one's office one's friends and allies or to advance partisan political goals is conduct fundamentally incompatible with the judicial role, and is thus impeachable conduct for a judge. However, the same sort of behavior is often the essence of being a President, and absent violation of some statute a President will not be impeached for exercising his powers of patronage or using his office to advance his party's agenda.

3. *Impeachable Non-criminal Offenses—Distinguishing Features and Special Cases*

What then are the distinguishing features of non-criminal impeachable offenses for Presidents? Such offenses surely include most of the "great" political infractions recognized at English common law including misapplication of funds, abuse of official power, neglect of duty, or encroachment on the prerogatives of another co-equal branch of governmental.[62] Virtually all of the charges against Presidents Johnson and Nixon were either criminal or fell into one of the common law 'great offense' categories or both. Articles 1–9 in the Johnson case were essentially claims of abuse of power, and were also technically criminal because they charged violation of the Tenure of Office Act which carried criminal penalties. Article 11, which alleged that Johnson had declared the 39th Congress "was not a Congress authorized by the Constitution to exercise legislative power" and that he was therefore not bound to enforce its statutes, charged an encroachment on the prerogatives of the legislative branch. All three articles approved by the Nixon Judiciary Committee arguably fall under the rubric of abuse of power, and Article 1 charging obstruction of justice clearly alleged criminal conduct. Of the two articles proposed but not adopted in 1974, the article concerning concealment of the bombing of Cambodia implicated both abuse of presidential power and a serious intrusion into the constitutional warmaking power of Congress, while the article charging tax evasion was plainly criminal.

Two charges from the prior presidential impeachments raise issues that do not fit comfortably within the traditional "great offense" categories: Article 3 in the case of Richard Nixon alleging resistance to congressional subpoenas as an impeachable offense, and Article 10 against Andrew Johnson asserting that his public speeches casting aspersions on Congress were grounds for removal. Although Article X of the Johnson case can be readily dismissed as an artifact of the particular virulence of that dispute, Article III in the Nixon impeachment raises more difficult questions to which we now turn.

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[61] The staff of the House Judiciary Committee in the Nixon presidential impeachment took the view that the standard for impeachment of judges is no different than the standard for presidents, but agreed with our reading of the judicial impeachment cases insofar as we take them to involve "an assessment of the conduct of the officer in terms of the constitutional duties of his office." *Constitutional Grounds for Presidential Impeachment,* Report by the Staff of the Impeachment Inquiry, Committee on the Judiciary, House of Representatives, 93rd Cong., 2d Sess., 17 (Feb. 1974).

[62] Berger, *supra* note 6, at 70–71.

a. *Presidential Resistance to Congressional Investigative Efforts*

In response to a series of subpoenas issued by the House Judiciary Committee, President Nixon refused to produce certain tape recordings and documents, asserting the novel theory that the doctrine of separation of powers gave him an "executive privilege" to refuse the Committee's investigative requests.[63] At the same time, the President was resisting criminal subpoenas from the Watergate Special Prosecutor's Office seeking some of the same material. It was only after the Supreme Court ruled unanimously that the President must comply with the criminal subpoenas that the Judiciary Committee also received materials it had demanded.[64] The Committee felt that the refusal to comply with congressional subpoenas was a transgression sufficiently grave and sufficiently distinct from the criminal obstruction of justice charged in Article I that it merited a separate article of impeachment. As the Committee said, "Whatever the limits of legislative power in other contexts—and whatever need may otherwise exist for preserving the confidentiality of Presidential conversations—in the context of an impeachment proceeding the balance was struck in favor of the power of inquiry when the impeachment provision was written into the Constitution."[65]

To the extent that resolution of certain aspects of the inquiry presently before this Committee may turn on the limits of a President's power to contest investigative requests made to the White House or other executive branch officials, several points may be worth noting. First, the Nixon Judiciary Committee differentiated sharply between President Nixon's legal contest with the Watergate Special Prosecutor over criminal subpoenas and his refusal to respond to congressional subpoenas issued in the course of an impeachment inquiry. At no point did the Judiciary Committee assert that President Nixon's battle with the Special Prosecutor over criminal discovery was a constitutional misdeed. Rather, in its third impeachment article, the Committee alleged that by defying its own subpoenas, the President "assum[ed] to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives."[66]

Second, clearly implicit in the Judiciary Committee report and its vote to approve Article III against President Nixon was the judgment that *this* President's assertion of "executive privilege" was a flimsy and legally unjustifiable excuse for selectively withholding evidence that was both central to the resolution of charges of obviously constitutional magnitude and known by the President to be so. Indeed, once President Nixon produced additional tapes in compliance with the Supreme Court's order, the Committee's conclusion about the nature of the withheld material was fully born out by its contents. Neither Article III of the Nixon impeachment nor the Committee reports can fairly be read to support the view that assertion of a legally substantial claim of privilege in either a criminal investigation or an impeachment inquiry is in itself an impeachable offense.

Third, the effect of the Nixon precedent becomes more difficult to divine where a President resists investigative requests from an Independent Counsel by asserting legal privileges in courts of law. If an Independent Counsel is considered the current analog of the Watergate Special Prosecutor, then the Nixon precedent suggests that a President's resistance to subpoenas from that source encroaches on no legislative prerogative and is thus no ground for impeachment. However, if one were to view the Independent Counsel Statute as a *de jure* or at least *de facto* delegation of a portion of the Congress' power to investigate impeachable offenses against high executive officials to the Office of Independent Counsel, the picture becomes murkier. In this view, resistance to the investigation of the Independent Counsel becomes tantamount to defiance of Congress itself.

We would find such a construction of either the Independent Counsel Statute or the Nixon impeachment precedent deeply troubling. We do not believe that Congress could delegate any part of its constitutional impeachment authority to an official who is accountable to both the head of an executive department—the Attorney General—and to a panel of judges. Nor do we think that conclusions drawn by the Judiciary Committee in 1974 about President Nixon's direct challenge to congressional investigative authority are plausibly transferrable to a contest between a President and an Independent Counsel. Put simply, we find it difficult to conceive that raising

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[63] As the Committee Report observed, with one possible exception, none of the subjects of the sixty-nine previous impeachment inquiries had ever asserted a privilege to refuse compliance with a legislative subpoena. *Nixon Impeachment Report,* at 206.

[64] *Id.* at 190. The Committee report also contains substantial evidence that the disclosures the President did make contained intentional omissions as well as false and misleading material. *Id.* at 203–05 and elsewhere.

[65] *Id.* at 209.

[66] *Id.* at 4.

legal objections in legal forums to the investigative requests of an Independent Counsel could constitute a high crime or misdemeanor.

b. *Other Forms of Non-criminal Misconduct*

Two other forms of non-criminal presidential misbehavior—personal immorality and lying—are often the subject of discussions concerning impeachment. We will discuss them seriatim:

(i) Re: Personal immorality.

Only one person has ever been impeached, even in part, for conduct that could fairly be characterized as purely personal immorality. In 1804, Judge John Pickering of the New Hampshire District Court was impeached because, among other things, he "in a most profane and indecent manner, [did] invoke the name of the Supreme Being, to the evil example of the good citizens of the United States."[67] However, Pickering was also charged and convicted for making a series of improper rulings and with being drunk on the bench. Moreover, the true reason for his impeachment appears to have been that he was insane.[68]

As for private sexual immorality, there seems little constitutional basis for concluding that such behavior could ever constitute an impeachable offense. No federal official has ever been impeached for sexual misconduct. Such history as there is on the point is negative and anecdotal, but supports the view that neither the Framers nor anyone since has seriously proposed impeachment as a remedy for private sexual misbehavior. For example, in 1792–93, Alexander Hamilton defused a congressional investigation into his financial relationship with a convicted swindler by telling the congressmen who came to question him that he had committed adultery with the man's wife and later paid him to hush up the affair.[69] Similarly, the unsuccessful effort to unseat Justice William O. Douglas began with questions about his character arising from his supposed promiscuity; however, the impeachment inquiry itself never dignified these scurrilous allegations with serious attention, focusing instead on the sources of Justice Douglas' extrajudicial income.[70]

We hasten to add that merely because the alleged misconduct of a President has a sexual component such conduct is not exempt from consideration by this Committee under the impeachment clauses. Criminal sexual misbehavior such as rape, child sexual assault, and the like would surely be an impeachable offense. And we can imagine consensual sexual conduct such as adulterous relations with a spouse or child of a foreign head of state or dignitary that would directly impact quintessentially political functions of the presidency and so subject a President to impeachment. For the present, however, it is sufficient to say that no actual impeachment case presenting such an unusual confluence of the sexual and the political has come to our notice.

(ii) Re: Lying.

Even leaving to one side the special problem of perjury, to which we will return presently, presidential lies present a particularly knotty problem. Everyone lies sometimes, and it would be absurd to hold Presidents to an inhuman standard of unfailing truthfulness. Moreover, a President is head of state, diplomat, and practicing politician rolled into one. A certain amount of dissimulation is necessary to the successful practice of statecraft. Nonetheless, certain kinds of presidential falsehoods are probably high crimes and misdemeanors, even when they are not delivered under oath.

The best example of an impeachable, but nonperjurious, lie would be a false statement made in the President's official capacity to the legislature or the judiciary for the purpose of deceiving the other branch in its execution of a core constitutional function. As James Iredell, one of the first Supreme Court Justices said in debate over the impeachment clauses, "The President must certainly be punishable for giving false information to the Senate."[71] Only one article of impeachment relying on this principle has ever been advanced, Article IV of the Nixon impeachment charging concealment of the bombing of Cambodia through the creation of false military documents and submission to Congress of false official reports on the war in Southeast Asia. Although the Judiciary Committee did not approve Article IV, we are dis-

[67] *See Appendix,* at A–2.
[68] Gerhardt, *supra* note 3, at 50.
[69] Robert Pear, *Clinton Lawyers Compare his Travails to Hamilton's,* The Sacramento Bee, October 4, 1998 (reprinted from New York Times).
[70] James F. Simon, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 391–409 (Harper & Row 1980). *See* also, Gerhardt, *supra* note 3, at 107.
[71] Quoted by Congresswoman Holtzman in *Nixon Impeachment Report* at 327.

posed to think that the vote resulted from a disinclination to inject the explosive politics of the Viet Nam War into a case where ample ground for impeachment already existed, rather than a rejection of the principle that the Chief Executive may not intentionally deceive Congress in matters that relate to the legislature's own constitutional duties.

The more difficult case to analyze is one involving allegations that a President lied to The People in public statements on important national issues. Although a few observers have intimated a general presidential obligation of public candor on pain of impeachment,[72] no impeachment has ever gone forward on this basis and it seems a very malleable and dangerous doctrine. The more desirable constitutional remedy for falsehoods of this sort probably rests in the hands of the public itself when it uses the ballot box.

4. *Non-criminal Impeachable Offenses—Summary*

The hallmarks of impeachable offenses not technically criminal are their magnitude and their public, political character. Congressman Danielson of the Nixon Judiciary Committee put it well when he wrote: "It is enough to support impeachment that the conduct complained of be conduct which is grossly incompatible with the office held and which is subversive of that office and of our Constitutional system of government. With respect to a President of the United States . . . conduct which constitutes a substantial breach of his oath of office, is impeachable conduct."[73]

C. *Is* All *Criminal Conduct a Proper Ground for Impeachment?*

What then of Presidential conduct that is a statutory crime? Not all violations of criminal statutes are "high crimes and misdemeanors." If the Framers had wanted *any* crime or misdemeanor to be a valid basis for impeachment, they knew how to say so. Their debates, the original restriction of impeachment by the Committee of Eleven to the crimes of treason and bribery, and the Convention's final choice of moderately expanded language all demonstrate a sensible intention to exclude some crimes from the category of impeachable offenses. Their judgment was sound. Jaywalking, public drunkenness, and reckless driving are all crimes, and offenses such as hunting without a license in a wildlife refuge are crimes punishable by six months imprisonment,[74] but a President self-evidently should not be displaced if he commits them.

Not even all felonies are necessarily impeachable offenses. For example, punching a "foreign official" in the nose,[75] destroying a document belonging to the estate of a debtor,[76] operating a bus or train while intoxicated,[77] counterfeiting a postage stamp,[78] and obliterating the vehicle identification number of someone else's car[79] are all federal felonies. One doubts that any of these are "high crimes and misdemeanors." Thus, not only are some, perhaps many, indictable crimes not impeachable, but there is no pre-existing division in the criminal law itself, such as that between felonies and misdemeanors, which will reliably distinguish the impeachable from non-impeachable crimes. We must therefore determine whether the Constitution or other sources provide any guidance in making this distinction.

D. *If Not All Crimes Are Impeachable Offenses, What Distinguishes Impeachable Crimes From Non-impeachable Crimes?*

1. *The President's Obligation to "Take Care That the Laws be Faithfully Executed"*

Article II of the Constitution vests the executive power of the United States government in the President. Section 3 of the same Article commands that the President "shall take Care that the Laws be faithfully executed," and Section 1 of that Article prescribes an oath of office in which the President must swear that he will "preserve, protect and defend the Constitution of the United States." It can be ar-

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[72] *See, e.g.,* Additional Views of Mr. Conyers, in *Nixon Impeachment Report,* at 295:

> By the same policies of secrecy and deception [regarding Cambodia], Richard Nixon also violated a principal tenet of democratic government: that the President, like every other elected official, is accountable to the people. For how can the people hold their President to account if he deliberately and consistently lies to them? The people cannot judge if they do not know, and President Nixon did everything within his power to keep them in ignorance.

[73] Additional Views of Mr. Danielson, *id.* at 303.

[74] 18 U.S.C. § 41.

[75] 18 U.S.C. § 112(a).

[76] 18 U.S.C. § 153(a).

[77] 18 U.S.C. § 342.

[78] 18 U.S.C. § 501.

[79] 18 U.S.C. § 511.

gued that the President's role as Chief Executive imposes a special obligation of scrupulous adherence to the law,[80] and thus that the failure to remove a presidential law breaker from office so endangers the rule of law that the remedy of impeachment ought to be liberally invoked whenever a President commits any significant legal infraction. We think, however, that such an argument is subject to the following criticisms:

First, impeachment is not the only remedy the law provides against a President who breaks it. As Alexander Hamilton said of those who actually are impeached, "After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law."[81] The same is true of those who commit crimes, but are *not* removed from office on that account. In other words, a refusal to impeach does not mean a refusal to punish. If a President commits crimes for which he is not impeached, nothing bars his prosecution for those offenses once he leaves office.

Second, the contention that the President's special Article II obligation to uphold the law authorizes his impeachment for virtually all serious criminal infractions collides squarely with the designedly restrictive scope of the impeachment clauses. In effect, the proponents of this view are arguing that the President's constitutional role should render him liable to impeachment for more kinds and degrees of crimes than any other federal officer. But as our previous discussion demonstrates, the Framers adopted the "treason, bribery, or other high crimes and misdemeanors" formula precisely in order to limit the occasions on which a *President* might be removed.

We find no inconsistency in the fact that the Constitution imposes on Presidents an obligation of scrupulous adherence to law and at the same time permits their impeachment and removal from office only for great infractions which constitute a limited subset of the crimes for which Presidents and paupers alike may be prosecuted and imprisoned. The Framers were sophisticated political architects who counted on more than the single and supremely disruptive mechanism of impeachment to regulate presidential behavior. They assumed that the primary check on presidential excesses would be the limited tenure of the post and the power of the electorate to turn Presidents out of office for misbehavior. And for criminal transgressions both great and small, they expressly contemplated the possibility of ordinary criminal prosecution of Presidents.

The view that only a restricted class of grave crimes warrant removal of a President was manifest in several aspects of the impeachment proceedings against President Nixon. The most obvious of these was the refusal of the Judiciary Committee to impeach the President on the basis of substantial allegations of income tax evasion, a refusal which contrasts sharply with congressional readiness both before and after 1974 to impeach federal judges on precisely the same ground.[82] The rejection of the Nixon impeachment article regarding personal tax evasion may, of course, be explainable as a tactical choice by those favoring the President's removal to focus on the more serious and more "political" first three articles, rather than as a judgment that presidential tax evasion is *per se* not an impeachable offense. But the minority report by ten dissenting members of the Committee unequivocally endorsed the view that even proof of multiple crimes by a President acting in concert with his subordinates would not necessarily compel impeachment. The minority wrote of the second article of impeachment that "isolated instances of unlawful conduct by presidential aides and subordinates," even with "varying degrees of direct personal knowledge or involvement of the President in these respective illegal episodes" were insufficient to warrant impeachment and removal of "President Nixon, or any President."[83]

None of the foregoing should be construed to imply that a President's obligation faithfully to execute the laws is irrelevant to the question of defining impeachable offenses. We can say, however, that this presidential obligation provides no panacea to the definitional problem.

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[80] *See, e.g.* Concurring Views of Congressman Hamilton Fish, Jr., *Nixon Impeachment Report,* 356 ("At the very least [the President] is bound not to violate the law; not to order others to violate the law; and not to participate in the concealment of evidence respecting violations of the law of which he is made aware.").

[81] Alexander Hamilton, THE FEDERALIST PAPERS, No. 65.

[82] *See* descriptions of impeachments of Judge Halstead Ritter in 1936, *Appendix* at A–22–23, and Judge Harry Claiborne in 1986, *Appendix* at A–24, both for income tax evasion.

[83] *Nixon Impeachment Report* at 360.

2. *Towards a Working Definition of an Impeachable Crime*

In the end, neither the Constitution, nor the Framers, nor the precedents, nor the commentators can tell us exactly what differentiates statutory crimes for which a President should be impeached from those for which he should not. However, careful study of all these sources viewed in the light of reason and common sense suggests certain tentative conclusions:

a. *The Relationship Between Moral Gravity and Political Seriousness*

We think that what makes a crime a "high crime or misdemeanor" and therefore a proper basis for impeachment is a hard to define, but intuitively identifiable, combination of moral gravity and political seriousness. Some kinds of particularly morally reprehensible crimes, for example murder or rape, would certainly require impeachment even if committed by the President for entirely private motives in circumstances wholly unconnected with the office of President. Such crimes are political only insofar as their heinousness strips the President of his legitimacy and renders him unfit in the eyes of the country to hold office. On the other hand, the more political the crime, the more it involves abuse of the president's official position or subversion of the proper functions of the other branches of government, the less likely we are to be concerned with its moral depravity. A President who used illegal wiretaps to obtain information with which to blackmail a Congressman into voting for flood and famine relief would be no less impeachable because his motives were good. Such conduct imperils honest constitutional government.

Crimes which are both morally reprehensible and intimately related to the presidential office are the most obviously impeachable (e.g., murder of a political rival; selling military secrets to known terrorists). Beyond such extreme examples, however, there will usually be an inverse relationship between moral gravity and political character. The more reprehensible the crime, the more relaxed will be the required nexus to the President's official duties. The more direct the connection between the crime and the President's constitutional functions, the lower the required level of heinousness.

b. *The Severity of the Crime in the Eyes of the Criminal Law*

Although it is true that not all crimes and not even all felonies are impeachable "high crimes and misdemeanors," the severity of the crime in the eyes of the criminal law is certainly relevant. Felonies *are* more serious than misdemeanors. Within the broad class of felonies, Congress has expressed some rough view of the relative seriousness of different felony offenses through the assignment of different levels of punishment.[84] On balance, a crime for which the criminal law prescribes a sentence of ten years is probably more serious than an offense where the likely punishment is six months. Such distinctions are certainly relevant to an impeachment inquiry.

c. *The Relative Importance of the Elements of a Crime and the Circumstances Under Which It Was Committed*

Any consideration of whether allegedly criminal presidential conduct is also an impeachable "high crime or misdemeanor" should not be limited to an abstract assessment of the statutory elements of the crime, but must also take account of the particular circumstances of the case. For example, in the State of Washington, wrongfully appropriating a $1500 watch misdelivered in the mail is the same statutory crime, First Degree Theft, as embezzling $1.5 million from a trust fund for widows and orphans.[85] It will often be the circumstances rather than the label of the crime that determines its true seriousness.

d. *Perjury and Obstruction of Justice*

Perjury and obstruction of justice are serious felonies that strike at the heart of the judicial process. In the impeachment setting, an allegation that a President lied under oath or sought to induce others to do so must be viewed with the utmost seriousness. As with any other crime, however, the label is not necessarily determinative of the true seriousness of the crime or of the weight to be accorded the crime in the impeachment calculus. Put plainly, some perjuries and obstructions are certainly "high crimes and misdemeanors," while other perjuries and obstructions may

[84] The real severity ranking of federal offenses may not always be apparent from looking at the statutory maximum sentences. A better gauge will often be found in the Federal Sentencing Guidelines.

[85] *See,* Revised Code of Washington, § 9A.56.020(1) (a) and (c) and 9A.56.030(1)(a).

not rise to that terrible level. Both the general principles concerning the impeachment clauses discussed at length above and several specific impeachment precedents provide some guidance in analyzing particular cases.

First, consistent with the principle that "high crimes and misdemeanors" are political crimes, the founding generation explicitly contemplated that a President who lied directly to Congress about matters relating to his office, under oath or not, could be impeached. Recall the declaration of James Iredell, one of the first Supreme Court Justices, that, "The President must certainly be punishable for giving false information to the Senate."[86]

Second, there is ample precedent for removing officials from office for perjury or obstruction. President Richard Nixon was impeached for obstruction of justice, and within the last decade two federal judges, Alcee Hastings and Walter Nixon, have been impeached and removed from office for perjury.[87] A notable feature of all three of these impeachments was that they involved lies about underlying conduct that was itself either criminal or involved a corrupt misuse of office. President Nixon's case is well known. Judge Hastings was impeached and convicted for lying at his own criminal trial about his participation in a conspiracy to solicit a bribe. Judge Walter Nixon was impeached and convicted for lying to a grand jury about his connection to the father of an accusing drug smuggler and his own attempts to influence the outcome of the son's case.

There is no clear guidance in the constitutional text, the debates of the Founders, or prior impeachment precedents regarding allegations of perjury or obstruction that do not concern lies told in the President's official capacity or in an effort to conceal conduct that would itself be a crime. We suggest, however, that it may be important in assessing the seriousness of any particular allegation of presidential perjury to consider the treatment of similar cases in the ordinary criminal process. For example, perjury before federal grand and trial juries is prosecuted with reasonable frequency, suggesting that lies in these settings are considered particularly egregious. On the other hand, perjury committed in civil cases is very rarely prosecuted in federal courts.

The language of Title 18, U.S.C., Sections 1512, 1621, and 1623 sweeps broadly enough to embrace false swearing in, and obstruction of, federal civil actions to which the federal government is not a party. As the Sixth Circuit said in *In re Morganroth,* "The possibility of a perjury prosecution exists whenever an individual takes an oath, in a civil or criminal matter, where the law of the United States authorizes an oath to be administered. . . ."[88] Cases charging perjury or obstruction in connection with a purely private civil action have been brought in federal court. Nonetheless, as the Eleventh Circuit noted in *United States* v. *Holland,* the "vast majority of convictions under 18 U.S.C. § 1621" involve perjury in a criminal proceeding.[89] Indeed, a search conducted of all reported federal cases since 1944 revealed sixteen (16) prosecutions for violations of 18 U.S.C. §§ 1512, 1621, or 1623 arising out of a civil action to which the United States, or some agency thereof, was not a party.[90] If one assumes that the sixteen cases located by search of prior appellate case law represent only one-sixth of the actual total of such cases filed, and therefore that roughly one hundred such cases have been brought since 1944, the

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[86] Quoted by Congresswoman Holtzman in *Nixon Impeachment Report* at 327.

[87] *See, Appendix,* at A–25–28.

[88] 718 F.2d 161, 166 (6th Cir. 1983).

[89] 22 F.3d 1040, 1047 (11th Cir. 1994). In fairness, it should be noted that the *Holland* court made this observation in the course of rejecting the district court's grant of a downward departure based on the ground that the perjury at issue in the case occurred in a civil proceeding. The civil case in question was an effort by Morris Dees of the Southern Poverty Law Center to collect a judgment obtained against the defendant for violating the civil rights of various persons while acting as leader of the Ku Klux Klan.

[90] Although the electronic search that produced this result was designed to discover every perjury or obstruction case reported in the past half century arising from a civil action to which the U.S. was not a party; we have no doubt that some such cases slipped through the search net. Nonetheless, we suggest that no search, no matter how exhaustive, will discover a significantly larger group of such cases. The cases identified were: *United States* v. *Holland,* 22 F.3d 1040 (11th Cir. 1994); *United States* v. *McAfee,* 8 F.3d 1010 (5th Cir. 1993); *United States* v. *Markiewicz,* 978 F.2d 786 (2nd Cir. 1992); *United States* v. *Morales,* 976 F.2d 724, 1992 WL 245718 (1st Cir. 1992) (unpublished); *United States* v. *Maddox,* 943 F.2d 53, 1991 WL 164318 (6th Cir. 1991) (unpublished); *United States* v. *Clark,* 918 F.2d 843 (9th Cir. 1990); *United States* v. *Reed,* 773 F.2d 477 (2nd Cir. 1985); *United States* v. *Jonnet,* 762 F.2d 16 (3d Cir. 1985); *United States* v. *Coven,* 662 F.2d 162 (2nd Cir. 1981); *United States* v. *Comiskey,* 460 F.2d 1293 (7th Cir. 1972); *Brightman* v. *United States,* 386 F.2d 695 (1st Cir. 1967); *United States* v. *Lester,* 248 F.2d 329 (2nd Cir. 1957); *Roberts* v. *United States,* 239 F.2d 467 (9th Cir. 1956); *United States* v. *Ashley,* 905 F.Supp. 1146 (E.D.N.Y. 1995); *United States* v. *Dell,* 736 F.Supp. 186 (N.D. Ill. 1990); *United States* v. *Taylor,* 693 F.Supp. 828 (N.D. Cal. 1988).

result would nonetheless be that a case of perjury or obstruction in a case involving only private parties is brought by any given U.S. Attorney's Office, on average, once every half century.[91] Among the sixteen cases identified above, the majority were plainly brought to vindicate a strong, and easily ascertainable, federal interest.[92]

E. *Is There a Category of Impeachable Offenses for Which the House Should Nonetheless Not Impeach?*

One of the conceptual difficulties in debates over impeachment flows from the fact that the constitutional language *seems* imperative. Article II says that the President "*shall* be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Read closely, however, the Constitution does not say that Congress must impeach if a President commits high crimes or misdemeanors; it says only that the President must be removed if impeached and convicted. This aspect of the impeachment process is captured better in the common term "impeachable offense" than in the constitutional language itself. An "impeach*able* offense" is one for which the legislature could, but need not, impeach and remove an officeholder. We think that there is indeed a class of such offenses. The process the Committee ought to apply in considering offenses that fall into this category is perhaps not dissimilar to the decisional process of a public prosecutor deciding which of many technically prosecutable offenses and offenders merit the imposition of the moral opprobrium and harsh punishments of the criminal law. In such a process, the decisionmaker must consider not only whether facts can be proven, but whether prosecution promotes or disserves the interests of the country.

CONCLUSION

We thank the Committee for the opportunity to contribute the foregoing remarks, and we hope they will prove in some small degree helpful in the exercise of the Members' grave constitutional duty.

APPENDIX

UNITED STATES IMPEACHMENTS 1789 TO PRESENT

What follows is a synopsis of articles of impeachment adopted in each of the fifteen impeachments in the nation's history, as well as Senate votes on each of these articles. For quicker reference, this information is further condensed into a chart at the end.

William Blount

United States Senator (Tenn.)
Articles of Impeachment Adopted: January 29, 1798
Senate Action: January 11, 1799

Article 1: In 1797, while the United States was officially neutral in the war between Spain and Great Britain, Blount, "designing and intending to disturb the peace and tranquility of the United States, and to violate and infringe the neutrality thereof," conspired to conduct a hostile military expedition against Spanish territory in Florida and Louisiana and to conquer such territory for Great Britain.

Article 2: Despite a treaty between the United States and Spain by which both nations agreed to "maintain peace and harmony among the several Indian nations" inhabiting the Floridas, and to restrain the Indian nations within their borders from attacking the subjects or natives of the other, Blount conspired to "excite the Creek and Cherokee nations of Indians . . . to commence hostilities against Spanish subjects and territory.

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[91] There are approximately ninety-five United States Attorney's Offices.

[92] *See, e.g. Markiewicz, supra* (witness tampering and perjury were part of scheme to steal tribal funds in Indian country); *Reed, supra* (perjury part of securities fraud scheme criminally prosecuted by U.S.); *Ashley, supra* (perjury part of scheme to defraud Federal Home Loan Mortgage Corp.); *Coven, supra,* and *Dell, supra* (obstruction, false statements, and perjury part of fraud scheme criminally prosecuted by U.S.); *Comiskey, supra* (case referred directly to U.S. Attorney by U.S. District Judge who presided over civil case); *Clark, supra* (perjury involved case concerning complaint to EEOC); *Holland, supra* (Southern Poverty Law Center acting as something approximating a government surrogate in long-running federal fight against bigotry and violence of the KKK).

Article 3: To accomplish the criminal designs described in Articles 1 & 2, Blount conspired and contrived "to alienate and divert the confidence" of the Indian nations from Benjamin Hawkins, the lawfully appointed federal agent for Indian affairs.

Article 4: To accomplish the criminal designs described in Articles 1 & 2, Blount conspired and contrived to seduce James Carey, the official federal interpreter to the Cherokee nation, from the duty and trust of his office and to engage him to assist in the promotion and execution of Blount's criminal designs.

Article 5: To accomplish the criminal designs described in Articles 1 & 2, Blount conspired and contrived to diminish and impair the confidence of the Cherokee nation in the government of the United States, and to foment discontent and disaffection between them, in relation to treaties by which the two agreed to ascertain and mark a boundary line between them.

In July 1797, after receiving a message from President Adams describing Senator Blount's conduct, the Senate expelled him by a vote of 25–1. The impeachment came the following year. The Senate ultimately dismissed the case after it ruled by a vote of 14–11 that a Senator was not a civil officer subject to impeachment.

John Pickering

Judge for the District of New Hampshire
Articles of Impeachment Adopted: December 30, 1803
Senate Action: March 12, 1804

Article 1: Pickering, with the intent to evade a federal law, ordered the ship *Eliza*, its contents, and some cables to be delivered to a claimant of such property despite the claimant's failure to provide a certificate that the applicable tonnage duties had been paid.

Article 2: Pickering, with the intent to defeat the just claims of the United States, refused the hear testimony of witnesses offered to show that the ship *Eliza* and its contents were properly forfeited to the United States, and instead ordered the property returned to the private claimant.

Article 3: Pickering, "disregarding the authority of the laws and wickedly meaning and intending to injure the revenues of the United States and thereby impair their public credit" refused to allow an appeal of his ruling regarding ownership ofthe ship *Eliza* and its contents.

Article 4: Pickering appeared in the bench "in a state oftotal intoxication, produced by the free and intemperate use of intoxicating liquors," and "in a most profane and indecent manner, [did] invoke the name of the Supreme Being, to the evil example of the good citizens of the United States."

Judge Pickering did not appear at the impeachment trial, but his son suggested to the Senate that the Judge was insane at the time of the *Eliza* case and remained so. The Senate ultimately convicted Judge Pickering on each count by a vote of 19–7. It then voted 20–6 to remove Pickering from office.

Samuel Chase

Associate Justice of the Supreme Court of the United States
Articles of Impeachment Adopted: December 4, 1804
Senate Action: March 1, 1805

Article 1: During the treason trial of John Fries, Chase "conduct[ed] himself in a manner highly arbitrary, oppressive, and unjust" by: (1) delivering a written legal opinion tending to prejudice the jury against the defendant before defense counsel had been heard; (2) prohibiting defense counsel from citing to English authorities and United States statutes counsel deemed illustrative; and (3) barring defense counsel from addressing the jury on the law. This conduct deprived Fries of his constitutional rights and disgraced the character of the American bench.

Article 2: "Prompted by a similar spirit of persecution and injustice" during the libel trial of James Callendar, and with the intent to oppress and procure a conviction, Chase overruled an objection to seating as a juror a

person who had made already up his mind that the defendant was guilty.

Article 3: During the Callendar trial, "with the intent to oppress and procure a conviction," Chase excluded testimony of a material defense witness on the pretense that the witness could not prove the truth of the whole of the allegedly libelous material, even though the charge embraced more than one fact.

Article 4: Chase's conduct throughout the Callendar trial was marked by "manifest injustice, partiality, and intemperance" by: (1) requiring defense counsel to submit in writing to the court all questions they planned to ask a witness; (2) refusing to postpone the trial despite a proper request based on the absence of a material defense witness; (3) being rude and contemptuous of defense counsel and falsely insinuating that they wished to excite public fears; (4) making repeated and vexatious interruptions of defense counsel, inducing them to abandon their cause and their client; and (5) expressing undue concern, "unbecoming even a public prosecutor," for the conviction of the accused.

Article 5: Chase illegally ordered the arrest of Callendar even though he was not charged with a capital offense.

Article 6: Chase illegally tried Callendar during the same term in which he was indicted.

Article 7: Disregarding the duties of his office, Chase "did descend from the dignity of a judge and stoop to the level of informer" by refusing to discharge a grand jury and advising it of allegedly libelous publications with the intention of procuring the prosection of the printer, "thereby degrading his high judicial functions and tending to impair the public confidence" in the tribunals of justice.

Article 8: Disregarding the duties and dignity of his judicial character, Chase delivered to a Maryland grand jury "an intemperate and inflammatory political harangue, with the intent the excite the fears and resentment" of the grand jury against the their state government and constitution.

The Senate voted as follows:

	Guilty	Not Guilty
Article 1	16	18
Article 2	10	24
Article 3	18	16
Article 4	18	16
Article 5	0	34
Article 6	4	30
Article 7	10	24
Article 8	19	15

Because the two-thirds majority required for conviction was lacking on all counts, Justice Chase was acquitted.

James H. Peck

Judge for the District of Missouri
Articles of Impeachment Adopted: May 1, 1830
Senate Action: January 21, 1831

Article 1: In December of 1825, Judge Peck issued a decree resolving a dispute to certain territorial lands. While the matter was on appeal to the Supreme Court, Judge Peck caused to be published in a local newspaper the reasons for his decision. Counsel for the appellants responded by getting another newspaper to print a letter in which he identified the errors in Judge Peck's opinion. In response, Judge Peck, "with intention wrongfully and unjustly to oppress, imprison, and otherwise injure" appellant's counsel, had counsel arrested, held him in contempt, ordered him imprisoned for 24 hours, and suspended him from practicing before the court for 18 months, all "to the great disparagement of public justice, the abuse of judicial authority, and to the subversion of the liberties of the people of the United States."

The Senate vote was 21 for guilty, 22 for not guilty. Judge Peck was therefore acquitted.

West H. Humphreys

Judge for the District of Tennessee
Articles of Impeachment Adopted: May 19, 1862
Senate Action: June 26, 1862

Article 1: On December 29, 1860 in Nashville, Tennessee, and contrary Humphreys endeavored by public speech to incite revolt and rebellion against the Constitution and government of the United States.

Article 2: In 1861, "with the intent to abuse the high trust reposed in him as a judge," Humphreys openly and unlawfully supported and advocated the secession of the State of Tennessee.

Article 3: In 1861 and 1862, Humphreys organized arm rebellion against the United States and levied war against them.

Article 4: With Jefferson Davis and others, Humphreys conspired to oppose by force the authority of the government of the United States.

Article 5: With intent to prevent the due administration of the laws of the United States, Humphreys neglected and refused to hold court, as by law he was required to do.

Article 6: With intent to subvert the authority of the government of the United States, Humphreys unlawfully acted as judge of an illegally constituted tribunal within Tennessee. In connection with this, Humphreys: (1) caused the arrest of one Perez Dickinson, and required him to swear allegiance to the Confederacy, and when Perez refused, Humphreys ordered Dickinson to leave the State; (2) ordered the confiscation of property of citizens of the United States, especially the property of one Andrew Johnson; and (3) caused the arrest and imprisonment of citizens of the United States because of their fidelity to their obligations as citizens and their resistance to the Confederacy.

Article 7: Humphreys, as a judge of the Confederate States of America and with the intent to injure one William G. Brownlow, ordered his unlawful arrest and imprisonment.

Judge Humphreys offered no defense and made no appearance either in person or through counsel. The Senate voted as follows:

	Guilty	Not Guilty
Article 1	39	0
Article 2	36	1
Article 3	33	4
Article 4	28	10
Article 5	39	0
Article 6(1)	36	1
Article 6(2)	12	24
Article 6(3)	35	1
Article 7	35	1

Based on the guilty verdicts, the Senate then voted 38–0 to remove Judge Humphreys from office and voted 36–0 to disqualify him from holding in the future any office under the United States.

Andrew Johnson

President of the United States
Articles of Impeachment Adopted: March 2, 1868
Senate Action: May 16, 1868

President Johnson was the only southern senator not to leave Congress when the South seceded. Later, as president, he obstructed many of the Radical Reconstruction efforts of Congress. He removed every military commander in the South who was committed to carrying out the spirit of the Reconstructions acts. He also denounced Black suffrage and claimed that some of the Reconstruction Acts, passed over his veto, were unconstitutional.

In March of 1867, apparently fearing that Johnson would remove Secretary of War Stanton, the only Republican left in the cabinet after the 1866 congressional elections, Congress passed the Tenure of Office Act. This Act was designed to limit the President's power to remove subordinate officials without the Senate's consent. It required that all executive officials appointed with senatorial approval hold office until a successor had been appointed and confirmed. Thus, until the Senate agreed to a successor, senior executive officials could not be fired. A partial exception was made for cabinet officers, who were to hold office only during the term of the President who appointed them and for one month thereafter.

In August, while Congress was out of session, Johnson suspended Stanton. Although it was far from clear whether Stanton, who had been appointed by President Lincoln, was truly covered by the Act, when Congress reconvened in December Johnson sent to the Senate his reasons for suspending Stanton. He thus implicitly acknowledged that Stanton was protected by the Act. The Senate declined to concur and Stanton returned to his post. During this period, the House of Representatives rejected by a vote of 57–108 an attempt to impeach President Johnson.

On January 30, 1868, Supreme Court Justice Stephen J. Field openly announced that the Tenure of Office Act was unconstitutional and that the Court would be sure to pronounce it so. In response, the House of Representatives began an impeachment investigation against Justice Field. This investigation dropped well into the background when, on February 21st, President Johnson fired Secretary Stanton. The next day, by a vote of 103–37 the House instructed the Reconstruction Committee to inquire whether grounds for impeachment existed.

Article 1: On February 21, 1868, Johnson unlawfully issued an order for the removal of Edwin Stanton from his office as Secretary of War.

Article 2: On February 21, 1868, Johnson unlawfully issued a letter to Major General Lorenzo Thomas authorizing him to act as Secretary of War ad interim, despite the lack of a vacancy in that office.

Article 3: On February 21, 1868, while the Senate was in session, Johnson unlawfully appointed Lorenzo Thomas as Secretary of War ad interim without the advice and consent of the Senate.

Article 4: On February 21, 1868, Johnson illegally conspired with General Thomas to hinder and prevent Secretary of War Stanton from holding his office.

Article 5: On February 21, 1868, Johnson illegally conspired with General Thomas to prevent and hinder the Tenure of Office Act.

Article 6: On February 21, 1868, Johnson conspired with General Thomas to take possession of property of the United States Department of War, in violation of an 1861 Act to define and punish certain conspiracies.

Article 7: On February 21, 1868, Johnson conspired with General Thomas to take possession of property of the United States Department of War, in violation of the Tenure of Office Act.

Article 8: On February 21, 1868, with the intent unlawfully to control the disbursements of the Department of War, and in violation of the Tenure of Office Act, Johnson delivered a letter to General Thomas authorizing him to take charge of the Department of War.

Article 9: On February 22, 1868, as Commander in Chief of the armed forces, Johnson instructed Major General William Emory to disregard and treat as unconstitutional the Tenure of Office Act, particularly that portion which required all military orders to be issued through the General of the Army, and to obey such orders as Johnson may give directly.

Article 10: Johnson attempted "to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States" by delivering loud, intemperate, inflammatory, and scandalous harangues against the Congress.

Article 11: On August 18, 1866, Johnson delivered a public speech in which he declared that the 39th Congress was not a lawful Congress of the United States, but a Congress of only some of them, in an effort to deny the validity of congressional legislation and the validity of proposed amendments to the Constitution.

On May 16th, the Senate voted on Article 11. The vote was 35–19 for guilty, one vote short of the two-thirds majority needed for conviction. The Senate then adjourned until May 26th. On May 26th, the Senate voted on Articles 2 and 3. Again the vote was 35–19. The Senate then voted to adjourn the impeachment trial and

the Chief Justice announced, without objection, a judgment of acquittal. In early 1875, Johnson was elected to the Senate by the Tennessee legislature. He served there until his death in July, 1875.

William W. Belknap

Former Secretary of War
Articles of Impeachment Adopted: April 3, 1876
Senate Action: August, 1876

On March 2, 1876, William Belknap resigned as Secretary of War. The House nevertheless proceeded to impeach him for his alleged misconduct while in office.

Article 1: On October 8, 1870, Belknap appointed Caleb P. Marsh to maintain a trading post at Fort Sill. On the same day, Marsh contracted with John S. Evans for Evans to fill the commission as posttrader at Fort Sill in exchange for a yearly payment to Marsh of $12,000. On October 10th, at the request of Marsh, Belknap appointed Evans to maintain the trading establishment at Fort Sill. On November 2, 1870, and on four more occasions over the next year, Belknap unlawfully received $1,500 payments from Marsh in consideration of allowing Evans to maintain a trading establishment at Fort Sill.

Article 2: Belknap, after "willfully, corruptly, and unlawfully" taking $1,500 from Marsh to permit Evans to maintain a trading post at Fort Sill, corruptly allowed Evans to maintain that trading post.

Article 3: From October 1870 to December 1875, Belknap received half of every payment Evans made to Marsh, during which period Belknap, "basely prostituting his high office to his lust for private gain" continued to allow Evans to serve as posttrader, all to the great injury of the officers and soldiers of the Army of the United States.

Article 4: [This article details, in 17 separate specifications, the 17 separate payments, ranging from $750 to $1,700, Belknap received from Marsh in consideration of allowing Evans to remain posttrader.]

Article 5: Belknap permitted Evans to remain posttrader until March 2, 1876 despite knowing that Evans had contracted to pay Marsh for his influence in securing the appointment; and that, in order to make sure that the payments to Marsh would continue, Belknap received or caused his wife to receive large sums of money.

Former Secretary Belknap appeared through counsel, but refused to enter a plea, on the grounds that as a private citizen he was not subject to impeachment. After trial, the Senate voted as follows:

	Guilty	Not Guilty
Article 1	35	25
Article 2	36	25
Article 3	36	25
Article 4	36	25
Article 5	37	25

As a result, Mr. Belknap was acquitted. Twenty-two of the Senators who voted to acquit (as well as two who voted to convict) believed the Senate lacked jurisdiction.

Charles H. Swayne

Judge for the Northern District of Florida
Articles of Impeachment Adopted: January 18, 1905
Senate Action: February 27, 1905

Article 1: On April 20, 1897, knowing that a far less sum was due, and for the purpose of obtaining payment, Swayne made a false claim in the amount of $230 against the United States for travel expenses relating to holding court in Waco, Texas. In doing so, he signed a false certificate.

Article 2: Swayne, knowing the rules on reimbursement for expenses, falsely certified that his expenses in traveling to, holding court in, and returning

from Tyler, Texas in December 1900 were $10 per day for 31 days, for which he received $310, when in fact his actual expenses were less.

Article 3: Swayne, knowing the rules on reimbursement for expenses, falsely certified that his expenses in traveling to, holding court in, and returning from Tyler, Texas in January 1903 were $10 per day for 41 days, for which he received $410, when in fact his actual expenses were less.

Article 4: In 1893, for the purpose of transporting himself, his family, and his friends from Delaware to Florida, Swayne unlawfully appropriated to his own use a railroad car owned by a railroad company which was under receivership in his court. In addition, and without paying therefor, Swayne was supplied by the receiver with provisions which he and his friends consumed, as well as the services of a conductor. Then, in his capacity as judge, Swayne allowed the receiver to claim these expenses as part of the necessary costs of operating the railroad company.

Article 5: In 1893, for the purpose of transporting himself, his family, and his friends from Florida to California, Swayne unlawfully appropriated to his own use a railroad car owned by a railroad company which was under receivership in his court. In addition, and without paying therefor, Swayne was supplied by the receiver with provisions which he and his friends consumed, as well as the services of a conductor. Then, in his capacity as judge, Swayne allowed the receiver to claim these expenses as part of the necessary costs of operating the railroad company.

Article 6: When Congress altered the boundaries of the northern district of Florida in 1894 in a way that removed Swayne's residence from the district, Swayne did not acquire a new residence within the district for more than six years, in violation of a law requiring judges to reside in the district in which they sit.

Article 7: Swayne, "totally disregarding his duty" to reside within the newly defined district, did not do so for a period of about nine years.

Article 8: On November 12, 1901, Swayne "did maliciously and unlawfully" hold an attorney named E.T. Davis in contempt of court, for which Swayne fined him $100 and imprisoned him for ten days.

Article 9: On November 12, 1901, Swayne "did knowingly and unlawfully" hold an attorney named E.T. Davis in contempt of court, for which Swayne fined him $100 and imprisoned him for ten days.

Article 10: On November 12, 1901, Swayne "did maliciously and unlawfully" hold an attorney named Simeon Belden in contempt of court, for which Swayne fined him $100 and imprisoned him for ten days.

Article 11: On November 12, 1901, Swayne "did knowingly and unlawfully" hold an attorney named Simeon Belden in contempt of court, for which Swayne fined him $100 and imprisoned him for ten days.

Article 12: On December 9, 1902, Swayne "did unlawfully and knowingly" hold W.C. O'Neal in contempt of court, for which Swayne imprisoned him for 60 days.

Judge Swayne was acquitted after the Senate voted as follows:

	Guilty	Not Guilty
Article 1	33	49
Article 2	32	50
Article 3	32	50
Article 4	13	69
Article 5	13	69
Article 6	31	51
Article 7	19	63
Article 8	31	51
Article 9	31	51
Article 10	31	51
Article 11	31	51
Article 12	35	47

Robert W. Archbald

Judge for the Court of Appeals for the Third Circuit
Articles of Impeachment Adopted: July 11, 1912
Senate Action: January 13, 1913

Article 1: On March 31, 1911, while assigned to the United States Commerce Court, Archbald induced the Erie Railroad Company, which was a litigant in several cases before the Commerce Court, to sell him and a partner certain property owned by a subsidiary corporation. In doing this, Archbald "willfully, unlawfully, and corruptly took advantage of his official position of a judge" in order to profit for himself.

Article 2: In August 1911, Archbald willfully, unlawfully, and corruptly used his influence as a judge of the Commerce Court to induce parties in litigation pending before the court and before the Interstate Commerce Commission to settle their dispute by having one party sell two-thirds of its stock to another party.

Article 3: In October 1911, Archbald unlawfully and corruptly used his official position and influence as a judge of the Commerce Court to cause a litigant before that court to lease him a culm dump containing large coal deposits.

Article 4: In late 1911 and early 1912, Archbald communicated secretly with the attorney for one party in a case before the Commerce Court and advised the attorney to see one of the witnesses and get an explanation and interpretation of the testimony given by the witness. He then secretly informed the attorney of the court's discovery of evidence contrary to the statements of the attorney and advised the attorney to submit additional arguments. Archbald did this all without the knowledge or consent of the Commerce Court.

Article 5: In 1904, Archbald wrongfully attempted to use his influence to assist Frederick Warnke in obtaining a lease of a culm dump owned by Philadelphia & Reading Coal & Iron Co., a company which also owns a railroad engaged in interstate commerce. After Archbald's efforts proved unsuccessful, he later accepted a promissory note for $500 from Warnke for making the attempt and for other favors.

Article 6: In 1911, Archbald unlawfully, improperly, and corruptly attempted to use his influence as a judge to induce the officers of Lehigh Valley Coal Co. to purchase an interest in an 800-acre tract of coal land.

Article 7: In 1908, Archbald wrongfully and corruptly agreed to purchase the stock in a gold-mining scheme in Honduras with W.W. Rissinger, who owned the Old Plymouth Coal Co., a plaintiff in several cases pending before Archbald. Archbald later ruled for the Old Plymouth on several legal issues, resulting in settlements by which Old Plymouth recovered approximately $28,000.

Article 8: In 1909, Archbald drew a promissory note for $500 in his favor and had it signed by John Henry Jones. At that time, Christopher and William Boland owned a coal company engaged in litigation involving a large sum of money and over which Archbald was presiding. Archbald agreed that the note, bearing his name and indorsement, should be presented to the Bolands in an effort to get them to discount it. This was done with the intent that Archbald's name on the note would coerce or induce them to do so.

Article 9: In 1909 Archbald drew another promissory note in his favor for $500 and had it signed by John Henry Jones. Knowing that his own indorsement was not sufficient to secure money in normal commercial channels, Archbald wrongfully permitted the indorsed note to be presented for discount at the office of C.H. Von Storch, in whose favor Archbald had recently ruled in a lawsuit. Storch did discount the note. The note has never been paid.

Article 10: On May 1, 1910, Archbald received a large sum of money from Henry W. Cannon for the purpose of defraying the cost of a pleasure trip to Europe. At that time, Cannon was a stockholder and officer of various interstate railway companies that in due course were likely to be interested in litigation pending in the Commerce Court and presided over

by Archbald. Accepting this money was improper and brought Archbald's office into disrepute.

Article 11: In May 1910, Archbald received more than $500 from attorneys who practiced before him, the money having been solicited by court officers appointed by Archbald.

Article 12: On April 9, 1901, Archbald appointed J.B. Woodward, an attorney for Lehigh Valley Railroad Co., as jury commissioner for his district court. While serving as jury commissioner, Woodward continued to act as attorney for the railroad, which Archbald well knew.

Article 13: During his time as a district judge and as a judge assigned to the Commerce Court, Archbald wrongfully sought to obtain credit from and through persons who were interested in litigation over which he presided. He speculated for profit in the purchase and sale of various coal properties, and unlawfully used his position as judge to influence officers of various railroad companies to enter into contracts in which he had a financial interest, which such companies had litigation pending in his court.

The Senate voted as follows:

	Guilty	Not Guilty
Article 1	68	5
Article 2	46	25
Article 3	60	11
Article 4	52	20
Article 5	66	6
Article 6	24	45
Article 7	29	36
Article 8	22	42
Article 9	23	39
Article 10	1	65
Article 11	11	51
Article 12	19	46
Article 13	42	20

After the guilty verdict was announced, the Senate voted to remove Judge Archbald from office. Then, by a vote of 39–35, it disqualified him from holding any office under the United States in the future.

George English

Judge for the Eastern District of Illinois
Articles of Impeachment Adopted: April 1, 1926
Senate Action: December 13, 1926

Article 1: English abused his office tyranny and oppression, thereby bringing the administration of justice in his court into disrepute, by (1) disbarring Thomas Webb and later Charles A. Karch without preferring charges against either, without prior notice to either, and without permitting either to be heard in his own defense; (2) unlawfully and deceitfully summoning several state and local officials to appear before him in an imaginary case, placing them in a jury box, and then in a loud, angry voice and using profane and indecent language, denouncing them without naming any act of misconduct and threatening to remove them from their offices; (3) intending to coerce the minds of certain jurymen by telling them that he would send them to jail if they did not convict a defendant whom the judge said was guilty; (4) unlawfully summoning an editor of the East St. Louis Journal and a reporter for the St. Louis Post-Dispatch and in angry and abusive language threatening them with imprisonment if they published truthful facts relating to the disbarment of Karch; and (5) unlawfully summoning the publisher of the Carbondale Free Press and threatening to imprison him for printing an editorial and some handbills.

Article 2: English engaged in a course of unlawful and improper conduct, "filled with partiality and favoritism," in connection with bankruptcy cases within the district. He did this by, among other things: (1) appointing Charles B. Thomas as the referee for all such cases; (2) unlawfully

changing the rules of bankruptcy for the district to allow Thomas both to appoint friends and relatives as receivers and to charge the cost of expensive office space to the United States and the estates in bankruptcy; and (3) allowing Thomas to hire English's son at a large compensation to be paid out of funds of the estates in bankruptcy.

Article 3: English corruptly extended partiality and favoritism, bringing the administration of justice into disrepute, by refusing to appoint the temporary receivers suggested by counsel for the parties in interest in a major case unless Charles Thomas was appointed attorney for such receivers. When they agreed, he retroactively increased the salary for Thomas, producing a total charge of $43,350, even though Thomas' services were not necessary. English did similar things in other cases. In a criminal case, English sentenced the convicted defendant to four months and a $500 fine. When the defendant's counsel withdrew and was replaced by Thomas, English vacated the sentence of imprisonment. For this, the defendant paid Thomas $2,500. English acted on the matter without the presence of Thomas in the court and without investigation, in order to show favoritism to Thomas, to whom English was under financial obligation. English then received $1,435 from Thomas in return for the favoritism extended.

Article 4: In conjunction with Thomas, English corruptly and improperly deposited, transferred, and used bankruptcy funds for the pecuniary benefit of himself and Thomas.

Article 5: English repeatedly treated members of the bar in a coarse, indecent, arbitrary, and tyrannical manner, so as to hinder them in their duties and deprive their clients of the benefits of counsel. He wickedly and illegally refused to allow parties the benefit of trial by jury. He conducted himself in making decisions and issuing orders so as to inspire the widespread belief that matters in his court were not decided on their merits, but with partiality and favoritism.

Judge English resigned his office on November 4, 1926. On December 11th, the House managers of the impeachment reported that Judge English's resignation "in no way affects the right of the Senate" to hear and determine the impeachment charges. Nevertheless, they recommended that the impeachment proceedings against him be discontinued. The House then passed a resolution indicating its desire not to urge the articles of impeachment before the Senate. On December 13th, the Senate concurred by a vote of 70–9.

Harold Louderback

Judge for the Northern District of California
Articles of Impeachment Adopted: February 24, 1933
Senate Action: May 24, 1933

Article 1: Louderback abused the power of his office through tyranny, oppression, favoritism, and conspiracy, and brought the administration of justice within the district into disrepute. In particular, on March 11, 1930, he discharged Addison G. Strong as receiver in a case after he attempted to coerce Strong to hire Douglas Short as attorney for the receiver by promising to allow large fees and threatening to reduce fees if Short were not appointed. He then appointed Short, who had been suggested by Sam Leake, to whom Louderback was under personal obligation. Leake had previously conspired with Louderback to rent lodgings for Louderback in San Francisco under Leake's name, so that Louderback could reside in San Francisco while maintaining a fictitious residence in Contra Costa County, so that a lawsuit Louderback expected to be filed against him could be removed to Contra Costa County. Short did receive exorbitant fees for his services as attorney for the receiver, and Leake received a kickback from Short.

Article 2: Louderback, filled with partiality and favoritism, improperly granted excessive and exorbitant allowances to the receiver and attorney he had appointed in a case over which he had improperly acquired jurisdiction. When his orders in the case were reversed on appeal, and Louderback was directed to order the receiver to turn the property over to the state insurance commissioner, Louderback improperly and illegally conditioned that order on the commissioner's agreement not to appeal the

award of fees Louderback had granted to the receiver and attorney. This allowed Louderback to favor and enrich his friends at the expense of the litigants and parties in interest in the case.

Article 3: Louderback misbehaved in office, resulting in expense, annoyance, and hindrance to the litigants, by appointing Guy H. Gilbert as receiver in a case, knowing that Gilbert was incompetent and unqualified for that position. He then refused the litigants a hearing on the appointment and caused them to be misinformed of his actions.

Article 4: For the sole purpose of enriching his friends, Louderback appointed a receiver on an improper application in a case involving Prudential Holding Co. Louderback then refused to give proper consideration to Prudential's petition to remove the receiver. When Prudential became the subject of a bankruptcy case, Louderback improperly and illegally took jurisdiction over the case, and appointed the receiver as receiver in bankruptcy, causing Prudential unnecessary expense and depriving it of the right to fair and impartial consideration of its rights.

Article 5: During his tenure as judge and in the manner in which he issued orders, appointed receivers, and appointed attorneys for receivers, Louderback displayed "a high degree of indifference to the litigants" and inspired the widespread belief that matters in his court were not decided on their merits, but with partiality and favoritism, all of which is prejudicial to the dignity of the judiciary.

The House later amended Article 5, the cumulative charge, to make it more detailed. The Senate acquitted Judge Louderback by voting as follows:

	Guilty	Not Guilty
Article 1	34	42
Article 2	23	47
Article 3	11	63
Article 4	30	47
Article 5	45	34

Halstead L. Ritter

Judge for the Southern District of Florida
Articles of Impeachment Adopted: March 2, 1936; Amended: March 30, 1936
Senate Action: April 17, 1936

Article 1: In July, 1930, Ritter awarded his former law partner an advance of $2,500 for his services in a receivership proceeding. Ritter, aware of the appearance of impropriety, then asked another judge in the district to fix the final fee allowance. The other judge did so, setting the fee at $15,000. Nevertheless, Ritter then allowed an additional $75,000. When the amount was paid, the former partner in turn paid Ritter $4,500 in cash, which Ritter corruptly and unlawfully accepted for his own use and benefit.

Article 2: In 1929, Ritter conspired with his former law partner and others to place a hotel into receivership in proceeding before Ritter. The former partner then filed the action without authorization from and contrary to the instructions of the parties in interest. When the matter came before Ritter, he refused the parties' request to dismiss the action and appointed one of the other conspirators receiver. Then follow the facts alleged in Article 1. Ritter willfully failed to perform his duty to conserve the assets of the company in receivership. Instead, he permitted their waste and dissipation, and personally profited thereby.

Article 3: Ritter violated the Judicial Code of the United States by continuing to work on a case after he became a judge, and he solicited and accepted additional $2,000 in fees for such work.

Article 4: Ritter violated the Judicial Code of the United States by working on another case after he became a judge, for which he received $7,500.

Article 5: Ritter violated federal law by willfully attempting to evade federal tax on income earned in 1929. Specifically, he received $12,000 in unreported income, $9,500 of which relates to matters described in Articles 3 & 4.

Article 6: Ritter violated federal law by willfully attempting to evade federal tax on income earned in 1930. Specifically, he received $5,300 in unreported income, $2,000 of which relates to matters described in Article 1.

Article 7: The reasonable and probable consequences of Ritter's actions was "to bring his court into scandal and disrepute," to the prejudice of the court and public confidence in the administration of justice therein. Specifically, in addition to the conduct in Articles 1–6, when one of his decisions came under public criticism, Ritter agreed to recuse himself from the case if the city commissioners of Miami passed a resolution expressing confidence in his integrity. Ritter thereby bartered his judicial authority for a vote of confidence.

The Senate voted on the articles of impeachment as follows:

	Guilty	Not Guilty
Article 1	55	29
Article 2	52	32
Article 3	44	39
Article 4	36	48
Article 5	36	48
Article 6	46	37
Article 7	56	28

As a result, Judge Ritter was acquitted on the first six articles, each of which charged specific wrongdoing, and was convicted on the final, general article charging Ritter with bringing his court into scandal and disrepute. The chair ruled that conviction carries with it removal from office, without a further vote being necessary. The Senate then voted 76–0 not to disqualify Ritter from holding future office.

Harry Claiborne

Judge for the District of Nevada
Articles of Impeachment Adopted: July 22, 1986
Senate Action: October 9, 1986

Article 1: In June 1980, and in violation of federal law, Claiborne willfully and knowingly filed a federal income tax return for the year 1979 that failed to report a substantial amount of income.

Article 2: In June 1981, and in violation of federal law, Claiborne willfully and knowingly filed a federal income tax return for the year 1980 that failed to report a substantial amount of income.

Article 3: On August 10, 1984, Claiborne was found guilty of making and subscribing a false income tax return for the calendar years 1979 and 1980.

Article 4: By willfully and knowingly falsifying his income on his federal tax returns for 1979 and 1980, Claiborne "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the federal courts and the administration of justice by the courts."

After a trial committee received the evidence, the entire Senate voted on the articles of impeachment as follows:

	Guilty	Not Guilty
Article 1	87	10
Article 2	90	7
Article 3	46	17
Article 4	89	8

Judge Claiborne was therefore convicted on counts 1, 2 and 4 but acquitted on count 3 (although more than two-thirds of those *voting* voted to convict, fewer than two-thirds of those *present* voted to convict; see U.S. Const. Art. I, § 3).

Alcee L. Hastings

Judge for the Southern District of Florida
Articles of Impeachment Adopted: August 3, 1988
Senate Action: October 20, 1989

Article 1: In 1981, Hastings and William Borders, an attorney, engaged in a corrupt conspiracy to obtain $150,000 from defendants in *United States* v. *Romano*, a case tried before Judge Hastings, in return for the imposition of sentences which would not require incarceration.

Article 2: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that he and Borders never made any agreement to solicit a bribe from defendants in the Romano case.

Article 3: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that he and Borders never agreed to modify the sentences of defendants in the Romano case in return for a bribe from those defendants.

Article 4: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that he and Borders never agreed that, in return for a bribe, Hastings would modify an order he previously issued that property of the Romano defendants be forfeited.

Article 5: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that his appearance at the Fontainebleau Hotel on September 16, 1981 was not part of a plan to demonstrate his participation in a bribery scheme and that he had not expected to meet Borders there.

Article 6: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that he did not expect Borders to appear at his room at the Sheraton Hotel on September 12, 1981.

Article 7: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that his motive for instructing his law clerk to prepare a new forfeiture order in the Romano case was based on his concern that the order be revised before the law clerk's scheduled departure, when in fact the instruction was in furtherance of a bribery scheme.

Article 8: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that his October 5, 1981, telephone conversation with Borders was about writing letters to solicit assistance for Hemphill Pride, when in fact it was a coded conversation in furtherance of a conspiracy with Borders to solicit a bribe from defendants in the Romano case.

Article 9: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that three documents that purported to be drafts of letters to assist Hemphill Pride had been written by Hastings on October 5, 1981, and were the letters referred to by Hastings in his October 5th telephone conversation with Borders.

Article 10: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that on May 5, 1981 he talked to Hemphill Pride by placing a telephone call to 803–758–8825.

Article 11: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that on August 2, 1981, he talked to Hemphill Pride by placing a telephone call to 803–782–9387.

Article 12: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that on September 2, 1981, he talked to Hemphill Pride by placing a telephone call to 803–758–8825.

Article 13: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that 803–777–7716 was a telephone number through which Hemphill Pride could be contacted in July 1981.

Article 14: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly and falsely stated that on October 9, 1981,

he called his mother and Patricia Williams from his hotel room at the L'Enfant Plaza Hotel.

Article 15: In 1983, while Hastings was a defendant in a criminal case and under oath, Hastings knowingly made a false statement concerning his motives for taking a plane on October 9, 1981, from Baltimore-Washington International Airport rather than from Washington National Airport.

Article 16: On September 6, 1985, Hastings revealed highly confidential information that he learned as the judge supervising a wiretap. As a result of this improper disclosure, certain investigations then being conducted by law enforcement agents of the United States were thwarted and ultimately terminated.

Article 17: Hastings, through a corrupt relationship with Borders, giving false testimony under oath, fabricating false documents, and improperly disclosing confidential information acquired by him as the supervisory judge of a wiretap, undermined confidence in the integrity and impartiality of the judiciary and betrayed the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts.

Prior to Senate action, Hastings had been acquitted in a criminal trial for bribery and conspiracy, but his alleged co-conspirator, Borders, had been convicted in a separate trial. During the impeachment trial, a committee ofthe Senate received the evidence. Prior to voting on the articles of impeachment, and with the consent of both the House managers and counsel for Judge Hastings, the entire Senate decided that if it acquitted on Article 1, no vote should be taken on Articles 2–5, 6 or 7. Instead, a judgment of acquittal on those charges should be automatically entered. The Senate then began to vote. After voting on the first six articles, the Senate decided it would be unnecessary to vote on Articles 10–15. The votes were as follows:

	Guilty	Not Guilty
Article 1	69	26
Article 2	68	27
Article 3	69	26
Article 4	67	28
Article 5	67	26
Article 6	48	47
Article 7	69	26
Article 8	68	27
Article 9	70	25
Article 16	0	95
Article 17	60	35

Judge Hastings was therefore deemed removed from office. In 1992, Hastings was elected to and became a member of the House of Representatives. He is currently in his third term.

Walter L. Nixon

Judge for the Southern District of Mississippi
Articles of Impeachment Adopted: May 10, 1989
Senate Action: November 3, 1989

Article 1: On July 18, 1984, Nixon testified before a federal grand jury investigating Nixon's business relationship with Wiley Fairchild and the handling of the criminal prosecution of Fairchild's son for drug smuggling. In doing so, he falsely denied having ever discussed the Fairchild case with District Attorney Paul Holmes.

Article 2: On July 18, 1984, Nixon testified before a federal grand jury investigating Nixon's business relationship with Wiley Fairchild and the handling of the criminal prosecution of Fairchild's son for drug smuggling. In doing so, he falsely asserted that he had nothing whatsoever to do with the Fairchild case and had never influenced anybody with respect to it.

Article 3: Nixon "has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and

the administration of justice by the Federal courts." He did this, after entering into an investment with Wiley Fairchild, by concealing from federal investigators and from a grand jury conversations Nixon had with Fairchild, the District Attorney, and others about the prosecution of Fairchild's son.

In 1986, Nixon was convicted on federal criminal charges for the conduct described in Articles 1 and 2. At the time of his impeachment trial, he had exhausted his appeals and was serving a 5-year sentence. The Senate appointed a committee to receive the evidence at trial. The whole Senate then voted on the articles of impeachment as follows:

	Guilty	Not Guilty
Article 1	89	8
Article 2	78	19
Article 3	57	40

As a result of the conviction on Articles 1 and 2, Nixon was removed from office, without a separate vote.

United States Impeachments, 1789 to present

Official	Office	Dates	Grounds	Result
William Blount	U.S. Senator (Tenn.)	1798–99	Conspiracy to aid a foreign power despite official U.S. neutrality.	Expelled; impeachment case then dismissed for lack of jurisdiction.
John Pickering	Judge (D.N.H.)	1803–04	Improper rulings, drunkenness & blasphemy	Convicted and removed from office.
Samuel Chase	Supreme Court Justice	1804–05	Bias in charging a grand jury and delivering an inflammatory political harangue to another.	Acquitted.
James H. Peck	Judge (D. Mo.)	1830–31	Improperly holding in contempt a lawyer who had criticized his rulings.	Acquitted.
West H. Humphreys	Judge (D. Tenn.)	1862	Incitement to revolt & rebellion	Convicted, removed, and disqualified from future office.
Andrew Johnson	President	1867–68	Violation of the Tenure of Office Act by firing Secretary of War Stanton.	Acquitted.
William W. Belknap	Secretary of War	1876	Bribery	Acquitted after resignation, largely on jurisdictional grounds.
Charles H. Swayne	Judge (N.D. Fla.)	1903–05	Falsifying expense accounts & using property held in a receivorship.	Acquitted.
Robert W. Archbald	Judge (3d Cir.)	1912–13	Bribery & hearing cases in which he had a financial interest	Convicted, removed, and disqualified from future office.
George English	Judge (E.D. Ill.)	1926	Habitual malperformance	No action taken by Senate after his resignation.
Harold Louderback	Judge (N.D. Cal.)	1932–33	Using favoritism in appointing receivers	Acquitted.
Halstead L. Ritter	Judge (S.D. Fla.)	1936	Taking kickbacks, tax evasion & bringing his court into scandal and disrepute.	Convicted only of last charge and removed from office.
Harry Claiborne	Judge (D. Nev.)	1986	Tax evasion	Convicted after committee trial and removed from office.
Alcee L. Hastings	Judge (S.D. Fla.)	1988–89	Conspiracy to solicit a bribe & perjury (acquitted in criminal trial).	Convicted after committee trial and removed from office.
Walter L. Nixon	Judge (S.D. Miss.)	1988–89	False statements to a grand jury	Convicted after committee trial and removed from office.
Near impeachments				
Mark W. Delahay	Judge (D. Kan.)	1873	Questionable financial dealings	Resigned after House voted to impeach but before articles of impeachment were adopted.
Richard M. Nixon	President	1974	Obstruction of justice	Resigned after Judiciary Committee voted to impeach but before whole House voted.
Robert Collins	Judge (E.D. La.)	1993	Bribery	Resigned following his criminal conviction.
Robert P. Aguilar	Judge (N.D. Cal.)	1996	Obstruction of justice	Retired with full pension as part of a deal to avoid impeachment.

[From The Star Ledger (New Jersey) Oct. 28, 1998.]

RODINO FINDS NO EVIDENCE TO IMPEACH

(By John Hassell)

President Clinton should not be impeached based on the evidence released so far, according to Peter Rodino, who as chairman of the House Judiciary Committee presided over impeachment hearings for President Nixon in 1974.

In his first extensive comments since the House voted to begin an open-ended inquiry into charges stemming from Clinton's relationship with White House intern Monica Lewinsky, Rodino said the allegations do not meet the standard of high crimes and misdemeanors.

If no other evidence emerges, Rodino said, "I would say that this does not rise to that level where we have to consider it to be a ground to remove from office the President of the United States."

Rodino, a former New Jersey congressman who oversaw a fractious committee during the turbulent days of Watergate, is widely credited with crafting a bipartisan consensus for articles of impeachment against Nixon, and his name has been invoked like a mantra in the proceedings against Clinton. Except for one brief interview Sept. 6 with ABC, however, Rodino has remained silent about Clinton's predicament.

Yesterday, in an hour-long interview with Steve Adubato, the host of New Jersey Network's "Caucus NJ," Rodino rendered his judgment on the charges presented by independent counsel Kenneth W. Starr for the first time.

"There has been, of course, this failure of character," Rodino said of Clinton's affair with Lewinsky. "The question is, has he committed those kinds of acts that are impeachable. . . . I would say that this does not rise to that level."

Although the U.S. Constitution is intentionally vague about the standards for impeachment, Rodino's committee worked hard to produce a workable yardstick. They concluded that "in an impeachment proceeding, a president is called to account for abusing powers that only a president possesses."

As Rodino said yesterday, an impeachable offense must "be grave in its effect on the system of government." He questioned whether Clinton had done anything that satisfied that definition.

The former Democratic congressman, now 89, who served in the House for 40 years, was particularly critical of the decision by Starr to include "tawdry" sexual material in his report and the decision by GOP leaders to release it, along with Clinton's grand jury testimony.

"It poisons the well. We don't need to hear it," Rodino said. "It certainly doesn't have any relevancy" to the central questions of whether Clinton "perverted the system that we live under."

During the Nixon hearings, which lasted nine months and resulted in three articles of impeachment, the committee worked mainly behind closed doors, despite public clamor for details and political pressure to get the process wrapped up swiftly.

"There were many things that we could have released—I won't talk about them now—but we didn't," Rodino said yesterday. "We didn't want to inflame passions. We didn't consider them relevant to whether or not there were grounds for impeachment."

When the Watergate hearings began, there were many questions about whether Rodino, an untested committee chairman from the notoriously corrupt political milieu of Newark, was capable of preventing the process from becoming hopelessly partisan.

The only precedent available to Congress was the 1868 impeachment of President Andrew Johnson—an effort that historians agree failed largely because it was a partisan exercise.

In the afterglow of the Nixon hearings, after which Nixon resigned to avoid a vote by the full House, the performance of Rodino and his committee of 21 Democrats and 17 Republicans was hailed as a model for future impeachment deliberations.

Based on that model, Rodino said the hearings on Clinton's fate, so far, raise warning flags.

"I've heard some and I wonder," he said. "I am seriously concerned, because I believe there is not yet the total immersion in what the Constitution says."

Above all, Rodino said he hopes Congress "will recognize that this is something that is going to be there forever. This is something that is going to be written into history. It's not for this generation. It's for other generations.

"We're talking about a constitutional issue of the highest importance," he said. "The more I read the Constitution, the more I realize the gravity of the situation."

Today, the House Judiciary Committee is chaired by Rep. Henry Hyde, R–Ill., a conservative known best for his uncompromising opposition to abortion. Members of both parties call him fair. He chairs a committee of 20 Republicans and 16 Democrats.

Rodino said it is crucial that Hyde be given the same freedom he enjoyed to run the committee hearings without interference from the leaders of his party.

"I do know Mr. Hyde and I respect him," Rodino said. "Unfortunately, I do know that Henry Hyde, when asked certain questions, has responded that he isn't the sole player."

In his day, Rodino and House Republicans worked out a process that gave the proceeding a trial-like atmosphere. Committee lawyers presented evidence, and the committee invited Nixon's personal lawyer, James St. Clair, to respond.

The ultimate result was a vote on three articles of impeachment in which as many as six and as few as two Republicans sided with the Democrats. Although it wasn't complete bipartisanship, the Republican votes boosted public confidence.

The current crisis requires the same approach, Rodino said.

"The people out there are yearning and wanting nonpartisanship," he said. "The Constitution is neither Republican or Democrat."

Rodino concluded the interview with Adubato—which will air in two installments on New Jersey Network and WNET Channel 13 the weekends of Nov. 14 and Nov. 21—with a description of how he felt on the day the Nixon proceedings came to a close.

"I went to my little cubbyhole, picked up the telephone and called my wife," he said. "And I broke down and cried. I wept. I wondered whether I had done the right thing. I wondered whether I lived up to the Constitution. I prayed that I had."

U.S. HOUSE OF REPRESENTATIVES,
Washington, DC, November 6, 1998.

Hon. NEWT GINGRICH,
Speaker of the House of Representatives,

Hon. RICHARD GEPHARDT,
Minority Leader of the House of Representatives,

Hon. HENRY HYDE,
Chairman of the House Judiciary, Committee,

Hon. JOHN CONYERS,
Ranking Member, House Judiciary Committee.

DEAR MR. SPEAKER, MESSRS. GEPHARDT, HYDE AND CONYERS: Did President Clinton commit "high Crimes and Misdemeanors" warranting impeachment under the Constitution? We, the undersigned professors of law, believe that the misconduct alleged in the report of the Independent Counsel, and in the statement of Investigative Counsel David Schippers, does not cross that threshold.

We write neither as Democrats nor as Republicans. Some of us believe that the President has acted disgracefully, some that the Independent Counsel has. This letter has nothing to do with any such judgments. Rather, it expresses the one judgment on which we all agree: that the allegations detailed in the Independent Counsel's referral and summarized in Counsel Schippers's statement do not justify presidential impeachment under the Constitution.

No existing judicial precedents bind Congress's determination of the meaning of "high Crimes and Misdemeanors." But it is clear that of Congress would violate their constitutional responsibilities if they sought to impeach and remove the President for misconduct, even criminal misconduct, that fell short of the high constitutional standard required for impeachment.

The President's independence from Congress is fundamental to the American structure of government. It is essential to the separation of powers. It is essential to the President's ability to discharge such constitutional duties as vetoing legislation that he considers contrary to the nation's interests. And it is essential to governance whenever the White House belongs to a party different from that which controls the Capitol. The lower the threshold for impeachment, the weaker the President. If the President could be removed for any conduct of which Congress disapproved, this fundamental element of our democracy—the President's independence from Congress—would be destroyed. It is not enough, therefore, that Congress strongly disapprove of the President's conduct. Under the Constitution, the Presi-

dent cannot be impeached unless he has committed "Treason, Bribery, or other high Crimes and Misdemeanors."

Some of the charges raised against the President fall so far short of this high standard that they strain good sense: for example, the charge that the President repeatedly declined to testify voluntarily or pressed a debatable privilege claim that was later judicially rejected. Such litigation "offenses" are not remotely impeachable. With respect, however, to other allegations, careful consideration must be given to the kind of misconduct that renders a President constitutionally unfit to remain in office.

Neither history nor legal definitions provide a precise list of high crimes and misdemeanors. Reasonable people have differed in interpreting these words. We believe that the proper interpretation ofthe Impeachment Clause must begin by recognizing treason and bribery as core or paradigmatic instances, from which the meaning of "other high Crimes and Misdemeanors" is to be extrapolated. The constitutional standard for impeachment would be very different if different offenses had been specified. The clause does not read, "Treason, Felony, or other Crime" (as does Article IV, Section 2 of the Constitution), so that any violation of a criminal statute would be impeachable. Nor does it read, "Arson, Larceny, or other high Crimes and Misdemeanors," implying that any serious crime, of whatever nature, would be impeachable. Nor does it read, "Adultery, Fornication, or other high Crimes and Misdemeanors," implying that any conduct deemed to reveal serious moral lapses might be an impeachable offense.

When a President commits treason, he exercises his *executive powers*, or uses information obtained by virtue of his *executive powers*, deliberately to aid an enemy. When a President is bribed, he exercises or offers to exercise his *executive powers* in exchange for corrupt gain. Both acts involve the criminal exercise of presidential powers, converting those awful powers into an instrument either of enemy interests or of purely personal gain. We believe that the critical, distinctive feature of treason and bribery is grossly derelict exercise of official power (or, in the case of bribery to obtain or retain office, gross criminality in the pursuit of official power). Non-indictable conduct might rise to this level. For example, a President might be properly impeached if, as a result of drunkenness, he recklessly and repeatedly misused executive authority.

Much of the misconduct of which the President is accused does not involve the exercise of executive powers at all. *If* the President committed perjury regarding his sexual conduct, this perjury involved no exercise of presidential power as such. *If* he concealed evidence, this misdeed too involved no exercise of executive authority. By contrast, *if* he sought wrongfully to place someone in a job at the Pentagon, or lied to subordinates hoping they would repeat his false statements, these acts could have involved a wrongful use of presidential influence, but we cannot believe that the President's alleged conduct of this nature amounts to the grossly derelict exercise of executive power sufficient for impeachment.

Perjury and obstructing justice can without doubt be impeachable offenses. A President who corruptly used the Federal Bureau of Investigation to obstruct an investigation would have criminally exercised his presidential powers. Moreover, covering up a crime furthers or aids the underlying crime. Thus a President who committed perjury to cover up his subordinates' criminal exercise of executive authority would also have committed an impeachable offense. But making false statements about sexual improprieties is not a sufficient constitutional basis to justify the trial and removal from office of the President of the United States.

It goes without saying that lying under oath is a very serious offense. But even if the House of Representatives had the constitutional authority to impeach for any instance of perjury or obstruction of justice, a responsible House would not exercise this awesome power on the facts alleged in this case. The House's power to impeach, like a prosecutor's power to indict, is discretionary. This power must be exercised not for partisan advantage, but only when circumstances genuinely justify the enormous price the nation will pay in governance and stature if its President is put through a long, public, voyeuristic trial. The American people understand this price. They demonstrate the political wisdom that has held the Constitution in place for two centuries when, even after the publication of Mr. Starr's report, with all its extraordinary revelations, they oppose impeachment for the offenses alleged therein.

We do not say that a "private" crime could never be so heinous as to warrant impeachment. Congress might responsibly take the position that an individual who by the law of the land cannot be permitted to remain at large, need not be permitted to remain President. But if certain crimes such as murder warrant removal of a President from office because of their unspeakable heinousness, the offenses alleged in the Independent Counsel's report or the Investigative Counsel's statement are not among them. Short of heinous criminality, impeachment demands convincing evi-

dence of grossly derelict exercise of official authority. In our judgment, Mr. Starr's report contains no such evidence.

Sincerely,

Richard L. Abel, Connell Professor of Law, UCLA Law School
Alice Abreu, Professor of Law, Temple University School of Law
Bruce Ackerman, Sterling Professor of Law and Political Science, Yale University
Matthew Adler, Assistant Professor, University of Pennsylvania
T. Alex Aleinikoff, Professor of Law, Georgetown University Law Center
Akhil Reed Amar, Southmayd Professor of Law, Yale University
Alison Grey Anderson, Professor of Law, UCLA School of Law
Mark Anderson, Associate Professor of Law, Temple University
William R. Anderson, Professor of Law, University of Washington
Peter Arenella, Professor of Law, UCLA School of Law
Barbara Allen Babcock, Judge John Crown Professor of Law, Stanford University Law School
Hope Babcock, Associate Professor of Law, Georgetown University Law Center
C. Edwin Baker, Nicholas F. Gallicchio Professor of Law, University of Pennsylvania
Fletcher N. Baldwin, Sam T. Dell Research Scholar and Professor of Law, University of Florida
Milner S. Ball, Caldwell Professor of Constitutional Law, University of Georgia
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OCTOBER 2, 1998.

Hon. NEWT GINGRICH, *Speaker,*
U.S. House of Representatives.

DEAR MR. SPEAKER: Did President Clinton commit "high Crimes and Misdemeanors" for which he may properly be impeached? We, the undersigned professors of law, believe that the misconduct alleged in the Independent Counsel's report does not cross that threshold.

We write neither as Democrats nor as Republicans. Some of us believe that the President has acted disgracefully, some that the Independent Counsel has. This letter has nothing to do with any such judgments. Rather, it expresses the one judgment on which we all agree: that the Independent Counsel's report does not make a case for presidential impeachment.

No existing judicial precedents bind Congress's determination of the meaning of "high Crimes and Misdemeanors." But it is clear that Members of Congress would violate their constitutional responsibilities if they sought to impeach and remove the President merely for conduct of which they disapproved.

The President's independence from Congress is fundamental to the American structure of government. It is essential to the separation of powers. It is essential to the President's ability to discharge such constitutional duties as vetoing legislation that he considers contrary to the nation's interests. And it is essential to governance whenever the White House belongs to a party different from that which controls the Capitol. The lower the threshold for impeachment, the weaker the President. If the President could be removed for any conduct of which Congress disapproved, this fundamental element of our democracy—the President's independence from Congress—would be destroyed.

It is not enough, therefore, that Congress strongly disapprove of the President's conduct. Under the Constitution, the President cannot be impeached unless he has committed "Treason, Bribery, or other high Crimes and Misdemeanors."

Some of the charges laid out in the Independent Counsel's report fall so far short of this high standard that they strain good sense: for example, the charge that the President repeatedly declined to testify voluntarily or pressed a debatable privilege claim that was later judicially rejected. These "offenses" are not remotely impeachable. With respect, however, to other allegations, the report requires careful consideration of the kind of misconduct that renders a President constitutionally unfit to remain in office.

Neither history not legal definitions provide a precise list of high crimes and misdemeanors. Reasonable people have differed in interpreting these words. We believe that the proper interpretation of the Impeachment Clause must begin by recognizing treason and bribery as core or paradigmatic instances, from which the meaning of "other high Crimes and Misdemeanors" is to be extrapolated. The constitutional standard for impeachment would be very different if, instead of treason and bribery, different offenses had been specified. The clause does not read, "Arson, Larceny, or other high Crimes and Misdemeanors," implying that any significant crime might be an impeachable offense. Nor does it read, "misleading the People, Breach of Campaign Promises, or other high Crimes and Misdemeanors," implying that any serious violation of public confidence might be impeachable. Nor does it read, "Adultery, Fornication, or other high Crimes and Misdemeanors," implying that any conduct deemed to reveal serious moral lapses might be an impeachable offense.

When a President commits treason, he exercises his *executive powers,* or uses information obtained by virtue of his *executive powers,* deliberately to aid an enemy. When a President is bribed, he exercises or offers to exercise his *executive powers* in exchange for corrupt gain. Both acts involve the criminal exercise of presidential powers, converting those awful powers into an instrument either of enemy interests or of purely personal gain. We believe that the critical, distinctive feature of treason and bribery is grossly derelict exercise of official power (or, in the case of bribery to obtain or retain office, gross criminality in the pursuit of official power). Non-indictable conduct might rise to this level. For example, a President might be properly impeached if, as a result of drunkenness, he recklessly and repeatedly misused executive authority.

The misconduct of which the President is accused does not involve the derelict exercise of executive powers. Most of this misconduct does not involve the exercise of executive powers at all. *If* the President committed perjury regarding his sexual conduct, this perjury involved no exercise of presidential power as such. *If* he concealed evidence, this misdeed too involved no exercise of executive authority. By contrast, *if* he sought wrongfully to place someone in a job at the Pentagon, or lied to subordinates hoping they would repeat his false statements, these acts could have involved a wrongful use of presidential influence, but we cannot believe that the President's alleged conduct of this nature amounts to the grossly derelict exercise of executive power sufficient for impeachment.

Perjury and obstructing justice can without doubt be impeachable offenses. A President who corruptly used the Federal Bureau of Investigation to obstruct an investigation would have criminally exercised his presidential powers. Moreover, covering up a crime furthers or aids the underlying crime. Thus a President who committed perjury to cover up his subordinates' criminal exercise of executive authority would also have committed an impeachable offense. But if the underlying offense were adultery, calling the President to testify could not create an offense justifying impeachment where there was none before.

It goes without saying that lying under oath is a serious offense. But even if the House of Representatives had the constitutional authority to impeach for any instance of perjury or obstruction of justice, a responsible House would not exercise this awesome power on the facts alleged in this case. The House's power to impeach, like a prosecutor's power to indict, is discretionary. This power must be exercised not for partisan advantage, but only when circumstances genuinely justify the enormous price the nation will pay in governance and stature if its President is put through a long, public, voyeuristic trial. The American people understand this price. They demonstrate the political wisdom that has held the Constitution in place for two centuries when, even after the publication of Mr. Starr's report, with all its extraordinary revelations, they oppose impeachment for the offenses alleged therein.

We do not say that a "private" crime could never be so heinous as to warrant impeachment. Thus Congress might responsibly determine that a President who had committed murder must be in prison, not in office. An individual who by the law of the land cannot be permitted to remain at large, need not be permitted to remain President. But if certain crimes demand immediate removal of a President from of-

fice because of their unspeakable heinousness, the offenses alleged against the President in the Independent Counsel's referral are not among them. Short of heinous criminality, impeachment demands convincing evidence of grossly derelict exercise of official authority. In our judgment, Mr. Starr's report contains no such evidence.

Sincerely,

Jed Rubenfeld, Professor of Law, Yale University.
Bruce Ackerman, Sterling Professor of Law and Political Science, Yale University.
Akhil Reed Amar, Southmayd Professor of Law, Yale University.
Susan Bloch, Professor of Law, Georgetown University Law Center.
Paul D. Carrington, Harry R. Chadwick Sr., Professor of Law, Duke University School of Law.
John Hart Ely, Richard A. Hausler Professor of Law, University of Miami School of Law.
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John E. Nowak, David C. Baum Professor of Law, University of Illinois College of Law.
Judith Resnik, Arthur L. Liman Professor, Yale Law School.
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Note: Institutional affiliations for purposes of identification only.

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TOP PROFS: NOT ENOUGH TO IMPEACH

(By Harvey Berkman, Staff Reporter)

On a "jury" of 12 constitutional law professors, all but two told The National Law Journal that, from a constitutional standpoint, President Clinton should not be impeached for the things Independent Counsel Kenneth W. Starr claims he did.

Some of the scholars call the question a close one, but most suggest that it is not; they warn that impeaching William Jefferson Clinton for the sin he admits or the crimes he denies would flout the Founding Fathers' intentions.

"On the charges as we now have them, assuming there is no additional report [from Mr. Starr], impeaching the president would probably be unconstitutional," asserts Cass R. Sunstein, co-author of a treatise on constitutional law, who teaches at the University of Chicago Law School.

The first reason for this conclusion is that the one charge indisputably encompassed by the concept of impeachment—abuse of power—stands on the weakest argument and evidence.

"The allegations that invoking privileges and otherwise using the judicial system to shield information . . . is an abuse of power that should lead to impeachment and removal from office is not only frivolous, but also dangerous, says Laurence H. Tribe, of Harvard Law School.

The second reason is that the Starr allegation for which the evidence is disturbingly strong—perjury—stems directly from acts the Founders would have considered personal, not governmental, and so is not the sort of issue they intended to allow Congress to cite to remove a president from office.

No "Large-Scale Infidelity"

Says Professor Sunstein, "Even collectively, the allegations don't constitute the kind of violation of loyalty to the United States or large-scale infidelity to the Constitution that would justify impeachment, given the Framers' decision that impeachment should follow only from treason, bribery or other like offenses. . . . What we have in the worst case here is a pattern of lying to cover up a sexual relationship, which is very far from what the Framers thought were grounds for getting rid of a president."

Douglas W. Kmiec, who spent four years in the Justice Department's Office of Legal Counsel and now teaches at Notre Dame Law School, agrees: "The fundamen-

tal point is the one that Hamilton makes in Federalist 65: Impeachment is really a remedy for the republic; it is not intended as personal punishment for a crime.

"There's no question that William Jefferson Clinton has engaged in enormous personal misconduct and to some degree has exhibited disregard for the public interest in doing so," he says. "But does that mean that it is gross neglect—gross in the sense of being measured not by whether we have to remove the children from the room when the president's video is playing, but by whether [alleged terrorist Osama] bin Laden is now not being properly monitored or budget agreements aren't being made?"

Adds Prof. John E. Nowak, of the University of Illinois College of Law, the impeachment clause was intended "to protect political stability in this country, rather than move us toward a parliamentary system whereby the dominant legislative party can decide that the person running the country is a bad person and get rid of him." Mr. Nowak co-authored a constitutional law hornbook and a multivolume treatise with fellow Illinois professor Ronald Rotunda, with whom he does not discuss these matters because Professor Rotunda is an adviser to Mr. Starr.

"It seems hard to believe that anything in the report . . . could constitute grounds for an impeachment on other than purely political grounds," Professor Nowak says. "If false statements by the president to other members of the executive branch are the equivalent of a true misuse of office . . . I would think that the prevailing legislative party at any time in our history when the president was of a different party could have cooked up . . . ways that he had misused the office."

And that, says Prof. A.E. Dick Howard, who has been teaching constitutional law and history for 30 years, would be a step in a direction the Founders never intended to go.

"The Framers started from a separation-of-powers basis and created a presidential system, not a parliamentary system, and they meant for it to be difficult for Congress to remove a president—not impossible, but difficult," says Professor Howard, of the University of Virginia School of Law. "We risk diluting that historical meaning if we permit a liberal reading of the impeachment power—which is to say: If in doubt, you don't impeach."

Many of the scholars point to the White House's acquisition of FBI files on Republicans as an example of something that could warrant the Clintons' early return to Little Rock—but only if it were proved that these files were acquired intentionally and malevolently misused. The reason that would be grounds for impeachment, while his activities surrounding Monica Lewinsky would not, the professors say, is that misuse of FBI files would implicate Mr. Clinton's powers as president. But if Mr. Starr has found any such evidence, he has not sent it to Congress, which he is statutorily bound to do.

One professor who believes there is no doubt that President Clinton's behavior in the Lewinsky matter merits his impeachment is John O. McGinnis, who teaches at Yeshiva University, Benjamin N. Cardozo School of Law. "I don't think we want a parliamentary system, although I would point out that it's not as though we're really going to have a change in power. If Clinton is removed there will be Gore, sort of a policy clone of Clinton. A parliamentary system suggests a change in party power. That fear is somewhat overblown."

Professor McGinnis considers the reasons for impeachment obvious. "I don't think the Constitution cares one whit what sort of incident [the alleged felonies] come from," he says. "The question is, 'Can you have a perjurer and someone who obstructs justice as president?' And it seems to me self-evident that you cannot. The whole structure of our country depends on giving honest testimony under law. That's the glue of the rule of law. You can go back to Plato, who talks about the crucial-ness of oaths in a republic. It's why perjury and obstruction of justice are such dangerous crimes."

This argument has some force, says Professor Kmiec, but the public is hesitant to impeach in this case because of a feeling that "the entire process started illegitimately, that the independent counsel statute is flawed and that the referral in this case was even more flawed, in that it was done somewhat hastily by the attorney general."

Jesse H. Choper, a professor at the University of California at Berkeley School of Law (Boalt Hall) and co-author of a con-law casebook now in its seventh edition, agrees that perjury, committed for any reason, can count as an impeachable offense. "The language says 'high crimes and misdemeanors,' and [perjury] is a felony, so my view is that it comes within the [constitutional] language. But whether we ought to throw a president out of office because he lied under oath in order to cover up an adulterous affair . . . my judgment as a citizen would be that it's not enough."

A Judge Would Be Impeached

Many of the professors say Mr. Clinton would almost certainly be impeached for precisely what he has done, were he a judge rather than the president. That double standard, they say, is contemplated by the Constitution in a roundabout way. Says Professor Kmeic, "The places where personal misbehavior is raised have entirely been in the context of judicial officers. There is a healthy amount of scholarship that suggests that one of the things true about judicial impeachments (which is not true of executive impeachments) is the additional phraseology saying that judges serve in times of good behavior. The counterargument is that there is only one impeachment clause, applying to executive and judicial alike. But . . . our history is that allegations of profanity and drunkenness, gross personal misbehavior, have come up only in the judicial context."

In addition to history, there is another reason for making it harder to impeach presidents, says Akhil Reed Amar, who teaches constitutional law at Yale Law School and who recently published a book on the Bill of Rights: "When you impeach a judge, you're not undoing a national election. . . . The question to ask is whether [President Clinton's] misconduct is so serious and malignant as to justify undoing a national election, canceling the votes of millions and putting the nation through a severe trauma."

They're Uncomfortable

None of these arguments, however, is to suggest that the professors are comfortable with what they believe the president may well be doing: persistently repeating a single, essential lie—that his encounters did not meet the definition of sexual relations at his Paula Jones deposition. Mr. Clinton admits that this definition means he could never have touched any part of her body with the intent to inflame or satiate her desire. It is an assertion that clashes not only with Ms. Lewinsky's recounting of her White House trysts to friends, erstwhile friends and the grand jury, but also with human nature.

"That's one of the two things that trouble me most about his testimony—that he continues to insist on the quite implausible proposition [of] 'Look, Ma, no hands,' which is quite inconsistent with Monica Lewinsky's testimony, and that he's doing that in what appears to be quite a calculated way," Professor Tribe laments. "But I take some solace in the fact that [a criminal prosecution for perjury] awaits him when he leaves office."

Professor Amar agrees that "whatever . . . crimes he may have committed, he'll have to answer for it when he leaves office, and that is the punishment that will fit his crime."

Also disturbing to Professor Tribe is the president's apparent comfort with a peculiar concept of what it means to tell the truth, a concept the professor describes as "It may be deceptive, but if you can show it's true under a magnifying glass tilted at a certain angle, you're OK."

But even that distortion, he believes, does not reach the high bar the Founders set for imposing on presidents the political equivalent of capital punishment.

"It would be a disastrous precedent to say that when one's concept of truth makes it harder for people to trust you, that that fuzzy fact is enough to say there has been impeachable conduct," Professor Tribe says. "That would move us very dramatically toward a parliamentary system. Whether someone is trustworthy is very much in the eye of the beholder. The concept of truth revealed in his testimony makes it much harder to have confidence in him, but the impeachment process cannot be equated with a vote of no confidence without moving us much closer to a parliamentary system."

Professor Kmiec does suggest that something stronger than simple "no confidence" might form the possible basis for impeachment. Call it "no confidence at all." "It is possible that one could come to the conclusion that the president's credibility is so destroyed that he'd have difficulty functioning as an effective president," Professor Kmiec says. "But the public doesn't seem to think so, and I don't know that foreign leaders think so," given the standing ovation Mr. Clinton received at the United Nations.

In the end, Professor Howard says that he opposes impeachment under these conditions not only because the past suggests it is inappropriate, but also because of the dangerous precedent it would set. "Starting with the Supreme Court's devastatingly unfortunate and totally misconceived opinion [in *Clinton* v. *Jones*, which allowed Ms. Jones's suit to proceed against the president while he was still in office], this whole controversy has played out in a way that makes it possible for every future president to be harassed at every turn by his political enemies," Professor Howard warns. "To draw fine lines and say that any instance of stepping across that

line becomes impeachable invites a president's enemies to lay snares at every turn in the path. I'm not sure we want a system that works that way."

The other "jurors" on this panel of constitutional law professors were:

* The one essentially abstaining "juror": Michael J. Gerhardt, of the College of William and Mary, Marshall-Wythe School of Law.
* Douglas Laycock, of The University of Texas School of Law.
* Thomas O. Sargentich, co-director of the program on law and government at American University, Washington College of Law.
* Suzanna A. Sherry, professor at the University of Minnesota Law School.