

ARTICLES

“HIGH CRIMES & MISDEMEANORS”: DEFINING THE CONSTITUTIONAL LIMITS ON PRESIDENTIAL IMPEACHMENT^{†*}

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I. INTRODUCTION

When then-Congressman Gerald Ford made his now-famous remark 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 to impeach 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 Crimes and Misdemeanors.”² The decisions to impeach and to convict and remove from office are almost certainly not reviewable by any court.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”⁴—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.⁵ This Article

1. 116 CONG. REC. H3113-14 (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.

2. *Id.* (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.

3. See *Nixon v. United States*, 506 U.S. 224 (1993); *Ritter v. United States*, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937) (rejecting as non-justiciable the claim of Judge Halstead Ritter that the Senate convicted and removed him for non-impeachable offenses). See generally, e.g., MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 143-46 (1996).

4. U.S. CONST. art. II, § 4.

5. Although the Supreme Court has come to be considered the primary guardian of constitutional principles, Congress has an independent obligation to interpret faithfully and carry out the dictates of the Constitution. See U.S. CONST. art. VI, cl.3 (“The Senators and Representatives before mentioned, and the Members of the Several State Legislatures, and all executive and judicial Officers, both of the United States and the several States, shall be bound by Oath or Affirmation, to support this Constitution”); *INS v. Chada*, 462 U.S. 919, 975 (1983) (Congress has an independent duty to uphold

addresses the difficult problem of determining what qualifies as an offense for which a President of the United States may constitutionally be impeached and removed from office. It also considers the even more nettlesome questions of whether there are impeachable offenses for which Congress could, but need not, constitutionally remove a President, and if such offenses exist, how Congress should exercise its discretion either to impeach or to hold its hand. This Article had its genesis in a statement by the authors submitted to the House Judiciary Committee during its proceedings regarding the impeachment of President Clinton. This final much expanded version appears after the conclusion of the Clinton impeachment proceedings in the Senate, and it is certainly informed by the course those proceedings took. Strictly speaking, however, this is not an article "about" the Clinton impeachment. Although this Article draws some conclusions from the treatment by the House and Senate of the fundamental allegations against President Clinton, it does not address in detail the specific facts underlying those allegations. The words "Monica Lewinsky" appear for the first and last time in this sentence. Likewise, this Article offers no opinion about whether President Clinton should or should not have been impeached or removed. Instead, it approaches the issue of defining impeachable offenses more generally, reviewing history (including the very recent history of the Clinton proceedings), text, and scholarship to discern the meaning of the constitutional phrase "Treason, Bribery, or other high Crimes and Misdemeanors." In doing so, this Article deals principally with five interpretive questions that recurred throughout the Clinton impeachment process, and that will certainly re-emerge in any future presidential impeachment controversy:

- 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 Impeachable Offenses for Which the Congress Should Nonetheless Not Impeach?*

the Constitution; members of Congress "are bound by oath to uphold the Constitution"); Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986); Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 GEO. L.J. 351 (1997).

II. SOURCES OF AUTHORITY

In mapping the limits of the rather inscrutable constitutional phrase “treason, bribery, or other high crimes and misdemeanors,” this Article 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 these categories—precedent—merits brief additional comment because the concept of “precedent” in impeachments differs in important respects from the more familiar judicial usage.

First, there is very little impeachment precedent because there have been very few impeachments. Until the impeachment of President Clinton, in the nation’s entire history the House of Representatives had impeached only fifteen federal officials. Of these fifteen, twelve were judges, one was a Senator, one a Secretary of War, and one was President Andrew Johnson. A handful of other federal officers, including President Richard Nixon, resigned or retired under threat of imminent impeachment. Consequently, there are few cases involving the impeachment of executive branch officials and, as discussed below, the standard for impeaching judges is arguably quite different than the standard that should be applied when removing a President.

Second, the “decisions” in impeachment cases are merely statements of result. The officeholder was either impeached or not impeached for this reason, or convicted or acquitted for another reason. Although individual representatives, senators, or the prevailing or dissenting faction of a committee, have occasionally stated their reasons for voting as they did, such statements represent only the views of the Members who subscribed to them, not the collective opinion of the legislature as a whole. Most importantly, an explanation of result from a congressional source is not 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.⁶

6. See GERHARDT, *supra* note 3, at 47-53 (discussing the difficulty of using prior impeachments as precedent).

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.⁷ 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 later acquitted in the Senate.⁸ 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 determined Congress.⁹

The biggest problem may be knowing what use to make even of 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 was an impeachable offense, 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, which means that 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, members of Congress are not bound by the actions of their congressional predecessors, but should view prior impeachment proceedings as a valuable source of

7. See *infra* text accompanying note 175.

8. See *infra* text accompanying notes 205-09.

9. See, e.g., RAOUL BERGER, IMPEACHMENT 214-23 (1973) (suggesting that legislators are amenable to impeachment despite the contrary precedent).

information about the proper and improper exercise of the impeachment power. It is for this reason that we have attached an Appendix to this Article detailing the grounds for and result of each of the prior impeachments.

III. FIVE INTERPRETIVE PROBLEMS CONSIDERED

A. IMPEACHABLE OFFENSES ARE NOT LIMITED TO CRIMES

Some commentators and advocates have asserted that impeachment may be based only on conduct that constitutes a crime. Notably, congressional opponents of impeachment in the cases of Andrew Johnson and Richard Nixon hewed to this line.¹⁰ However, the weight of authority is to the contrary.¹¹ In the first place, the Framers almost certainly intended that presidents be impeachable for conduct not technically criminal. During the Constitutional Convention debates in July 1787, the delegates twice voted in favor of the general proposition that the president should be removable for “malpractice or neglect of duty.”¹² Many delegates spoke of

10. 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 COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, H.R. REP. NO. 93-1035, at 359 (1974) (“The language of the Constitution indicates that impeachment can lie only for serious criminal offenses.”). Twenty-five years later, then-Congressman Wiggins, now a Senior Judge on the United States Court of Appeals for the Ninth Circuit, testified before the House Judiciary Committee during the Clinton impeachment proceedings and reiterated the view that “the misconduct alleged to the officer subject to impeachment should be a crime.” *The Consequences of Perjury and Related Crimes: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 65 (1998) (statement of Hon. Charles E. Wiggins). See also *Statement of Senator Johnson*, in 3 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 51 (1868) [hereinafter TRIAL OF ANDREW JOHNSON] (explaining his vote against impeachment in part on the ground that, “the terms crimes and misdemeanors in the [Constitution] mean legal crimes and misdemeanors”).

11. 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 misdemeanours.” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 797 (1833). See also GERHARDT, *supra* note 3, at 103; BERGER, *supra* note 9, at 56-57; CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 33-35 (1974); Statement of Professor Gary L. McDowell, *infra* note 22, at 37 (“Thus while an indictable crime may be deemed an impeachable offense, impeachable offences are not simply limited to indictable crimes.”); *Constitutional Grounds for Presidential Impeachment: Report by the Staff of the Impeachment Inquiry, House Comm. on the Judiciary*, 93d Cong. 22-25 (1974) [hereinafter *Constitutional Grounds*]; *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 89 (1998) [hereinafter *Impeachment Background*] (statement of Cass R. Sunstein).

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."¹³ 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,¹⁴ or corruption."¹⁵

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."¹⁶ 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.¹⁷ Madison objected to removal of a President "for any act which might be called a misdemeanor [sic],"¹⁸ observing that, "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate."¹⁹ Mason withdrew "maladministration," substituting "other high crimes and misdemeanors against the State."²⁰ The phrase "against the State" was later amended to "against the United States,"²¹ and then deleted altogether by the Committee on Style in the final draft of the Constitution.²²

12. The first vote came on July 19, 1787, and the second on July 26, 1787. MAX FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 61, 69, 116 [hereinafter RECORDS].

13. *Id.* at 64-69. See also GERHARDT, *supra* note 3, at 7-9.

14. "Malversation" means "corrupt conduct or fraudulent practices, as in public office." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 819 (3d ed. 1997).

15. RECORDS, *supra* note 12, at 337.

16. *Id.* at 495.

17. *Id.* at 550.

18. *Id.* at 551.

19. *Id.* at 550.

20. *Id.*

21. *Id.* at 551.

22. During the hearings before the House Judiciary Committee on the Clinton impeachment, some scholars argued that the deletion of the phrase "against the United States" was tremendously significant and signaled an intention to include within the category of "high Crimes and Misdemeanors" a wide variety of purely private offenses with no relation to the presidential office. See, e.g., *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 89 (1998) (statement of Gary L. McDowell). Other scholars contended that the deletion was genuinely one of style, signifying nothing more than a redundancy. See, e.g., *id.* at 85 (statement of Professor Cass R. Sunstein); *Impeachment Inquiry: Hearing Pursuant to H.R. 581 Before the House Comm. On the Judiciary*, 105th Cong. 21 (1998) [hereinafter *Impeachment Inquiry*] (statement of Professor Sean Wilentz). We concur in the latter view.

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.²³ And although neither Mason nor anyone else at the Convention offered any particular views on what the phrase "high Crimes and Misdemeanors" meant, evidence suggests that the words were intended to embrace at least some non-criminal conduct. Raoul Berger 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."²⁴ 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.²⁵ Both Berger's factual premise that all, or at least 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 the particulars of 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 sixteen hundred ratifiers who debated and approved the Constitution in the state conventions.²⁶ However, Berger is certainly correct that many 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.²⁷

23. See BERGER, *supra* note 9, at 86.

24. *Id.* at 71, 86-87. See also PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 266-70 (1984) (arguing that the American understanding of impeachable offenses essentially incorporates the English understanding); Statement of Professor Gary L. McDowell, *supra* note 22, at 34-43.

25. See BERGER, *supra* note 9, at 70-71.

26. In the thirteen state conventions, a total of 1,071 delegates voted for the Constitution and 577 against it. See 3 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 29-31 (Merrill Jensen, ed. 1978).

27. Berger's thesis is rendered somewhat more plausible by the recollection that many of the active political figures of the revolutionary generation were also energetic practical political philosophers for whom English history provided the principle source of precedent and comparison. For example, in 1773-74, John Adams was casting about for a means of resisting parliamentary legislation that undermined the independence of Massachusetts judges by securing them a salary from the Crown rather than, as the Massachusetts charter required, from the colonial assembly. Adams made a special study of English impeachments before proposing that the assembly impeach the judges for violating the charter. Acting on Adams' suggestion and relying on English precedents, the Massachusetts House of

The conclusion that criminality is not a prerequisite for impeachment makes intuitive sense. It is hard to imagine that the Framers wished to tolerate—or that Congress and the country must suffer—a President who willfully refuses to perform, or is incapable of performing, the duties of the Presidency. To take some extreme examples, a President would certainly be subject to impeachment for refusing to organize the defense of the country against foreign invasion, or refusing to cooperate with military officers charged with command and control of the nuclear arsenal, or firing all cabinet officers and refusing to name replacements. Likewise, it is inconceivable that Congress could not remove a President who drank himself into insensibility by lunchtime on a daily basis.²⁸ While it may be difficult to draw a hard and fast line between impeachable dereliction of duty and the rejected standard of “maladministration,” common sense demands that the country have some means of self-protection against a Chief Executive who abandons the constitutional responsibilities of the office but does not happen to violate any criminal statutes.

Indeed, the historical record reveals a consistent pattern of impeachment for non-criminal conduct.²⁹ For example, Justice Samuel Chase was impeached (though not convicted) for exhibitions of judicial bias and making improper rulings.³⁰ Judge George English was impeached for habitual malperformance.³¹ The House impeached Judge Halstead

Representatives approved articles of impeachment against the judges, although the Council refused to act upon them. *See* PAGE SMITH, JOHN ADAMS 150-52 (1962). Still, it seems unlikely that the particulars of Adams' pre-Revolutionary legal research lingered in the memory of any member of the Constitutional Convention fourteen years later, and Adams himself was abroad as Ambassador to England while the Constitution was being drafted and ratified. *Id.* at 725. On the other hand, the fact that Massachusetts had impeached judges for non-criminal violations of its charter would certainly have been well-remembered.

28. Of course, presidential incapacity due to drunkenness or other substance abuse might be dealt with through the provisions of the Twenty-Fifth Amendment, rather than the impeachment process. U.S. CONST. amend. XXV.

29. It is worth noting that non-criminal considerations may have been very important in the impeachment and trial of at least two of those accused of criminal conduct. The impeachment of Judge West Humphreys for his role in the southern rebellion and Confederacy and the impeachment of Judge Walter Nixon following his conviction and imprisonment for perjury both involved judges who were not holding court. Humphreys was in fact serving as a Confederate judge and Nixon, although drawing a salary, could hardly preside over cases from his prison cell. *See infra* text accompanying notes 187-90 & 236. Impeachment and removal of these officials would have been appropriate solely on these grounds, and Nixon's incarceration undoubtedly was a factor in his case.

30. *See infra* text accompanying note 183.

31. *See infra* text accompanying note 217. In recommending impeachment of Judge English, the House Judiciary Committee expressly dealt with this issue. It wrote:

[I]mpeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were

Ritter on six charges of taking kickbacks and tax evasion, as well as a seventh for bringing his court “into scandal and disrepute.” Though the Senate acquitted him of the six articles charging criminal offenses, the judge was nonetheless convicted and removed on the seventh article.³² President Andrew Johnson was impeached by the House for, among other things, giving speeches casting aspersions on Congress.³³ 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.³⁴

In sum, a showing of criminality is not necessary to establish an impeachable offense. Nonetheless, it may be important to remember that the historical evidence of the Founders’ intentions must be viewed in the context of their time when by modern reckoning there were very few criminal laws. At the time the Constitution was ratified, there were no federal crimes at all, unless one counts those few mentioned in the Constitution itself, such as treason. The sprawling federal and state criminal codes of the late twentieth century would have seemed quite foreign to our eighteenth century forebearers. 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.³⁵ One may

understood at common law but also acts which are not defined as criminal and made subject to indictment, but also to those which affect the public welfare.

HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT: SELECTED MATERIALS ON PROCEDURE, 93d Cong. 886 (1974) [hereinafter IMPEACHMENT PROCEDURE].

Thus, an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also, for abuses or betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or as one writer puts it, for a

breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness when habitual, or in the performance of official duties, gross indecency, profanity, obscenity, or other language used in the discharge of an official function, which tends to bring the office into disrepute, or an abuse or reckless exercise of discretionary power as well as the breach of an official duty imposed by statute or common law.

Id.

32. See *infra* text accompanying notes 225-27. See also *Ritter v. United States*, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937) (rejecting as non-justiciable the claim of Judge Halstead Ritter that the Senate convicted and removed him for non-impeachable offenses).

33. See 1 TRIAL OF ANDREW JOHNSON, *supra* note 10, at 8-10 (Articles X and XI of the Articles of Impeachment against President Johnson).

34. See Nixon Impeachment Report, *supra* note 10, at 3-4.

35. Such modern innovations include the wire and mail fraud statutes, 18 U.S.C. §§ 1341 and 1343 (1998); the RICO statute, 18 U.S.C. § 1962, *et seq.* (1998); the federal false statements statute, 18 U.S.C. § 1001 (1998); and many others.

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. DISTINGUISHING IMPEACHABLE NON-CRIMINAL CONDUCT 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."³⁶ 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 for committing treason, taking bribes,³⁷ or performing other acts similar both in type and seriousness to bribery and treason.³⁸

36. U.S. CONST. art. II, § 4 (emphasis added).

37. Giving bribes is not necessarily as serious as taking bribes. Accepting a bribe almost necessarily involves a public act; that is an act relating to the President's office. Paying a bribe may not relate to the office, and thus might be far less serious. For example, a President who bribed a college admissions officer to enroll the President's child may not have committed an impeachable offense. Even if the bribe were a criminal act, such as payment to a foreign official to do something in the best interests of the United States, it might not justify impeachment. See *infra* text accompanying notes 86, 120 & 139-43 (discussing the significance of the conduct's relationship to the accused's office).

38. The canon of statutory construction bearing the Latin title *ejusdem generis* holds that "where general words follow an enumeration of particular classes of things, such general words are not to be construed . . . as applying only to things of the same general . . . class as those specifically mentioned." BLACK'S LAW DICTIONARY 517 (6th ed. 1990). See also Robert J. Araujo, S.J., *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Texts*, 68 MISS. L.J. 225, 319-28 (1998) (discussing *ejusdem generis* and other canons of statutory construction). 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. See Statement of Cass R. Sunstein, *supra* note 11, at 84 (arguing that application of *ejusdem generis* to text of Constitution suggests "other high Crimes and Misdemeanors" must be of the same type and degree as treason and bribery).

Thus, two things may fairly be inferred from the constitutional text. First, a "high crime or misdemeanor" must be an offense of the most serious kind. Treason is and always has been punishable by death.³⁹ Furthermore, bribery is everywhere considered one of the gravest non-violent crimes.⁴⁰ Second, impeachable offenses are public offenses, offenses that strike at the heart of the democratic order. As Alexander Hamilton said, such offenses are "of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to the injuries done to the society itself."⁴¹

Over the centuries, observers have employed 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."⁴² 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."⁴³ 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."⁴⁴ 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."⁴⁵ 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."⁴⁶

39. The first treason statute, enacted in 1790, provided death as the penalty for treason. See Act of Apr. 30, 1790, ch. IX, 1 Stat. 112 (1845) (An Act for the Punishment of Certain Crimes against the United States). The current treason statute also permits the death penalty. See 18 U.S.C. § 2381 (1998) (providing that one who is guilty of treason against the United States "shall suffer death" or a term of imprisonment).

40. Bribery was among the first offenses designated by statute as a federal crime following the ratification of the Constitution in 1789. See Act of April 30, 1790, ch. IX, § 21, 1 Stat. 112 (1845).

41. THE FEDERALIST NO. 65, at 331 (Alexander Hamilton) (Buccaneer Books ed. 1992).

42. George Mason, the originator of the phrase "high crimes and misdemeanors," said earlier in the Convention that he favored impeachment for "great crimes." RECORDS, *supra* note 12, at 65.

43. BERGER, *supra* note 9, at 88 (quoting Lord Chancellor Somers, 5 NEW PARLIAMENT HISTORY 678 (1691)).

44. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 113 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter DEBATES].

45. 1 JAMES WILSON, *Lectures on Law*, in THE WORKS OF JAMES WILSON 426 (R. McCloskey ed., 1967) (1804).

46. STORY, *supra* note 11, § 749.

More recently, Raoul Berger concluded that the Founders intended to “preclude resort to impeachment of the President for petty misconduct,”⁴⁷ and that they “conceived that the President would be impeachable for ‘great offenses’ such as corruption [or] perfidy.”⁴⁸ 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.”⁴⁹

The proposition that impeachment of a President should result only from “great” offenses seems borne out by the actual conduct of the impeachment proceedings against Presidents Johnson and Nixon. Almost all of the charges against Andrew Johnson involved his removal of Secretary of War Stanton in defiance of the Tenure of Office Act.⁵⁰ Whatever the technical merits of these charges, the true occasion for the effort to remove Johnson was an irreconcilable conflict between the President and the dominant forces in the ruling Republican party 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.⁵¹ Over time, the conventional wisdom about the Johnson impeachment effort became that it was a case of congressional overreaching by a vengeful group of radicals against a President acting within his rights. Whether or not this a correct view of history,⁵² 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 treasonous betrayals of the cause for which more than two million northern men fought and over three hundred thousand died.⁵³ To modern eyes,

47. BERGER, *supra* note 9, at 90.

48. *Id.* at 298.

49. GERHARDT, *supra* note 3, at 104-05. See also *Impeachment Inquiry Hearing Pursuant to H. Res. 581, Before the House Comm. on the Judiciary*, 105th Cong. 19-20 (statement of Nicholas Katzenbach).

50. See *infra* text accompanying notes 191-202.

51. See WILLIAM H. REHNQUIST, *GRAND INQUESTS* 276 (1992) (discussing the root causes of the Johnson impeachment effort). See also Statement of Professor Sean Wilentz, *supra* note 22, at 22.

52. For a brief discussion of the change in the way historians have viewed the Johnson impeachment, see Bernard A. Weisberger, *Impeachment Aftermath: William Jefferson Clinton, Andrew Johnson, and the Judgment of History*, AM. HERITAGE, Feb./Mar. 1999, at 22.

53. For example, in his written statement explaining his vote in favor of impeachment, Senator Charles Sumner of Massachusetts characterized President Johnson as “the impersonation of the tyrannical slave power,” and described the impeachment effort as “one of the last great battles with slavery.” 3 TRIAL OF ANDREW JOHNSON, *supra* note 10, at 247.

Johnson's removal of Stanton seems a trivial matter and a transparently specious ground on which to impeach a president. 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. The three Articles of Impeachment against President Nixon approved by the House Judiciary Committee concerned grave 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.⁵⁴ 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.⁵⁵ Article 3 sought impeachment based on the President's refusal to comply with the Judiciary Committee's own subpoenas.⁵⁶ Moreover, as with the case of Andrew Johnson, the Nixon impeachment effort was entwined with a deeply divisive quarrel about a war and its aftermath. One of the two 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.⁵⁷

The near-universal theme of the Nixon 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

Estimates of the number of men enlisted in the Union Army vary from around 2.1 million to nearly 2.9 million. Compare VERNON BLYTHE, A HISTORY OF THE CIVIL WAR IN THE UNITED STATES 383-85 (1914) (placing number of Union enlistees at between 2,772,408 and 2,898,304), with MARK MAYO BOATNER III, THE CIVIL WAR DICTIONARY 602 (1959) (stating that 2,128,948 men served in the Union Army). There is general agreement that 359,528 Union men were killed by enemy action or died from disease or accident. See BLYTHE, *supra*; BOATNER, *supra*.

54. See H.R. REP. No. 93-1035, at 1-2 (1974).

55. See *id.* at 3-4.

56. See *id.* at 4.

57. See *id.* at 217-19, 338.

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.

....

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, not 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.⁵⁸

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."⁵⁹ 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."⁶⁰ 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."⁶¹ Several Members who voted for impeachment did so because the President's conduct, in their view, "violated our guarantees of liberty,"⁶² or was a "grave threat to the liberties of the American people."⁶³ Referring in particular to Article 3 concerning the President's defiance of congressional subpoenas, Congressman McClory observed that the "power of impeachment is the Constitution's paramount power of self-preservation."⁶⁴

58. *Id.* at 6-8.

59. *Id.* at 289.

60. *Id.* at 327 (Statement of Congresswoman Holtzman, joined by Congressmen Kastenmeier, Edwards, Hungate, Conyers, Waldie, Drinan, Rangel, Owens, and Mezvinsky).

61. *Id.* at 297.

62. *Id.* at 341 (Statement of Congressman Wayne Owens).

63. *Id.* at 287 (Supplemental Views of Congressman Don Edwards).

64. *Id.* at 349 (McClory was joined by Congressmen Danielson and Fish).

Those who voted against all of the Nixon articles of impeachment endorsed the minority report which concluded that impeachment was constitutionally permissible only for the commission of crimes, and then only for "extremely grave crimes."⁶⁵ 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."⁶⁶

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 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 pre-Clinton presidential impeachment proceedings strongly suggest that presidents are to be impeached only for "great" transgressions that present a real 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 Judiciary. The office is attained by direct grant of the people,⁶⁷ and does not rest on any delegation of power from the legislature. As an original matter, the Framers, fresh from their struggle with the parliamentary tyrannies of the mother country, were as concerned with legislative overreaching as they were with the prospect of an "imperial presidency."⁶⁸ Dramatically lowering the impeachment threshold invites conversion of impeachment into a mechanism for legislative removal of the

65. *Id.* at 349 (McClory was joined by Congressmen Danielson and Fish).

66. *Id.* at 495.

67. Of course, technically the Electoral College stands as intermediary between the voters and selection of the President, but only twice in American history has a candidate won the popular vote, but lost the presidency in the Electoral College. *See* LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 26, 46-47 (1996).

68. *See* THORNTON ANDERSON, *CREATING THE CONSTITUTION* 143 (1993). The phrase "imperial presidency" was coined by Arthur M. Schlesinger, Jr. in his 1974 book of that name. *See generally* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). *See also* ERWIN C. HARGROVE, *THE POWER OF THE MODERN PRESIDENCY* vii (1974) (discussing concern that presidency "has become a kind of republican monarchy").

chief executive on a vote of no confidence, and is therefore antithetical to the design of this Constitution.⁶⁹

2. *Judicial Impeachment Precedents*

The nation's experience with impeachment of federal judges arguably supports the view that federal officers may be removed for non-criminal conduct far different and less grave than the "great" offenses. As the Appendix details, judges have been impeached for drunkenness, blasphemy, entering improper judicial orders,⁷⁰ bias in charging a grand jury,⁷¹ improperly holding in contempt a lawyer who had criticized the court's rulings,⁷² habitual malperformance,⁷³ using favoritism in appointing

69. 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.

H.R. REP. NO. 93-1305, at 365 (Minority Views of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti and Latta).

In his testimony before the House Judiciary Committee during the Clinton impeachment inquiry, former Attorney General Nicholas Katzenbach observed:

If [the impeachment] power is not limited—as it clearly is—then any President could be removed if a sufficient number of members of the House and Senators simply disagreed with his policies, thus converting impeachment into a Parliamentary vote of no confidence. Whatever its merits, that is not our Constitutional system.

Statement of Nicholas Katzenbach, *supra* note 49, at 19. *See also* Statement of James Hamilton, *id.* at 224. During the debate in the House on the Clinton articles of impeachment, Congresswoman Jackson Lee declared:

Today, our vote leads into the darkness of a vile attack on the Constitution. We leave here today void and empty because our president will have been toppled against the will of the people of the United States. Mr. President, if you can hear me, do not resign. This is not a parliamentarian [sic] form of government.

House Floor Debate on Four Articles of Impeachment Against President Clinton, F.D.C.H., Dec. 18, 1998, available in 1998 WL 883521.

Chief Justice Rehnquist, in his book discussing the impeachment trials and eventual acquittals of Supreme Court Justice Samuel Chase and President Andrew Johnson, concluded that:

The importance of these acquittals can hardly be overstated. With respect to the chief executive, they have meant that as to the policies he sought to pursue, he would be answerable only to the country as a whole in the quadrennial presidential elections, and not to Congress through the process of impeachment.

REHNQUIST, *supra* note 51, at 271.

70. *See infra* text accompanying note 176; GERHARDT, *supra* note 3, at 50 (both describing the impeachment of Judge John Pickering).

71. *See infra* text accompanying note 183 (describing the impeachment of Supreme Court Justice Samuel Chase).

72. *See infra* text accompanying note 185 (describing the impeachment of Judge James H. Peck).

73. *See infra* text accompanying note 217 (describing the impeachment of Judge George English).

receivers,⁷⁴ and bringing the court into scandal and disrepute.⁷⁵ However, we join with the majority of commentators who have concluded that the impeachment standard for judges is different than the standard for the President.⁷⁶ At least five reasons support this conclusion.

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." However, Article III provides that federal judges "shall hold their Offices during good Behavior." While the impeachment standard in Article II certainly does apply to judges, the additional language in Article III suggests an additional—and perhaps lesser—basis for their impeachment and removal.⁷⁷

Second, in marked contrast to the profound political questions and great occasions that precipitated the impeachment efforts against Presidents Johnson and Nixon, the impeachments of judges seem rather tawdry affairs generally revolving around charges of personal incapacity,⁷⁸ political or personal bias,⁷⁹ or, more commonly, financial dishonesty.⁸⁰ No president

74. See *infra* text accompanying note 222 (describing the impeachment of Judge Harold Louderback).

75. See *infra* text accompanying note 225 (describing the impeachment of Judge Halstead L. Ritter).

76. See, e.g., BERGER, *supra* note 9, at 122-80; GERHARDT, *supra* note 3; *Constitutional Grounds for Presidential Impeachment: Modern Precedents, Minority Views*, 105th Cong., Ser. No. 17, at 16 (Dec. 1998) (judges and Presidents "are and should be subject to differing impeachment considerations"); Statement of Nicholas Katzenbach, *supra* note 49 at 18; Statement of Bruce Ackerman, *id.* at 44; Statement of Cass R. Sunstein, *supra* note 11, at 88 ("[T]he standard for impeaching the President has been much higher [than for impeaching judges], and properly so.").

77. The Report of the House Judiciary Committee proposing impeachment of Judge George English expressly indicated that the constitutional provision limiting the tenure of federal judges to their good behavior should be considered along with the Article II, § 4 standard applicable to all other civil officers. The Report continued: "[g]ood behavior is the essential condition on which the tenure of judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office." IMPEACHMENT PROCEDURE, *supra* note 31, at 886.

78. See *infra* text accompanying notes 176 & 217 for descriptions of the impeachment of Judges Pickering (drunkenness, blasphemy, senility, and improper rulings) and English (habitual malperformance).

79. See *infra* text accompanying notes 183, 185 & 222 for descriptions of the 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).

80. See *infra* text accompanying notes 211, 214, 225, 230 & 233 for descriptions of the 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.

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 friends in the exercise of official duties. 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. In short, historical precedent suggests that judges are treated differently. Congress seems more disposed to impeach judges than presidents for incapacity or fundamental unsuitability for office.

Third, judges have life tenure: they continue in office until death or resignation unless removed through impeachment. In contrast, presidential tenure is limited to four years and an impeachment issue often arises when substantially less than the whole term remains.⁸¹ Indeed, this distinction almost prompted the Constitutional Convention not to subject presidents to impeachment at all.⁸²

Fourth, judges are appointed while presidents are elected. This is not a trivial distinction. One of the notable differences between the American constitutional democracy and its English progenitor is the federal constitution's textual command that elections be conducted with metronomic regularity—congressional elections every two years, presidential elections every four.⁸³ The legitimacy of American government is so dependent on regular ratification by the electorate that the biennial timetable has never been disrupted, and national elections were conducted routinely during both the Civil War⁸⁴ and World War II⁸⁵ with

81. Andrew Johnson was impeached with about one year remaining in his term. The House Judiciary Committee voted articles of impeachment against President Nixon when he had about two and a half years left in his term and was ineligible for re-election. President Clinton's impeachment occurred when he had just over two years left on his term and was also ineligible for re-election. Indeed, during the trial, President Clinton went past the half-way mark of his term, thereby guaranteeing that Vice President Gore would be eligible for two full terms as President even if Clinton had been convicted and removed. *See* U.S. CONST. amend. XXII, § 1.

82. During the debates about impeachment, Rufus King argued that the president should not be subject to impeachment because of the rather short term associated with the office. Benjamin Franklin suggested, however, that without impeachment a chief magistrate who made himself obnoxious might be assassinated, which deprived the magistrate not only of life, but also of the opportunity to vindicate his character. He contended it would be better to provide punishment "when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused." *RECORDS, supra* note 12, at 65. While Franklin's views carried the day, the point remains that the different tenures are a reasoned basis for applying the constitutional standard differently. Indeed, the rather limited debates in the Constitutional Convention regarding impeachment were focused almost exclusively on the President and other senior officers. Little attention was devoted to removal of judges.

83. *See* U.S. CONST. art. I, § 2; U.S. CONST. art. I, § 3; U.S. CONST. art. II, § 1.

84. Abraham Lincoln so despaired of his own re-election that in August 1864, he jotted a memorandum that read:

no apparent thought that any other option was possible. Because the tenure of any American President is legitimized only by the ballot box, the mandate conferred by the electorate is not lightly to be repealed. Any effort to undo the results of an election—which is the practical consequence of presidential, but not judicial, impeachments—should be undertaken with great care and only in cases of great need.

Finally, any effort to remove 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 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.

For all these reasons, it seems that 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.⁸⁶ For example, judges are expected to be apolitical and impartial. Exercising the powers of one's office to favor 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. Absent violation of some statute, a President will not be impeached for exercising the powers of patronage or

This morning, as for some days past, it seems exceedingly probable that this Administration will not be re-elected. Then it will be my duty to so co-operate with the President elect, as to save the Union between the election and the inauguration; as he will have secured his election on such ground that he cannot possibly save it afterwards.

ABRAHAM LINCOLN, *Third Lincoln-Douglas Debate*, Sept. 15, 1858, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-65, at 624 (Library of America ed. 1989). For a general discussion of the election of 1864, see STEPHEN B. OATES, WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN 380-99 (1977).

85. For example, in the summer of 1944, President Franklin D. Roosevelt declined a request from Winston Churchill to meet and discuss the post-war fate of Poland, pleading concern about the upcoming presidential election. See MARTIN GILBERT, CHURCHILL: A LIFE 784 (1991).

86. 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*, *supra* note 11, at 17. See also Statement of Nicholas Katzenbach, *supra* note 49, at 18-19:

Only if one takes the view articulated by Senator Fessenden in the Johnson impeachment that impeachment is a power "to be exercised with extreme caution" in "extreme cases" can the same standard apply to both Presidents and judges. One simply needs to take into consideration the different roles and responsibilities of the offices involved.

Id.

using the office to advance a political agenda. The nature of the presidential office is so fundamentally different than the nature of any judgeship, that the constitutional standard for impeaching a President should reflect that difference.

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 under 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 government.⁸⁷ Virtually all of the charges against Presidents Johnson and Nixon were criminal, fell into one of the common law “great offense” categories, or both. In the Johnson case, Articles 1 through 9 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.⁸⁸ Article 11 charged an encroachment on the prerogatives of the legislative branch, because Johnson had allegedly 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.⁸⁹ 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.⁹⁰ 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.⁹¹

Two charges from the pre-Clinton presidential impeachments raise issues that do not fit comfortably within the traditional “great offense” categories: Article 3 in the case against Richard Nixon alleging resistance

87. See BERGER, *supra* note 9, at 70.

88. See *infra* text accompanying note 198 (describing the articles of impeachment against President Johnson).

89. IMPEACHMENT MATERIALS, *infra* note 173, at 154-60.

90. For text of the articles of impeachment against President Nixon approved by the House Judiciary Committee, see H.R. REP. NO. 93-1035, at 1-4 (1974). For discussion of these articles, see *supra* text accompanying notes 54-57.

91. See H.R. REP. NO. 93-1305, at 217-23 (text of articles of impeachment against President Nixon proposed, but not approved, by the House Judiciary Committee).

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 10 of the Johnson case can be readily dismissed as an artifact of the particular virulence of that dispute, Article 3 in the Nixon impeachment raises the more difficult question of the limits of a President's power to contest investigative requests from Congress or other investigators. This same question resurfaced in the case of President Clinton.

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.⁹² 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 subpoenas⁹³ that the Judiciary Committee also received materials it had demanded.⁹⁴ 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 1 so as to merit a separate article of impeachment. As the Committee Report observed:

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.⁹⁵

In the Clinton case, the House Judiciary Committee reported four articles of impeachment to the full House, the fourth charging "misuse and abuse" of the office of the Presidency.⁹⁶ As originally drafted by majority counsel for consideration in the Judiciary Committee, the fourth article charged four separate types of abuse of power, including: frivolous

92. The Committee Report noted that, 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. *See id.* at 206.

93. *See United States v. Nixon*, 418 U.S. 683, 713-14 (1974).

94. *See H.R. REP. NO. 93-1305*, 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. *See, e.g., id.* at 203-05.

95. *Id.* at 209.

96. H.R. Res. 611, 105th Cong., 2d Sess. (1998).

assertions of executive privilege in response to subpoenas directed to White House officials by the Office of Independent Counsel;⁹⁷ and failing to respond to a list of eighty-one written questions from the House Judiciary Committee and making "perjurious, false and misleading sworn statements" in response to those written questions.⁹⁸ On December 12, 1998, Congressman Gekas (R-Pa.) successfully moved in committee to amend the fourth proposed article by deleting its first three paragraphs, including the allegation of abuse of executive privilege in disputes with the Independent Counsel.⁹⁹ As reported to the full House, Article 4 alleged only failures to respond appropriately to inquiries from the Judiciary Committee itself (the eighty-one questions).¹⁰⁰ In the full House, Article 4 was defeated and did not become a part of the Bill of Impeachment presented to the Senate.¹⁰¹

The Nixon and Clinton cases present striking parallels and contrasts. 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."¹⁰²

The Clinton Judiciary Committee followed the same pattern, albeit with obvious reluctance. Republican committee members thought seriously about impeaching President Clinton for too-vigorously using the tools of the law to frustrate the Independent Counsel's investigation, but shrank from it in the end. Like their Watergate-era predecessors, however, they were willing to defend Congress' constitutional prerogative of

97. *See id.*

98. *Id.*

99. *See House Judiciary Committee Holds Hearing on Articles of Impeachment*, F.D.C.H., Dec. 18, 1998, available in 1998 WL 857390.

100. *See id.*

101. *See* 144 CONG. REC. H12042 (daily ed. Dec. 19, 1998) (on the adoption of Art. IV: yeas 148, nays 285, not voting 2).

102. H.R. REP. NO. 93-1305, at 4.

investigating impeachable offenses by voting to impeach a President who, in their view, defied Congress itself.¹⁰³

Second, a comparison of the Nixon and Clinton cases demonstrates—unsurprisingly—that congressional response to presidential “stonewalling” depends heavily on the nature of the alleged wrongdoing being investigated and the value to the investigation of the information a President resists providing. In Watergate, there was never any real dispute that the most serious allegations against President Nixon, if true, would merit impeachment. The question was always whether the President was guilty, or in Howard Baker’s famous phrase, “What did the President know, and when did he know it?”¹⁰⁴ Until the disclosure of the “smoking gun” White House tapes proving Nixon’s complicity in criminal obstruction of justice, neither Congress, nor the Special Prosecutor, nor the public knew all the critical facts. Consequently, by defying congressional subpoenas, President Nixon truly was withholding evidence essential to the determination of his suitability to remain in office. Implicit, but unmistakable, in the Nixon Judiciary Committee report and its vote to approve Article 3 against President Nixon was the judgment that Nixon’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.¹⁰⁵ Indeed, once President Nixon produced additional tapes in compliance with the Supreme Court’s order, the Committee’s surmise about the nature of the withheld material was fully born out by its contents. The material was so damaging that it led almost immediately to the President’s resignation.¹⁰⁶

Clinton’s case was different. From the moment the presidential sex scandal broke in January 1998, the nation was torn by passionate disagreement over whether the allegations, even if true, should be investigated at all, much less serve as grounds for impeachment.

103. Indeed, the fourth article of impeachment against President Clinton in the version reported to the full House appropriated language directly from Article 3 in the President Nixon case, alleging that Clinton “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.” H.R. Res. 611, *supra* note 96.

104. THEODORE H. WHITE, *BREACH OF FAITH: THE FALL OF RICHARD NIXON* 236 (1975).

105. H.R. REP. NO. 93-1305, at 187-213 (discussing Committee’s conclusions regarding the third article of impeachment against President Nixon). The Committee’s discussion of executive privilege and its pointed conclusions regarding the untrustworthiness of tape transcripts provided by the White House are particularly noteworthy. *See id.* at 203-12.

106. *See* WHITE, *supra* note 104, at 1-35 (describing how release of the tapes in response to the Supreme Court’s order of July 24, 1974, led to President Nixon’s resignation on August 9, 1974).

Moreover, by the time the Independent Counsel submitted his referral to Congress, there was little question about the facts. The eighty-one interrogatories submitted to President Clinton by the Judiciary Committee had no real investigative purpose, since they sought nothing but admissions concerning President Clinton's state of mind at the time he answered various questions during the Jones civil deposition and the Independent Counsel interview before the grand jury.¹⁰⁷ Significantly, Clinton did not dispute the Committee's right to ask questions, and he did answer them, albeit in the way civil litigants customarily answer interrogatories—carefully, elliptically, evasively, even disingenuously.¹⁰⁸ In the end, the full House was unconvinced that the President's answers were a sufficient affront to its impeachment authority to warrant a constitutional confrontation and failed to approve the fourth article of impeachment charging abuse of power.¹⁰⁹

The Watergate Judiciary Committee was surely correct in concluding that the impeachment power necessarily implies a congressional power to inquire about presidential wrongdoing,¹¹⁰ as well as a corresponding obligation on the part of the President to respond to such inquiries. Moreover, we do not view the refusal of the House of Representatives to impeach President Clinton for his lawyerly responses to the eighty-one questions as precedent to the contrary (though a future President faced with an aggressive congressional impeachment investigation will undoubtedly want to interpret it in just that way). Considered impartially, the House vote on Article 4 most likely flowed from an evaluation of the specifics of President Clinton's answers and a judgment about their significance to the overall controversy, rather than from a repudiation of the House's right to demand responses to its questions. This is not to say that a President could

107. The 81 questions and the President's responses appear at *Presentations by Investigative Counsel: Impeachment Inquiry Pursuant to H. Res. 581 Before the House Comm. on the Judiciary*, 105th Cong. 251-74 (1998).

108. As but one minor example, consider the question and answer to Request No. 75:

Request 75: Do you admit or deny having knowledge that Betsy Wright was contacted or employed to make contact with or gather information about witnesses or potential witnesses in any judicial proceeding relating to any matter in which you are or could be involved?

Response to Request No. 75: Ms. Betsy Wright was my long-time chief of staff when I was Governor of Arkansas, and she remains a good friend and trusted advisor. Because of her great knowledge of Arkansas, from time to time my legal counsel and I have consulted her on a wide range of matters.

Id. at 271.

109. See 144 CONG. REC. H12042 (daily ed. Dec. 19, 1998).

110. See H.R. REP. NO. 93-1305, *supra* note 10, at 213. See also *supra* text accompanying notes 92-95. But see BLACK, *supra* note 11, at 20-23 (arguing that a President is privileged to withhold certain information, particularly information affecting national security, even from a congressional impeachment inquiry).

never properly refuse to answer a question posed by a congressional committee considering impeachment. Nonetheless, judging the propriety of such a refusal would be a “political” rather than a “legal” choice, in the sense that there is no body of law delineating proper and improper areas of inquiry. The judgment would be “political” in that Congress is free to consider any refusal in making its impeachment decision.¹¹¹

b. *Presidential resistance to inquiries by an Independent Counsel or other non-congressional investigator.* As noted above, the House Judiciary Committee distinguished between President Nixon’s refusals to answer its subpoenas and his legal battles over production of evidence with the Watergate Special Prosecutor by voting to impeach the President on the former, but not on the latter. A quarter-century later, the Committee appears to have drawn the same distinction by deleting from its proposed fourth article of impeachment against President Clinton allegations of improper assertions of executive privilege in response to subpoenas from the Independent Counsel.¹¹² Taken together, the Nixon and Clinton impeachment precedents suggest that presidential resistance to a criminal investigation by a non-congressional investigator is not an impeachable offense, so long as that resistance takes the form of asserting in court colorable claims of privilege.¹¹³

Nonetheless, the difference in status between the Watergate Special Prosecutor, a purely executive branch official appointed by the Attorney General, and the Office of Independent Counsel, an odd hybrid both in and out of all three constitutional branches of government,¹¹⁴ could give rise to

111. For example, while a President, like any other citizen, would be free to assert his Fifth Amendment privilege against self-incrimination in an impeachment inquiry due to a well-founded fear of prosecution in the criminal courts, an impeachment is not itself a “criminal case” for Fifth Amendment purposes and thus Congress may draw adverse inferences from a refusal to answer. *See, e.g.,* *Quinn v. United States*, 349 U.S. 155 (1955) (Fifth Amendment available to witnesses testifying before a Congressional committee, to be claimed only when a reasonable apprehension the answer will lead to a criminal conviction); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923) (inferences from silence may be drawn during deportation hearings); *Harrison v. Wille*, 132 F.3d 679, 683 (11th Cir. 1998) (adverse inference may be drawn from public employee’s refusal to answer).

112. *See supra* text accompanying note 110.

113. An outright refusal to respond to a lawful subpoena or to comply with a judicial order compelling compliance with such a subpoena would present a different case. For example, if President Nixon had refused to comply with the Supreme Court’s ruling enforcing Leon Jaworski’s subpoenas, impeachment on that ground alone would have been appropriate.

114. *See* 28 U.S.C. § 592 (preliminary investigation and application for the appointment of independent counsel is governed by the Attorney General); § 594 (an independent counsel has “full power and independent authority to exercise all investigative and prosecutorial functions”); § 593 (“court shall appoint appropriate independent counsel”); § 595 (“Congress shall have oversight jurisdiction with respect to the official conduct of the independent counsel”); § 592 (independent counsel may be removed “only by personal action of the Attorney General”) (1998).

troubling questions in the future. If one considers an Independent Counsel the current analog of the Watergate Special Prosecutor, then the Nixon and Clinton precedents suggest that a President's resistance to subpoenas from either source encroaches on no legislative prerogative and is thus no ground for impeachment. However, the picture becomes murkier if one sees 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. In this view, resistance to the investigation of the Independent Counsel is tantamount to defiance of Congress itself.

Such a construction of the Independent Counsel Statute would be deeply troubling. We do not believe that Congress may 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.¹¹⁵ 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 transferable to a contest between a President and an Independent Counsel. Put simply, we find it difficult to conceive that raising legal objections in legal forums to the investigative requests of an Independent Counsel could constitute a high crime or misdemeanor.

c. *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 and were central to the Clinton impeachment debate.

i. *Personal immorality:* Before the impeachment of President Clinton, 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.”¹¹⁶ However, Pickering was also charged and convicted for making a series of improper rulings and

115. For an excellent discussion of the impeachment referral provisions of the Independent Counsel Statute, see Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2195-96 (1998) (concluding that the impeachment referral provision of the Independent Counsel Statute should be abandoned).

116. See *infra* text accompanying note 176.

being drunk on the bench. Moreover, the true reason for his removal appears to have been that he was insane.¹¹⁷

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.¹¹⁸ 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' extra-judicial income.¹¹⁹

Of course, merely because the alleged misconduct of a President has a sexual component does not mean it is 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. Even consensual sexual conduct might warrant impeachment. For example, a president's adulterous entanglement with the spouse of a foreign head of state or dignitary could significantly impact foreign relations, and thus could relate directly to the political functions of the presidency so as to subject a President to impeachment. For the present, however, it is sufficient to say that no actual impeachment case has presented such an unusual confluence of the sexual and the political.

ii. *Lying*: Even leaving to one side the special problem of perjury, which is discussed below, 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

117. See GERHARDT, *supra* note 3, at 50.

118. See Robert Pear, *Clinton Lawyers Compare His Travails to Hamilton's*, SACRAMENTO BEE, Oct. 4, 1998, at A8. See generally CLAUDE G. BOWERS, JEFFERSON AND HAMILTON (1925).

119. See JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 391-409 (1980). See also GERHARDT, *supra* note 3, at 107.

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."¹²⁰ 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, the vote probably resulted from a disinclination to inject the explosive politics of the Vietnam 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, no impeachment has ever gone forward on this basis¹²¹ 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.

120. In the North Carolina ratification debates, Iredell stated that the "President must certainly be punishable for giving false information to the Senate" in connection with a proposed treaty, and suggested that the same result would apply if the President failed to give the Senate full information, but instead concealed important intelligence which ought to have been communicated. *DEBATES, supra* note 44, at 126-28. Iredell's comments were quoted by Congresswoman Holtzman during the proceedings against President Nixon. *See* H.R. REP. NO. 93-1305, at 327.

121. *See, e.g.,* H.R. REP. NO. 93-1305, at 295 (additional views of Mr. Conyers):

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.

Id. Congressman Conyers may have been alluding to Article I, paragraph 8 of the Articles of Impeachment approved by the Judiciary Committee against President Nixon. That paragraph alleged that false public statements were one of nine means employed to carry out a criminal scheme to obstruct justice. It is difficult, however, to find in this paragraph an endorsement of a general obligation of presidential honesty.

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:

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.¹²²

C. NOT ALL CRIMINAL CONDUCT IS A PROPER GROUND FOR IMPEACHMENT

Not all violations of criminal statutes are “high Crimes and Misdemeanors.”¹²³ If the Framers had wanted *any* crime 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,¹²⁴ but a President self-evidently should not be displaced for committing them.¹²⁵

Not even all felonies are necessarily impeachable offenses. For example, punching a “foreign official” in the nose,¹²⁶ destroying a document belonging to the estate of a debtor,¹²⁷ operating a bus or train while intoxicated,¹²⁸ counterfeiting a postage stamp,¹²⁹ and obliterating the vehicle identification number of someone else’s car¹³⁰ are all federal

122. *Id.* at 303 (additional views of Mr. Danielson).

123. *See* GERHARDT, *supra* note 3, at 106 (“Not all statutory crimes demonstrate unfitness for office”); Statement of Professor Sean Wilentz, *supra* note 22, at 20 (“The scholars agree that not all criminal acts are necessarily impeachable acts.”).

124. *See* 18 U.S.C. § 41 (1998).

125. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 294 (2d ed. 1988) (jaywalking or speeding “obviously would not be an adequate basis for presidential removal.”).

126. 18 U.S.C. § 112(a) (1998).

127. *See* 18 U.S.C. § 153(a) (1998).

128. *See* 18 U.S.C. § 342 (1998).

129. *See* 18 U.S.C. § 501 (1998).

130. *See* 18 U.S.C. § 511 (1998).

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 impeachable from non-impeachable crimes.

Still, if not all crimes or even all felonies are "high Crimes and Misdemeanors," does not the President's unique status broaden the category of criminal violations that ought to be grounds for impeachment? 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 argued that the President's role as Chief Executive imposes a special obligation of scrupulous adherence to the law,¹³¹ 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 a significant legal infraction.¹³² Such an argument is subject to several powerful criticisms.

First, impeachment is not the only remedy the law provides against a President who breaks it. Alexander Hamilton said of those who are actually 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."¹³³ The same holds true for 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

131. See, e.g., H.R. REP. NO. 93-1305, at 356 (concurring views of Congressman Hamilton Fish, Jr.) ("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 law of which he is made aware.").

132. See *Testimony of Impeachment Trial of President William Jefferson Clinton*, 106th Cong. (1999) (closing remarks of Rep. Henry Hyde, Chair of the House Judiciary Committee) ("The rule of law is what stands between all of us and the arbitrary exercise of power by the state.").

133. THE FEDERALIST NO. 65, at 332-33 (Alexander Hamilton) (Buccaneer Books ed. 1992). While one could argue that criminal conduct by public officials is particularly troubling and thus deserving of a harsher treatment than the same conduct by a private citizen, such an argument supports having tougher criminal sentences, not a separate proceeding.

he is not impeached, nothing bars his prosecution for those offenses once he leaves office.¹³⁴

Second, the contention that the President's special Article II obligation to uphold the law authorizes his impeachment for virtually all serious criminal infractions is at odds with the designedly restrictive scope of the Constitution's 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 crime than any other federal officer. But as discussed above, 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.¹³⁵

There is no inconsistency in the fact that the Constitution imposes on the President an obligation of scrupulous adherence to law and simultaneously permits his 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. 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 warrants removal of a President was manifest in several aspects of the impeachment proceedings against President Nixon. The most obvious of these was the Judiciary Committee's refusal to impeach the President on the basis of substantial allegations of income tax evasion,¹³⁶ a refusal which contrasts sharply with congressional readiness both before and after 1974 to impeach federal judges on precisely the same ground.¹³⁷ The rejection of the Nixon impeachment article regarding personal tax evasion may, of course, be

134. Indeed, there is a body of opinion that a President may be indicted while in office. *See, e.g.,* Eric M. Freedman, *The Law As King and the King As Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7 (1992).

135. *See supra* text accompanying notes 12-22.

136. *See* H.R. REP. NO. 93-1305, at 220. The rejected article of impeachment against President Nixon charging tax evasion also alleged that the President improperly received government money to improve his private estates at San Clemente, California, and Key Biscayne, Florida. This charge was rejected together with the tax allegation. *See id.*

137. *See infra* text accompanying notes 225 & 229, describing the impeachments of Judge Halstead Ritter in 1936 and Judge Harry Claiborne in 1986, both for income tax evasion.

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. However, it is interesting to observe that the minority report, authored by ten dissenting Republican 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."¹³⁸

A President's obligation to faithfully execute the laws is certainly relevant to the question of defining impeachable offenses. However, this presidential obligation provides no panacea to the definitional problem.

D. DISTINGUISHING IMPEACHABLE CRIMES FROM NON-IMPEACHABLE CRIMES

1. *Towards a Working Definition of an Impeachable Crime*

In the end, neither the Constitution, the Framers, 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 character:* It is tempting to assert categorically that only those crimes that relate to an official's public duties are impeachable. This was certainly the view of some noted commentators in the first half of the Nineteenth Century,¹³⁹ and a number of prominent constitutional scholars took this stance during the

138. H.R. REP. NO. 93-1305, at 360.

139. See, e.g., WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 210-19 (2d ed. 1829) (excerpted in 2 THE FOUNDERS' CONSTITUTION 169 (Philip B. Kurland & Ralph Lerner, eds. 1987)) ("In general those offences 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 offences not immediately connected with office, except the two expressly mentioned, are left to the ordinary course of judicial proceeding . . .").

Clinton impeachment proceedings.¹⁴⁰ However, while the relationship of the misconduct to the official's public duties is one of the most important considerations and this absolutist position has the merit of simplicity, it is very difficult to maintain, either as a matter of original intent, political theory, or practical politics.

When pressed on the point, almost all modern commentators concede that at least a few *really* nasty private crimes would certainly result in impeachment. For example, Professor Cass Sunstein told the House Judiciary Committee during the Clinton inquiry:

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.¹⁴¹

Professor Sunstein went on to argue that the criminal allegations against President Clinton—perjury and obstruction of justice as part of an effort to cover up an illicit sexual affair—are not impeachable because the subject matter of the cover-up was private conduct unrelated to the office of the presidency and because the allegations do not fall into the narrow category of "extremely heinous" impeachable private crimes.¹⁴² Noticeably, this argument leaps nimbly over the question of *why* the allegations against President Clinton were not sufficiently heinous to merit impeachment.

The key to unraveling Sunstein's argument is his characterization of impeachable private crimes as particularly "heinous." This may be an accurate characterization, but it fails to explain why even heinous crimes should merit impeachment if "high Crimes and Misdemeanors" embrace only abuses of office. The answer is surely that certain kinds of egregious

140. For example, a group of 400 historians styling themselves "Historians In Defense of the Constitution" signed a letter asserting that the Constitution authorizes presidential impeachment only "for high crimes and misdemeanors in the exercise of executive power." *Impeachment Background*, *supra* note 11, at 334 (1998) (statement of Historians in Defense of the Constitution). Similarly, more than 300 law professors wrote the Speaker of the House and argued that, while private crimes might in some circumstances merit impeachment, the crimes alleged against President Clinton were not impeachable because they did not involve the "grossly derelict exercise of official authority." *Id.* at 375-76 (letter to Newt Gingrich, et al.).

141. *Id.* at 89 (statement of Cass R. Sunstein).

142. *See id.* at 90.

behavior, whether connected to the office or not, strip the President of legitimacy and render the President unfit in the eyes of the country to hold office. Murder and rape are easy exemplars of this truth, but contrary to Professor Sunstein's suggestion, the principle extends beyond such extreme cases. Democratic leadership requires more than an electoral majority and a four-year lease on the White House. Presidential leadership depends in significant part on the exercise of moral authority, some inherent in the office of the presidency and some deriving from the character of its occupant. Presidential leadership also requires integrity, at least insofar as both a President's friends and foes must have reasonable confidence that, at least most of the time, the President speaks the truth and keeps promises. Furthermore, presidential leadership demands at least some modicum of virtue, at least to the degree that the President must not violate the basic social norms embodied in the law's proscriptions against very serious criminal offenses. Without some indefinable minimum of these characteristics of moral authority, integrity, and personal virtue, a President cannot govern.

We do not suggest that the President must be the spotless High Priest of the nation's civic religion who must be cast down for any sin. Nor do we suggest, in the maudlin terms employed by the House managers in the Clinton impeachment, that a President must be removed whenever he becomes a bad role model for "the kids."¹⁴³ Rather, we endorse the practical view that "high Crimes and Misdemeanors" includes not only crimes that are "political" in *nature*, but also crimes that are "political" in *effect*. While the principal focus of the Constitution's impeachment clauses is certainly on offenses involving serious abuses of the powers of office, a President may also be impeached for crimes which make it unbearably difficult for the President to perform the duties of his necessarily political office.

Accordingly, we believe that what makes a crime a "high Crime or Misdemeanor," and therefore a proper basis for impeachment is a combination of moral gravity and political character which is admittedly difficult to define with precision. Some particularly morally reprehensible crimes, including but not limited to the oft-cited examples of premeditated murder and forcible rape, would certainly require impeachment of the President even if committed for entirely private motives in circumstances

143. See 145 CONG. REC. S948 (daily ed. Jan. 23, 1999) (statement of Rep. Henry Hyde, Chairman of the House Judiciary Comm.).

wholly unconnected with the Office of the President.¹⁴⁴ On the other hand, the more political the crime and 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 significant will be 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 (for example, murder of a political rival, or selling military secrets to known terrorists). Beyond such extreme examples, however, 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 not all crimes—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 a rough view of the relative seriousness of different felony offenses by assigning different levels of punishment.¹⁴⁵ 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

144. As Professor Sean Wilentz has noted, however, the only pertinent historical case seems to point in the other direction. Aaron Burr killed Alexander Hamilton in a duel, was indicted in New Jersey for murder, but was not impeached. See Statement of Sean Wilentz, *supra* note 22, at 27 n.4.

145. 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. For an explanation of the operation of the Federal Sentencing Guidelines, see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 Wis. L.R. 679, 692-704.

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.¹⁴⁶ It will often be the circumstances rather than the label of the crime that determine 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,"¹⁴⁷ while other perjuries and obstructions may 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, whether 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."¹⁴⁸

146. See WASH. REV. CODE ANN. §§ 9A.56.020(1)(a), (c) & 9A.56.030(1)(a) (West 1998).

147. See *Impeachment Inquiry*, *supra* note 22, at 34-37 (statement of Professor Gary L. McDowell). Professor McDowell argues at length that perjury would plainly have been understood by the Framers to be a "high crime or misdemeanor" for impeachment purposes. While agreeing that perjury may sometimes be an impeachable offense, we find Professor McDowell's argument from original intent unconvincing. He contends that "high crimes and misdemeanors" was, in effect, a legal term of art drawn from English impeachment cases which the Framers adopted because it had a well-understood, or at least readily ascertainable, meaning to be found in English common law. See *id.* at 32-34. He then refers to numerous English common law authorities which describe perjury as a serious offense. See *id.* at 34-37. The difficulty with McDowell's argument is that none of the English authorities on perjury whom he cites concern either impeachment in general or the meaning of "high crimes and misdemeanors" in particular; they really say nothing more than that perjury was a common law crime prosecutable in the ordinary criminal courts. McDowell cites no English or early American case or legal commentator holding that perjury was an *impeachable* offense at common law. Indeed, McDowell would seem to be defeated by his own premises: If at the time of the adoption of the Constitution "high crimes and misdemeanors" had a well-understood meaning rooted in English impeachment cases, the absence of any instance of an English or pre-Revolutionary American impeachment for perjury would seem to exclude, rather than include, perjury as an impeachable offense.

148. DEBATES, *supra* note 44, at 127.

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, were impeached and removed from office for perjury.¹⁴⁹ A notable feature of these impeachments was that they all 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 Alcee Hastings was impeached and convicted for lying at his criminal trial about his participation in a conspiracy to solicit a bribe.¹⁵⁰ Judge Walter Nixon was impeached and convicted for lying to a grand jury about his connection to the father of an accused drug smuggler and for attempting to influence the outcome of the son's case.¹⁵¹

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. However, in assessing the seriousness of any particular allegation of presidential perjury, it may be important to consider the treatment of similar cases in the ordinary criminal process. The Clinton impeachment suggests at least two possible grounds for categorizing perjury cases—the forum in which the perjury occurred and the subject about which the lie was told.

i. *The forum of the lie*: Perjury before federal grand juries and in federal criminal trials 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.¹⁵² Even more rare is a prosecution for perjury or obstruction

149. See *infra* text accompanying notes 233-36.

150. See *infra* text accompanying notes 233-34.

151. See *infra* text accompanying notes 236-37.

152. This point was made repeatedly during the Clinton impeachment proceedings by a parade of Democratic and Republican ex-prosecutors who testified before the House Judiciary Committee. See, e.g., *Impeachment Inquiry*, *supra* note 22, at 289 (statement of Thomas P. Sullivan, former U.S. Attorney, Northern District of Illinois) ("It is rare that federal criminal process is used with respect to allegations of perjury or obstruction in civil matters."); Statement of Richard J. Davis, former Assistant Treasury Secretary for Enforcement and Operations and Task Force Leader in Watergate Special Prosecution Force, *id.* at 304 ("Prosecutions of individuals for lying in civil depositions is extremely rare. While in isolated instances such cases have been brought, criminal prosecutions have generally not been used to police veracity in the civil justice system."); Statement of Edward S.G. Dennis, former Department of Justice official, *id.* at 316 ("In my experience, perjury or obstruction of justice prosecutions of parties in private civil litigation are rare."); Professor Ronald K. Noble, former Deputy Assistant Attorney General, *id.* at 325 ("As a general matter, federal prosecutors are not asked to bring

of justice arising from a civil case to which the federal government is not itself a party.¹⁵³

The language of 18 U.S.C. §§ 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. The Sixth Circuit has observed that “[t]he 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”¹⁵⁴ 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, the “vast majority of convictions under 18 U.S.C. § 1621 may involve perjury in a criminal proceeding”¹⁵⁵ Indeed, a search of all reported federal cases since 1944 revealed seventeen 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.¹⁵⁶ If one assumes that the seventeen 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 result would nonetheless be that a case of perjury

federal criminal charges against individuals who allegedly perjure themselves in connection with civil lawsuits.”). No present or former federal prosecutor testified to the contrary.

153. See, e.g., *id.* at 289 (statement of Thomas P. Sullivan) (“Federal prosecutors do not use the criminal process in connection with civil litigation involving private parties.”).

154. *In re Morganroth*, 718 F.2d 161, 166 (6th Cir. 1983).

155. *United States v. Holland*, 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.

156. 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: *Holland*, 22 F.3d 1040; *United States v. McAfee*, 8 F.3d 1010 (5th Cir. 1993); *United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992); *Morales v. United States*, No. 92-1157, 1992 WL 245718 (1st Cir. Oct. 1, 1992) (unpublished); *United States v. Maddox*, Nos. 91-5142, 91-5185, 1991 WL 164318 (6th Cir. Aug. 23, 1991) (unpublished); *United States v. Clark*, 918 F.2d 843 (9th Cir. 1990); *United States v. Reed*, 773 F.2d 477 (2d Cir. 1985); *United States v. Jonnet*, 762 F.2d 16 (3d Cir. 1985); *United States v. Coven*, 662 F.2d 162 (2d 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 (2d Cir. 1957); *Roberts v. United States*, 239 F.2d 467 (9th Cir. 1956); *Schiffman v. Postmaster of Philadelphia*, Nos. Civ.A. 95-5363, Civ.A. 95-6846, 1997 WL 602786 (E.D. Pa. Sept. 19, 1997) (unpublished); *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).

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.¹⁵⁷ Among the seventeen cases identified above, the majority were plainly brought to vindicate a strong, and easily ascertainable, federal interest.¹⁵⁸

The principle that crimes are more impeachable the more closely they relate to the functions of the President's office and to subversion of the interests of the national government suggests that a lie told in a private civil action to which the government is not a party is less constitutionally significant than a lie directly affecting the President's office and the national interest. This view seems to have carried the day, or at least to have contributed to the outcome, in the Clinton case. Although the House Judiciary Committee reported out an article of impeachment charging that President Clinton committed perjury in the Paula Jones civil lawsuit, the full House of Representatives voted against including this article in the final Bill of Impeachment.¹⁵⁹

ii. *The subject matter of the lie:* The subject matter of the lie also makes a difference. President Clinton's defenders suggested that lying about consensual sexual relations, whether in a civil lawsuit or in the grand jury is not a proper ground for impeachment, regardless of whether it may technically constitute a crime. Some commentators went so far as to

157. There are 93 United States Attorney's Offices. For a complete listing, see FEDERAL STAFF DIRECTORY 620-24 (Summer 1999).

158. See, e.g., *Markiewicz*, 978 F.2d 786 (witness tampering and perjury were part of scheme to steal tribal funds in Indian country); *Reed*, 773 F.2d 477 (perjury part of securities fraud scheme criminally prosecuted by U.S.); *Ashley*, 905 F. Supp. 1146 (perjury part of scheme to defraud Federal Home Loan Mortgage Corp.); *Coven*, 662 F.2d 162 and *Dell*, 736 F. Supp. 186 (obstruction, false statements, and perjury part of fraud scheme criminally prosecuted by U.S.); *Comiskey*, 460 F.2d 1293 (case referred directly to U.S. Attorney by U.S. District Judge who presided over civil case); *Clark*, 918 F.2d 843 (perjury involved case concerning complaint to EEOC); *Holland*, 22 F.3d 1040 (Southern Poverty Law Center acting as something approximating a government surrogate in long-running federal fight against bigotry and violence of the KKK).

159. See 144 CONG. REC. H12041 (daily ed. Dec. 19, 1998) (on the adoption of Art. II: yeas 205, nays 229, not voting 1). Of course, as with so many other aspects of the Clinton case, the House vote on proposed Article 2 is subject to varying interpretations. On the one hand, a dispassionate view of the Jones deposition leads inescapably to the conclusion that the President lied repeatedly about various aspects of his connection with a White House intern. See *Presentations by Investigative Counsel, Impeachment Inquiry Pursuant to H.R. 581*, 105th Cong. 103-140 (Dec. 10, 1998) (statement of David Schippers, majority counsel in House Judiciary Comm.). On the other hand, colorable legal arguments were pressed vigorously by the President's defenders that the President's statements in the deposition, even if untrue, were not material to the Jones proceeding and thus could not constitute perjury. *Id.* at 39-42 (statement of Abbe Lowell, minority counsel in House Judiciary Comm.). Thus, some congressmen who voted against Article 2 may, as we suggest, have done so because they thought lying in a civil deposition (or at least lying in a civil deposition about consensual sex) is not impeachable, while others may have voted the same way because they believed the lies legally immaterial, and thus not criminal, and thus not impeachable.

suggest that a "gentleman" is honor-bound to lie about extra-marital sex.¹⁶⁰ Even presidential supporters who were not willing to go quite that far argued that lies about sex are unlikely to be impeachable because such lies ordinarily concern private conduct unrelated to public duties, because they are commonly told, and because they are uncommonly prosecuted. In the Clinton case, the Republican majority of the House Judiciary Committee attempted to refute at least the last of these contentions by calling as witnesses two persons who had actually been convicted and sentenced to prison for lying under oath about sexual matters.¹⁶¹ Whatever else one may say of these witnesses, the very rarity of their cases would seem to have undermined the point their Committee sponsors were trying to make.

E. DESCRIBING A CATEGORY OF IMPEACHABLE OFFENSES FOR WHICH
THE HOUSE SHOULD NONETHELESS NOT IMPEACH AND THE SENATE NOT
REMOVE A PRESIDENT

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.¹⁶² This aspect of the impeachment process is captured better in the common term "impeachable offense" than in the constitutional language itself. An "impeachable offense" is one for which, consistent with the Constitution, the legislature could, but need not, impeach and remove an officeholder. We think that there is indeed a class of such offenses. The difficulty is to articulate a sensible and systematic way of deciding which cases merit removal and which do not.

1. *The Model of Prosecutorial Discretion*

A useful model for a Congress deciding whether an impeachable offense warrants presidential removal is the decisional process by which a public prosecutor decides which of many technically prosecutable offenses and offenders merit the imposition of the moral opprobrium and harsh

160. See, e.g., *Impeachment Background*, *supra* note 11, at 101 (statement of Arthur Schlesinger) ("[o]nly a cad tells the truth about his love affairs").

161. See *Consequences of Perjury*, *supra* note 10, at 6-11 (statements of Pam Parsons and Barbara Battalino).

162. As to whether conviction *requires* removal, see *infra* note 181.

punishments of the criminal law. In such a process, the decisionmaker must consider: (1) what are the provable facts; (2) whether the facts establish a violation of the law; (3) whether prosecution promotes or disserves the goals of criminal law; and more broadly, (4) whether the interests of society are best served by proceeding or exercising restraint.

In the case of impeachment, two of the four conventionally articulated rationales for criminal prosecution and punishment—retribution, rehabilitation, deterrence, and incapacitation—are absent.¹⁶³ The goal of impeachment is neither retribution against, nor rehabilitation of, the official who commits an offense.¹⁶⁴ However, the impeachment remedy certainly is designed to deter would-be presidential miscreants from abusing their office.¹⁶⁵ Likewise, and perhaps more importantly, impeachment serves a function much akin to “incapacitation” in criminal theory—it is a remedy designed to put the offender in a place where the offender can do no more harm. For the ordinary felon, incapacitation is attained by imprisonment; in cases of presidential impeachment, Congress incapacitates by removal from office. A Congress applying the “prosecutorial discretion” model of impeachment analysis would first ascertain the facts regarding the President’s conduct, then decide whether the conduct constituted a “high Crime or Misdemeanor” under the Constitution, and finally determine whether to exercise its discretion to impeach or forebear from impeachment. Carrying the analogy to prosecutorial discretion a step further, a Congress considering impeachment of a President whose conduct has reached the impeachable threshold might find it useful to consider:

a) whether impeachment and removal for the particular conduct at issue is necessary to deter future Presidents from engaging in similar conduct;

163. For a general account of the conventional justifications of criminal punishment, see ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 9-55 (1976). See also Bowman, *supra* note 145, at 684-96 (discussing the traditional justifications for punishment in connection with the Federal Sentencing Guidelines).

164. See STORY, *supra* note 11, § 801 (“an impeachment is a proceeding of a purely 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.”)

165. Impeachment achieves general, rather than specific, deterrence. Specific deterrence is absent because once a President is impeached and removed, the President is unable to commit—not dissuaded from committing—more public transgressions that Congress wishes to deter. Indeed, the law would prevent the President’s return to any federal office if the Senate imposed the additional penalty of disqualification, and even if it did not, practical politics would almost certainly prevent re-election. Those actually deterred from future wrongdoing in office are the impeached President’s successors.

b) whether impeachment and removal for such conduct might deter others prone to engage in such conduct from seeking the Presidency in the first place, and whether the country is better off if such persons are deterred from running;

c) whether "incapacitation" of the President under scrutiny is necessary for the immediate protection of the Republic; that is, whether removal before the natural expiration of the presidential term is necessary in order to prevent more wrongdoing of a similar character; and

d) most importantly, whether the impeachment and removal of this President on these grounds promotes or disserves the country over the long term.

2. *Applying the Model to the Clinton Case*

It is possible to explain the result of the Clinton impeachment primarily in terms of the first two stages of prosecutorial discretion analysis. That is, one can conclude that the impeachment effort failed because of lingering doubts about the facts of the case or because not enough legislators were convinced that the charges met the constitutional standard of "high Crimes or Misdemeanors." Indeed, the House's refusal to accept two articles of impeachment recommended by the Judiciary Committee—perjury in the Paula Jones lawsuit and abuse of power—seems to have been based on this kind of analysis,¹⁶⁶ as does the Senate's acquittal on the obstruction of justice charge.¹⁶⁷

166. With regard to the charge of perjury in the deposition, given that the Judge in the case recently held President Clinton in contempt for his lack of honesty, see *Jones v. Clinton*, 36 F. Supp. 2d 1118 (E.D. Ark. 1999), we take as a given that the President lied in the Paula Jones civil deposition. Indeed, the facts of this charge were never truly an issue. It seems, therefore, that the refusal of the full House to impeach on this ground is most readily explained as a judgment that the lies were not "high Crimes or Misdemeanors" either because no lie about sex in a private civil lawsuit could ever be impeachable, or because *these* lies concerned issues so peripheral to *this* lawsuit—let alone to the President's official duties—that the President's falsehoods were either legally immaterial or nearly so.

With regard to proposed Article 4, which charged President Clinton with abuse of power for providing incomplete, misleading, or false answers to interrogatories from the Judiciary Committee, there was a real factual issue about whether the responses were false and misleading, or merely permissibly narrow and not forthcoming. Moreover, even if one concluded that the answers were impermissibly narrow or downright deceptive, there was a genuine issue about whether slippery responses to Congress, as opposed to outright defiance, constitute a "high Crime or Misdemeanor."

167. The obstruction article passed by the House, but rejected by the Senate, included allegations that the President concealed evidence and encouraged witnesses to commit perjury. These were probably the most serious charges against the President, and although they related to the President's office only tangentially, it is difficult to imagine that a majority of Senators concluded that, if proven, they did not rise to the level of an impeachable offense. However, the evidence in support of these allegations was weak. Against the unequivocal denial of the President and those he allegedly

However, Clinton's acquittal may also be an example of the exercise of discretion by the Senate. Some senators may well have believed that the President's conduct met the minimum constitutional threshold for impeachment, but have employed something akin to the deterrence and incapacitation rationales enunciated above. That is, particularly in reference to the charge of perjury before the grand jury, they may have concluded that the House managers failed to show either that conviction was necessary to prevent this President, or deter future presidents, from engaging in similar behavior, or that the country either required or desired protection from further misdeeds by President Clinton through his immediate ouster from the presidency.¹⁶⁸

As influential as these considerations may have been, we strongly suspect that President Clinton would have been removed from office had it not been for another factor bearing on the exercise of congressional discretion: a powerful national consensus opposing impeachment which took into account not only the gravity of the statutory violations and the subject matter of the lies and obstructive behavior, but the procedural context in which the occasions for lying and obstruction arose. While the adultery at the heart of the scandal was the President's failing alone, an original sin without which nothing that happened thereafter could have happened, by contrast, the *crimes* for which he faced impeachment were the lies and evasions *about* the sin. Those crimes were, at least arguably, manufactured for the purpose of destroying the President. These crimes of

influenced to lie or conceal evidence, the prosecution could produce only hearsay testimony and circumstantial inferences from phone records and visitors logs. Thus, the Senate's action is more probably attributable to doubts about whether the allegations were sufficiently proven.

168. Although the evidence may be less compelling on this charge than with respect to the charge of perjury in the deposition, it seems likely that the President took some liberties with the truth in his grand jury testimony. Moreover, the difference in setting between the civil deposition and the grand jury may explain the decision of the full House to impeach the President for perjurious grand jury testimony, but not for perjury in the Jones deposition. The shift in setting had two likely effects on the thinking of wavering House members. First, as noted above, grand jury perjury is regularly prosecuted and universally accepted as a serious criminal offense. See *supra* text accompanying note 152. Second, while the President could plausibly claim that his false answers in the Jones deposition were not legally material to the plaintiff's civil rights claim, they were certainly material, in the sense of being relevant, to the focus of the Independent Counsel's criminal investigation. Thus, in the House a majority of Members was convinced that the facts proved commission of a crime which was sufficiently grave to be both impeachable and worthy of a vote for removal.

In the Senate, Clinton's lawyers argued that even if the President's testimony was not entirely candid or forthcoming about the details of his conduct, the essence of his testimony—confessing an “inappropriate” relationship of a sexual character—was truthful. Perhaps, then, the failure of this article in the Senate is attributable to a determination by many senators that any untrue portions of the President's testimony were “immaterial” in the sense of being insubstantial. More likely, though, the Senate's failure to convict on this article is explained as an exercise of discretion.

falsehood were not “manufactured” in the sense that the President did not commit them. Rather, they were manufactured in the sense that once evidence of the original sin began to surface, the President’s opponents persistently sought to place him in situations where either a lie or the truth would be used as a political weapon against him.

It is not the purpose of this Article to explore the issue of the propriety of the conduct of the Independent Counsel, or the particulars of the interaction between the Office of Independent Counsel and the private lawyers working on the Jones civil lawsuit. The issue here is the relationship of the emergent culture of politics by investigation to the constitutional process of impeachment. A confluence of circumstances has created an engine for the destruction of public men and women. It has grown slowly and its many components, often beneficial in themselves, have fallen together largely by accident. Congress has passed an ever more comprehensive set of laws that make virtually every sort of unpleasant, unethical, or merely boorish behavior a legal cause of action. The courts and Congress have approved rules of civil discovery that allow intrusive questioning into the most collateral matters. We have laws against perjury and false statement that are seldom used, but always available. We have—or at least had—an independent counsel statute that confers on unelected officials who belong to none of the three constitutional branches of government the power to pursue our highest public officers for any real or suspected transgression of the sprawling federal criminal code. We have well-funded advocacy groups at both extremes of the political spectrum who are beyond political control and who will use any available legal or public relations tool to demonize and destroy those they perceive to be their enemies.

In combination, these many apparently unrelated developments permit the extremists of both parties to pull down their opponents. The strategy is plain. Find a mistake or personal weakness. If it is already criminal, call for an independent counsel. If not criminal yet, file a civil lawsuit or start a congressional investigation. If no direct evidence of criminality is unearthed, get the target under oath. Force the victim to admit indiscretions that will embarrass and potentially bring political ruin, or to lie and commit perjury.

We suspect that the real question on which the Clinton impeachment turned was whether the constitutional remedy of impeachment was to become merely another weapon in the arsenal of practitioners of the politics of personal destruction. The most persuasive advocates for President Clinton’s removal argued with sincerity and passion that

adherence to the rule of law requires a President to conform to the law's rules.¹⁶⁹ To give them their due, while the President's oath to see that the laws be faithfully executed may not translate every presidential violation of a criminal code into an impeachable offense, neither is the oath merely a form of words. A president's oath of office imposes a special trust. Violation of that trust is undeniably germane to the impeachment calculus. The House Managers prosecuting President Clinton countered the argument that impeachment is principally directed at abuses of official power with the persuasive contention that a pattern of conscious lawbreaking for personal gain delegitimizes a President and renders him impeachable because it destroys his capacity to lead a free people. Had it not been for the national revulsion against the process through which President Clinton's disgraceful conduct was exposed, this argument might well have carried the day.

At the core of the national consensus that saved President Clinton was the belief that, while Presidents must obey the law, the impeachment calculus may in the extraordinary case require a judgment about the legal process that unearthed or even induced allegedly unlawful presidential behavior. Impeachment is a political tool whose constitutional function is to remove officials whose presence in office disserves the country. As a political process, impeachment can equally aptly, and equally constitutionally, be used as a vehicle to express disapproval of a method of politics more destructive of the public welfare than the continuance in office of one severely flawed individual.

IV. CONCLUSION

On August 9, 1974, Gerald Ford, the ex-congressman who sought unsuccessfully to impeach Justice Douglas, took the oath of office as President of the United States, replacing Richard Nixon who resigned rather than face near-certain impeachment and removal.¹⁷⁰ In his inaugural address, President Ford declared, "our long national nightmare is over."¹⁷¹ He was only partly right, of course. "Watergate" as a daily drama was

169. See, e.g., Closing statement of Rep. Henry Hyde, Chair House Judiciary Comm., *supra* note 132:

The rule of law is the safeguard of our liberties. [It] is what allows us to live our freedoms in ways that honor the freedom of others while strengthening the common good. The rule of law is like a three-legged stool: one leg is the honest judge, the second leg is an ethical bar and the third leg is an enforceable oath.

Id.

170. See WHITE, *supra* note 104, at 34.

171. GERALD R. FORD, A TIME TO HEAL: THE AUTOBIOGRAPHY OF GERALD R. FORD 41 (1979).

indeed over, but no event of real historical consequence ever ends crisply like a movie or a play, with a final fadeout or the drawing of a curtain. The fall of Richard Nixon changed the way Americans thought about politics and government. It fueled a wave of ethics-in-government reforms, notably including the Independent Counsel statute, many of which came into play during the Clinton scandal. In the mythology of American politics, Watergate transformed impeachment of the President from a faintly disreputable constitutional museum piece into an Excalibur to be wielded by brave legislator-statesmen against a renegade Chief Executive who besmirched his high office.

Whether the sword of impeachment should have been unsheathed against President Clinton is a question we leave to others. Regardless of one's views on the outcome, the Clinton affair illuminated certain truths about the impeachment process itself. First, the Framers of the Constitution intended that removal of the President be difficult. They erected two formidable barriers to impeachment and removal: first, the textual limitation of impeachable offenses to the narrow category of "high Crimes and Misdemeanors," and second, the procedural hurdle of votes by a majority of the House of Representatives and two-thirds of the Senate. In the Clinton case, the procedural barrier proved insurmountable and thus dispositive of the controversy. Given this result, one might conclude that Gerald Ford was right all along, that impeachable offenses are whatever Congress says they are,¹⁷² and that all the debate over the constitutionally proper definition of "high Crimes and Misdemeanors" (including this Article) was and always will be a waste of time. Although there is some undeniable force in such a view, we remain convinced that the constitutional language matters profoundly.

In the Clinton case, for example, despite much disagreement over important details, the universally-voiced consensus that the constitutional impeachment threshold is "high" set the general boundaries of the field on which the battle was fought. This consensus, drawn from constitutional language and historical precedent, placed an immensely heavy burden of proof on proponents of impeachment, and represented an immensely valuable psychological bulwark for the President's defenders. Perhaps more important still, the very debate over the constitutional standard—the meticulous dissections of constitutional language and legislative history, the enumeration of precedents rooted in dimly remembered controversies from the Nation's past, and the sometimes mind-numbing disputes of

172. See 116 CONG. REC. H3113-14, *supra* note 1.

scholars, journalists, and politicians—served an incommensurably valuable function. In the course of debating the meaning of four words—“high Crimes and Misdemeanors”—the Nation wrestled with itself over fundamental questions about the design of the Republic: the proper relationship between the branches of government, the nature of presidential leadership, the connection between private morals and public duties, and the kind of politics appropriate to healthy representative democracy. In the course of deciding the meaning of four words, the country was able to make some decisions about itself.

The most common post-mortem on the fall of President Nixon was that, “The Constitution worked.” The verdict of history has not yet been written on the Clinton impeachment. If a consensus emerges that “the Constitution worked” yet again, it will be because the impeachment clauses of the Constitution proved supple enough to recognize a distinction between a President who endangers the constitutional order and a system of personalized politics every bit as dangerous to the Nation as one bad man.

APPENDIX

UNITED STATES IMPEACHMENTS:

1789 TO PRESENT

What follows is a synopsis of articles of impeachment adopted in each of the sixteen impeachments in the nation's history, as well as the Senate's 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.)

House Vote to Impeach: July 7, 1797

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."
- 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.¹⁷³

On July 8, 1797, after receiving a message from President Adams describing Senator Blount's conduct, the Senate expelled him by a vote of 25-1.¹⁷⁴ Although the House had voted the previous day to impeach Senator Blount, it did not adopt the articles of impeachment necessary to pursue the matter until 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.¹⁷⁵

JOHN PICKERING

Judge for the District of New Hampshire

House Vote to Impeach: March 2, 1803

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 to hear testimony of witnesses offered to show that the ship *Eliza* and its contents were properly

173. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT: SELECTED MATERIALS, H.R. DOC. 93-7, at 126-28 (1973) (hereinafter IMPEACHMENT MATERIALS).

174. See 7 ANNALS OF CONG. 43-44 (1797). See also IMPEACHMENT PROCEDURE, *supra* note 31, at 343-47.

175. See *id.* at 378.

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 of the ship *Eliza* and its contents.

Article 4: Pickering appeared on the bench “in a state of total 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.”¹⁷⁶

Judge Pickering did not appear at the impeachment trial, but his son sent a letter to the Senate suggesting and offering to prove that the Judge was insane at the time of the *Eliza* case and remained so.¹⁷⁷ After the Senate received evidence as to both guilt and insanity,¹⁷⁸ it voted on the articles of impeachment. Five senators “retired from the court” and refused to vote on the articles because they believed the form of the question posed to be an unfair one, because it precluded them from expressing judgment on what they considered the most important issues: Judge Pickering’s sanity and whether the conduct charged rose to the level of an impeachable offense.¹⁷⁹ The Senate then convicted Judge Pickering on each count by a vote of 19-7.¹⁸⁰ After that, it voted 20-6 to remove Pickering from office.¹⁸¹

176. IMPEACHMENT MATERIALS, *supra* note 173, at 133-35.

177. *See* IMPEACHMENT PROCEDURE, *supra* note 31, at 397-99.

178. *See id.* at 403-04.

179. *See id.* at 409.

180. *See id.*

181. *See id.* Note, Professor Gerhardt has suggested that “the Senate has construed the Constitution to make removal automatic upon a two-thirds vote on at least one article of impeachment.” GERHARDT, *supra* note 3, at 60. It is true that the Senate has removed every impeached official whom it has convicted. Moreover, in the impeachment trial of Judge Ritter, the chair ruled that conviction carries with it automatic removal. *See infra* text accompanying note 227. However, the Senate’s action here in voting separately on conviction and removal, as it also did in the impeachment trials of Judges Humphreys and Archbald, *see infra* text accompanying notes 190 & 216, suggests that the two need not be inexorably linked.

SAMUEL CHASE

Associate Justice of the Supreme Court of the United States

House Vote to Impeach: March 12, 1804¹⁸²

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 already made 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

182. The vote to impeach Justice Chase apparently came less than one hour after the Senate convicted and removed Judge Pickering. See Daniel H. Pollitt, *Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259, 270 (1998). For a brief discussion of the political nature of both impeachments, see *id.* at 268-71.

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 prosecution 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 to excite the fears and resentment" of the grand jury against the their state government and constitution.¹⁸³

The Senate voted as follows:¹⁸⁴

	<u>Guilty</u>	<u>Not Guilty</u>
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

183. IMPEACHMENT MATERIALS, *supra* note 173, at 133-35.

184. *See* IMPEACHMENT PROCEDURE, *supra* note 31, at 472.

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

House Vote to Impeach: April 24, 1830

Article of Impeachment Adopted: May 1, 1830

Senate Action: January 31, 1831

Article: In December 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."¹⁸⁵

The Senate vote was 21 for guilty, 22 for not guilty. Judge Peck was therefore acquitted.¹⁸⁶

WEST H. HUMPHREYS

Judge for the District of Tennessee

House Vote to Impeach: May 6, 1862

Articles of Impeachment Adopted: May 19, 1862

Senate Action: June 26, 1862

Article 1: On December 29, 1860, in Nashville, Tennessee, Humphreys endeavored by public speech to incite revolt and rebellion

185. IMPEACHMENT MATERIALS, *supra* note 173, at 136-39.

186. *See* IMPEACHMENT PROCEDURE, *supra* note 31, at 506.

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 an armed 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.¹⁸⁷

Judge Humphreys offered no defense and made no appearance either in person or through counsel.¹⁸⁸ The Senate voted as follows:¹⁸⁹

	<u>Guilty</u>	<u>Not Guilty</u>
Article 1	39	0

187. See IMPEACHMENT MATERIALS, *supra* note 173, at 140-42.

188. See IMPEACHMENT PROCEDURE, *supra* note 31, at 518.

189. See *id.* at 522.

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.¹⁹⁰

ANDREW JOHNSON

President of the United States

House Vote to Impeach: February 24, 1868

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 Reconstruction Acts. He also denounced Black suffrage and claimed that some of the Reconstruction Acts, passed over his veto, were unconstitutional. Others, such as the Confiscation Act of 1862, he effectively nullified by issuing a great number of pardons.¹⁹¹

Beginning in late 1866, and in response to Johnson's opposition to their political agenda, some members of the House tried to impeach the President. They charged him with, among other things, corruption in the use of his powers of appointment, pardon, and veto.¹⁹² Some even suggested that Johnson was guilty of complicity in the murder of President

190. See *id.* at 523-24. Senator Solomon Foot of Vermont, the president *pro tempore* of the Senate who presided over the trial, ruled that removal and disqualification were separate issues, and divided the vote on them. Cf. *supra* note 181.

191. See MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 41-43 (1973).

192. See *IMPEACHMENT PROCEDURE*, *supra* note 31, at 526-34.

Lincoln.¹⁹³ In March 1867, while the House Judiciary Committee was investigating these charges, and 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. In December, the House of Representatives rejected by a vote of 57-108 the long-pending effort to impeach President Johnson.¹⁹⁴

On January 30, 1868, Congressman Schofield of Pennsylvania took the floor of the House. He proclaimed that area newspapers had reported Supreme Court Justice Stephen J. Field to have openly announced that the Tenure of Office Act was unconstitutional, and that the Court would be sure to pronounce it so.¹⁹⁵ In response, the House of Representatives began an impeachment investigation against Justice Field.¹⁹⁶ This investigation dropped well into the background when, on February 21st, President Johnson fired Secretary Stanton. Three days later, the House impeached President Johnson by a vote of 128-47.¹⁹⁷

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

193. *See id.* at 528.

194. *See id.* at 547.

195. *See* IRVING BRANT, IMPEACHMENT: TRIALS AND ERRORS 136-37 (1972).

196. *See id.* at 137.

197. *See* IMPEACHMENT PROCEDURE, *supra* note 31, at 555.

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 United States Department of War property, 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 United States Department of War property, 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 that 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.¹⁹⁸

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.¹⁹⁹ The Senate then adjourned. On May 26th, the Senate voted on Articles 2 and 3. Again the vote was 35-19,²⁰⁰ whereupon the Senate voted to adjourn the impeachment trial and the Chief Justice announced, without objection, a judgment of acquittal.²⁰¹

One commentator has noted that “[i]f one argues that Johnson’s conviction would have resulted from votes motivated by political considerations, one must concede that the same considerations secured his acquittal.”²⁰² This conclusion is based on evidence suggesting that at least three of the seven Republicans who broke ranks and voted to acquit did so in part for political reasons. Senators Fessenden and Grimes apparently informed Johnson’s counsel that they would feel freer to vote against conviction if they were assured the President would stop interfering with Reconstruction. They suggested that Johnson appoint General Schofield as Secretary of War. Johnson did. Senator Ross suggested he would vote for acquittal if the President accepted the new constitutions of Arkansas and South Carolina. Johnson did that too.

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

House Vote to Impeach: March 2, 1876

Articles of Impeachment Adopted: April 3, 1876

Senate Action: August 1, 1876

198. See IMPEACHMENT MATERIALS, *supra* note 173, at 154-60.

199. See IMPEACHMENT PROCEDURE, *supra* note 31, at 602-03.

200. See *id.* at 605.

201. See *id.*

202. BENEDICT, *supra* note 191, at 126.

On March 2, 1876, William Belknap resigned as Secretary of War. Nevertheless, later that day the House proceeded to impeach him for his alleged misconduct while in office.²⁰³

- 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 post trader 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 post trader, 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 post trader.]
- Article 5: Belknap permitted Evans to remain post trader 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.²⁰⁴

On April 17th, former Secretary Belknap appeared in person and urged the Senate to take no further cognizance of the articles of

203. See IMPEACHMENT PROCEDURE, *supra* note 31, at 608-09.

204. See IMPEACHMENT MATERIALS, *supra* note 173, at 143-48.

impeachment on the grounds that as a private citizen he was not subject to impeachment.²⁰⁵ However, on May 29th, by a vote of 37-29, the Senate resolved that Belknap was amenable to trial by impeachment, notwithstanding his resignation before the House impeached him.²⁰⁶ It then gave him ten days to file a plea. Belknap refused to enter a plea, and instead continued to challenge the Senate's jurisdiction.²⁰⁷ The Senate proceeded with the trial as if Belknap had pleaded not guilty, and Belknap's counsel cross-examined the House manager's witnesses and then presented the defendant's case.²⁰⁸ After trial, the Senate voted as follows:²⁰⁹

	<u>Guilty</u>	<u>Not Guilty</u>
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 and one who did not vote) believed the Senate lacked jurisdiction.²¹⁰

CHARLES H. SWAYNE

Judge for the Northern District of Florida

House Vote to Impeach: December 13, 1904

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

205. See IMPEACHMENT PROCEDURE, *supra* note 31 at 624-25.

206. See *id.* at 639.

207. See *id.* at 641-42.

208. See *id.* at 644-46.

209. See *id.* at 651.

210. See *id.*

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 travelling 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 travelling 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 that 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: “[T]otally disregarding his duty” to reside within the newly defined district, Swayne 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.²¹¹

Judge Swayne was acquitted after the Senate voted as follows:²¹²

	<u>Guilty</u>	<u>Not Guilty</u>
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

211. IMPEACHMENT MATERIALS, *supra* note 173, at 149-53.

212. *See* IMPEACHMENT PROCEDURE, *supra* note 31, at 684.

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, 1912²¹³
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.

213. Beginning with the impeachment of Judge Archbald, the House voted on impeachment only after specific articles of impeachment were presented to it, usually by the Judiciary Committee.

- 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 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 endorsement 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. Von 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.²¹⁴

The Senate voted as follows:²¹⁵

	<u>Guilty</u>	<u>Not Guilty</u>
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

214. See IMPEACHMENT MATERIALS, *supra* note 173, at 177-83.

215. See IMPEACHMENT PROCEDURE, *supra* note 31, at 817.

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.²¹⁶

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 through 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 proffering 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

216. See *id.* With regard to the Senate's separately voting on guilt and removal, compare *supra* note 181.

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 course, 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.²¹⁷

217. See IMPEACHMENT MATERIALS, *supra* note 173, at 164-73.

Judge English resigned his office on November 4, 1926.²¹⁸ 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.²¹⁹ The House then passed a resolution indicating its desire not to urge the articles of impeachment before the Senate.²²⁰ On December 13th, the Senate concurred by a vote of 70-9.²²¹

HAROLD LOUDERBACK

Judge for the Northern District of California

Articles of Impeachment Adopted: February 24, 1933;

Amended: April 17, 1936

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.

218. See IMPEACHMENT PROCEDURE, *supra* note 31, at 890.

219. *Id.* at 891.

220. *See id.*

221. *See id.*

- 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.²²²

In response to a motion from Judge Louderback's counsel for a more definite statement of Article 5B the House later amended it to make it more

222. IMPEACHMENT MATERIALS, *supra* note 173, at 184-87.

detailed.²²³
follows:²²⁴

The Senate acquitted Judge Louderback by voting as

	<u>Guilty</u>	<u>Not Guilty</u>
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

223. See IMPEACHMENT PROCEDURE, *supra* note 31, at 835-39.

224. See *id.* at 850.

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 and 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 were "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 through 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.²²⁵

The Senate voted on the articles of impeachment as follows:²²⁶

	<u>Guilty</u>	<u>Not Guilty</u>
Article 1	55	29
Article 2	52	32
Article 3	44	39
Article 4	36	48
Article 5	36	48

225. IMPEACHMENT MATERIALS, *supra* note 173, at 188-202.

226. *See* 80 CONG. REC. 5602-06 (1936).

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, but 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.²²⁷ The Senate then voted 76-0 not to disqualify Ritter from holding future office.²²⁸

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."²²⁹

227. *See id.* at 5607. *Cf. supra* note 181.

228. *See id.*

229. 132 CONG. REC. 17295-305 (1986).

After a trial committee received the evidence, the entire Senate voted on the articles of impeachment as follows:²³⁰

	<u>Guilty</u>	<u>Not Guilty</u>	<u>Present</u>
Article 1	87	10	1
Article 2	90	7	1
Article 3	46	17	35
Article 4	89	8	1

Judge Claiborne was therefore convicted on counts 1, 2 and 4 but acquitted on count 3.²³¹

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*,²³² 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

230. See 132 CONG. REC. 29870-72 (1986).

231. 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. This issue apparently also arose in the impeachment trial of Judge Ritter. After the Senate voted 56-28 on the last Article of Impeachment, the chair pronounced Ritter guilty. Senator Austin made a point of order suggesting, among other things, that the required two-thirds majority was lacking because two-thirds of those *present* had not voted to convict. See 80 CONG. REC. 5606 (1986). The point of order was overruled. See *id.* In doing so, the president *pro tempore* commented briefly on Senator Austin's other arguments, but made no reference to the requirement of a two-thirds majority of those present.

232. 523 F. Supp. 1209 (S.D. Fla. 1981)

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.²³³

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 of the 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, 7 or 8.²³⁴ 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 through 15. The votes were as follows:²³⁵

	<u>Guilty</u>	<u>Not Guilty</u>
Article 1	69	26
Article 2	68	27
Article 3	69	26
Article 4	67	28
Article 5	67	28
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 fourth term.

233. See 134 CONG. REC. 20208-09 & 20221 (1988).

234. See 135 CONG. REC. 25329 (1989).

235. See 135 CONG. REC. 25330-35 (1989).

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 his 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 ever having discussed the Fairchild case with District Attorney Paul Holmes.
- Article 2: On July 18, 1984, Nixon testified before a federal grand jury investigating his 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.²³⁶

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 five-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:²³⁷

236. See 135 CONG. REC. 8814-24 (1989).

237. See 135 CONG. REC. 27102-04 (1989).

	<u>Guilty</u>	<u>Not Guilty</u>
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.

WILLIAM J. CLINTON

President of the United States

Articles of Impeachment Adopted: December 19, 1998

Senate Action: February 12, 1999

- Article 1: On August 17, 1998, President Clinton gave perjurious, false and misleading testimony to a grand jury concerning one or more of the following: (1) the nature and details of his relationship with a subordinate Government employee; (2) prior perjurious testimony he gave in a federal civil rights action brought against him; (3) prior false and misleading statements he allowed his attorney to make to the judge in that civil rights action; and (4) his corrupt efforts to influence the testimony of witnesses and to impede the discovery of evidence in that civil rights action.²³⁸
- Article 2: Clinton obstructed the administration of justice, personally and through subordinates, by engaging in a course of conduct designed to conceal the existence of evidence and testimony related to a civil rights action brought against him. Clinton did this by: (1) On or about December 17, 1997, corruptly encouraging a witness in a federal civil rights action brought against him to execute a sworn affidavit that he knew to be perjurious; (2) on or about December 17, 1997, corruptly encouraging a witness in a civil rights action brought against him to give perjurious testimony if and when called to testify in that proceeding; (3) on or about December 28, 1997,

238. It is interesting to compare the specificity of this charge to the articles of impeachment against Judges Hastings and Nixon, both of whom were also charged with perjury. In both of the prior cases, the articles of impeachment identified very specific perjurious statements that the judges allegedly made, whereas the charge against President Clinton was entirely general.

corruptly engaging in a scheme to conceal evidence that had been subpoenaed in the civil rights action brought against him; (4) from December 7, 1997, through January 14, 1998, endeavoring to secure a job for a witness in the civil rights action brought against him in order to corruptly prevent the truthful testimony of that witness in that proceeding; (5) on or about January 17, 1998, at his deposition in the civil rights action, corruptly allowing his attorney to make false and misleading statements to the judge, in order to prevent questioning deemed relevant by the judge; (6) on or about January 18 and 20-21, 1998, relating a false account of events relevant to the civil rights action to a potential witness, in order to corruptly influence the testimony of that witness; and (7) on or about January 21, 23 and 26, 1998, making false statements to potential witnesses in a grand jury proceeding in order to corruptly influence the testimony of those witnesses.²³⁹

Both Articles of Impeachment sought not only Clinton's removal from office, but also his disqualification from holding any federal office in the future. After trial, the Senate voted as follows:

	<u>Guilty</u>	<u>Not Guilty</u>
Article 1	45	55
Article 2	50	50

As a result, President Clinton was acquitted.

239. See 144 CONG. REC. H11774-75 (daily ed. Dec. 18, 1998). Article 1 was adopted by a vote of 228-206. Article 3 was adopted by a vote of 221-212. See 144 CONG. REC. H12040-42 (daily ed. Dec. 19, 1998). The House rejected two other proposed Articles of Impeachment. One of these, rejected by a vote of 205-229, concerned giving false responses to interrogatories and false deposition testimony in the Paula Jones suit. The other, rejected by a vote of 148-285, concerned the President's refusal to respond to some requests for admission and his providing false responses to other requests for admission presented to him by the House Judiciary Committee in connection with the impeachment investigation. See *id.*

UNITED STATES IMPEACHMENTS 1789 TO PRESENT					
OFFICIAL	OFFICE	DATES	GROUND	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	1868	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.)	1905	Falsifying expense accounts & using property held in a receivership	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.)	1933	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
William J. Clinton	President	1998-99	Perjury & obstruction of justice	Acquitted
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. Aquilar	Judge (N.D. Cal.)	1996	Obstruction of justice	Retired with full pension as part of a deal to avoid impeachment