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### ESSAY

#### IMPEACHING THE PRESIDENT<sup>†</sup>

CASS R. SUNSTEIN<sup>††</sup>

#### INTRODUCTION

The American Constitution allows the removal of the President for “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>1</sup> Well over 200 years after ratification, the meaning of these terms is debated, even over the most fundamental questions. The continuing debate raises a number of important issues in constitutional theory—involving the role of “politics” in

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<sup>†</sup> This Essay represents a written and updated version of the Owen J. Roberts Memorial Lecture, delivered at the University of Pennsylvania on November 10, 1998.

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<sup>1</sup> U.S. CONST. art. II, § 4.

interpretation, the place of text and history, the relevance of changed circumstances, the place of post-ratification practice, and the relevance of contemporary moral and political changes to constitutional meaning.

This is, then, a valuable arena in which to test contending approaches to constitutional law. But the interpretive debate has practical importance too—perhaps growing practical importance. After a fifty year period in which no judges were impeached—from 1936 to 1986—three federal judges were impeached between 1986 and 1989.<sup>2</sup> The 1998 impeachment of President Clinton may signal more frequent resort to the impeachment mechanism, especially in a world in which recent events are highly salient, and in which political opponents like to play “tit for tat.” At least it can be said that, in an era in which scandals involving public or private behavior are an omnipresent aspect of news coverage and partisan politics, the country may well start to resort to impeachment more frequently. Is this desirable? How, if at all, does this possibility bear on constitutional interpretation?

I offer two substantive claims here. The simplest is that, with respect to the President, the principal goal of the Impeachment Clause is to allow impeachment for a *narrow category of egregious or large-scale abuses of authority that comes from the exercise of distinctly presidential powers*. On this view, a criminal violation is neither a necessary nor a sufficient condition for impeaching the President. What is generally necessary is an egregious abuse of power that the President has by virtue of being President. Outside of this category of cases, impeachment is generally foreign to our traditions and is prohibited by the Constitution. Outside of this category of cases, the appropriate course of action for any crime is generally<sup>3</sup> not impeachment, but a prosecutorial judgment, *after* the President leaves office, whether indictment is desirable. This is not a claim that the President can never be impeached for decisions and acts that do not involve the abuse of distinctly presidential powers. The Nation has left that issue undecided, and it should continue to do so until it becomes necessary to decide it.

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<sup>2</sup> These were Harry Claiborne, impeached for income tax evasion; Alcee Hastings, impeached for taking a bribe; and Walter Nixon, impeached for perjuring himself before a grand jury by denying he made a phone call to a state prosecutor to ask him to drop a case. The Senate convicted all three. See STAFF OF THE IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY, 105TH CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS 4-14 (Comm. Print 1998) [hereinafter 105TH CONG. IMPEACHMENT INQUIRY] (discussing these three judicial impeachments of the 1980s); see also STAFF OF THE IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 43-55 (Comm. Print 1974) [hereinafter 93D CONG. IMPEACHMENT INQUIRY] (listing previous impeachments of a president, a cabinet officer, a senator, and 10 federal judges).

<sup>3</sup> I offer an explanation of this qualification *infra* at note 110 and accompanying text.

My second substantive claim is that in the current period, it is more, not less, important to insist on this particular understanding of the Impeachment Clause. There are grave systemic dangers in resorting to impeachment except in the most extreme cases. The prospect of impeachment can be highly destabilizing to government, and in an era in which the opposing party and the mass media are likely to be aligned in accusing political opponents of criminality or severe misconduct, there is a continuing risk that impeachment proceedings will become decreasingly exceptional. This risk is all the more serious in light of the central modern role of the American President both domestically and internationally. In the interest of national stability, the best course lies in legislative forbearance and self-restraint—a kind of “mutual arms control” agreement, to be entered into by both political parties, in the service of the Nation as a whole.

I also offer two claims about constitutional interpretation. The first is that our tradition is, at least in part, a common law tradition,<sup>4</sup> and the Nation’s practice between ratification and the present is no less important for interpretive purposes than the Nation’s understanding in 1787 and 1788. Indeed, that long-standing practice may be the most important clue to the appropriate meaning of the phrase “other high Crimes and Misdemeanors.” And with respect to the President, the Nation has shown a remarkable tradition of forbearance and restraint, by refusing to proceed in cases in which Presidents—including Presidents Reagan, Bush, Nixon,<sup>5</sup> Kennedy, Eisenhower, Roosevelt, and Lincoln—might have been said, by some, to have committed impeachable offenses.<sup>6</sup> With respect to the office of the President, there have been only three serious impeachment inquiries in American history.<sup>7</sup> This practice of caution is as important as anything else to my general argument.

A striking aspect of the debate over impeachment between 1997 and 1999 has been its insistently originalist character. Many participants, on all sides, have urged that the meaning of the Impeachment Clause depends on the understanding of the Nation in 1787. Part of my argument speaks in originalist terms, and originalism does support my general conclusion. But post-ratification practice speaks even more unambiguously, and it is that practice that deserves to bear most of the argument’s weight. Political

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<sup>4</sup> See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884-88 (1996) (arguing that, in the American legal tradition, the Constitution is “part of an evolutionary common law system”).

<sup>5</sup> I mean to refer here to the allegation, against President Nixon, of income tax evasion.

<sup>6</sup> For a discussion of these possible impeachable offenses, see *infra* Part II.B.

<sup>7</sup> Two of these inquiries involved alleged abuses of public power. One of them was a grotesquely partisan affair that history has not treated well; I believe that the impeachment of President Clinton will be regarded in the same basic way.

“precedents” are less articulate than judicial ones, but in this context, our political practice speaks very loudly indeed.

It should be clear that one of my principal targets is the famous 1970 statement by Gerald Ford, then a Representative from Michigan, that an impeachable offense “is whatever a majority of the House of Representatives considers [it] to be.”<sup>8</sup> In a practical sense, of course, Ford was right—in the absence of extraordinary circumstance, no court is likely to review a decision to impeach. But in a constitutional sense, he was entirely wrong. The Constitution sharply circumscribes the power of the House of Representatives by limiting the category of legitimately impeachable offenses.

This Essay has three basic parts. Part I discusses the original understanding of Congress’s impeachment power, with reference to the Constitution’s text and the founding era. Part II explores historical practice. Part III briefly applies the basic analysis to the effort to impeach President Clinton; much more importantly, it deals with modern political culture and its relationship to the topic of impeachment.

## I. 1788

Some people believe that the meaning of the Constitution is settled by the original understanding,<sup>9</sup> and debates about impeachment have had a striking and unmistakable “originalist” dimension. I have suggested that post-ratification practice is highly relevant, but of course the original understanding matters too. Let us begin, then, by examining the original understanding of the impeachment power. What was the impeachment power soon after ratification in, for example, 1788?

### A. *The Text*

The text of the Constitution is the place to begin. It says that a President may be removed for “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>10</sup> How much progress can be made by looking at the text alone,<sup>11</sup> at least if we attempt to read it as it would have been read in 1788? The basic answer is that while the text certainly does not answer every

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<sup>8</sup> 116 CONG. REC. 11, 913 (1970) (statement of Rep. Gerald Ford).

<sup>9</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997) (arguing that the Constitution should be interpreted after consulting the writings of delegates to the Constitutional Convention and other intelligent people of that era and determining “the original meaning of the text”).

<sup>10</sup> U.S. CONST. art. II, § 4.

<sup>11</sup> Of course no text can ever be read “alone”; it is always read in light of context, including cultural understandings.

question, it is highly suggestive. What it suggests is that to be impeachable, the President must have engaged in large-scale abuses of distinctly presidential powers.

The opening reference to treason and bribery, together with the word “other,” seems to indicate that high crimes and misdemeanors should be understood to be of the same general kind and magnitude as treason and bribery (as in the Latin canon of construction, *ejusdem generis*<sup>12</sup>). For a reader in 1788, the terms “treason” and “bribery” would be unmistakable references to misuse of office, probably through betraying the country in one way or another.<sup>13</sup> Thus, it would be reasonable to think that “other high Crimes and Misdemeanors” must amount to a kind of egregious misuse of public office.<sup>14</sup> The Constitution does not say “Murder, Assault, and other High Crimes and Misdemeanors,” nor does it say, “Blasphemy, Disorderly Conduct, and other High Crimes and Misdemeanors.”<sup>15</sup> The opening references to treason and bribery seem to limit the kinds of offenses for which a president may be removed from office.

Other provisions of the Constitution appear to support this judgment; they suggest that the choice of terms was no coincidence, that the words “treason” and “bribery” were carefully chosen, and that the term “high” was intended as a serious restriction on the legitimate grounds for impeachment. The Interstate Extradition Clause refers to persons “charged in any State With Treason, Felony, or other Crime,”<sup>16</sup> in striking contrast to the impeachment provision. Consider, also, the Speech and Debate Clause, which refers to congressional immunity from arrest “in all Cases, except Treason, Felony, and Breach of the Peace,”<sup>17</sup> and the Fifth Amendment’s Grand Jury Clause, which guarantees a right to a grand jury when someone is “held to

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<sup>12</sup> The phrase “*ejusdem generis*” means “of the same kind.”

<sup>13</sup> See *infra* Part I.B for a discussion of the founding of the Constitution.

<sup>14</sup> By itself, the term “high” creates a problem of “scaling without a modulus,” a problem that is bound to create arbitrariness and variability in individual judgments. See Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2106-07 (1998) (explaining that a “modulus” is a particular rating to a standard stimulus used “to assign ratings to other stimuli in relation to that modulus”). Much of the debate is about the search for a modulus. The terms “treason” and “bribery” might supply one; so too with the historical practice, as I emphasize. I am grateful to Akhil Amar for this analogy.

<sup>15</sup> See Letter from Jed Rubenfeld, Professor of Law, Yale University, et al. to Newt Gingrich, Speaker of the House of Representatives 1-2 (Nov. 4, 1998) (on file with Professor Rubenfeld) (arguing that the words “treason” and “bribery” indicate that impeachment is the appropriate remedy for only abuses of executive power).

<sup>16</sup> U.S. CONST. art. IV, § 2, cl. 2.

<sup>17</sup> U.S. CONST. art. I, § 6, cl. 1.

answer for a capital, or otherwise infamous crime.”<sup>18</sup> The different constitutional references to diverse “crimes” suggests that the impeachment provision had a special purpose. Because the phrase “other high Crimes and Misdemeanors” is a dramatic contrast to other provisions in the text, it is reasonable to think that those terms are a reference to abuses that are, in both nature and magnitude, similar to treason and bribery.

This reading does not entirely dispose of the interpretive problems. For one thing, the term “bribery” creates some ambiguity. Bribery could be the President’s acceptance of a payment of money to act in a way that is inconsistent with the republic’s needs or desires, or it could be a payment of money by the President himself, to convince people to vote for him. These would be abuses of power. But “bribery” could also be a payment by the President to a judge, to decide a case in favor of a childhood friend; or it could be a presidential payment of money to an athlete, to allow an opposing team to win some competition. In light of the wide range of possible “bribes,” it would be possible to suggest that not every “bribe” is an abuse of office, or even connected in any way with office. And if this is so, it is not altogether clear what counts as “other” high crimes and misdemeanors.

There is another textual puzzle. The word “high” precedes “crimes” but not “misdemeanors”; does this suggest that any misdemeanor is a legitimate basis for impeachment? Perhaps a “high crime” *or* a “misdemeanor” is sufficient for impeachment. And is there not a difference between “crimes” and “misdemeanors,” as the text seems to suggest? Perhaps—the open-minded contemporary textualist might wonder, trying to reconstruct the audience’s judgment in 1788—misdemeanors are not crimes at all, but forms of relatively minor misconduct. It would thus be possible to think that the Constitution allows impeachment for the following: treason; bribery; other high crimes, of whatever sort; and misdemeanors, or crimes of a lower variety. Perhaps, then, treason and bribery are obviously impeachable offenses, but the text grants posterity a great deal of leeway to remove presidents for crimes or misbehavior that fall short of those things. At the very least, the text might seem to leave this possibility open.

For someone in 1788, however, this would be a most unlikely judgment, and the apparent textual puzzles would be likely to dissolve fairly rapidly. If the Constitution has given Congress the authority to remove the President for the stated offenses (“Treason, Bribery, or other high Crimes and Misdemeanors”), it would be extremely odd, textually speaking, to say that the Constitution has given Congress the authority to remove the President for any criminal offenses at all. It would be far more sensible, textually

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<sup>18</sup> U.S. CONST. amend. V.

speaking, to understand “other high Crimes and Misdemeanors” to conform to “treason” and “bribery,” and to require the relevant “misdemeanors” to have to meet a certain threshold of “highness” as well. Thus, the phrase “high Crimes and Misdemeanors” would be read as a piece, to suggest illegal acts of a serious kind and magnitude and also acts that, whether or not technically illegal, amount to an egregious abuse of office.<sup>19</sup> This is not an inevitable reading, but it seems to be the more natural one.

Nor—in all probability—would the term “bribery” create serious puzzles. A reader in 1788 would likely read the word “bribery,” in context, to mean taking or offering money in return for abuse of official office; the term would not likely be taken as a reference to private acts of bribery.<sup>20</sup> The text thus supports the view that impeachment is designed for abuses of public authority. But it does not answer every question, and armed with the text alone, reasonable people could understand similar cases in quite different ways. It is certainly appropriate to look elsewhere.

## B. *The Founding*

The founding of the Constitution of course occurred in two stages. The first involved the Constitution’s actual drafting, which was done in secret; the second involved ratification, which was highly public. There is thus room for a debate over the appropriate sources of constitutional interpretation. It is possible to question whether the secret meetings of the drafters should play a large role in constitutional interpretation; but what happened there is extremely interesting. Impeachment was no marginal issue. It was central to the Framers’ deliberations. What emerged from those deliberations was an effort to cabin the impeachment power in order to preserve the separation of powers, and also to define the grounds for impeachment in a way that would meet the Framers’ stated concern: the large-scale abuse of distinctly presidential powers.

### 1. The Convention

Meeting in Philadelphia in the summer of 1787, the Framers sought to produce a form of government that would reject England’s monarchical

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<sup>19</sup> There is historical support for this understanding. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 59-67 (1973) (discussing the origins of the phrase “high crimes and misdemeanors” in English law and concluding that the meaning of the phrase is “confined to impeachments, without roots in the ordinary criminal law”).

<sup>20</sup> Thus, I do not believe that all briberies are impeachable offenses; a president who paid an athlete to lose a basketball game would not have committed an act of “bribery” within the meaning of the Impeachment Clause.



heritage in favor of a system of republican self-government.<sup>21</sup> The Framers agreed that a president was necessary to head the new nation and they shared a commitment to disciplining public officials through a system of checks and balances.<sup>22</sup> But they sharply disagreed about the precise extent of presidential power and about how, if at all, the President should be removable from office. This question played a large role in the Constitutional Convention, as revealed by James Madison's detailed notes of the founding debate, which I summarize here. The extensive debates in the Convention strongly suggest a sharply limited conception of impeachment, one that sees the process as a targeted response to the President's abuse of public power through manipulation of distinctly presidential authority, or through procurement of his office by corrupt means.<sup>23</sup>

The initial draft of the Constitution took the form of resolutions presented before the members meeting in Philadelphia on June 13, 1787.<sup>24</sup> One of the key resolutions, found in the Convention's official journal, said that the President could be impeached for "mal-practice, or neglect of duty."<sup>25</sup> On July 20, this provision provoked an extended debate. Three positions dominated the day's discussion. One extreme view, represented by Roger Sherman and attracting very little support, was that the legislature should have the power to remove the Executive at its pleasure. Charles Pinckney, Rufus King, and Gouverneur Morris represented the opposing extreme view, that in the new republic, the President "ought not to be impeachable whilst in office."<sup>26</sup> This view did receive considerable support, and it played a large role in the day's debate. It was defended partly by reference to the system of separation of powers, which would be compromised by impeachment, and partly by reference to the fact that the President, unlike a monarch, would be subject to periodic elections, a point that seemed to make impeachment less necessary. The third position, which ultimately carried the day, was that the President should be impeachable, but only for a narrow category of abuses of the public trust—for example, by procuring office by unlawful means, or using distinctly presidential authority for ends that are treasonous.

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<sup>21</sup> A good treatment of this issue is JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994).

<sup>22</sup> See generally *THE FEDERALIST* NO. 51 (James Madison) (discussing checks and balances with regard to the relative powers of the legislative and executive branches).

<sup>23</sup> See 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 61-70 (1966) (discussing the need for a check on the executive branch to discourage abuse of presidential powers).

<sup>24</sup> See 1 *id.* at 223-39.

<sup>25</sup> 1 *id.* at 226.

<sup>26</sup> 2 *id.* at 64.

George Mason took a lead role in promoting the compromise course. Against Pinckney, he argued that it was necessary to counter the risk that the President might obtain his office by corrupting his electors. “[S]hall that man be above” justice, he asked, “who can commit the most extensive injustice?”<sup>27</sup> This question identified the risk, to which the Convention was quite sensitive, that the President might turn into a near-monarch; and it led the crucial votes—above all, Morris—to agree that impeachment might be permitted for, in Morris’s words, “corruption & some few other offences.”<sup>28</sup> James Madison promptly concurred with Morris, pointing to a case in which a president “might betray his trust to foreign powers.”<sup>29</sup> Capturing the emerging consensus of the Convention, Edmund Randolph favored impeachment on the ground that the Executive “will have great opportunit[ie]s of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands.”<sup>30</sup> The clear trend of the discussion was toward allowing a narrow impeachment power by which the President could be removed only for gross abuses of public authority.

But Pinckney, concerned about the separation of powers, continued to insist that a power of impeachment would eliminate the President’s “independence.”<sup>31</sup> Morris once again offered the decisive response, urging that he was convinced of the necessity of impeachment, because the President “may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard [against] it by displacing him.”<sup>32</sup> At the same time, Morris insisted, “we should take care to provide some mode that will not make him dependent on the Legislature.”<sup>33</sup> Led by Morris, the convention thus moved toward a compromise position, one that would continue the separation between the President and Congress, but still permit the President to be removed in the most extreme cases. The discussion ended without agreement on any particular set of terms.

The new draft of the Constitution’s Impeachment Clause emerged two weeks later, on August 6. It would have permitted the President to be impeached, but only for treason, bribery, and corruption (apparently exempli-

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<sup>27</sup> 2 *id.* at 65.

<sup>28</sup> 2 *id.*

<sup>29</sup> 2 *id.* at 66.

<sup>30</sup> 2 *id.* at 67.

<sup>31</sup> 2 *id.* at 66.

<sup>32</sup> 2 *id.* at 68.

<sup>33</sup> 2 *id.* at 69.

fied by the President's securing his office by unlawful means).<sup>34</sup> With little additional debate, and for no clear reason, this provision was narrowed on September 4, to "treason, or bribery."<sup>35</sup> But in early September, the delegates took up the Impeachment Clause anew. Here they slightly broadened the grounds for removing the President, but in a way that stayed close to the compromise position that appeared to carry the day in July.

The opening argument was offered by Mason, who complained that the provision was too narrow to capture his earlier concerns, and that "maladministration" should be added, so as to include "[a]ttempts to subvert the Constitution" that would not count as treason or bribery.<sup>36</sup> Mason's strongest point was that the President should be removable if he attempted to undo the constitutional plan. But Madison insisted that the term "maladministration" was "[s]o vague" that it would "be equivalent to a tenure during pleasure of the Senate,"<sup>37</sup> which the Framers had been attempting to avoid all along. Hence Mason withdrew "maladministration" and added the new, more precise terms "other high crimes and misdemeanors [against] the State."<sup>38</sup> The term "high Crimes & Misdemeanors" was borrowed from English law, as we shall see; but it received no independent debate in the Convention. During the debates, the only subsequent development—and it is not trivial—was that "against the State" was changed to "against the United States" in order to remove ambiguity.<sup>39</sup>

There is one further wrinkle. The resulting draft was submitted to the Committee on Arrangement and Style, which deleted the words "against the United States."<sup>40</sup> Hence there is an interpretive puzzle. Was the deletion designed to broaden the legitimate grounds for impeachment? This is extremely unlikely. As its name suggests, the Committee on Style and Arrangement lacked substantive authority (which is not to deny that it made some substantive changes), and it is far more likely that the particular change was made on grounds of redundancy. Hence the Impeachment Clause, in its final incarnation, was targeted at "high Crimes and Misdemeanors."

The most reasonable reading of these debates is that in designing the provision governing impeachment, *the Framers were thinking, exclusively*

<sup>34</sup> See 2 *id.* at 185-86 ("[The President] shall be removed from his office on impeachment by the House of Representatives, and conviction in the supreme Court, of treason, bribery, or corruption.").

<sup>35</sup> 2 *id.* at 499.

<sup>36</sup> 2 *id.* at 550.

<sup>37</sup> 2 *id.*

<sup>38</sup> 2 *id.*

<sup>39</sup> 2 *id.* at 551.

<sup>40</sup> See 2 *id.* at 600.

or principally, of large-scale abuses of distinctly public authority. The unanimous rejection of "maladministration" suggests that the Framers sought to create an authority that was both confined and well-defined. All of the alleged grounds for impeachment involved abuses of public trust through the exercise of distinctly presidential powers (or corruption in procuring those powers). There were no references to private crimes, such as murder and assault. We cannot over-read silence on that point; it is possible that the Framers would have considered some such crimes to be "high Crimes and Misdemeanors." But the debates strongly suggest that the model for impeachment was the large-scale abuse of public office.

## 2. Ratification

The same view is supported by discussion at the time of ratification and in the early period. The basic point is that impeachment was explained and defended as a way of removing the President when he used his public authority for treasonous or corrupt purposes. I offer a few brief notations here.

Alexander Hamilton explained that the "subjects" of impeachment involve "the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to society itself."<sup>41</sup> This suggestion should be taken as an echo of the textual idea, on which the discussants were unanimous on September 8, that the relevant high crimes and misdemeanors must run "against the United States."<sup>42</sup>

One of the most sustained discussions came from the highly respected (and later Supreme Court Justice) James Iredell, speaking in the North Carolina ratifying convention: "I suppose the only instances, in which the President would be liable to impeachment, would be where he had received a bribe, or had acted from some corrupt motive or other."<sup>43</sup> By way of explanation, Iredell referred to a situation in which "the President had received a bribe . . . from a foreign power, and, under the influence of that bribe, had address enough with the Senate, by artifices and misrepresentations, to seduce their consent to a pernicious treaty."<sup>44</sup>

James Wilson wrote similarly in his great 1791 *Lectures on Law*: "In the United States and in Pennsylvania, impeachments are confined to politi-

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<sup>41</sup> THE FEDERALIST NO. 65, at 334 (Alexander Hamilton) (Max Beldoff ed., 2d ed. 1987).

<sup>42</sup> 2 FARRAND, *supra* note 23, at 545.

<sup>43</sup> 2 THE FOUNDERS' CONSTITUTION 165 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>44</sup> 2 *id.*

cal characters, to political crimes and misdemeanors, and to political punishments.”<sup>45</sup> Another early commentator went so far as to say that

[t]he legitimate causes of impeachment . . . can have reference only to public character, and official duty. . . . 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 offenses not immediately connected with office, . . . are left to the ordinary course of judicial proceeding. . . .<sup>46</sup>

This was a contested view, and a few people suggested in the early period that murder and the like would be a legitimate basis for impeachment; but there was general agreement that the great office of impeachment was to remove from office those who had abused distinctly public power. In the ratification debates themselves, I have not been able to find a single example of an impeachable offense that did not involve this kind of abuse, and certainly the prominent examples all involved abuses of that sort.

### 3. High Crimes and Misdemeanors in England

Thus far, I have said very little about the particular understanding in America in 1788 of the phrase “high Crimes and Misdemeanors.” This term was not debated in the convention; it was treated as a term of art, satisfactory for the purpose. Because the term comes from English law, it is possible to contend that it should be interpreted in accordance with English understandings.<sup>47</sup>

There is considerable sense in this view—the term certainly does come from English law—but serious questions might be raised about this basic proposition. The most important point is that it is not at all clear that the American understanding was the same as the English one. Recall that in the framing period, participants were aware of two exceedingly important differences between America and England: (1) the election of the President and (2) the separation of powers. As we have seen, these differences led many to suggest no impeachment power, or at least a narrow power of impeachment. It is possible that many of the Framers were aware of the content of English practice, but it is doubtful that most of them were, or they knew of every detail. It is even more doubtful that they meant to transport it

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<sup>45</sup> 2 *id.* at 166.

<sup>46</sup> 2 *id.* at 179.

<sup>47</sup> See, e.g., BERGER, *supra* note 19, at 54 (“To understand what the Framers had in mind [regarding the phrase ‘high Crimes and Misdemeanors’] we must begin with English law, for nowhere did they more evidently take off from that law than in drafting impeachment provisions.”).

unreformed into their new republic.<sup>48</sup> Thus it is hazardous to suggest, as some have, that the American understanding essentially incorporates the English understanding.<sup>49</sup> Especially because the impeachment device had fallen into disuse in England during the century preceding the American founding, there can be little support for the view that the Founders sought to introduce the English practice of, say, 1360 to 1600. With these qualifications, let me briefly investigate the English practice. As it turns out, that practice basically supports the argument I am making here.

The English idea of “impeachment” arose largely because its objects were, for various reasons, not subject to the reach of conventional criminal law. Hence, ministers and functionaries of the King were subject to impeachment for public offenses. Under English law, the term “misdemeanor” was emphatically not a reference to what we would now call misdemeanor (as opposed to felony); it referred instead to distinctly public misconduct. Thus the term “high Crimes and Misdemeanors” represented “a category of *political crimes against the state.*”<sup>50</sup>

In English law, there was some ambiguity in the use of the word “high.” Did the term refer to the seriousness of the offense, or to the nature of the office against which the proceeding was aimed? Probably the better view, based on the actual practice, was that the term referred to both.<sup>51</sup> In any case a “high Crime and Misdemeanor” could be a serious crime, but it could also be a serious offense that was not a technical violation of the criminal law. Serious misconduct, as in the form of committing the Nation to “an ignominious treaty,” was said by some to be a just basis for impeachment in England.<sup>52</sup> Whatever one thinks of the particular example, it is clear that there was no consensus in England that a “high Crime and Misdemeanor” had to be a violation of the criminal law. Indeed, the better view—based on what was said at the framing—is that an impeachable offense, to qualify as such, need not be a crime in the United States.

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<sup>48</sup> See PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 266-68 (1984) (arguing that the Framers were acquainted with English practice, but did not possess “intimate knowledge” of its details).

<sup>49</sup> See *id.* at 266-68. Hoffer and Hull examine numerous state practices, revealing that impeachment was relatively common in the colonies and the states. See *id.* at 78-95. This practice does not, however, show that impeachment of the President was intended to be relatively common, and I do not understand Hoffer and Hull to have so argued.

<sup>50</sup> BERGER, *supra* note 19, at 61.

<sup>51</sup> See *id.* at 59-60 (“Impeachment itself was conceived because the objects of impeachment, for one reason or another, were beyond the reach of ordinary criminal redress.”).

<sup>52</sup> See *id.* at 63 (quoting 2 RICHARD WOODDESON, *LAWS OF ENGLAND* 602-03 (E. Lynch ed., 1792)).

For present purposes, the more important point is that the great cases involving charges of impeachable conduct in England reveal a far readier resort to the practice than has been the case in America, probably for the reasons mentioned above. But those cases generally involved criminal or extremely inappropriate conduct in the form of abuse of the authority granted by public office, or, in other terms, the kind of misconduct that someone could engage in only by virtue of holding public office. A prominent listing of the key cases refers to the following: unlawful use of publicly appropriated funds;<sup>53</sup> thwarting Parliament's order to store arms and ammunition in storehouses;<sup>54</sup> preventing a political enemy from standing for election and causing his unlawful arrest and detention;<sup>55</sup> arbitrarily granting general blank search warrants;<sup>56</sup> and stopping writs of appeal.<sup>57</sup> In addition, a general list suggests that in the great run of cases, impeachment proceedings were brought for the abuse of the distinctive authority vested in public officers.<sup>58</sup> It appears that the actual English practice was more wide-ranging,<sup>59</sup> with some exceptions to the basic point I have been urging; but the most highly publicized and well-known cases fell within the category of the egregious use, or misuse, of official powers.

We may summarize the discussion with two simple points. First, English practice shows a far readier resort to impeachment than the American practice. This difference makes sense in light of the fact that the President is subject to electoral checks and the American commitment to separation of powers. The place of impeachment in a monarchy is naturally different from the place of impeachment in a republic. Second, English practice was concentrated, at least as a general rule, on the abusive exercise of distinctly public authorities.

#### 4. The Originalist's Impeachment Clause

I do not believe that the meaning of the Impeachment Clause was settled in 1787, any more than that the meaning of the First Amendment was settled in 1789. Two centuries of practice matter a great deal, especially, perhaps, in the context of separation of powers. But the original under-

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<sup>53</sup> See BERGER, *supra* note 19, at 67.

<sup>54</sup> See *id.* at 68.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.* at 67.

<sup>58</sup> See BERGER, *supra* note 19, at 69-71 (reducing a list of charges into "intelligible categories," all involving the abuse of authority by public officers).

<sup>59</sup> See HOFFER & HULL, *supra* note 48, at 64-67 (explaining that the American practice substantially narrowed prior practice by limiting impeachment to official misconduct).

standing is certainly a part of the interpretive picture. The best judgment is that the Impeachment Clause was fundamentally designed for egregious or large-scale abuses of power that officials exercised by virtue of their office. In 1788, it would have been implausible to contend that a president could be impeached for the commission of any crime at all, or that a violation of his oath of office, through a failure to obey the laws, would be by itself sufficient for impeachment. Indeed, in 1788 it would have been close to implausible to suggest that a criminal act was necessary for impeachment; a large-scale abuse of office could have provided a good basis for impeachment even if no crime was involved.

To be sure, there is no explicit suggestion that the President could not be impeached for misconduct that did not involve an abuse of office. In the framing of ratification debates, I have been unable to find any discussion of murder, rape, or assault, as grounds for impeachment. Although silence on this point is not decisive, it is highly revealing. Whether or not it resolves some barely imaginable cases, it suggests that the key cases, from which any analysis must start, involve close analogies to treason and bribery.<sup>60</sup>

## II. TWO CENTURIES OF PRACTICE

What have been our historical practices? This question is important for several reasons. Some people argue that America does and should have a

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<sup>60</sup> My colleague Joseph Isenbergh has argued that the House has the power to impeach the President for acts short of "high Crimes and Misdemeanors," and also that it is legitimate for the Senate to convict but not to remove the President in the face of a House impeachment; in his view, impeachment is mandatory for "high Crimes and Misdemeanors," but permissive for acts that do not meet that standard. See Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process* (Dec. 31, 1998) (unpublished manuscript, available at <<http://www.law.uchicago.edu/Publications/Occasional>>). This is a creative and ingenious argument. I cannot discuss it in detail here, but for three reasons, I do not believe that it should be accepted. The first problem is the sheer weight of history. For well over a century at least, the nation has agreed that without a high crime and misdemeanor, there can be no impeachment, and any effort to disrupt that agreement bears a heavy burden of justification. The second problem is practical: recognition of congressional power to impeach the President (or for that matter judges) for reasons that do not involve high crimes and misdemeanors would gravely threaten the separation of powers. The third problem is that despite its ingenious presentation, I do not believe that Isenbergh has shown that this view had the support of the founding era. Most of his evidence is speculative, inferential, and indirect, and the direct evidence supports the conventional view. Consider, for example, the crucial remark by George Mason, arguing, in his initial claim to include "maladministration," that "it is the more necessary to extend: the *power* of impeachments." 2 FARRAND, *supra* note 23, at 550 (emphasis added). This remark, and the following colloquy, would be senseless if Congress already had the power to impeach presidents for grounds falling short of high crimes and misdemeanors. Certainly someone, during the founding and ratification debates, would have been expected to make the mandatory/permissive distinction if it had been what was intended and understood.



common law constitution—a constitutional order in which the meaning of constitutional provisions is settled less by the original understanding than by the practices and judgments that have been developed over time.<sup>61</sup> It is controversial to claim that this is the way things should be, but it is undoubtedly part of the way things are. In the context of impeachment, any kind of common law constitution will reflect legislative rather than judicial practices. There are of course no judicial precedents with respect to what counts as an impeachable offense; but there is nonetheless a long line of historical practices, capturing a distinctive set of social judgments. We can build, from these practices, a set of understandings about constitutional meaning. Those understandings greatly fortify the basic proposition I am attempting to defend here.

### A. *Impeachments and the President: Two (But Now Three) Cases*

The most important lesson of history is that the exceptional infrequency of serious impeachment proceedings against the President—even in circumstances in which such proceedings might have appeared legitimate—suggests a historical understanding that impeachment is appropriate only in the most extraordinary cases of abuse of distinctly presidential authority. We should notice at the outset that, before the impeachment of President Clinton, there had only been sixteen impeachments; only one President was impeached; and only one other President was subject to serious impeachment inquiry.

President Nixon was of course subject to an impeachment inquiry because of a series of alleged abuses of the public trust. Thus, Article 1 of the Articles of Impeachment against President Nixon referred to an unlawful entry into the headquarters of the Democratic National Committee “for the purpose of securing political intelligence” and a conspiracy to cover it up.<sup>62</sup> Article 2 referred to the allegation that he “repeatedly engaged in conduct violating the constitutional rights of citizens,” including the use of the Internal Revenue Service, the Federal Bureau of Investigation, and the Secret Service.<sup>63</sup> Article 3 referred to repeated refusals to produce papers and things under subpoenas specifically signed “to resolve by direct evidence fundamental, factual questions relating to Presidential direction, knowledge or approval of actions demonstrated by other evidence to be substantial

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<sup>61</sup> See Strauss, *supra* note 4, at 877-80 (summarizing the “common law approach to constitutional interpretation”).

<sup>62</sup> HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 2 (1974).

<sup>63</sup> *Id.* at 3.

grounds for impeachment of the President.<sup>64</sup> In retrospect, a remarkable feature of these Articles is their relative restraint—fastening on large-scale abuses of distinctly public authority. In exercise of that relative restraint, the House of Representatives declined to proceed against President Nixon with an allegation of unlawful tax evasion.<sup>65</sup>

The only President to have been impeached (though not convicted) was the unelected President Andrew Johnson, who was subject to an extraordinarily partisan battle. The key counts involved allegations that he discharged his Secretary of State in violation of the Tenure in Office Act, which Johnson believed (rightly, as it turned out) to be unconstitutional.<sup>66</sup> President Johnson was impeached less because of a violation of law—though there was a violation of law—than because radical Republicans were critical of Johnson on unambiguously political grounds.<sup>67</sup> History has not been kind to that impeachment effort, which weakened the presidency for a period of decades.<sup>68</sup> But even in the Johnson case, when partisan fervor was at its height, the allegations involved the allegedly large-scale abuse of presidential authority, through the lawless exercise of presidential power. With respect to the office of the President, at least, impeachment has been considered as a weapon of rare and last resort, in a way that vindicates the Framers' emphasis on the safeguards of the electoral process.

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<sup>64</sup> *Id.* at 4.

<sup>65</sup> See *The U.S. House of Representatives Comm. on the Judiciary Hearing on the Impeachment of the President*, 105th Cong. (1998) [hereinafter *House Impeachment Hearing*, 105th Cong.], available in 1998 WL 846820 (statements of former Congresswoman Elizabeth Holtzman (D-NY), former Congressman Robert Drinan (D-MA), former Congressman Wayne Owens (D-UT)) (noting that because it was personal rather than official misconduct, Nixon's tax evasion was not impeachable).

<sup>66</sup> See *Myers v. United States*, 272 U.S. 52 (1926) (holding that the Tenure in Office Act of 1867 was unconstitutional because it prohibited the President from removing executive officers).

<sup>67</sup> See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 245 (1992) (noting that a senator from Massachusetts viewed the impeachment issue as based on Johnson's obstruction of Republican policies and not on his violation of the Tenure in Office Act).

<sup>68</sup> See *id.* at 260 (noting that Henry Cabot Lodge believed that the executive branch was crippled and the balance of power was unduly shifted to Congress as a result of the Johnson impeachment).

## B. *Dogs That Didn't Bark*<sup>69</sup>

To have a sense of American history, it is at least as important to have a sense of the cases in which impeachment did *not* occur as of cases in which it did occur. This topic has received far too little emphasis during discussion of the impeachment question. An examination of American history shows that even when impeachment might well have been contemplated, cooler heads prevailed, and both the Nation and Congress insisted on an extremely high standard. Consider here simply a few cases (they could easily be multiplied), mostly from twentieth-century history; in all of these the House acted with great restraint. The House was correct to do so, both as a matter of constitutional law and as a matter of prudence. I list the cases not to complain about the Nation's failure to pursue the impeachment route, but, on the contrary, to suggest the solidity of the American presumption against impeachment.

### 1. Nixon's Taxes

In a decision that has received considerable publicity in the last weeks, the House refused to include, as an impeachment count, legitimate allegations of income tax evasion against President Nixon. A basic ground for the refusal was that income tax evasion—though hardly excusable and indeed a major breach of every citizen's obligation—did not amount to a misuse of distinctly presidential authority.<sup>70</sup>

### 2. Reagan and the Iran-Contra Controversy

President Reagan was allegedly involved in unlawful misconduct in connection with the Iran-Contra controversy; at least he presided over an administration allegedly involved in such unlawful misconduct. Indeed, the Independent Counsel's investigation yielded no fewer than seven guilty pleas and four convictions, including convictions of relatively high-level executive branch officials.

Many people believed or feared that President Reagan was personally involved in the unlawful acts. This allegation could have been sufficient to

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<sup>69</sup> See ARTHUR CONAN DOYLE, *Silver Blaze*, in 1 SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES 455, 475 (1986) ("Before deciding that question I had grasped the significance of the silence of the dog, for one true inference invariably suggests others . . . . Obviously the midnight visitor was someone whom the dog knew well.")

<sup>70</sup> See *House Impeachment Hearing*, 105th Cong., *supra* note 65 (statements of former Congresswoman Elizabeth Holtzman (D-NY), former Congressman Robert Drinan (D-MA), former Congressman Wayne Owens (D-UT)) (noting that because it was personal rather than official misconduct, Nixon's tax evasion was not impeachable).

commence impeachment hearings to investigate those charges. Nonetheless, impeachment was never considered as a serious option.<sup>71</sup>

### 3. Bush and the Iran-Contra Controversy

Many people have alleged that Vice-President Bush was involved in aspects of the Iran-Contra controversy, and some people suggested that he had personal knowledge of the unlawful activity. An impeachment investigation would not have been hard to imagine. Here too impeachment never emerged as a serious possibility.

### 4. Roosevelt and Illicit Arms Shipments

In World War II, the Lend-Lease Act allowed the President to build and sell arms and ammunition to other nations, most notably England. Before the passage of the Act, the sale of arms to other nations, including England, was prohibited by law. Nonetheless, it is generally agreed that President Roosevelt was secretly and unlawfully transferring arms—including over 20,000 airplanes, rifles, and ammunition—to England. Indeed, illegal approval of such weapons transfers were quite routine in the two full months before Congress authorized it. Even President Roosevelt's Secretary of War "felt troubled by the illegality and deception."<sup>72</sup> It is often said that Roosevelt both deceived and lied to Congress and the American people in connection with the program.

### 5. Eisenhower's Public Lies

President Eisenhower lied to the country at least twice. After the Russian downing of a U-2 airplane, he publicly denied that the plane was engaged in intelligence-gathering, claiming that it "may have drifted across the Russian border," and that it was a weather plane. The story had to be retracted after the Soviets produced contrary evidence from the plane.<sup>73</sup> In

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<sup>71</sup> This point was highlighted during a hearing of the Constitution Subcommittee of the House Judiciary Committee, when Professor Arthur Schlesinger commented, "[I]t seems to me that the Reagan administration systematically violated the Boland Amendments in the course of aid to the contras in Nicaragua." Representative Henry J. Hyde, Chairman of the House Judiciary Committee, responded, "If I may answer, professor, I was on the Iran-contra committee, and we went all summer turning over every rock we could. Nobody ever filed a bill of impeachment against the president." *History and Background of Impeachment and the U.S. Constitution*, Federal News Service, Nov. 9, 1998, available in LEXIS, News Library, Transcripts File.

<sup>72</sup> Aaron Xavier Fellmeth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941*, 3 BUFF. J. INT'L L. 413, 486 (1996-97).

<sup>73</sup> See D. WISE & R. ROSS, *THE U-2 AFFAIR* 57 (1960).

addition, President Eisenhower shipped arms to a hostile foreign government—Indonesia—in return for the release of a hostage; the administration deceived the Senate and Nation about its activities, and probably violated domestic law as well.<sup>74</sup>

#### 6. Suspicions of Ford's Pardon of Nixon

There were widespread claims of a secret "deal" between President Ford and President Nixon, culminating in the pardon granted by President Ford.<sup>75</sup> At the time, many Americans suspected that such a "deal" had occurred. So far as I am aware, no evidence supports any such suspicion. But in view of the climate of the time, these claims might well have produced an impeachment inquiry.

#### 7. Kennedy's Illicit Relationships

It was widely believed that President Kennedy was involved in a series of illicit sexual relationships while in office, including an illicit sexual relationship with a woman who was simultaneously involved with a member of the Mafia.<sup>76</sup> This relationship—some people have suggested—could have compromised the efforts of the Department of Justice. Some people have alleged that whether or not it involved technical violations of law, this reckless behavior reflected a serious indifference to law enforcement efforts. Yet no one has suggested, at the time or since, that impeachment was the appropriate course.

#### 8. Lincoln's Suspension of Habeas Corpus

Consider, as just one further illustration, the fact that President Lincoln suspended the writ of habeas corpus, a serious violation of civil liberties that was ruled unlawful.<sup>77</sup>

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<sup>74</sup> See Peter Morgan, *Legal Theory: The Undefined Crime of Lying to Congress*, 86 N.W. U. L. REV. 177, 183 (1992).

<sup>75</sup> See *Major Points from Appearance by Haig Before Senate Committee*, N.Y. TIMES, January 10, 1981, at A9.

<sup>76</sup> See, e.g., *Dangerous World: The Kennedy Years* (ABC television broadcast, Dec. 4, 1997) (reporting that Judith Campbell met Kennedy through Frank Sinatra, became his lover, and "was involved in Kennedy's secret dealings with the Mafia"). It is important to note that rumors of the affair did not surface until after Kennedy's assassination. However, there is some evidence that the FBI was aware of the affair. See Caryn James, *Ladies' Man Theory: A Kennedy Tour Stop*, N.Y. TIMES, Dec. 6, 1997, at B7 (mentioning an FBI memo with Campbell as the subject and an FBI surveillance photo of her).

<sup>77</sup> See *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) (stating that constitutional guarantees are to be upheld and protected by the courts "at all times, and under all circumstances," irre-

## 9. Conclusions

These are simply a few random examples, and doubtless reasonable people will suggest that some or all of them involve conduct far less egregious, or less legitimately impeachable, than alleged in other actual or hypothetical cases, or with respect to President Clinton. Other reasonable people will disagree; and if these examples seem weak, it should not be hard to come up with others. My basic point is to establish a lengthy historical practice of great restraint. The fact that only one President has been impeached, when many others might have been, attests to the strength and longevity of our historical understandings.

To be sure, it is not entirely clear how to read this history. A particular problem is that the practices are generally unaccompanied by reasons; we do not have an authoritative explanation of *why* impeachment was not taken seriously in these cases. A rejoinder to my suggestion would be that the cases of restraint and inaction reveal a practice of cautious exercise of prosecutorial discretion (and sometimes national ignorance of the misconduct). They do not establish a practice of considering wrongdoing that does not involve abuse of office, or wrongdoing that is not exceptionally egregious, to be a basis for impeachment. For various reasons, the Nation has not sought the impeachment route in many cases in which it might have done so. But this kind of forbearance is not relevant to constitutional interpretation. It does not suggest that the Nation was without power to undertake impeachment proceedings in these cases. The Nation might have been responding to political will, or to a lack of public concern about the particular wrongdoing at issue, or to competing considerations not bearing on the constitutional questions.

This is not an implausible understanding of the relevant history. Certainly there was not, in most of the cases, a considered or explicit judgment against impeachment. Certainly there is a difference between a failure to exercise prosecutorial discretion and a judgment that a certain offense is not impeachable as a matter of law. But it is also entirely reasonable to understand the history as reflecting a national judgment that the impeachment device ought not to be used except in the most extreme cases, and to say as well that this judgment reflects a certain set of beliefs about what offenses are legitimately impeachable.<sup>78</sup> It would be very odd to begin to understand

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spective of whether the nation is in peace or at war). For the factual details and background of *Milligan*, the first significant civil liberties decision by the Supreme Court, see William Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 *IND. L.J.* 927 (1997).

<sup>78</sup> Cf. *Kent v. Dulles*, 357 U.S. 116, 127-30 (1958) (reflecting a judgment that longstanding practice, under an apparently general statute, narrows the statute's reach).

the Constitution in a way that would call for impeachment in current and future cases that are, in principle, comparable to those described above. The most reasonable inference is that the Nation has decided that impeachment is not a legitimate solution except in the most egregious cases of presidential wrongdoing.<sup>79</sup>

### C. *Is the Office of the President Unique for Impeachment Purposes?*

The Constitution allows impeachment of all civil officers—not only the President, but also the Vice President, cabinet heads, and judges—for high crimes and misdemeanors.<sup>80</sup> Does this mean that the same standard applies to all such officers? Are there differences between the legitimate grounds for impeaching a president and the legitimate grounds for impeaching a federal judge? The question is extremely important for current purposes. If the same standards apply, it would make sense to say that the standards—perhaps the more lenient standards—applied to the impeachment of federal judges apply as well to the impeachment of presidents. My basic conclusion is that our history establishes that, as applied, the constitutional standard for impeaching the President has been distinctive, and properly so.<sup>81</sup>

#### 1. Non-Presidential Impeachments

By far the largest majority of impeachments in American history have involved federal judges. Even here, the number is extremely low. In all of American history, there have been just thirteen judicial impeachments.<sup>82</sup> This is an exceptionally small number of impeachments, as remarkable in its way as the corresponding number of presidents, especially when we consider the enormously larger number of judges than presidents. Of those cases, by far the largest number, indeed almost all, involved at least some

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<sup>79</sup> There is a great deal of difference between the argument I am proposing and a reasonable alternative: that the power to impeach is somewhat broader than what I have suggested, but that the House appropriately uses that power only in the most compelling cases. Some people might suggest, for example, that the House had the power to impeach President Clinton, but that it did not, all things considered, exercise its discretion wisely. On this view, the examples I have given show the wise exercise of discretion. I prefer an understanding involving power to an understanding involving the appropriate exercise of discretion because it seems to me to fit somewhat better with history, both in the framing period and throughout history, and because it greatly decreases the likelihood, to which the Founders were alert, that impeachment will be used as a political tool.

<sup>80</sup> See U.S. CONST. art. II, § 4.

<sup>81</sup> I avoid the word “higher” because it is somewhat misleading.

<sup>82</sup> See 105TH CONG. IMPEACHMENT INQUIRY, *supra* note 2, at 4-14 (discussing the three federal judges who were impeached in the 1980s); 93D CONG. IMPEACHMENT INQUIRY, *supra* note 2, at 28-37 (listing 10 impeachments of federal judges between 1787 and 1974).

allegation of abuse of distinctly judicial powers. It is possible to argue that three, and conceivably more, of those cases also involved egregious private behavior. But this interpretation is itself questionable, and I will suggest that the most extreme cases involving impeachment of federal judges should not be understood to set a precedent for impeachment of presidents, a point to which I will return. Let us now explore the non-presidential impeachments.

One U.S. Senator has been impeached. In 1797, William Blount was accused of conspiring with the British to incite Native American forces against the Spanish and was separately expelled from the Senate.<sup>83</sup> Justice Samuel Chase was impeached in 1804 for engaging in arbitrary and oppressive treatment of parties before the Court.<sup>84</sup> William Belknap, the Secretary of War, was impeached in 1876 for bribery.<sup>85</sup> In 1912, a judge on the U.S. Commerce Court, Robert Archbald, was impeached for influence peddling with litigants.<sup>86</sup> The bulk of impeached officials have been federal district court judges. Consider the following catalogue:

John Pickering was impeached in 1803 for refusing to hear witnesses in a case, for violating an act of Congress, and also for drunkenness and blasphemy;<sup>87</sup>

James H. Peck was impeached in 1826 for holding a lawyer in contempt of court for no legitimate reason;<sup>88</sup>

West H. Humphreys was impeached in 1862 for supporting secession and acting as a confederate judge;<sup>89</sup>

Mark Delahay was impeached in 1876 for questionable financial dealings and drunkenness;<sup>90</sup>

Charles Swayne was impeached in 1903 for not residing in his district and unlawfully holding attorneys in contempt of court;<sup>91</sup>

George W. English was impeached in 1926 for disbaring lawyers and for threatening members of the press and jurors;<sup>92</sup>

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<sup>83</sup> See 93D CONG. IMPEACHMENT INQUIRY, *supra* note 2, at 29-30.

<sup>84</sup> For a general discussion, see REHNQUIST, *supra* note 67, at 59 (discussing the charges against Chase based on his conduct during the Fries trial in which he "conducted himself in a manner highly arbitrary, oppressive, and unjust").

<sup>85</sup> See 93D CONG. IMPEACHMENT INQUIRY, *supra* note 2, at 34-35.

<sup>86</sup> See *id.*

<sup>87</sup> See *id.* at 32.

<sup>88</sup> See *id.* at 34.

<sup>89</sup> See *id.* at 33.

<sup>90</sup> See *id.* at 32.

<sup>91</sup> See *id.* at 34-35.

<sup>92</sup> See *id.* at 33-34.



Harold Louderback was impeached in 1932 for setting up a false residence in anticipation of a divorce action by his wife;<sup>93</sup>

Halsted Ritter was impeached in 1936 for income tax evasion and corruption in a receivership case;<sup>94</sup>

Harry Claiborne was impeached in 1986 for income tax evasion and for perjury in connection with that unlawful act;<sup>95</sup>

Alcee Hastings was impeached in 1989 for taking a bribe;<sup>96</sup> and

Walter L. Nixon, Jr. was impeached in 1989 for perjury before a grand jury, in connection with a claim that he had called a prosecutor to obtain favorable treatment for the son of a friend.<sup>97</sup>

Of the fifteen non-presidential impeachments, only seven were convicted: Pickering, Humphreys, Archbald, Ritter, Claiborne, Hastings, and Nixon. Delahay, Belknap, and English resigned before the Senate vote.

## 2. Of Judges and Presidents

In several impeachments, it would be possible to argue that the grounds invoked by the House of Representatives could not meet the test I have suggested for presidential impeachment. Harry Claiborne, for example, was not shown to have abused distinctly judicial powers, and it is possible to make the same argument about Walter Nixon, Jr. and Harold Louderback. Some of the counts for impeaching Mark Delahay and Charles Swayne also seem to fall short of my suggested standard. Do these practices suggest that the test I have suggested is wrong? If, as the text plainly suggests, the same standard governs both the President and the federal judiciary, the answer is that my test is indeed wrong.

We can distinguish three possible positions here. First, it might be thought that the legitimate grounds for impeachment are the same for all officers. On this view, there is no difference among civil officers. Second, it might be thought that to impeach the President, Congress must meet an especially distinctive or high standard—what counts as a high crime or misdemeanor is context-specific. This view could be described as a suggestion that the same constitutional standard must be applied differently to different officers. An impeachable act for a judge might not be an impeachable act for a vice president. Third, it might be thought that the constitutional standard is the same, but that the House legitimately exercises prosecutorial dis-

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<sup>93</sup> See *id.* at 35, 60.

<sup>94</sup> See *id.*

<sup>95</sup> See 105TH CONG. IMPEACHMENT INQUIRY, *supra* note 2, at 21-23.

<sup>96</sup> See *id.* at 25-27.

<sup>97</sup> See *id.* at 23-25.

cretion so as to match offense to office. On this view, for example, perjury may be a clear basis for impeaching a judge (who is charged with operating the system of justice), but not for impeaching the President. For constitutional purposes, we might collapse the first and third positions, since it seems plain that the House, in its exercise of prosecutorial discretion, might legitimately choose not to proceed against someone who has committed technically impeachable offenses,<sup>98</sup> and that the nature of the office is relevant to the exercise of discretion.

At first glance, the constitutional text seems to support the view that the constitutional standards are identical. As noted, the text is the same. But there are several problems with this apparently simple position. The first is based on the history recited above. The Framers' particular concerns involved protection of the President from the discretionary authority of Congress; they sought to insulate the President in particular from a high degree of dependence. They expressed no such concern about judges. It is certainly legitimate to suggest that interpretation should be affected by the Framers' and ratifiers' special concern with excessive use of the impeachment device with respect to the President.

A second, more structural point involves the great difficulty of removing federal judges, who of course have life tenure. Judicial independence is, of course, important, but the fact that judges have life tenure might well be thought to justify a more expansive impeachment power. If judges can be impeached only for the most grotesque abuses, then the Nation will be stuck with judges whose abuse falls just short of that level for the remainder of those judges' lives. This practical concern argues in favor of a lower standard for impeaching judges, or at least for a different application of the standard. Indeed, this practical concern might reasonably be labeled a structural one, firmly rooted in the Constitution itself. The Constitution's structure—life tenure for judges and four year terms for presidents—strongly argues in favor of a narrower impeachment power for the President.

A third and more textual argument is that judges have tenure "during good behavior," a provision that does not, of course, apply to the President. The President may not be removed for "bad behavior." It might be suggested that with respect to judges, the "good behavior" provision qualifies, or works hand in hand with, the Impeachment Clause. It does so by allowing impeachment of judges on somewhat broader grounds—bad behavior—and not simply high crimes and misdemeanors, or perhaps high crimes and misdemeanors understood in the context of judges to include bad behavior.

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<sup>98</sup> *But see generally* Isenbergh, *supra* note 60.

I do not believe that this argument is convincing. Judges may not be removed from office for bad behavior; they may be removed only for high crimes and misdemeanors. The function of the “good behavior” clause is not to give Congress broader power to remove judges from office; it is simply to make clear that judges ordinarily have life tenure. There is no authority in Congress to remove judges who have not engaged in “good behavior.”

On the other hand—and this is the fourth and to me the most important point—judges have particular duties, and it may be that what counts as a “high Crime and Misdemeanor” is understood by reference to those duties. A judge who committed perjury might well be disqualified from the particular office of judge; the same need not be true of the Vice President. On this view, the power of impeachment is understood by the distinct functions of the officer.

Finally, historical practice suggests a broader congressional power to impeach judges than presidents, and indeed, it suggests a special congressional reluctance to proceed against the President. We might say that our history has unambiguously converged on the judgment that there is a lower threshold for judges than for presidents. The theory is partly that judges cannot otherwise be removed from office. It is partly that it is uniquely destabilizing if presidents are too freely subject to removal from office. To remove a federal judge is an important act, but by itself it does not paralyze the Nation, or place in some doubt the continued stability of domestic and international policy. Presidential impeachment proceedings in this sense have no clear parallel. The existence of a wide range of political checks on presidential misconduct has apparently been thought to provide a kind of surrogate safeguard, one that makes impeachment a remedy of rarest resort.<sup>99</sup>

### III. APPLICATIONS: PRESIDENT CLINTON, MUTUAL ARMS CONTROL, AND BEYOND

My basic purpose thus far has been to defend a particular understanding of the impeachment power. But two elements are missing from the picture. The first, of more immediate interest, has to do with the evaluation of the 1998 impeachment of President Clinton. Did President Clinton commit a

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<sup>99</sup> The cases in which judges have been impeached for perjury might be understood as suggesting that a judge, whose basic job is to preside over trials, cannot be entrusted with that job in the face of a perjury conviction. Presidential perjury is not excusable, but it is a different sort of problem. It should also be noted that Harry Claiborne was impeached partly because he was in jail at the time, and that Walter Nixon, Jr.’s perjury involved a call to a prosecutor.

high crime and misdemeanor? This is a time-bound question, of course; and to answer, it will be necessary to spend a little time on an extremely unpleasant and sordid set of events. The second question, of far more general interest, has to do with future uses of the impeachment power, and how the House of Representatives and the Nation should now understand that device.

I suggest that the impeachment of President Clinton was unconstitutional, because the two articles of impeachment identified no legitimate ground for impeaching the President. Much more importantly, I suggest that it is essential for members of opposing political views to enter into a kind of “mutual arms control agreement,” in which they self-consciously decide to use the impeachment weapon only in the most extreme cases, in a small but far from trivial effort to reduce the level of scandal-mongering and accusation that has undermined American democracy for the last several decades.<sup>100</sup>

#### A. *The Peculiar Case of President Clinton*

Both the original understanding and historical practice converge on a simple principle: The principal purpose 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) cases, impeachment is unacceptable.

#### 1. A Simple Conclusion

How does all this bear on the current allegations against President Clinton? The first implication is that the charges made by Judge Kenneth Starr and David Schippers did not, even if proven, constitute legitimately impeachable offenses under the Constitution. The second implication is that no impeachable offense was identified in the four Articles of Impeachment voted on by the House of Representatives, including the two Articles that were approved. These charges do not involve egregious misuse of the powers of the office of the President. Perjury and obstruction of justice—the basis of the two Articles that passed the House—are extremely serious charges, and they are legitimately the basis for a criminal indictment. There

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<sup>100</sup> I discuss the lessons of the impeachment of President Clinton from other angles in *From Impeachment to Reform*, 51 FLA. L. REV. (forthcoming 1999).

is nothing trivial about these charges. But the alleged acts did not involve perjury or obstruction of justice in connection with an alleged abuse of office. There is no allegation, for example, that President Clinton attempted to obstruct justice with respect to an investigation of his misuse of the Central Intelligence Agency, or that he perjured himself in connection with unlawful trading of arms to a nation with whom the United States has an unfriendly relationship. There is no question that perjury and obstruction of justice could be legitimately impeachable offenses; but under the standard I have outlined, these acts fall far short of the constitutional standard if they involve an effort to conceal an illicit sexual relationship.

The closest claim, not passed by the House, involves the suggestion that the President lied to his advisers and enlisted their help in covering up his illicit relationship and his lies about it. Perhaps the relevant acts involved, in some sense, the authority of the office of the President; it is reasonable to think that in some sense they did. But this suggestion falls far short of a legitimate basis for impeachment. We do not have, with this kind of misuse of authority, the level of misuse that would justify an analogy to treason (as understood at the time of the framing or since) or bribery.

## 2. Weak Responses

Let us explore several responses to this claim. One possible view, suggested by many observers, is that no matter the crime, it is simply unacceptable for a criminal to stay in the White House. If the President in fact committed a crime, it might be said he is legitimately removed from office. It should be clear that this view is not consistent with the Constitution as it is written. The President is palpably not removable for the commission of any crime. The question is whether he has committed a high crime or misdemeanor.<sup>101</sup> Criminality is not a sufficient ground for impeachment.

A related response would stress the possibility that the President has, by committing perjury and engaging in other unlawful acts, violated the rule of law, his oath of office, and his duty under the Take Care Clause of the Constitution.<sup>102</sup> This may well be true, but as grounds for impeachment it is a weak argument. It cannot be claimed that any violation of the oath of office, or any law, or the Take Care Clause, is a legitimate basis for impeachment, without rereading the Constitution in a quite fundamental way. Presi-

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<sup>101</sup> It is possible to understand "high" as referring to the office, not the crime, and this is not an implausible view of the English practice. But in America, the concern was so conspicuously to require serious criminality, not any criminality, that this view could not, for us, be seriously urged.

<sup>102</sup> U.S. CONST. art. II, § 3.

dent Truman, for example, was held to have violated the Take Care Clause by seizing the steel mills,<sup>103</sup> and many of the cases described above involved presidential violations of law. Law violations that amount to a violation of the oath of office, or the Take Care Clause, cannot count as impeachable offenses without something more than that.

### 3. Subtler Responses

In the present context, it would be possible to respond to my basic suggestion—that President Clinton's alleged wrongdoing does not meet the constitutional standard—in two more subtle ways. First, it might be urged that actual or possible counts against President Clinton—the two Articles for which he was impeached, and perhaps also frequent lies to the American public—are very serious indeed, and in a sense uniquely serious. No other president has been charged with lying under oath, and President Clinton is joined only by President Nixon in having been charged with obstruction of justice. It follows that if these very serious charges are deemed a legitimate basis for impeachment, little or nothing will be done to alter the traditional conception of impeachment. Perhaps some of these charges, involving interactions with his advisers designed to promote lies or continued procedural objections to the underlying inquiry, even amount to abuse of power. In any case, the acts of lying within the criminal justice system and enlisting others in the effort to do so are highly distinctive, different in kind from past allegations against any other president (with the exception of President Nixon). It might even be urged (as discussed below) that these acts are very close indeed to bribery. If the President may be impeached for bribing a judge or bribing a witness, may he not be impeached for lying under oath or encouraging others to lie on his behalf? Second, and more ambitiously, it might be said that whatever history and past practice show, we should understand the Constitution's text to allow the President to be impeached, via the democratic channels, whenever a serious charge, of one sort or another, is both made and proven. Let me take up these two responses in sequence.

If the first claim is that certain kinds of falsehoods under oath, perjury, obstruction of justice, and so forth, could be a legitimate basis for impeachment, there can be no objection. As I have suggested, a false statement under oath about a practice of using the IRS to punish political opponents would almost certainly be an impeachable offense; so, too, would a false statement about the acceptance of a bribe to veto legislation. False state-

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<sup>103</sup> See *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579, 587-89 (1952) (holding that the seizure of steel mills by the President could not be sustained under the provisions of Article II of the Constitution, including the Take Care Clause).

ments under oath might well be a legitimate basis for impeachment. Indeed, lying to the American people may itself be an impeachable offense if, for example, the President says that a treaty should be signed because it is in the best interest of the United States when in fact he supports the treaty because its signatories have agreed to donate money to his campaign. Nor can it be denied that it is important to tell the truth under oath, no matter the subject of the discussion. But it does not diminish the universal importance of telling the truth under oath to say that whether perjury or a false statement is an impeachable offense depends on what it is about. The same is true for “obstruction of justice” or interactions with advisers designed to promote the underlying falsehood.

Of course, anyone can be prosecuted for violating the criminal law, and if the President has violated the criminal law, he is properly subject to criminal prosecution after his term ends.<sup>104</sup> But it does not make much sense to say, for example, that an American president could be impeached for false statements under oath<sup>105</sup> in connection with a traffic accident in which he was involved, or that a false statement under oath, designed to protect a friend in a negligence action, is a legitimate basis for impeachment. Just as sensible prosecutors make decisions about which perjuries are sufficiently serious to warrant prosecution, so a constitutional provision allowing impeachment for “high Crimes and Misdemeanors” should not be taken to treat all perjuries as of a piece.

Probably the best general statement is that a false statement under oath is an appropriate basis for impeachment if and only if the false statement involves conduct that by itself raises serious questions about abuse of office. A false statement about an illicit, consensual sexual relationship, obstruction of justice, and a “conspiracy” to cover up that relationship, are not excusable or acceptable; the President can be made accountable for them via indictment after he leaves office; but they are not high crimes or misdemeanors under the Constitution. The same is true for the other allegations made about President Clinton thus far. It trivializes the criminal law to say that some violations of the criminal law do not matter or do not matter much. But it trivializes the Constitution to say that any false statement under oath, regardless of its subject matter, provides a proper basis for impeachment.

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<sup>104</sup> It is an unsettled question whether a president may be indicted while in office. I believe that *Clinton v. Jones*, 117 S. Ct. 1636 (1997), would not be understood to allow a president to be subject to a criminal trial, which is far more likely to threaten the performance of the President’s constitutional duties than a civil proceeding. In any case, it is clear that an effort to put the President in jail could not be consistent with Article II.

<sup>105</sup> I use this term as a placeholder for any allegations of conspiracy, obstruction of justice, improper use of legal privileges, and so forth in connection with the illicit sexual relationship in question.

#### 4. Truth and Proportion

Of course, people of good faith could say that the President has a special obligation to the truth, especially in a court of law, and that it is therefore reasonable to consider impeachment whenever the President has violated that obligation. It is certainly true that as the Nation's chief law enforcement officer, the President has a special obligation to the truth. Perhaps such people also believe that false statements under oath, perjury, obstruction of justice, and associated misconduct are genuinely unique and that impeachment for such statements and misconduct would therefore fail to do damage to our historical practice of resorting to impeachment only in the most extreme cases. But this position has serious problems of its own. Even if it would be possible, in principle, for reasonable people to confine the current alleged basis for impeachment, it is extremely doubtful that the line could be held in highly partisan practice. Thus, the House's judgment that the current grounds are constitutionally appropriate has set an exceedingly dangerous precedent for the future, a precedent that could threaten to turn impeachment into a political weapon, in a way that would produce considerable instability in the constitutional order.

Consider, for example, the fact that reasonable people can and do find tax evasion far more serious than false statements about a consensual sexual activity, and that reasonable people can and do find an unlawful arms deal more serious, from a constitutional standpoint, than either. The question is not whether those people are correct; they may or may not be. The problem is deeper than that. Whenever serious charges are made, participants in politics may well be pushed in particular directions by predictable partisan pressures. The serious risk is therefore that contrary to the constitutional plan, impeachment will become a partisan tool to be used by reference to legitimate arguments by people who have a great deal to gain. As we will soon see, a special risk of a ready resort to the impeachment instrument is that it would interact, in destructive ways, with existing trends in American democracy. From the standpoint of the constitutional structure, it is far better to draw a line in the sand, one that has been characteristic of our constitutional practice for all of our history: a practice of invoking impeachment only for the most extreme cases of abuse of distinctly presidential authority.

There is an important question about how those who approve (as I do not) of the impeachment of President Clinton will, and should, regard the general principle for which that impeachment stands. I suggest that in order to remain as true as possible to our history, they should urge that President Clinton committed serious felonies in direct connection with the judicial system, and that it is appropriate to impeach the President for such serious



and unique acts, even if presidential power was not involved. On this view, the impeachment of President Clinton does not signal any departure from our practices, nor does it mean that impeachment can be used more readily than it has in the past.<sup>106</sup>

### B. *Impeachment Now*

But should the Nation adopt a lower standard for impeachment of the President? Should we, for example, conclude that impeachment is legitimate for criminality not involving misuse of office, or for misuse of office that is perhaps not as “high” as has traditionally been thought? We might consider, for example, the following propositions:

1. The President may be impeached for any violation of any law.
2. The President may be impeached for any crime.
3. The President may be impeached for any felony.
4. The President may be impeached for any violation of any law (civil or criminal) involving the performance of his official responsibilities at any time in public life.
5. The President may be impeached for any violation of any law (civil or criminal) involving the performance of his official responsibilities while in office.
6. The President may be impeached for any egregious abuse of his official powers.

In the abstract, it is not clear whether a nation should subscribe to one, two, or all of these propositions if it were creating a constitution from first principles. Undoubtedly, a movement in the direction of propositions 1, 2, or 3 would push a nation more toward a parliamentary system in which the head of the executive branch can be removed from office upon a vote of “no confidence.” In the abstract, it is hardly obvious that an intermediate system—a presidential system in which the President can be removed not for mere lack of confidence, but because he has committed some identifiable offense—would be inferior to the alternatives. Perhaps such an intermediate system would create more in the way of separation of powers than a parliamentary system, but not the degree of dependence that a parliamentary system creates. Perhaps the degree of separation produced by our hypothetical intermediate system would be optimal. Surely it is possible to imagine assumptions under which this would be true. Institutional questions of this kind do not have acontextual answers.

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<sup>106</sup> The legacy of the impeachment of President Clinton is discussed in more detail in Cass R. Sunstein, *Lessons from Impeachment to Reform*, 51 FLA. L. REV. (forthcoming 1999).

For the United States, it is doubtful that we could create such a system, short of a constitutional amendment. But suppose that we could move in that direction, via interpretation or amendment. Should we seek to do so? I think that the clear answer is that we should not. The reason has a great deal to do with the nature of both the contemporary presidency and modern American democracy, where political disagreements are frequently turned into allegations of scandalous behavior, asserting, all too often, an abuse of public trust, a violation of law, or even criminality. This is not a claim that the allegations are usually offered in bad faith or are always without merit, or that what emerges in practice does not sometimes amount to an abuse, a violation, or a crime. Political opponents can, on occasion, uncover something quite bad. My claim is instead that the focus on this kind of material has a series of unfortunate effects for American self-government, and that the possible benefits (discouraging and discovering bad conduct) do not justify those unfortunate effects.

Let us briefly consider the Independent Counsel Act ("the Act")<sup>107</sup> and then move to the topic of impeachment.<sup>108</sup> The Act was a well-intentioned effort to promote trust in government by ensuring that independent officials would be entrusted with the authority to investigate allegations of improper behavior by high-level people in the executive branch. In practice, however, the Act has created a variety of harmful incentives for Congress, the media, and the independent counsel himself. Members of an opposing party have every incentive to ask for the appointment of an independent counsel, and to take any apparent wrongdoing extremely seriously, in such a way as to divert attention from the actual task of making lives better for citizens. Reporters who are concerned with audience share (which is to say almost all reporters) are under considerable pressure to give great attention to the appointment of an independent counsel, or the work of the counsel, in such a way as to crowd out news about more substantive matters. And armed with an unlimited budget and a narrow focus, the Independent Counsel has a natural incentive toward zealotry in a way that contrasts sharply with the ordinary criminal prosecutor, who would spend little or no time on many of the cases that have been the focus of independent counsel investigations. (None of this is a comment about the Independent Counsels themselves; all of them have been honorable people). The result of all this has been a disaster for the American public—a diversion from serious issues, a fear that all politicians are crooks, and a deepened distrust of politicians.

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<sup>107</sup> 28 U.S.C. §§ 591-99 (1994).

<sup>108</sup> For a more detailed discussion of the Act, see Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267 (1998).

Now consider impeachment in this light. Under current conditions, what is likely to happen if the grounds for impeachment are expanded? The serious risk is that impeachment will become a political weapon, one to be used as a kind of substitute for the tasks of running the country and making people's lives better. Of course, one way to attempt to be elected, or reelected, is to say that a certain policy initiative is actually desirable and will do a great deal of good. But another way to get elected, or reelected, is to claim that members of the opposing party have actually committed crimes and are in fact criminals to be eliminated from office. A risk of a ready resort to the impeachment instrument is that it would interact, in destructive ways, with existing trends in American democracy.

We may go further. In light of the incentives faced by the media and the opposition party, and in the context of the Act, it was close to inevitable that the impeachment instrument would eventually be invoked as a mechanism to oust the President from office. With the unlimited budget and narrow focus of the Independent Counsel, some such Counsel would, sooner or later, generate evidence that an American president has been involved in some kind of crime. An impeachment proceeding would follow. None of this eliminates President Clinton's own responsibility. The impeachment of President Clinton reflected an odd constellation of events: the President's own inexcusable misconduct; the incentives of the press and the opposing party; the natural incentive effects of the Act for Independent Counsels themselves; and the "referral" mechanism which essentially allows the independent counsel to initiate an impeachment inquiry.

There is one final point. The office of the President has assumed more rather than less importance since the Founding, and in at least some respects, its importance has continued to grow in every twenty-year period in the twentieth century. This is true both domestically, where the President is entrusted with ensuring execution of an extraordinary range of legislation, and internationally, where the President is the only real spokesman for the Nation. In these circumstances, the great risk of the impeachment mechanism is that it is destabilizing in a way that threatens to punish the Nation as much as, or perhaps far more than, the President himself. Since the purpose of impeachment is not to punish officials but to protect the Nation,<sup>109</sup> this is a cruel irony.

None of these points amounts to a *demonstration* that it would be undesirable to move in the direction of a "lower bar" for impeachment. The

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<sup>109</sup> See BERGER, *supra* note 19, at 1, 5-6, 297-98 (distinguishing impeachment from criminal prosecutions and suggesting that the Framers "were steeped in history" in intending for impeachment to be used as a means of preserving the effectiveness of the government rather than as an instrument to punish officials for their conduct).

question is what would be gained and what would be lost. If the basic purpose of government is to make for better lives for citizens, it is highly likely that nothing would be gained and a considerable amount would be lost. It would be far better for the House of Representatives to conform to our history and to adopt a kind of “mutual arms control” agreement by which members of opposing parties would agree not to use the impeachment weapon, with its potentially destructive effect on national stability, except in the most egregious cases.

### C. *Imaginable Cases*

By way of summary and review, let us now explore a set of possible cases for impeaching the President.

1. The President has accepted a bribe from a foreign country, receiving substantial campaign contributions in return for a promise to help that country, even though the help endangers the national security of the United States. This is an easy case for impeachment. Even if it does not involve treason, it does involve a “high” crime and is, therefore, an impeachable offense.

2. The President uses the FBI and the CIA in order to obtain incriminating evidence about, and to punish, political adversaries. This conduct may not involve a violation of the criminal law but it nonetheless involves an impeachable offense—an egregious abuse of the power of the office.

3. During a war or a domestic crisis, the President fails to perform the basic tasks of office, not because he has made choices with which many people disagree, but because he has essentially defaulted. The default may be a result of drunkenness, mental illness, physical problems, or sheer laziness. Here, too, there is no crime, but there is a misdemeanor sufficient to remove the President from office.

4. The President cheats on his taxes. In ordinary circumstances, this is not a legitimate basis for impeachment. There is no misuse of distinctly governmental authority.

5. The President smokes marijuana in the White House. Here, too, there is no basis for impeachment because there is no misuse of distinctly governmental authority.

6. The President murders a political enemy. This is an easy case for impeachment. It falls within the same category as case two above—an egregious abuse of the President’s power.

7. The President murders someone simply because he does not like him. There is no political motivation; the dispute is entirely personal. This is a hard case under the analysis thus far. There is no clear view from his-

tory. On one view, there is no abuse of distinctly presidential powers, and hence no impeachable offense. On another view, the best conclusion is that the President can be impeached for this level of private misconduct on the theory that this is undoubtedly an exceptionally serious crime, and the President is not likely to be able to govern after committing such a crime. Perhaps the Constitution would make little sense if it did not permit the Nation to remove murderers from the highest office in the land. It would probably be intolerable not to allow the President to be removable in such an extreme case; the key point is that this judgment should not be allowed to produce a different judgement about cases four and five above.<sup>110</sup>

#### D. *A Note on Partisanship*

From their discussion in Philadelphia, it is clear that the Framers feared that impeachment could be used as a political tool, and sought to ensure a standard that would insulate the President from impeachments that were driven by factions, passions, or parochial interests. And while the Framers did not anticipate the rise of political parties, it is reasonable to ask whether and how the interest in “bipartisanship” should bear on the topic of impeachment. The impeachment of Andrew Johnson seems deplorable in large part because of its partisan character.<sup>111</sup> And it is fair to say that the founding debates show a general intention of allowing the impeachment devices to be invoked only where there was a kind of national consensus, cutting across partisan disagreements, to the effect that the President had grossly abused his official powers. It makes sense to endorse the general principle, on which history has also generally converged, to the effect that the President (or for that matter judges) should not be subject to serious impeachment inquiry unless there is at least some consensus, across political lines, that the inquiry is justified. It follows that future impeachments should be avoided unless and until people who disagree on political questions can be brought to agree that the President has committed deeds that justify his removal from office.

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<sup>110</sup> This conclusion does not contradict my suggestion that presidential abuse of power is ordinarily required; I am speaking here of an extremely unusual case, an exception to the general proposition.

<sup>111</sup> See, e.g., JOHN F. KENNEDY, *PROFILES IN COURAGE* 126 (1961) (describing the impeachment as “the sensational climax, to the bitter struggle” between President Johnson and the Radical Republicans); REHNQUIST, *supra* note 67, at 208-09, 214-18 (describing the role of the Radical Republicans in passing the impeachment resolution in the House of Representatives).

## CONCLUSION

Text, history, and long-standing practice suggest that the notion of “high Crimes and Misdemeanors” should generally be understood to refer to large-scale abuses that involve the authority that comes from occupying a particular public office. A President who accepted a bribe from a foreign nation, or who failed to attend to the public business during a war, would be legitimately subject to impeachment. Perjury or false statements under oath could certainly qualify as impeachable offenses if they involved, for example, lies about using the Internal Revenue Service to punish one’s political opponents or about giving arms, unlawfully, to another nation. The most ordinary predicate for impeachment is an act, by the President, that amounts to a large-scale abuse of distinctly presidential authority.

If there is ever to be impeachment outside of that category of cases—if the experience with President Clinton is to be repeated—it should be on exceedingly rare occasions. This principle is consistent with the basic view of the Nation during the founding era. In the current period, the argument for adhering to this view has been strengthened rather than weakened. It has been strengthened partly because of a long historical tradition of forbearance and restraint, one that has created a strong norm against the commencement of impeachment proceedings, even when the President’s misconduct has been quite serious. And it has also been strengthened by current trends in the modern political system, which has seen decreasing attention to issues of substance and increasing attention to allegations of misconduct, criminal or otherwise. In such circumstances, the impeachment device stands not as a political tool, but as a remedy of last resort, designed to make possible the removal from office of those presidents whose egregious official misconduct has produced a social consensus that continuation in office is no longer acceptable.

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