Impeachment Essay

What Does "High Crimes and Misdemeanors" Mean?

Joseph M. Bessette

Tuohy Professor of Government and Ethics, Claremont McKenna College

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In recent weeks and months we have heard much about the meaning of the constitutional provision that a president may be impeached for "Treason, Bribery, or other high Crimes and Misdemeanors." Because the allegations against President Clinton do not include treason or bribery, the question currently before the Congress is whether the president has committed "high Crimes and Misdemeanors." As is evident from the testimony presented in November by nineteen constitutional scholars to the Subcommittee on the Constitution of the House Judiciary Committee, the key issue that separates the scholarly community - and that apparently separates most congressional Republicans from their Democratic colleagues - is whether an impeachable offense must involve a serious abuse of "distinctly presidential powers," as one witness put it, or whether serious crimes such as perjury, witness tampering, and obstruction of justice that arise out of a private lawsuit rise to the constitutional standard.(1) We believe that despite the range of arguments already voiced, there is something more to be said on the subject. As we will show, there is an even stronger case to be made that the allegations against the president, if proven, rise to the constitutional standard for impeachment and removal from office.

I. The Origin and Imprecision of the Phrase "High Crimes and Misdemeanors"

The current great debate over what constitutes impeachable offenses stems from the fact that the Constitution itself is silent on the meaning of "high Crimes and Misdemeanors" and the record from the Constitutional Convention is ambiguous. Historians, law professors, and political scientists reading the same original materials reach quite different conclusions. Our particular contribution, as will become evident below, is to find more guidance on this matter than others have in the Constitution itself, in the records from the state ratifying conventions, and in the history of impeachments in the United States

under the constitutional provisions.

How and why was the phrase "other high Crimes and Misdemeanors" added to the Constitution? Here the record is relatively clear. As the Constitutional Convention was drawing to a close in September 1787, Virginia delegate George Mason objected to the fact that the only grounds listed in the draft constitution for impeaching a president at that point were "treason" and "bribery." This left any number of "great and dangerous offenses," including efforts "to subvert the Constitution," uncovered. It was, Mason contended, incumbent on the members of the Convention "to extend the power of impeachment" to reach these other possible offenses. Thus, he suggested adding "maladministration." To this, however, fellow Virginian James Madison objected: "maladministration" was too "vague a term." It was a license for the Senate to remove presidents at will, potentially rendering the president a mere servant of the Congress. In response to Madison's objection, Mason suggested that the phrase "other high crimes & misdemeanors against the State" be added instead. Apparently without debate, the delegates accepted Mason's new language by a vote of eight states to three. A few days later the language was finalized after the Committee of Style dropped the phrase "against the State."(2) Based on this brief record, all one can say for sure is that those who wrote the Constitution wanted a president to be impeachable for offenses or misbehavior in addition to treason and bribery but not for all acts that might be viewed as bad administration of the office.

Unfortunately, the record of the debates that followed in the state ratifying conventions provides little additional insight into the precise meaning of the phrase "high Crimes and Misdemeanors." For one thing, impeachment was not a matter that generated much discussion; and what discussion there was focused on the question of how impeachment could be squared with separation of powers. When the substantive grounds for impeachment were mentioned at all, they were most often described simply as some unspecified violation of the public trust. In this regard, Alexander Hamilton was right in step with his contemporaries when, writing in *The Federalist*, he stated that impeachment is for "the misconduct of public men, . . . from the abuse or violation of some public trust."(3)

Other prominent founders were equally imprecise. At the South Carolina ratifying convention Charles Cotesworth Pinckney, who had also served at the Philadelphia convention, explained that the House of Representatives could impeach "those who behave amiss, or betray their public trust."(4) At the Virginia convention Governor Edmund Randolph, who had introduced the "Virginia Plan" in Philadelphia, asserted that the president could be impeached if he "misbehaves."(5) Other delegates to the ratifying conventions, many relying on British precedents, identified such grounds of impeachment as "malconduct,"(6) "misconduct,"(7) "mal-practices,"(8) "mal-administration,"(9) "any misdemeanor in office,"(10) "great misdemeanors against the public,"(11) "crimes against the state,"(12) "acts of great injury to the community,"(13) "great offences,"(14) "treachery,"(15) "deviat[ion] from . . . duty,"(16) "a violation of duty,"(17) and a willful "abuse of . . . trust."(18) Note that although the delegates to the Constitutional Convention had, on Madison's objection, rejected George Mason's proposed standard of "maladministration," the secrecy of the Convention's proceedings meant that this was not known to the delegates in the state ratifying conventions. At least some of them seemed to have believed that "high crimes and misdemeanors" was equivalent to Mason's rejected formulation. And it is easy to see why; for in William Blackstone's widely read and authoritative *Commentaries on the Laws of England*, the "first and principal" example of a "high misdemeanor," subject to parliamentary impeachment, was "mal-administration of such high officers as are in public trust and employment."(19) (Interestingly, just two years after the Convention met, on June 17, 1789, James Madison argued on the floor of the House of Representatives that if a president "displace[d] from office a [subordinate] whose merits require that he should be continued in it[,] . . . . [he would be] impeachable by this House, before the Senate, for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust."(20) Moreover, the day before he asserted that the president "is impeachable for any crime or misdemeanor before the Senate."(21))

The lengthiest recorded comments made on impeachment at the state ratifying conventions were those of James Iredell of North

Carolina, who two years later would begin a decade of service as an associate justice on the new U.S. Supreme Court. As part of a general explication of the proposed Constitution and the presidency, Iredell explained that the impeachment process made it possible to bring "great offenders to punishment" and remove from office those whose actions had caused "great injury to the community." In making these comments, Iredell did not distinguish between "treason," "bribery" and "high crimes and misdemeanors," leaving it unsettled whether his summary description was meant to comprehend all three grounds for impeachment or simply capture the fact that, by including treason and bribery, the new Constitution would be able to reach the most grave presidential abuses.(22)

In the remarks that followed, Iredell did nothing to clarify this basic issue. According to the Carolinian, if the president is "a villain, and willfully abuse his trust," then impeachment is appropriate. But he made no attempt to provide a comprehensive account of what would constitute such an abuse. Rather, in no particular order, he gave examples of offenses for which a president could be impeached as taking a bribe, acting from "some corrupt motive or other," and providing the Senate with inadequate or incorrect information, resulting in the adoption of measures "injurious" to the country.(24) That Iredell did not mean his few comments to be taken as a definitive account is evident from his earlier admission that determining what would constitute grounds for impeachment is "not easy to describe."(25)

The imprecision surrounding the phrase "high crimes and misdemeanors" in the Convention and the follow-on debates in the state ratifying conventions is not especially surprising; for this phrase had its source in over four centuries of British parliamentary practice, during which its meaning was no more specific. Ever since the fourteenth century, "high crimes and misdemeanors" had included not only criminal conduct but also a broad array of charges involving corruption, misuse of funds, and abuse of authority. More specifically, English officials had been impeached for the following "high crimes and misdemeanors" (among others): providing offices to unfit individuals, commencing but not prosecuting legal suits, failing to repair the office of Ordnance despite the availability of appropriated funds, thwarting Parliament's order to store arms and ammunition in storehouses, causing an illegal arrest, negligently preparing for an

invasion, and misapplying appropriated funds.(26) In his discussion of the history of impeachments in England, constitutional scholar Raoul Berger discerned seven basic categories of "high crimes and misdemeanors": misapplication of funds, abuse of official power, neglect of duty, encroachments on parliament's powers, corruption, betrayal of trust, and giving pernicious advice to the crown.(27)

Although impeachments had become increasingly rare in Britain in the century before the drafting of the U.S. Constitution, ironically the most famous impeachment proceeding in British history had been underway in London for more than a year when the delegates to the Constitutional Convention gathered in Philadelphia in the summer of 1787. In April of 1786, British statesman and party leader Edmund Burke had presented to the House of Commons nearly two dozen "Articles of Charge of High Crimes and Misdemeanors" against Warren Hastings, the former governor of India. In May of 1787, on the basis of a slimmed-down version of those charges, the House of Commons voted to impeach Hastings for "high crimes and misdemeanors." That the delegates knew of the Hastings impeachment is evident from Mason's complaint that the grounds for impeachment should not be limited to treason and bribery alone: "Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason."(28)

The charges leveled at the former governor were certainly serious: corruption, abuse of office, and the creation of a despotic form of rule over India. But, according to Burke, who led the impeachment effort, the charges did not principally involve violations of English or Indian law. Rather, Hastings was being impeached because he had used his discretionary authority as governor in a manner that ran afoul of his more fundamental duty to act in accord with just and right rule. As Burke argued in his opening speech on Hastings to the House of Lords in 1788, the "high crimes and misdemeanors" with which the former governor was charged rested "not upon the niceties of narrow jurisprudence, but upon the enlarged and solid principles of state morality."(29)

II. Constitutional Guidance: Powers and Duties

Given this history, it is hardly surprising that scholars and politicians continue to disagree about the meaning of the phrase "high crimes and misdemeanors" as it was written into the Constitution of 1787. At best one is left with a few broad, albeit important, principles: first, consonant with the separation-of-powers principle, the standard for impeachment was not so low as to encourage Congress to make impeachment a routine means for checking the president; second, "high crimes and misdemeanors" included offenses that were not, strictly speaking, illegal; and third, "high crimes and misdemeanors" were generally associated with violations of a public trust and, in the major impeachment case of the time, involved actions which in some fashion undermined or ran contrary to the fundamental norms of sound rule. But what history does not provide is a coherent, code-like catalogue of what constitutes "high crimes and misdemeanors."

For British constitutional practice, Edmund Burke believed that a broad statement of principle was sufficient to identify offenses worthy of impeachment. For American constitutional practice, however, one resting on a written text, identifying such offenses is far more problematic. A written standard that is too specific may not reach serious situations unforeseen when the Constitution was drafted. On the other hand, a standard that is too vague is open to misuse by a partisan majority in Congress. We believe that the Constitution itself contains the key both to understanding the grounds for a president's impeachment and to tying those grounds to more precise infractions. That key is the distinction between *powers* and *duties* that lies at the heart of the structure and content of Article II on the presidency.

Section One of Article II begins by vesting "the executive Power" in the president; it ends by imposing upon him, through the oath of office, the overarching duty "to faithfully execute the Office of President" and "to the best of [his] Ability, preserve, protect and defend the Constitution." Section Two consists of a list of specific powers (commander-in-chief, the pardoning power, the authority to make appointments, etc.); while Section Three sets out several specific responsibilities or duties ("he shall" recommend measures,

receive ambassadors, faithfully execute the laws, etc.).

By dividing the president's authorities along these lines, the architects of the Constitution were essentially copying the format employed by the New York Constitution of 1777, the constitution that had created the most effective of the Revolutionary War governors and one with which they were intimately familiar. In this constitution the list of the governor's constitutional authorities, comparable to what would later appear in the U.S. Constitution, was explicitly divided between, first, a set of powers ("he shall have power . . .") and, second, a list of duties ("it shall be the duty of the governor . . ."). Finally, Section Four of Article II of the U.S. Constitution completes this theme of powers and duties by spelling out those crimes ("Treason" and "Bribery") which would clearly violate the president's oath, as well as those other activities ("high Crimes and Misdemeanors") which, while perhaps not criminal, may nevertheless violate the president's constitutional duties. So just as Section One of Article II begins with power and ends with duty, Article II as a whole begins with the vesting of power and duty and ends in effect with the divesting of these as a consequence of the violation of duty. Note also that in its provisions governing presidential succession and disability, Article II, Section One stipulates that in the case of the president's "Inability to discharge the Powers and Duties of the said Office, the same [powers and duties] shall devolve on the Vice President." Thus, we may say that the faithful execution of the office of the president, sworn to in the oath of office, is equivalent to faithfully discharging the office's powers and duties.

Despite the modern tendency to refer to the president's various constitutional authorities as simply "powers," both historically and etymologically a governmental office is more directly associated with duty than with power. Indeed, the English word "office" comes from the Latin word for duty, officium. As the great constitutional and presidential scholar Edward Corwin noted some decades ago, "Etymologically, an 'office' is an officium, a duty; and an 'officer' was simply one whom the King had charged with a duty."(30) At its core, then, the presidential office is best understood as centered on a set of specific responsibilities as well as broader duties to faithfully execute the office and to defend the underlying constitutional order. The logic of Article II is that the president's powers do not exist in isolation but are bounded by his duties.

It necessarily follows that a president may not employ his powers in a way that subverts his constitutional duties. For example, although Article II, Section Two gives a president what appears to be an unlimited power to grant pardons (other than in cases of impeachments), he cannot use that power in a manner that violates his specific responsibility to "take Care that the Laws be faithfully executed." Accordingly, a president who dangles a pardon in front of an individual in an effort to frustrate a legal investigation or prosecution or who pardons those who have committed crimes in which he himself was involved would be in violation of his law-enforcement duty and therefore subject to impeachment and removal. Indeed, this was precisely Madison's response at the Virginia ratifying convention to Mason's complaint that the president might use his pardoning power "before indictment, or conviction . . . [to] stop inquiry and prevent detection" of wrongdoing. If the president used his pardoning power to "shelter" a confederate, Madison countered, the Congress could "impeach him . . . [and] remove him if found guilty."(31) Similarly, it might be argued that a president violates his obligation to enforce the laws if he knowingly asserts claims of executive privilege in an effort to delay or obstruct lawful proceedings, even though the privilege itself may be perfectly legitimate when employed in other circumstances (such as to protect national security or internal executive branch deliberations). A president cannot, in short, use a legitimate power for an illegitimate end. He cannot employ his discretionary powers in a way that violates the duties that define his office.

Thus, the true test of presidential performance is whether the occupant faithfully discharges the duties assigned to his office. Although every officer of the government has a responsibility to follow the law, the Constitution singles out the president by assigning him two unique law-enforcement responsibilities. Only he takes an oath to "preserve, protect and defend the Constitution"; and only he is explicitly enjoined to "take Care that the Laws be faithfully executed," a duty described by Madison in 1793 as nothing less than "the essence of the executive authority."(33) It may truly be said, then, that the Constitution imposes upon the president a higher standard than that imposed on any other constitutional officer, a more emphatic and comprehensive obligation to uphold and enforce the nation's legal and constitutional order. A president who fails to fulfill the high duties of

his office forfeits his right to possess it.

* * *

British parliamentary practice, records from the American founding, and the history of impeachments under the U.S. Constitution all support the linkage between "high crimes and misdemeanors" and the duties of constitutional office. We have already seen that "neglect of duty" was one of the broad categories of offenses that led to British parliamentary impeachments in the centuries before the writing of the U.S. Constitution. The Earl of Oxford, for example, was charged by the Parliament in 1701 for "violation of his duty and trust" by using his access to the King as a member of his Privy Council to secure royal rents and revenues for his own use.(34) Indeed, the very first standard for impeachment adopted by the delegates at the Constitutional Convention was "mal-practice or neglect of duty." This was approved on June 2, just a few days into the deliberations.(35) Seven weeks later, on July 20, the delegates reaffirmed the earlier decision by a vote of eight states to two.(36) Then, six days later they again endorsed the "mal-practice or neglect of duty" standard.(37) During the Convention's final month, through the work of two committees and brief floor debate on September 8 (just a week before the Convention adjourned), the new language "treason, bribery, or other high crimes and misdemeanors" was embraced. Though more specific and concrete than the language it replaced, the new wording essentially incorporated the "neglect of duty" standard through the precedent of British parliamentary practice.

Or so it was thought by many of the delegates to the state ratifying conventions who spoke on impeachment. In the Virginia convention, for example, Patrick Henry, the leader of the opponents of the Constitution, praised British practice because "[i]mpeachment follows quickly a violation of duty." Appearing to assume that the same standard was formally incorporated in the new Constitution, Henry

worried that in practice the new Congress would lack the knowledge or will to impeach culpable officials.(38) In neighboring North Carolina, federalist leader James Iredell explained that an officer would be punished through impeachment and removal if he "deviate[d] from his duty" or, what would appear to amount to the same thing, if he "willfully abuse[d] his trust."(39) In the South Carolina convention leading federalists used similar language. Edward Rutledge, signer of the Declaration of Independence and brother of the framer John Rutledge, argued that a president could be impeached and removed if he "abused . . . [his] trust."(40) His ally, Charles Cotesworth Pinckney, who had served at the Philadelphia Convention, held that the House of Representatives would "impeach those who . . . betray their public trust."(41) This was the same language, noted above, that Hamilton used in *The Federalist* to describe the kind of behavior subject to the impeachment remedy: "the abuse or violation of some public trust."(42) At the very least, a constitutional officer's "public trust" includes the faithful and effective performance of the formal duties of his office.

In the two centuries since the Constitution was written, there have been sixteen impeachments voted by the House of Representatives. The first was of Tennessee Senator William Blount in 1797 and the most recent was of federal judge Walter Nixon in 1989. Of the other fourteen, twelve were of federal judges, one of a cabinet member (Secretary of War William Belknap in 1876), and one of a president (Andrew Johnson in 1868). In 1974 the staff of the House Judiciary Committee reviewed the basis of previous House impeachments (thirteen to that time) in a report that analyzed the "Constitutional Grounds for Presidential Impeachment." Its summary of impeachment practice in the United States concluded that a common allegation was that "the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions." The impeachment power of the House was "intended to reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office." Reflecting on the precedents to date, it concluded that "[t]he American impeachment cases demonstrate a common theme useful in determining whether grounds for impeachment exist - that the grounds are derived from understanding the nature, functions and duties of the office."(43)

III. Must Impeachable Acts Involve Abuse of Official Powers? Historical Precedents

This linkage of "high crimes and misdemeanors" to the duties of office is entirely consistent with famed nineteenth-century jurist Joseph Story's extended discussion of impeachment in his *Commentaries on the Constitution of the United States*, published in 1833. The impeachment jurisdiction of the House and Senate, wrote Story, "is to be exercised over offences, which are committed by public men in violation of their public trust and duties."(44) Not amenable to precise legal definition, such offenses "must be examined upon very broad and comprehensive principles of public policy and duty."(45) Story also referred to impeachable offenses as "a breach of duty" and as "acting grossly contrary to the duties of . . . office."(46)

Anticipating by a century and a half the chief issue in today's debate, Story asked whether "under the constitution, any acts are impeachable, except such, as are committed under colour of office."(47) Here Story provides a summary of the arguments presented in the first Senate impeachment trial, that of Senator Blount in 1799. Those who urged Blount's conviction "pressed with great earnestness, that there is not a syllable in the constitution, which confines impeachments to official acts, and it is against the plainest dictates of common sense, that such restraint should be imposed upon it." Blount's defenders argued to the contrary "that the power of impeachment was strictly confined to civil officers of the United States, and this necessarily implied, that it must be limited to malconduct in office."(48) Story, himself, declined "to express any opinion . . . as to which [of these] is the true exposition of the constitution." This was a matter on which the Senate had not definitively ruled, having ended its proceedings against Blount with the determination that senators were not "civil officers" and therefore not subject to impeachment.(49)

A more detailed review of the Blount impeachment suggests that a

stronger case can be made that both branches of Congress did in fact determine at this early date that impeachable acts need not involve abuse of official powers. In the early summer of 1797 it became known to President John Adams that Senator Blount, contrary to national policy, had been conspiring with British authorities to promote a military expedition against the Spanish colonies of Florida and Louisiana. Blount expected to benefit financially if this effort succeeded. The principal evidence against Blount was a letter he wrote to the official who served as the federal representative to the Creek and Cherokee nations, a communication designed to influence the Indians to support the British interests. When this letter and other documents came into Adams's hands, he sent them to the House of Representatives and Senate. After two days of debate the House voted unanimously to impeach Blount on July 7. As Eleanore Bushnell notes in her history of federal impeachment trials, one of the issues debated in the House was whether "an officeholder could properly be impeached for conduct not directly connected with his office."(50) The unanimous support for Blount's impeachment suggests that the House supported the position that an official "to be found guilty, need not have committed the offense while performing official duties."(51) Six months later the House formally adopted five articles of impeachment against Blount. The first, which was the most comprehensive, charged Blount with actions "contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligations of neutrality, and against the laws of the United States and the peace and interests thereof."(52)

While Blount's impeachment was first being debated in the House, a special investigating committee in the Senate concluded "that Mr. Blount's conduct has been inconsistent with his public duty, renders him unworthy of a further continuance of his present trust in this body, and amounts to a high misdemeanor."(53) In the meantime Blount had fled from the capital, refusing to attend his own impeachment trial. The Senate, not waiting for the outcome of the trial itself and relying on its independent constitutional authority to discipline its members, expelled Blount by a vote of twenty-five to one for "having been guilty of a high misdemeanor entirely inconsistent with his public trust and duty as a Senator."(54) It is noteworthy that in expelling Blount through a proceeding constitutionally distinct from the impeachment process, the Senate categorized his offense as a "high

misdemeanor," thereby saying, in effect, that it also met the standard for impeachment.

It was not until a year and a half later that Blount's formal impeachment trial began in the Senate. In their written response to the House's articles of impeachment, Blount's attorneys argued, among other points, that "Blount had not been charged with any crime or misdemeanor in the execution of his office."(55) Later on the Senate floor one of Blount's attorneys maintained that "no crime or misdemeanor had been charged against Blount in connection with his senatorial duties."(56) In the final address in the trial, Congressman Robert Goodloe Harper, one of the House managers (who serve as the prosecutors in the Senate trial), gave the following answer to the contention that impeachment extended only to the abuse of official powers:

Suppose a judge of the United States to commit theft or perjury; would the learned counsel say that he shall not be impeached for it? If so, he must remain in office with all his infamy; . . . . It seems to me, on the contrary, that the power of impeachment has two objects: first, to remove persons whose misconduct may have rendered them unworthy of retaining their offices; and secondly, to punish those offenses of a mere political nature, which though not susceptible of that exact definition whereby they might be brought within the sphere of ordinary tribunals, are yet very dangerous to the public.(57)

Shortly thereafter, the Senate voted fourteen to eleven that it lacked jurisdiction because senators were not "civil officers" as that term was used in the Article II, Section Four impeachment clause of the Constitution. Despite the Senate's failure to vote on the articles of impeachment, it seems clear from the public record - including the Senate's earlier expulsion vote - that both branches believed that impeachable offenses were not limited to the misuse of office or the abuse of official powers. If federal officials, in the words of Congressman Harper, engaged in "misconduct" that "rendered them unworthy of retaining their offices," then the House and Senate were empowered to remove them.

Blount's was the first, but not the last, impeachment and trial in which one of the key issues was whether impeachable offenses extended beyond the specific misuse of public office. In December of 1904 the

House of Representatives impeached federal judge Charles Swayne for "(1) filing false expense claims, (2) accepting use of a private railroad car, (3) failing to reside in his district, and (4) imposing unlawful sentences for contempt of court."(58) Swayne's attorneys responded in part that even if the first three of these charges were true, they "did not constitute impeachable offenses," for these "were not official acts and so could not make the judge a subject of impeachment."(59) At the conclusion of the trial in the Senate, Swayne's attorney "restated the defense position that to be impeachable the acts complained of must be crimes and must have been committed in the accused's official capacity."(60) Unlike Blount, Swayne was, however, charged with offenses at least related to his official responsibilities: the expense account was to reimburse official travel by federal judges; the acceptance of free travel was deemed inappropriate because the railroad company was likely to have business before the judge's court; and the failure to reside in the judicial district was a direct violation of the requirements of federal law. In the end large majorities of senators voted to acquit Swayne of all the charges against him. We do not know whether the senators believed (1) that the charges had not been proved; (2) that though proved, they did not meet the standard of impeachable offenses; or (3) that though they technically met the standard for impeachment, they did not seem serious enough to warrant the punishment of removal from office.

The impeachment of federal judge Robert W. Archbald less than a decade later again raised the issue of the relationship of impeachable offenses to official misconduct. By a vote of 223 to 1, the House impeached Archbald in July of 1912 for various actions he took while serving on United States Commerce Court, the federal court that heard all appeals from rulings of the Interstate Commerce Commission, and in his previous capacity as a federal district judge. The most damaging charges, and the ones that led to conviction in the Senate, focused on Archbald's efforts to benefit financially by trading on his influence as a federal judge with coal and railroad interests. Like judge Swayne's attorneys before them, Archbald's counsel argued that the accusations, even if true, did not demonstrate abuse of official powers and therefore did not rise to the constitutional standard for impeachment. None of the charges, insisted one of Archbald's attorneys at the Senate trial, "relates to anything that has

been done in the performance of the duties of the office which Judge Archbald holds."(61) As related by Bushnell, House manager Henry Clayton "insisted that the offenses with which Judge Archbald had been charged need not have been committed in office. He produced an analogy, made familiar in various forms in earlier impeachment trials: 'Suppose a judge were to commit highway robbery and be put in the penitentiary, would you hold that he could not be impeached upon the ground that it was not done in his official capacity?'"(62)

The Senate convicted Archbald by overwhelming majorities on four of the articles relating to his actions while serving on the Commerce Court and by just over the two-thirds required on a "catch-all" article that described a pattern of misconduct throughout his federal judicial career. He was acquitted on six charges relating to his previous service on the district court. One of the senators who voted consistently against conviction filed a statement after the trial was completed explaining his view that "misconduct as a product of office had to be proved and . . . that Archbald had not been shown to have misbehaved in his judicial capacity."(63) Given the overwhelming vote for conviction, Bushnell concludes that "the thrust of the trial sustains the argument that it is not essential in an impeachment procedure to demonstrate official, as distinct from general, bad performance."(64)

Two subsequent impeachments and convictions of federal judges present even clearer evidence of Congress acting on an understanding of "high crimes and misdemeanors" broader than abuse of official powers. In 1936 the House impeached federal judge Halsted L. Ritter by a vote of 181 to 146. Although most of the seven articles of impeachment concerned official misconduct, two charged that Ritter had evaded federal income taxes in both 1929 and 1930. These charges, however, played little role in the Senate trial. In the end the Senate voted 36-48 and 46-37 for conviction on the two income tax charges. Although the votes on these and the other specific charges fell below the two-thirds necessary for conviction, the catch-all seventh article of impeachment narrowly passed by the requisite ratio and Ritter was removed from office. Here a majority of both branches (though not two-thirds of the Senate) voted that income tax evasion - not in itself an abuse of official powers - met the constitutional standard of "high crimes and misdemeanors."

Half a century later income tax evasion was the central issue in the

impeachment, conviction, and removal from office of federal district judge Harry E. Claiborne. In 1984 Claiborne was convicted in federal court of two counts of failing to report over one hundred thousand dollars of taxable income in 1979 and 1980. He was fined $10,000 and sentenced to two years in federal prison. Despite numerous calls for his resignation, Claiborne refused to give up his federal position and salary even while serving his prison sentence. In July of 1986, 406 members of the House of Representatives unanimously voted to impeach Claiborne. The first two articles of impeachment charged Claiborne with failing "to report substantial income" on his federal tax returns in 1979 and 1980. The third article recounted the judge's conviction for these federal offenses and his concurrent sentences to two years in prison. The fourth and final article read in full as follows:

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of misdemeanors in office in a manner and form as follows:

Judge Harry E. Claiborne took the oath for the office of judge of the United States and is required to discharge and perform all the duties incumbent on him and to uphold and obey the Constitution and laws of the United States.

Judge Harry E. Claiborne, by virtue of his office, is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.

Judge Harry E. Claiborne, by willfully and knowingly falsifying his income on his Federal tax returns for 1979 and 1980, has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of misdemeanors and, by such conduct, warrants impeachment and trial and removal from office.

Recalling similar defenses presented in the past, Oscar Goodman,

Claiborne's lawyer, argued that his client "had not been accused of anything relating to discharge of his office. . . . The accusations against the judge . . . were based on alleged misconduct, private in nature, not on official misconduct"(65) (an argument remarkably similar to that advanced by President Clinton's attorneys). For a federal judge to be impeached, Goodman contended before the Senate Impeachment Trial Committee, his misbehavior must be related to "his official function as a judge."(66) In response, "Paul Sarbanes (Democrat, Maryland) . . . asked whether Goodman meant that, had the judge 'committed murder or rape, and not in doing his official duties, that that is not an impeachable offense?' 'That is my position,' Goodman replied." The Senate was not persuaded by this defense: it voted 87-10 and 90-7 for conviction on the two counts of income tax evasion and 89-8 for betraying "the trust of the people of the United States" and "bringing disrepute on the Federal courts."

Finally, three years after Claiborne's removal, the House and Senate impeached and convicted two more federal district judges: Alcee L. Hastings and Walter L. Nixon, Jr. In both cases the crime of perjury was central to the accusations. In 1988 the House of Representatives by a vote of 413-3 adopted seventeen articles of impeachment against Hastings. The first of these charged Hastings with conspiring to obtain a bribe to reduce the sentences of two men convicted in his court. Most of the rest accused him of lying and submitting false evidence at his 1983 trial for bribery, conspiracy, and obstruction of justice (for all of which the jury acquitted him). In October of 1989 the Senate convicted Hastings of eight of the charges by the requisite two-thirds vote. It is important to note that although Hastings's perjury definitely stemmed from an abuse of judicial office, both the House and Senate treated the perjury as a separate offense sufficient by itself to warrant removal from office.

Walter Nixon's impeachment focused entirely on the offense of perjury. In 1986 Nixon had been convicted and sentenced to five years in prison for lying to a grand jury about his efforts to get favorable treatment from a district attorney for an associate's son charged with drug smuggling. The drug smuggling case was not before Nixon's court, and Nixon's intercession was not apparently illegal, however inappropriate. Like Claiborne before him, Nixon refused to resign from the bench or to forego his salary even after his incarceration. In May of 1989 the House impeached Nixon by the

unanimous vote of 417-0, approving two articles charging perjury before a grand jury and one article accusing him of bring discredit upon the federal judiciary. In November the Senate convicted Nixon on the two perjury counts by votes of 89-8 and 78-19.

The record of American impeachments makes it clear that the House and Senate have both read "high Crimes and Misdemeanors" to include misbehavior in addition to that "committed under the colour of office," to use Joseph Story's phrase. As we have seen, Story himself was reluctant to express a final opinion as to whether impeachment reached only malconduct in office. No doubt this was partly because the Senate had left this issue unresolved when it dismissed the articles of impeachment against Senator Blount on the grounds that senators were not "civil officers" under the Constitution. Justice Story was not one to prejudge a question that the Constitution had left in the hands of another body. Moreover, Story may well have believed that there was no general rule that could be laid down to distinguish "private" misbehavior that truly merited impeachment from that which did not. In each case the House and Senate would have to judge whether the particular misdeeds at issue were of such a nature as to call into question the wisdom of allowing the miscreant to remain entrusted with his powers. Story might even have worried that allowing impeachment for private misdeeds created something of a constitutional Pandora's box. Yet, the history of impeachment proceedings in this country has shown that although the House and Senate have consistently affirmed the idea that private misconduct by civil officials might be cause for impeachment and removal, doing so has not resulted in sweeping impeachment inquests into the private lives and deeds of judicial and executive officials.

IV. President Clinton's Constitutional Defense

To date the president's attorneys have released four reports challenging the accusations against their client.(67) All argue (1) that the president did not commit the offenses with which he is charged - perjury, witness tampering, obstruction of justice, and abuse of power

- and (2) that even if he did, these do not rise to the level of "high crimes and misdemeanors" as that phrase is used in the Constitution. For our purposes here, we are interested only in the latter claim. The following quotations from the reports capture the essential elements of the president's constitutional defense:

The impeachment clause was designed to protect our country against a President who was using his official powers against the nation, against the American people, against our society.(68)

Nothing less than the gravest executive wrongdoing can justify impeachment.(69)

In short, impeachment is a necessary Constitutional check by a coordinate branch of government upon serious and aggravated abuses of executive power. . . . Holders of public office are therefore not to be impeached for private conduct, however wrongful. . . . Conduct . . . which bears no 'functional relationship' to public office, does not constitute grounds for impeachment. . . . Private misconduct, or even public misconduct short of an offense against the state, is not redressable by impeachment . . . .(70)

The [impeachment] process must focus on public acts, performed in the President's public capacity, and affecting the public interest. . . . [T]he [House Judiciary] Committee should consider and approve articles of impeachment only for such acts as have, in its judgment, so seriously threatened the integrity of governmental processes as to have made the President's continuation in office a threat to the public order.(71)

Impeachment was intended to redress public offenses committed by public officials in violation of the public trust and duties. Because presidential impeachment invalidates the will of the American people, it was designed to be justified for the gravest wrongs - offenses against the Constitution itself.(72)

[T]he Framers made the standard of impeachable offenses an especially high one, requiring a showing of injury to our very system of government. . . . Impeachment is a basic constitutional safeguard,

designed both to correct harms to the system of government itself and to protect the people from serious malfeasance in the carrying out of public functions. Nothing less than the gravest executive wrongdoing can justify impeachment.(73)

Impeachment is reserved for the most serious abuses of executive power that, given the President's four-year term, might otherwise go unchecked.(74)

[C]riminal acts are not necessarily impeachable. Holders of public office should not be impeached for conduct (even criminal conduct) that is essentially private.(75)

If the president's attorneys are right, then the impeachment of a public official is only appropriate when two key criteria are met: (1) the individual abuses his official powers and (2) he does so in a way that injures "our very system of government." In the specific case of presidential impeachment, the president's official acts must be so damaging to "the integrity of governmental processes" that his continuation in office poses "a threat to the public order." As the evidence we have adduced in this analysis demonstrates, neither of these two criteria is consistent with how "high crimes and misdemeanors" was understood at the time of the writing of the Constitution nor with the history of American impeachments during the subsequent two centuries.

On whether impeachable offenses must be limited to official misconduct, the historical record could hardly be clearer. Since the impeachment of Senator Blount, just a decade after the Constitution was written, the House and Senate have consistently interpreted "high Crimes and Misdemeanors" to include misbehavior that went beyond the misuse of official powers. Indeed, the attorneys for Blount (1799), Swayne (1904), Archbald (1912), and Claiborne (1986) all argued essentially the same position now urged by President Clinton's lawyers. Of these four impeached officials, the Senate convicted and removed from office both Archbald and Claiborne, and it expelled Blount for a "high misdemeanor," indicating, as noted earlier, that his misbehavior met the constitutional standard for impeachment and removal. In addition to these cases, the House approved two articles of impeachment against Halsted Ritter (1936) for income tax evasion, an offense other than official misbehavior.

Although the Senate failed to convict on these charges, a majority of senators supported conviction and removal for one count of tax evasion. Finally, in the late 1980s the House impeached and the Senate convicted two federal judges (Alcee Hastings and Walter Nixon) for the distinct offense of perjury. Indeed, Nixon was convicted by the Senate only of the perjury charges and not for any underlying abuse of office.

There is, however, one precedent that seems to cut the other way. This was the decision by the House Judiciary Committee in 1974 not to approve an article of impeachment against President Richard Nixon for filing a false federal income tax return. Two-thirds of the committee members voted to reject this charge, and several of these made comments suggesting that in their opinion income tax evasion could not rise to the level of an impeachable offense. In their "Memorandum Regarding Standards for Impeachment" President Clinton's lawyers introduce their discussion of this episode by noting how "closely" the perjury charge against Clinton "resembles" the charge that Nixon filed a false tax return ("signed under penalty of perjury"). The "Memorandum" interprets the Committee's 1974 decision as a precedent that the charges against Clinton, "analogous" to those against Nixon rejected by the House Judiciary Committee, do not reach the "demanding standard" of the Constitution's impeachment provisions.

But surely this reads too much into this one committee decision. First, it must be remembered that the full House of Representatives has impeached two federal officials (judges Ritter and Claiborne) for income tax evasion and two more for perjury (judges Hastings and Nixon). Three of these impeachments occurred since the decision on the Nixon tax matter (1986, 1988, and 1989), and all three officials were convicted of these charges by the Senate and removed from office. So it is simply contrary to the facts to argue that the Congress has embraced a standard for impeachment that excludes such crimes as tax evasion or perjury. Second, even in President Nixon's case the Judiciary Committee was divided, with nearly a third of the members believing that the tax allegations met the constitutional standard for impeachment. Indeed, twelve of the twenty-one Democrats, the majority party on the committee, voted to impeach Nixon on this charge. Third, some members of the Committee may well have believed that presidential income tax evasion could properly result in

impeachment, but that this was not a sufficiently egregious case or sufficiently proven by the evidence. Finally, with the case for impeachment so much stronger on other counts, some committee members may have wished to keep the focus on the coverup and abuse-of-power charges that were at the heart of the Watergate scandal. There is, however, another possibility. This is that different standards ought to apply to presidents and federal judges: that judges may properly be removed from office for perjury, income-tax evasion, or other crimes unrelated to misuse of office but that presidents may not. We return to this issue below.

As for the second element of the president's constitutional argument - that a president is not impeachable unless his actions "so seriously threatened the integrity of governmental processes" that his continuance in office would pose "a threat to the public order" - there is simply no evidence either that the framers themselves meant to so restrict presidential impeachments or that those who ratified the Constitution understood the impeachment clauses this way. Certainly, a gross abuse of power that undermined social peace or that threatened the preservation of the constitutional system would render the president subject to impeachment and removal. George Mason, as we noted earlier, objected at the Constitutional Convention to limiting impeachments to "treason" and "bribery" because these might not reach actions by a president "to subvert the Constitution." Yet it is Mason himself who proposed the standard of "maladministration," a term that would certainly encompass more than actions to undermine the governmental system or to endanger public order. It may well be asked, then, whether the Convention's substitution of "high crimes and misdemeanors" for "maladministration" was meant to limit impeachments to presidential actions that subverted the constitution or threatened public order.

Three facts demonstrate otherwise. First, throughout hundreds of years of English parliamentary practice the phrase "high crimes and misdemeanors" had encompassed a broader range of wrongdoing than attacks on the constitutional system or threats to public order. Second, as we have seen, James Madison, whose objection to the term "maladministration" led to its replacement by "high crimes and misdemeanors," maintained just two years later on the floor of the House of Representatives that a president could properly be impeached and convicted for "the wanton removal of meritorious

officers." Our point here is not that Madison was right in this particular interpretation but only that he clearly embraced a broader view of impeachable offenses than that now advanced by the president's attorneys. Finally, we should not forget that the framers expressly made "bribery" an impeachable offense. Yet a single instance of bribery - the president, for example, selling an appointment to a subcabinet position or vetoing some legislation of middling importance in exchange for a cash payoff - would hardly constitute the kind of act that would make the president's "continuation in office a threat to the public order." But it is "only for such acts," the president's attorneys contend, that articles of impeachment "should [be] consider[ed] and approve[d]." It appears that the U.S. Constitution itself does not meet the president's "demanding standard" for impeachment. And, indeed, most of those who spoke on impeachment in the state ratifying conventions, reviewed above, used language far broader than the narrow interpretation now offered in the president's defense.

V. The Meaning of "High Crimes and Misdemeanors"

How best, then, to understand "high crimes and misdemeanors"? We believe that the history of British impeachments, the debates in the Constitutional Convention, the content and structure of Article II of the Constitution, the debates in the state ratifying conventions, and the history of impeachments under the Constitution all support the following interpretation: *Federal officials commit high crimes and misdemeanors when they seriously abuse or violate their public trust and duties*. It is the abuse of public trust and duties that is the consistent theme that runs through the words of the Founders and the history of impeachments in the United States. This definition raises two important issues. First, how do we identify the public trust and duties of a constitutional office; and, second, how serious must the violation be to warrant impeachment and removal from office.

Just as the Constitution applies the same impeachment standard to all civil officers of the federal government - "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors" - so each civil officer is equally obliged to act in accordance with his public trust and duties. In this respect, all civil officers are held to the same standard, and a serious violation of that standard subjects all civil officers equally to impeachment and removal. It may well be asked, however, whether the public trust and duties of every federal officer are identical. And if they are not identical, does this mean that some acts of misbehavior might constitute impeachable "high crimes and misdemeanors" for one office but not for another?

It is useful here to distinguish *implicit* from *explicit* duties. All executive and judicial officials, for example, are required by the Constitution itself to take an oath "to support this Constitution." Here no distinction is made between such officers as judges, ambassadors, and heads of the executive departments. This obligation to support the Constitution applies equally to all, and a serious abuse or violation of this duty would subject all to impeachment and removal. Yet, there may well be other explicit duties governing proper conduct in office under federal law or regulations that *do* vary by office. Some officials, for example, may be subject to stricter conflict of interest rules than others. As a consequence, it may happen that of two officials who engage in similar financial relationships with private parties, only one might seriously violate his duty by so doing.

It is, of course, more difficult to identify an *implicit* public trust or duty. Yet, American impeachment history offers many such examples. As noted earlier, Senator Blount was impeached by the House of Representatives for actions "contrary to the duty of his trust and station as a Senator of the United States" and the Senate expelled him for "conduct [that] has been inconsistent with his public duty, [and that] renders him unworthy of a further continuance of his present trust in this body . . . ." As a senator, Blount had a broad obligation - implicit in his high office - to respect the government's policies towards foreign nations; his actions violated that obligation and thus justified his removal from Congress.

A century later, when the House impeached Judge Swayne in part for

accepting use of a private railroad car, it did so not because he broke a federal law but because the lawmakers believed that it was grossly inappropriate for a judge to receive such a gratuity from a company that would likely have business before his court. Similarly, Judge Archbald was impeached, convicted, and removed from office for inappropriate financial investments with companies also likely to have business before his court - again, actions that were not apparently illegal. In announcing the impeachment to the House, the chairman of the Judiciary Committee charged Archbald with "prostitut[ing] his high office for personal profit[;] . . . degrad[ing] his office[;] . . . destroy[ing] the confidence of the public in his judicial integrity[;] . . . [and] forfeit[ing] the condition upon which he holds his commission . . . ."(76) Finally, Judge Ritter's impeachment in 1936 involved accusations of inappropriate, but not technically illegal, judicial behavior in addition the charges of evading his federal income taxes that were discussed above. In the Swayne, Archbald, and Ritter impeachments the House of Representatives clearly operated on the view that federal judges had obligations beyond the formal requirements of law and that a serious violation of these implicit obligations might well warrant impeachment and removal from office (with the Senate concurring by two-thirds votes in two of the three cases).

What, then, of the difference between the offices of federal judge and president? Are the public trust and duties of a judge, whether explicit or implicit, so different from those of the president that actions such as tax evasion, perjury, or grossly inappropriate, if technically legal, behavior that might properly lead to the ouster of a judge ought not to lead to the impeachment and removal of a president? This distinction can hardly be defended on the grounds of the explicit constitutional duties of office. As we have noted, judges, like legislators and executive officials, are required to take an oath "to support this Constitution." Only the president is required to take the more emphatic and comprehensive oath "to the best of my Ability, preserve, protect and defend the Constitution of the United States." And only the president is constitutionally enjoined to "take Care that the Laws be faithfully executed." Thus, there is no basis in our fundamental law for arguing that judges have a higher duty to obey and enforce the law than do presidents. If anything, the Constitution tilts in the other direction.

What, then, of the implicit duties of office, of the public trust in some broader sense? It has been argued, for example, that given the nature of the judicial office, a convicted perjurer or tax evader could hardly preside over civil or criminal trials with the authority, respect, and public confidence required for such a job. The job of the president, by contrast, is so much more diverse - conducting foreign policy, attending to the nation's security needs, fashioning legislation, managing the bureaucracy, and the like - that misbehavior of the sort that would disqualify a judge can be tolerated in a president. A moment's reflection demonstrates the unpersuasiveness of this argument. Can it seriously be maintained that if the president of the United States is known to be a perjurer, a tax cheat, or otherwise the perpetrator of felonies that this would have no effect on his credibility with foreign heads of state, on the respect and morale of those who serve under the Commander-in-Chief, or on the broader moral tone of his administration? And what of law enforcement itself, an essential element of the executive power? If the attorney general of the United States, who serves directly under the president, were guilty of perjury, obstruction of justice, and witness tampering, but was not fired by the president, would the House and Senate have any trouble determining that these offenses were so inconsistent with the duties and public trust of the office that they would in fact constitute "high crimes and misdemeanors"? Yet the attorney general is, in a constitutional sense, the mere extension of the president. It is the president in whom the Constitution vests "the executive Power." And it is the president who is constitutionally obligated to "take Care that the Laws be faithfully executed." Are we prepared to argue that the Constitution grants presidents more leeway for criminal misbehavior than it grants to both federal judges *and* attorneys general, despite the fact that this same Constitution imposes a more emphatic, a more direct, and a more comprehensive law-enforcement obligation on the president than on these, or any other, federal officials?

It is useful here to reflect on why there may well be a connection between the so-called "private misbehavior" of officials and their public responsibilities. If a public official engaged in seriously immoral or criminal behavior "on his own time," this would naturally raise questions as to whether this individual could be trusted with the powers and duties associated with public office. It follows that private behavior may be of legitimate public concern. A public official guilty of

serious personal misbehavior seems to demonstrate character defects that might carry over into the conduct of public office. Indeed, it would be odd if a system of government could not remove an official who had clearly shown himself willing to violate the law in one area but had not, as yet, abused his official powers. All offices are in some sense a matter of power entrusted. If an officeholder shows himself to be unworthy of a high trust - because be cannot or will not conform his behavior to the law and common morality - then it follows that removal should be an option as a matter of constitutional self-protection.

VI. Impeachment, the Law, and Constitutional Duty

Because the House Judiciary Committee is filled with lawyers and the impeachment process itself echoes a judicial proceeding, there is a natural tendency for those involved in the process to stress those instances of presidential misbehavior that seem most closely to violate criminal or civil statutes. The president's defenders have responded by putting a good deal of time and effort into disputing whether in fact the president committed perjury, with all the legal gymnastics such arguments entail. For example, in a technically legal sense the fact that the president's testimony in the *Paula Jones* deposition was eventually dismissed may render any willful misstatements under oath non-perjurious (although the lawyers argue both sides on this). In our view, however, this kind of technical legal issue, though quite appropriate in a court of law, ought to be irrelevant in an impeachment inquiry. The issue for impeachment should be whether the president has violated his duty to his office and the constitutional system. Getting into a debate about whether the president has or has not committed the specific federal offense of perjury (or whether a jury might or might not convict him of this offense) misses the larger point that every president is under a positive obligation not just to avoid acts that meet the technical definitions of federal crimes but to see to it in a positive way - "to take Care"- that the whole body of laws is faithfully executed and obeyed. The issue in an impeachment proceeding ought not to be whether the president technically committed a federal offense but whether by his behavior (such as alleged false statements under oath, witness tampering, obstruction of justice, or misuse of his prerogatives) he turned his back on his high constitutional obligations - whether he seriously violated his public trust and duties.

Indeed, there may well be times when a president actually has an obligation to violate a specific federal law. Abraham Lincoln, for example, maintained that a president may break the law if necessary to "preserve, protect and defend the Constitution." Defending his suspension of the privilege of the writ of habeas corpus during the first weeks and months of the Civil War, Lincoln asked, "are all the laws, *but one,* to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"(77) As we noted earlier in this analysis, the true test of presidential performance is how well the occupant of the office discharges the duties assigned to it, with the overarching duty being that enjoined by the oath of office.

In sum, there are three distinct, but related, reasons why the allegations against President Clinton - lying under oath (in a civil deposition, to a criminal grand jury, and in response to a congressional impeachment inquiry), witness tampering, and obstruction of justice - rise to the level of "high Crimes and Misdemeanors." First, even apart from the specific duties of office, such misbehavior calls into question any official's fitness to serve in positions of public trust. Second, such actions directly violate the specific and emphatic duty of the president - the nation's Chief Executive - to "take Care that the Laws be faithfully executed." Finally, they are an assault on both the integrity of the judicial branch of government and on the constitutional duties and responsibilities of the Congress. They are, in short, a breach of the president's highest duty: to "preserve, protect and defend the Constitution of the United States."

The impeachment provisions of the U.S. Constitution impose on the House of Representatives and the Senate the high responsibility of determining whether a president's violation of his public trust and duties is so egregious as to justify removal from office. This involves a political (not legal) judgment of the highest order. It calls forth from our elected representatives a seriousness of purpose, a dedication to constitutional principle, and a willingness to disregard partisan or private political advantage that is uncommon in American politics. The framers of the U.S. Constitution, realists all, believed both that

political virtue was not so universal as to make the impeachment check unnecessary, nor was it so rare as to render its exercise by the two branches of Congress unsafe to the constitutional balance of powers. Indeed, it is, properly employed, the ultimate constitutional safeguard. By judging the actions of high public officials against the standard of their constitutional duties and broad public responsibilities, the impeachment process serves three great ends: it removes from office those who have forfeited their right to serve, protecting the public from further depredations; it induces others to act in accord with their high public responsibilities; and it provides the citizenry with a vital lesson in the principles of constitutional democracy.

NOTES

1. The quotation is from "Statement of Cass R. Sunstein," Subcommittee on the Constitution, Committee of the Judiciary, U.S. House of Representatives, November 9, 1998.

2. Max Farrand, ed., *The Records of the Federal Convention of 1787*, Revised Edition, 4 vols. (New Haven: Yale University Press, 1966), vol. II, p. 550 (September 8).

3. Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Cleveland: Meridian Books, World Publishing Company., 1961), No. 65, p. 439.

4. Jonathan Elliot, ed., *Debates on the Adoption of the Federal Constitution*, 5 vols. (Philadelphia: J. B. Lippincott Co., 1901), vol. 4, p. 281 (January 17, 1788).

5. Ibid., vol. III, p. 201 (June 10, 1788).

6. Stillman, ibid., vol. II, p. 169 (Massachusetts, February 4, 1788).

7. James Iredell, ibid., vol. IV, p. 32 (North Carolina, July 24, 1788).

8. Patrick Henry, ibid., vol. III, p. 397 (Virginia, June 17, 1788).

9. Nicholas, ibid., p. 16 (Virginia, June 3, 1788).

10. Spencer, ibid., vol. IV, p. 116 (North Carolina, July 28, 1788).

11. Governor Johnston, ibid., p. 48 (North Carolina, July 25, 1788).

12. Ibid.

13. Iredell, ibid., p. 113 (North Carolina, July 28, 1788).

14. Maclaine, ibid., p. 34 (North Carolina, July 25, 1788).

15. Judge Pendleton, ibid., p. 263 (South Carolina, January 16, 1788).

16. Iredell, ibid., p. 32 (North Carolina, July 24, 1788).

17. Henry, Ibid., vol. III, p. 398 (Virginia, June 17, 1788).

18. Iredell, ibid., vol. IV, p. 126 (North Carolina, July 28, 1788).

19. William Blackstone, *Commentaries on the Laws of England, Vol. IV, Of Public Wrongs* (Boston: Beacon Press, 1962), p, 123. It can be argued that the views of those who ratified the Constitution in the state conventions is a more authoritative indication of the original meaning of the document than the views of those who wrote the document at the Constitutional Convention; for it was the act of ratification that gave the proposal of the framers legal force. See especially Charles A. Lofgren, "The Original Understanding of Original Intent?" *Constitutional Commentary*, Vol. 5, No. 1 (Winter 1988), pp. 77-113. Lofgren quotes, for example, the following statement of Madison's in 1796: "If we were to look, therefore, for the meaning of the instrument [the Constitution] beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution." By Madison's own principles, then, if the ratifiers of the Constitution understood "high crimes and misdemeanors" more broadly than he himself did at Philadelphia, it is the view of the ratifiers that would be controlling.

20. *The Debates and Proceedings in the Congress of the United States*, compiled by Joseph Gales (Washington: Gales and Seaton, 1834), vol. I, p. 517.

21. Ibid., p. 480.

22. James Iredell, in (23)

23. "Statement of Cass R. Sunstein," Subcommittee on the Constitution, Committee of the Judiciary, U.S. House of Representatives, November 9, 1998.

24. Ibid., p. 125. Iredell says here, "According to these principles, 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." As is clear from the context, the point of the "only" is to distinguish willful and corrupt misconduct from honest mistakes of judgment, for which a president "ought not to be punished."

25. Ibid., p. 113.

26. Raoul Berger, *Impeachment: The Constitutional Problems* (New York: Bantam Book, 1974), pp. 71-72.

27. Ibid., pp. 73-75.

28. Farrand, *Records of the Federal Convention*, vol. II, p. 550 (September 8).

29. "Speech in Opening the Impeachment," February 15, 1788, in *The Writings and Speeches of Edmund Burke*, 12 vols. (Boston: Little, Brown and Company, 1901), vol. IX, p. 333.

30. Edward S. Corwin, *Presidential Power and the Constitution*, ed. Richard Loss (Ithaca, NY: Cornell University Press, 1976), p. 72. See also Corwin, *The President: Office and Powers, 1787-1957*, Fourth Revised Edition (New York: New York University Press, 1957), p. 70.

31. Elliott, *Debates on the Adoption of the Federal Constitution*, vol. III, pp. 496, 498 (June 18, 1788).(32)

32. "Statement of Cass R. Sunstein," Subcommittee on the Constitution, Committee of the Judiciary, U.S. House of Representatives, November 9, 1998.

33. James Madison, "Letters of Helvidius," No. I in *The Letters of Pacificus and Helvidius* (Delmar, New York: Scholar's Facsimiles &

Reprints, 1976, reprint of the 1845 edition), p. 61.

34. *Constitutional Grounds for Presidential Impeachment*, Staff Report to the House Committee on the Judiciary, February 22, 1974, Part II, "The Historical Origins of Impeachment," Section A, "The English Parliamentary Practice."

35. Farrand, *Records of the Federal Convention*, vol. I, p. 88.

36. Ibid., vol. II, p. 69.

37. Ibid., p. 121 (July 26).

38. Elliot, *Debates on the Adoption of the Federal Constitution*, vol. III, p. 398 (June 17, 1788).

39. Ibid., vol. IV, pp. 32 (July 24, 1788) and 125 (July 28, 1788).

40. Ibid., p. 276 (January 16, 1788).

41. Ibid., p. 281.

42. *Federalist*, No. 65, p. 439.

43. *Constitutional Grounds for Presidential Impeachment*, Part II, "The Historical Origins of Impeachment," Section C, "The American Impeachment Cases."

44. Joseph Story, *Commentaries on the Constitution of the United States*, 3 vols. (New York: Da Capo Press Reprint Edition, 1970, reprint of the 1833 first edition), vol. II, p. 217.

45. Ibid., p. 234.

46. Ibid., pp. 262, 268.

47. Ibid., p. 269.

48. Ibid., p. 272.

49. Ibid., p. 273.

50. Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal*

Impeachment Trials (Urbana and Chicago: University of Illinois Press, 1992), p. 28. Unless otherwise noted, this is the source of the following factual information on the history of federal impeachments.

51. Ibid.

52. Quoted in ibid., p. 30.

53. Quoted in ibid., p. 29.

54. Quoted in ibid.

55. Quoted in ibid., p. 32.

56. Ibid., p. 33.

57. Quoted in ibid., p. 35.

58. Ibid., p. 193.

59. Ibid., pp. 201, 205.

60. Ibid., p. 208.

61. Quoted in ibid., p. 235.

62. Ibid., p. 236.

63. Ibid., p. 239.

64. Ibid., p. 240.

65. Ibid., p. 296.

66. Quoted in ibid., p. 296.

67. These are: David E. Kendall *et al.*, "Preliminary Memorandum Concerning Referral of Office of Independent Counsel," September 11, 1998; "Initial Response to Referral of Office of Independent Counsel," September 12, 1998; "Memorandum Regarding Standards for Impeachment," October 2, 1998; and "Submission by Counsel for President Clinton to the Committee on the Judiciary of the United States House of Representatives," December 8, 1998.

68. Kendall *et al.*, "Preliminary Memorandum Concerning Referral of Office of Independent Counsel"

69. Ibid.

70. Ibid.

71. Ibid.

72. Kendall *et al.*, "Initial Response to Referral of Office of Independent Counsel"

73. Kendall *et al.*, "Memorandum Regarding Standards for Impeachment"

74. Ibid.

75. Ibid.

76. Quoted in Bushnell, *Crimes, Follies, and Misfortunes*, p. 219.

77. "Message to Congress in Special Session," July 4, 1861, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, NJ: Rutgers University Press, 1953), vol. IV, p. 430, emphasis in the original. Lincoln went on to maintain that he had not in fact violated any law, although by his own argument he would have been justified in so doing.

CONTACT

The Salvatori Center
Claremont McKenna College
850 Columbia Avenue
Claremont, CA 91711

Campus Location
Kravis Center, Third Floor
888 Columbia Avenue
Claremont, CA 91711

Phone: (909) 621-8201
Fax: (909) 621-8416
Email:
SalvatoriCenter@cmc.edu

VISIT | APPLY

ADMISSION OFFICE

888 Columbia Avenue
Claremont, CA 91711
909.621.8088

WEBSITE ACCESSIBILITY

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