

Impeachment: A Handbook

Philip C. Bobbitt

PREFACE TO THE NEW EDITION

It is said that in the United States, a “new & improved” label will always increase sales.¹ This is doubtless a testament to our irrepressible optimism.²

Since the publication of *Impeachment: A Handbook*, by Charles L. Black, Jr., in 1974, it has become the standard work. *Lawfare* called it “the most important book ever written on presidential impeachment.”³ Its sales peak whenever there is impeachment talk in the Congress, and staffers can be seen like schoolchildren carrying their *vade mecums*.

As the 2018 midterm elections approached, there was some anxiety—and no doubt, in some quarters, hope—that impeachment might again be undertaken. As it happened, I was teaching the *Handbook* in my Legal Methods class at Columbia as an exquisite demonstration of the forms of constitutional argument. My students complained that the book had been published before any definitive action was taken to remove President Nixon, and they chafed to know how Black would have dealt with the significant questions of the hour—both then and now. Was the hacking of the Democratic campaign chairman’s

-
1. By contrast, in the United Kingdom, realtors say that a new house is harder to sell.
 2. What other country would have established a nationwide organization of societies of businessmen called the “Optimist Club” in the middle of the First World War? See *History of Optimist International*, OPTIMIST INT’L (2018), <https://www.optimist.org/member/about5.cfm> [<https://perma.cc/3YNJ-YT4G>].
 3. Jane Chong, *To Impeach a President: Applying the Authoritative Guide from Charles Black*, LAWFARE (July 20, 2017, 2:00 PM), <https://www.lawfareblog.com/impeach-president-applying-authoritative-guide-charles-black> [<https://perma.cc/5CQ6-UH8E>].

emails in 2016 like the burglary of the Democratic campaign chairman's correspondence at the Watergate complex in 1972? Was the Republican campaign's contacts with Russian diplomats in 2016 like the Nixon campaign's contacts with South Vietnamese diplomats in 1968? Do the House Judiciary Committee's charges against Nixon set a precedent defining an "impeachable offense" arising from improper use of the Justice Department,⁴ even though the President resigned before the House could vote on this charge?⁵ Was the Clinton impeachment charge for the obstruction of justice a precedent because it was adopted by the House⁶—or not, because the Senate did not convict on this charge?⁷ And what about issues Black didn't address, like the relation between the Twenty-Fifth Amendment and impeachment, or the role of the Emoluments Clause as a possible basis for impeachment? And what about the president's pardon power?⁸ Are there circumstances in which the issuance of a pardon—or the promise of one—can provide a ground for impeachment?

To all of these questions, I gave the same answer: my students had all they needed in Black's book. It wouldn't tell them *what* to think of these or any other problems, even in the Nixon case, which was unfolding as the book was written. The *Handbook* would instruct them *how* to think. It laid out clearly and concisely the methods by which a legal answer could be derived from the text, history, structure, doctrine, practicality, and ethos of the Constitution, and it showed rather elegantly how to apply these six fundamental methods.

Still, I took the students' point. Black's chapter "Application to Particular Problems" cried out for the application of his methods to the problems raised by the class. And there were important precedents—cases of attempted and partly successful impeachments that created or affirmed doctrine—that had occurred since the book's publication.

Moreover, while Black's masterpiece remained the standard reference work, new books on presidential impeachment were appearing by writers I liked and

4. ARTICLES OF IMPEACHMENT AGAINST PRESIDENT NIXON, H.R. REP. NO. 93-1305 (1974), <https://www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc3/pdf/GPO-CDOC-106sdoc3-19-3.pdf> [<https://perma.cc/24M3-CSFG>].

5. Carroll Kilpatrick, *Nixon Resigns*, WASH. POST (Aug. 9, 1974), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm> [<https://perma.cc/DH6P-79A6>].

6. Articles of Impeachment Against William Jefferson Clinton, H.R. RES. 611, <https://www.congress.gov/105/bills/hres611/BILLS-105hres611enr.pdf> [<https://perma.cc/37AZ-L873>].

7. *Roll Call Vote 106th Congress—1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=1&vote=00018#top [<https://perma.cc/6DTE-LT8B>].

8. Article II, Section 2 provides that the President "shall have Power to grant Reprieves and Pardons . . . except in cases of Impeachment." U.S. CONST. art. II, § 2, cl. 1.

respected that, because of their intrinsic merit and also because of the consumer bias for the “new & improved,” might eclipse the *Handbook* in the marketplace.⁹ That would be a great shame, not because there is anything wrong with these new books but because outside the esoteric topic of impeachment, Black’s book was a key exposition of how we go about resolving constitutional questions in the absence of a Supreme Court opinion. (This remains, I hate to say, a continuing problem for the field. When asked whether a president could pardon himself, a prominent law professor replied, “There really is no answer to this question since it has never arisen.”) Allowing Black’s book to gather dust on the library shelves would be far more than simply a loss for the literature on impeachment, which in any case would build on his insights. It would remove a foundation stone from the intellectual edifice that is perhaps the most important advance made in constitutional law during my lifetime: the development of what might be called the “standard model”¹⁰ that enables legislators, citizens, and journalists as well as judges to resolve constitutional questions when there is no authoritative judicial precedent, and to assess judicial opinions when there is a precedent. Black’s tour de force¹¹ is as important to this development as Weinberg and Salam’s equations are to the Standard Model in physics.¹²

The one thing I refused to do in this new edition was to touch a word of Black’s inimitable writing. It was enough that I was foolishly prepared to put my own stolid texts next to his poet-perfect prose. I would not “revise” Black’s work of genius.

So here it is: new (in some respects) but not improved.

Philip Bobbitt

-
9. See, e.g., CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* (2017); LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* (2018).
 10. See Jack M. Balkin, *Foreword* to PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (2d ed. forthcoming 2019) (noting that the standard view is that “all legitimate constitutional argument takes the form of one of six modalities: appeals to the text, to structure, to history, to precedent, to prudence (or consequences), and to national character (or ethos)”).
 11. For a similar exposition on another important but nonjusticiable constitutional question, see Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *YALE L.J.* 657 (1970).
 12. The “standard model” is the name given in the 1970s to a theory of particle physics that describes how elementary particles interact. It incorporated those subatomic particles known at the time, classified them, and predicted the existence of additional particles. See Christine Sutton, *Electroweak Theory*, *ENCYCLOPÆDIA BRITANNICA*, <https://www.britannica.com/science/electroweak-theory> [<https://perma.cc/4Y8R-WNFE>]; Christine Sutton, *Standard Model*, *ENCYCLOPÆDIA BRITANNICA*, <https://www.britannica.com/science/Standard-Model> [<https://perma.cc/4UBF-LXAB>].

March 18, 2018

I. CHAPTER SEVEN: RECENT PRECEDENTS

Charles Black's essay was written during the constitutional crisis provoked by the efforts of Richard Nixon's presidential campaign to corrupt the processes of the 1972 election. Since then, we have experienced several other tremors of varying force in the landscape of impeachment.

Doctrinal arguments in constitutional law are developed case by case, following rules laid down in precedents. Very few actions by the Congress are governed by doctrine, but the Congress's—and the president's *constitutional* decisions—are subject to a similar sort of doctrinal analysis as those of courts or other legal institutions. As in common-law doctrine, the rule of “last in time” prevails (recent precedents are more salient than older ones),¹³ but the significance to be accorded these precedents varies with the authority of the decider. The 1999 impeachment and acquittal of President Bill Clinton carries more authority than the abortive attempt by a state legislature in 2008 to bring about impeachment proceedings against President George W. Bush,¹⁴ even though the latter is more recent. And what is the significance, if any, of the attempted impeachments against Presidents Ronald Reagan and Barack Obama? Can we infer that the legal bases for these indictments—respectively, the creation of a secret, privately funded covert action capability¹⁵ and the refusal to enforce congressional mandates regarding narcotics and immigration¹⁶—were constitutionally inadequate? Or that the facts simply didn't support the claims of high crimes, assuming these charges amount to such infractions?

There is something to be learned from the doctrinal history of presidential impeachments since 1974,¹⁷ but perhaps the most important development has

13. With the caveat that in the American system, the principle of stare decisis—the doctrinal reliance on governing precedent—can always be overruled.

14. For example, see the New Hampshire legislature's failed effort in 2008. H.R. 24, 2008 Sess. (N.H. 2008).

15. H.R. Res. 370, 98th Cong. (regarding covert action in Grenada); H.R. Res. 111, 100th Cong. (regarding the Iran-Contra affair).

16. S. Con. Res. 43, 55th Leg., 2d Sess. (Okla. 2016), http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20INT/SRES/SCR43%20INT.PDF [<https://perma.cc/4MAK-H894>]; see also Jennifer Steinhäuser, *Ignoring Qualms, Some Republicans Nurture Dreams of Impeaching Obama*, N.Y. TIMES (Aug. 24, 2013), <https://www.nytimes.com/2013/08/25/us/politics/ignoring-qualms-some-republicans-nurture-dreams-of-impeaching-obama.html> [<https://perma.cc/PY4E-JJDT>].

17. Just as there is from earlier precedents: the acquittals of Justice Chase and President Johnson “—decided not by courts but by the United States Senate—surely contributed as much to

been the transfer of influence from the organs of governmental decision-making to the public. Black's essay emphasized the solemnity of the American trial process and cautioned that "a snow of telegrams ought to play no part" in it. The taking of polls regarding guilt or innocence would be "an unspeakable indecency." That position, however faithful to the history, text, and structure of the impeachment provisions, is harder to maintain today.

What has changed is ourselves: we no longer have the confidence in the leadership of Congress that we had in the Nixon era, and impeachment is a supremely congressional action (indeed one reason we have lost that confidence is the fiasco of the Clinton impeachment by the House). Moreover, owing to the zeal of some (and perhaps the self-absorption of others), we have compromised the habits of decorum, fastidious withholding of judgment, impartial procedures, detachment from partisanship, and insistence on fundamental fairness that Black thought necessary to the due process of impeachment. We are more inclined to treat impeachment as a political struggle for public opinion, waged in the media, and less like the grand inquest envisioned by the Constitution's Framers. The "vigilant waiting" urged by Black¹⁸ is less acceptable to a citizenry inflamed by its political divisions and uncertain as to the competence of its institutions.

There remains, however, this hope: that our people come to believe, even more than they believe the superiority of their own opinions, that the best means of realizing their preferences, and of preserving the values on which they believe their preferences to be based, lies in the working of legal institutions whose legitimacy depends on shared understandings, not sheer partisan political power. If this becomes the ethos of the new century, then the precedents still to be formed will restore Black's reverence for the due process of impeachment as it stood in 1974, poised before the abyss.

A. Nixon and Watergate

On February 6, 1974, one year after a Senate committee convened its investigation¹⁹ of a burglary at the Democratic campaign's Watergate headquarters, the House of Representatives passed a resolution authorizing the House Judiciary Committee to determine if grounds existed to bring a Bill of

the maintenance of our tripartite federal system of government as any case decided by any court." WILLIAM H. REHNQUIST, *GRAND INQUESTS* 278 (1992).

18. CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK*, NEW EDITION 5 (2018).

19. 119 CONG. REC. 3831 (1973).

Impeachment against Richard Nixon.²⁰ Following a subpoena²¹ from the special prosecutor as part of a grand jury inquiry, on April 30, 1974, the White House released to the House committee edited transcripts of tapes made of Oval Office conversations. When the special prosecutor pressed for unedited transcripts and additional conversations,²² the White House refused²³ on grounds that the recordings were protected from compelled disclosure by executive privilege. On July 24, however, the Supreme Court ordered the president to comply with the subpoena. The pace quickened. On July 27, 29, and 30, the committee approved three proposed Articles of Impeachment and sent them to the full House.²⁴ Before the House could vote, Nixon on August 5 released an incriminating tape that triggered a collapse in his support in Congress.²⁵ He resigned on the 8th.²⁶

Does Nixon's resignation create a precedent, even though there was no impeachment and conviction? What is the scope of that precedent? Is it coextensive with the charges in the Bill of Impeachment?

At a minimum, we can dismiss two proposed counts that were not referred to the full House: one charging the president with misleading the Congress regarding the secret bombing of Cambodia, and one alleging a failure to pay appropriate income taxes.²⁷ There is little doubt that making war in the absence of an imminent hostile attack must occur with the acquiescence of Congress, but there was some doubt whether the administration, by informing senior congressional officials, had constructively informed the larger membership as well. It was also not clear whether a particular bombing campaign within a larger, authorized war might be within the prerogatives of

20. H.R. Res. 803, 93rd Cong. (1974).

21. Richard Nixon, Address to the Nation Announcing Answer to the House Judiciary Committee Subpoena for Additional Presidential Tape Recordings (Apr. 29, 1974), <http://www.presidency.ucsb.edu/ws/?pid=4189> [https://perma.cc/C977-845C].

22. John Herbers, *Nixon Will Give Edited Tape Transcripts on Watergate to House and the Public; Notes Ambiguities, Insists He Is Innocent*, N.Y. TIMES (Apr. 30, 1974), <https://www.nytimes.com/1974/04/30/archives/nixon-will-give-edited-tape-transcripts-on-watergate-to-house-and.html> [https://perma.cc/XN4A-8H6Z].

23. Two subpoenas in May and one in June were ignored, according to the third article of impeachment. ARTICLES OF IMPEACHMENT AGAINST PRESIDENT NIXON, *supra* note 4.

24. *Id.*

25. *The Smoking Gun Tape*, WATERGATE.INFO, <http://watergate.info/1972/06/23/the-smoking-gun-tape.html> [https://perma.cc/BU57-DBSB].

26. Kilpatrick, *supra* note 5.

27. See David E. Rosenbaum, *2 Articles Fail to Win in Panel*, N.Y. TIMES (July 31, 1974), <https://www.nytimes.com/1974/07/31/archives/2-articles-fail-to-win-in-panel-taxes-and-bombing-issues-defeated.html> [https://perma.cc/A3PV-3A93].

the commander in chief, at least in the absence of congressional action to the contrary.²⁸ The president's failure to pay taxes is not in itself a high crime or misdemeanor because it is unrelated to his official duties; this count also decisively failed in the committee.²⁹

The three Articles of Impeachment sent to the House charged that the president obstructed the investigation of the Watergate burglary (adopted by a committee vote of 27-11); that he engaged in a pattern of conduct that violated various rights of individual citizens (adopted 28-10); and that he refused to cooperate with the committee by providing materials when requested (adopted 21-17).³⁰ Of these three proposed Articles, the most we can say is that the president apparently judged at least one of them a sufficient basis for his resignation, thus giving Nixon's resignation the vague status of a plea bargain negotiated in advance of an indictment—or perhaps what is called an *Alford* plea, wherein a defendant while asserting his innocence admits that the evidence is sufficient for him to be found guilty.³¹ In this case, a president effectively preempted indictment—impeachment—by voluntarily accepting the penalties that would have accompanied his conviction.

Thus the effective constitutional consequences of the Nixon precedent presume that at least one of the three counts was legally and factually sufficient for the president's removal from office. Moreover, and more decisively, we know from multiple sources that by August 5, 1974, following the release of incriminating conversations recorded in the Oval Office, more than two-thirds of the Senate votes needed for conviction were committed against the president.³²

We can eliminate the third count as a precedent because the offense of contempt of Congress, on which Article 3 of the Bill of Impeachment was based,³³ would have been cured by the release of the tapes and transcripts

28. BLACK & BOBBITT, *supra* note 18, at 40.

29. The vote was twelve to twenty-six against for both failed articles of impeachment. See H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305 (1974); James M. Naughton, *House Panel, 21 to 17, Charges Nixon with Defying Subpoenas*, N.Y. Times (July 31, 1974), <https://www.nytimes.com/1974/07/31/archives/house-panel-21-to-17-charges-nixon-with-defying-subpoenas-ends-its.html> [<https://perma.cc/K98R-YG4N>].

30. Naughton, *supra* note 29.

31. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

32. See, e.g., Kilpatrick, *supra* note 5; *The Unmaking of the President*, TIME (Aug. 19, 1974), <http://www.cnn.com/ALLPOLITICS/1996/analysis/back.time/9608/21/index.shtml> [<https://perma.cc/P33P-4DTE>].

33. ARTICLES OF IMPEACHMENT AGAINST PRESIDENT NIXON, *supra* note 4.

requested by the House Judiciary Committee, which, in the event, led to the president's resignation. That leaves Articles 1 and 2, both of which charged Nixon with having violated his oath of office and the requirement of Article II of the Constitution that he faithfully execute the laws.³⁴ The basis for this charge in Article 1 lay in the president's impeding, delaying, and obstructing the investigation into the attempted theft of materials from the Democratic campaign headquarters (which he was not charged with planning.)³⁵ Article 2 charged a violation of much the same duties in four separate spheres: violating the rights of citizens through IRS audits and the unauthorized sharing of personal data, and through surveillance outside that authorized by lawful authority; interfering with Department of Justice (DOJ) and CIA operations to effect a cover-up of White House officials' involvement in the break-in; failing to report what he knew once he learned about the break-in; and creating a special intelligence unit in the White House.³⁶ There is ample historical evidence, based primarily on statements by Nixon's Republican defenders in the House, that Article 1 would have commanded broad support. The support for Articles 2 and 3 was less definitive.³⁷

Dealing with congressional doctrine much as we might parse the judicial opinions of a multimember panel, we can say that Nixon's resignation stands for the proposition that where agents of a presidential campaign have violated the law in order to acquire political intelligence, and where the president, whether or not he was aware of the scheme, subsequently engages in a course of conduct intended to impede or mislead investigation of this illicit operation—such as by counseling witnesses to issue false statements, promising or paying “hush money” to potential witnesses, making false statements to US officials, withholding evidence, promising favorable treatment for silence, or making false statements to the public—there is a sufficient predicate for impeachment.

Thus, far from eviscerating the precedent, or at least creating no new doctrine, as would have been the case had the charges been withdrawn before the House could vote on them, the president's own conduct stands for the recognition that the gravamen of at least one of the charges satisfied Article II's requirement of a “high crime” against the Constitution.

34. *Id.*

35. *Id.*

36. *Id.*

37. See, e.g., *Statement by Wiggins on Support of Impeachment*, N.Y. TIMES (Aug. 6, 1974), <https://www.nytimes.com/1974/08/06/archives/statement-by-wiggins-on-support-of-impeachment-give-new-meaning.html> [<https://perma.cc/P2R3-P37U>].

B. Regan and Iran-Contra

For the increasingly fraught relationship between Congress and the president today, the Watergate affair is the gift that keeps on giving. One such gift is the legacy of the Church Committee, convened in 1975 to explore the Nixon administration's illicit use of the intelligence agencies, which had been uncovered by the Senate Judiciary Committee in its Watergate investigation. The Church Committee examined CIA and FBI abuses more broadly, including the improper monitoring of American citizens' political activities as well as various sensational intrigues abroad.³⁸ In the aftermath of the ensuing revelations, Congress enacted various statutory and regulatory restraints on covert action – and pressed for a restrictive executive order promulgated by the Ford administration – that many intelligence professionals felt hampered their ability to compete effectively against foreign adversaries.³⁹

By the 1980s, US covert operations faced a funding cutoff in Central America⁴⁰ and risked exposure there and elsewhere from congressional committees that were, by law, required to be informed of these secret plans.⁴¹ This conflict with the Congress occurred against the backdrop of a rise in anti-American terrorism in the Near East⁴² and the apparent inability of US

38. See David E. Rosenbaum, *C.I.A.-F.B.I. Inquiry Voted by Senate*, N.Y. TIMES (Jan. 28, 1975), <https://www.nytimes.com/1975/01/28/archives/ciafbi-inquiry-voted-by-senate-church-is-expected-to-be-named.html> [<https://perma.cc/E587-EL7R>].

39. For what it's worth, my own view is that this encroachment of law and legality into clandestine operations has been a considerable boon on the whole.

40. See, e.g., Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 99-83, 99 Stat. 190 (1985); Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 98-473, 98 Stat. 1837 (1984); Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, 97 Stat. 1473 (1983); An Act Making Appropriations For the Department of Defense For the Fiscal Year Ending September 30, 1984, and For Other Purposes, Pub. L. No. 98-212, 97 Stat. 1421 (1983); Joint Resolution, Pub. L. No. 97-377, 96 Stat. 1830 (1982).

41. See Intelligence Oversight Act, Pub. L. No. 96-450, 94 Stat. 1975 (1980).

42. See, e.g., Thomas L. Friedman, *Buildings Blasted: Truck Loaded with TNT Wrecks Headquarters of a Marine Unit*, N.Y. TIMES (Oct. 23, 1983), https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/991023onthisday_big.html?module=inline [<https://perma.cc/JJ45-4SKK>] (reporting that a U.S. Marine unit had been bombed in Beirut, killing 241 Americans); Thomas L. Friedman, *U.S. Beirut Embassy Bombed; 33 Reported Killed, 80 Hurt; Pro-Iran Sect Admits Action*, N.Y. TIMES (Apr. 19, 1983), <https://www.nytimes.com/1983/04/19/world/us-beirut-embassy-bombed-33-reported-killed-80-hurt-pro-iran-sect-admits-action.html> [<https://perma.cc/8DQ6-2E8Z>]; Les Ledbetter, *Kuwait Car Bomb Hits U.S. Embassy; Damage Extensive*, N.Y. TIMES (Dec. 12, 1983), <https://www.nytimes.com/1983/12/12/world/kuwait-car-bomb-hits-us-embassy-damage-extensive.html>

clandestine operations to penetrate and neutralize the groups responsible.⁴³ Throughout 1984 and 1985, the United States was the target of bombings, assassinations of its diplomats, hijackings of sea and aircraft, and, ominously, a wave of kidnappings originating in the stateless chaos of Lebanon.⁴⁴ The traditional methods of counterterrorism, which depend upon firm local authority and careful police work, seemed impossible in such circumstances. The Reagan administration struggled to secure the release of hostages,⁴⁵ several of whom were tortured and killed.⁴⁶ Despite its failure to protect its agents, the administration steadfastly refused to pay ransoms.⁴⁷ Thus the country was genuinely shocked to learn from a report first published in a Lebanese magazine that a secret mission, headed by the president's former national security advisor, had traveled to Iran to do just that.⁴⁸ The mission was sent to negotiate a ransom payment by means of the sale of otherwise embargoed US missiles to the Iranian regime.⁴⁹

When Justice Department officials, who thought they were investigating a relatively simple arms-for-hostages scandal, stumbled upon a memorandum that quite casually listed the Nicaraguan Contras, a right-wing insurgency against that country's elected socialist government, as recipients of profits from the illicit arms transactions, the effect on the public was electrifying. It

[<https://perma.cc/338K-J88G>]; Bob Woodward & Charles R. Babcock, *Captive CIA Agent's Death Galvanized Hostage Search*, WASH. POST. (Nov. 25, 1986), <https://www.cia.gov/library/readingroom/docs/CIA-RDP90-00965R000807560015-3.pdf> [<https://perma.cc/WBzB-L87J>] (reporting that the CIA station chief in Beirut that was kidnapped on March 16, 1984 was dead).

43. See Timothy Naftali, *US Counterterrorism Before Bin Laden*, 60 INT'L J., no. 1, Winter, 2004/2005, at 25, 27.

44. See *supra* note 42 and accompanying text.

45. Stephen Engelberg, *The White House Crisis; U.S. Aides Tell of Hostage Plan That Collapsed*, N.Y. TIMES (Mar. 12, 1987), <https://www.nytimes.com/1987/03/02/world/the-white-house-crisis-us-aides-tell-of-hostage-plan-that-collapsed.html> [<https://perma.cc/HA72-HN2Z>].

46. See, e.g., Ihsan A. Hijazi, *Gunmen in Beirut Kidnap American*, N.Y. TIMES (Mar. 17, 1985), <https://www.nytimes.com/1985/03/17/world/gunmen-in-beirut-kidnap-american.html> [<https://perma.cc/Z2WP-JQFW>]. The hostage was later killed. See Engelberg, *supra* note 45. For another example, see Woodward & Babcock, *supra* note 42.

47. See Bernard Weinraub, *President Bars 'Concessions'; Orders Antihijacking Steps; 3 More TWA Hostages Freed*, N.Y. TIMES (June 19, 1985), <https://www.nytimes.com/1985/06/19/world/president-bars-concessions-orders-antihijacking-steps-3-more-twa-hostages-freed.html> [<https://perma.cc/H7GT-DJZ2>].

48. Ihsan A. Hijazi, *Hostage's Release is Linked to Shift in Iranian Policy*, N.Y. TIMES (Nov. 4, 1986), <https://www.nytimes.com/1986/11/04/world/hostage-s-release-is-linked-to-shift-in-iranian-policy.html> [<https://perma.cc/3YC2-NGPB>].

49. *Id.*

appeared not only that the president had been lying about ransoming hostages—“America will never make concessions to terrorists,” Reagan had asserted in a news conference in June 1985—but that he had taken the opportunity presented by the ransom deal to divert funds to aid the Nicaraguan insurgency in defiance of US statutes forbidding such assistance. When the Senate select committee appointed to investigate the affair began its work in early 1987,⁵⁰ the public and the Congress believed they already had a relatively clear picture of the facts in the Iran-Contra scandal. This picture was depicted in the report of the Tower Commission, whose account went as follows: the president, in a desperate effort to rescue American hostages held captive in Lebanon, had agreed to sell hitherto embargoed arms to the Iranian government; because these weapons were procured at wholesale cost to the US government and sold at a black market price to the Iranians, they brought a substantial profit; instead of being returned to the US Treasury, these profits were then “diverted” to the Contras. The question of the hour was: Did the president know about this diversion?⁵¹

This focus on the diversion reflected a mistaken assumption among the president’s political enemies that only a violation of the US Criminal Code could serve as grounds for impeachment. They seized on the diversion as the most promising basis for such a charge. If the president had contrived to misappropriate funds that properly belonged to the Treasury by authorizing that the profits from the sale of US war materiel be sent to the Contras, then proof of this would serve as the predicate for his removal from office. The House majority staff conducted an investigation that appeared to be based on these assumptions.⁵² Interestingly, and with perhaps greater insight, the president’s closest counselors were also willing to stake their hopes on the outcome of a contest over the president’s knowledge of the diversion. They believed that the president would not have paid much attention to what was little more than an accounting method.

50. See *Understanding the Iran-Contra Affairs: The Hearings*, BROWN, https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/thehearings.php [https://perma.cc/J7KQ-UDRC].

51. See Steven V. Roberts, *The White House Crisis: The Tower Report Inquiry Finds Reagan and Chief Advisers Responsible for ‘Chaos’ in Iran Arms Deals; Reagan Also Blamed*, N.Y. TIMES (Feb. 27, 1987), <http://www.nytimes.com/1987/02/27/world/white-house-crisis-tower-report-inquiry-finds-reagan-chief-advisers-responsible.html> [https://perma.cc/7LNV-HAZH].

52. REP. OF THE CONG. COMMS. INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REPT. NO. 100-216, at 411 (1987), <https://archive.org/details/reportofcongress87unit/page/no> [https://perma.cc/NA5Z-4A3H].

In fact, the constitutional violation was far more profound than the diversion. The more serious offense lay in the development of a quasi-private covert action capability of which the diversion was merely a minor side effect. A privatized, off-the-books covert action agency offered the administration several important advantages. First, the outsourced agency could manage the Contra insurgency, fulfilling the oversight role played by the CIA before its funding and participation were curtailed through a series of statutes.⁵³ The privatized agency would avoid the unwelcome scrutiny of Congress because it would not be subject to congressional funding, and this too was thought to enhance the secrecy of its projects.⁵⁴ Second, such an agency could act more daringly, avoiding the legal restraints of executive orders that it would be embarrassing to repeal.⁵⁵ It could defy certain international norms against reprisal because it would not be definitively associated with the US government. Thus it might recapture the initiative that the United States seemed to have surrendered to terrorist groups. Finally, the agency's apparent detachment from the official government would afford the president plausible denial of US responsibility should the agency's operations be exposed. Statutes adopted in the late 1970s required that the president verify in writing the necessity of each covert operation and inform congressional oversight committees about them. These laws had greatly increased the political risk of these operations, since the president's authorization might always be exposed after he had issued a public denial.⁵⁶

There was, however, a fundamental constitutional problem with this bright idea. Article I provides the link between government operations and the democratic mandate by requiring that all funding take place by statute,⁵⁷ that

53. See Memorandum on the 1984 Boland Amendment from J.R. Scharfen to W. Robert Pearson (Aug. 23, 1985), http://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/documents/d-nic-21.pdf [<https://perma.cc/KS9E-F5R3>].

54. REP. OF THE CONG. COMMS. INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REPT. NO. 100-216 (1987).

55. See Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at § 2.11 (Dec. 4, 1981), *reprinted as amended in* 50 U.S.C. § 401 (2018) (prohibiting assassinations by any “person employed by or acting on behalf of the United States Government” or any “agency of the Intelligence Community”).

56. See Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, § 501, 94 Stat. 1975, 1981-82 (codified as amended at 50 U.S.C. § 3091 (2018)) (“The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence . . .”).

57. U.S. CONST. art. 1, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).

is, by the actions of elected officials who can be turned out by the voters every biennium. In attempting to circumvent Article I by relying on nonappropriated funds, no matter how noble his purpose and no matter how beneficent the source, the president was striking at the Article's role as the very foundation of our democratic system. Article I provides the check on the actions of the federal government provided by the biennial election of members of the House.

This error in attempting to use nonappropriated funds is compounded by the solicitation of operating funds from foreign governments with whom the federal government alone has institutional economic, security, and diplomatic relations. In some cases, where the "donating" country is the recipient of federal assistance, the solicitations amount to little more than kickbacks, and the executive avoids congressional oversight because the money comes from the assistance program budget. Moreover, the United States can become subject to blackmail when the donating regime threatens to expose the scheme.

The *Federalist Papers* do not treat this exotic subject directly, but a relevant discussion can be found there. In *Federalist* #26, Alexander Hamilton observed: "It has been said that the provision, which limits the appropriation of money for the support of an army to the period of two years, would be unavailing: because the executive, when once possessed of a force large enough to awe the people into submission, would find resources in that very force sufficient to enable him to dispense with supplies from the acts of the legislature."⁵⁸ In the same essay, Hamilton had discounted this concern, asserting the profound importance of biennial elections for maintaining control through appropriations. This seems to underscore the centrality of the appropriations process, even and perhaps especially in the arena of national security.

In the event, nothing happened. The president went on television and vaguely apologized for not appreciating that his scheme to release American hostages could be perceived as a ransom.⁵⁹ The "Enterprise," as one of the conspirators had named the private covert-action entity, was not discussed. Without some appreciation of what was at stake, the idea of impeachment faded with the inability to prove the president had himself directed the diversion. A tree had fallen in the forest, but even those that heard it did not recognize it as such.⁶⁰ Article 2 of the Articles of Impeachment against Richard

58. THE FEDERALIST NO. 26, at 173 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

59. President Ronald Reagan, Address on the Iran Contra Affair (Mar. 4, 1987), <https://www.nytimes.com/1987/03/05/us/reagan-white-house-transcript-reagan-s-speech-take-full-responsibility-for-my.html> [<https://perma.cc/S3XN-F79C>].

60. A notable exception was the journalist Daniel Schorr. See, e.g., Daniel Schorr, *A Whiff of Watergate?*, WASH. POST (Nov. 12, 1986), <https://www.washingtonpost.com/archive>

Nixon adopted by the House Judiciary Committee had charged that the president had “authorized and permitted to be maintained a secret investigative unit [which was privately] financed which unlawfully utilized the resources of the Central Intelligence Agency, [and] engaged in covert . . . activities.”⁶¹ But no connection was drawn between this charge and the privately financed, covert action agency set up by the National Security Council under President Reagan.

Moreover, nothing compelled the Congress to go further. A decade later, some members of Congress would argue that the Constitution gave the House no discretion not to impeach the president if he had committed high crimes and misdemeanors,⁶² but this erroneous insight lay in the future.

While there is no doctrinal precedent to be inferred from this travesty, it would be idle to suppose that the secret privatizing of federal functions ended with the Iran-Contra affair. It waits, hidden in the groundcover of constitutional misapprehension, and will no doubt stir again as market mechanisms replace agency regulations as a preferred means of governmental operations.

C. Clinton and Gingrich

What is the scope of the precedent created by the Clinton impeachment if, as in the Andrew Johnson impeachment, the Senate refused to convict? Does the refusal to convict cast doubt on the legal sufficiency of the indictment, given that the principal facts were not really at issue?

On November 5, 1997, well after the independent counsel Robert Fiske had determined that Bill Clinton and his wife had not acted improperly in the collapse of an Arkansas bank and land development scheme known as Whitewater, and well before the confidante of a former White House intern secretly taped the intern’s revelations of a brief affair with the president,⁶³ a Georgia congressman introduced House Resolution 304 along with seventeen

/opinions/1986/11/12/a-whiff-of-watergate/f2b71ace-da9e-4186-b753-bd1c38dbdcf3/?utm_term=.3118b709a0cc [https://perma.cc/TXX9-S67Q].

61. See H.R. REP. NO. 93-1305, at 3 (1974).

62. See, e.g., H. COMM. ON THE JUDICIARY, 105TH CONG., CONSIDERATION OF ARTICLES OF IMPEACHMENT (Comm. Print 1999); Rep. Jim Leach, *Impeachment Decision*, C-SPAN (Dec. 16, 1998), <https://www.c-span.org/video/?116691-1/impeachment-decision> [https://perma.cc/4WXR-WFFP] (describing President Clinton’s conduct as an “absolute breach of an absolute standard”).

63. *The Tripp Audio Tapes*, N.Y. TIMES, <https://partners.nytimes.com/library/politics/111898triptapes.2a.ram.htmlmanager> [https://perma.cc/CT86-FLJU].

cosponsors.⁶⁴ This resolution called for an investigation to determine whether there existed grounds for Clinton's impeachment, though none of its claims ever made it into the Bill of Impeachment (of which the congressman became a House manager⁶⁵), or into the report of the independent counsel who succeeded Fiske, which provided the basis on which Clinton was impeached. Nevertheless, the resolution caught the affronted mood and the venom evoked in many by the president and the exhilaration of the effort, nurtured by the Speaker of the House, to contrive the president's removal. The history of the Clinton impeachment is not one of an unfolding, escalating disclosure of the president's maneuvers, like Watergate, but rather a largely fortuitous combination of parallel legal moves actuated not so much by events as by an obsessive ambition to remove Clinton from the White House by whatever means could be found.

Parallel lines of inquiry linked the independent counsel's Whitewater investigations and a private civil suit, financed by the president's political opponents, over an alleged sexual advance. Both scandals, if that's what they were, occurred when Clinton was governor of Arkansas, before he became president. Had either strand played out on legal grounds, there might never have been an impeachment proceeding. The independent counsel never found any evidence of wrongdoing with respect to the Whitewater matter, and sexual misconduct is not, in itself, an impeachable offense, barring some nexus between this behavior and the president's official duties. It was only when these two lines of attack were studiously brought into intersection that a trap could be laid for the president, tempting him into false testimony that might conceivably serve, it was thought, as a predicate for impeachment.

The Whitewater scandal erupted into the national consciousness when a *New York Times* story⁶⁶—which did not charge the Clintons with anything unlawful—was suddenly supercharged by the suicide, in late July 1993,⁶⁷ of a deputy White House counsel and former law partner of the first lady in Little Rock. Republicans in the Congress pressed for the appointment of an independent counsel to investigate Whitewater and its relationship to this

64. H.R. Res. 304, 105th Cong. (1997).

65. *Prosecution Who's Who*, WASH. POST (Jan. 14, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/prosecution.htm> [<https://perma.cc/G58V-TPEF>].

66. Jeff Gerth, *Clintons Joined S.&L. Operator in an Ozark Real-Estate Venture*, N.Y. TIMES (Mar. 8, 1992), <https://www.nytimes.com/1992/03/08/us/1992-campaign-personal-finances-clintons-joined-s-l-operator-ozark-real-estate.html> [<https://perma.cc/265B-U9WN>].

67. Thomas L. Friedman, *White House Aide Leaves No Clue About Suicide*, N.Y. TIMES (July 22, 1993), <https://www.nytimes.com/1993/07/22/us/white-house-aide-leaves-no-clue-about-suicide.html> [<https://perma.cc/F3ET-YM3E>].

death.⁶⁸ Perhaps convinced that he had not behaved improperly, the president asked the attorney general to appoint such a counsel. Because the statute authorizing the office of the independent counsel had expired,⁶⁹ she made the appointment on the basis of her authority as head of the Justice Department, choosing a prominent Republican lawyer, Robert Fiske.⁷⁰ After a six-month investigation, his office issued a final report⁷¹ dispatching claims of foul play in the death of the deputy counsel. As for the Whitewater charges, Fiske's report amply sustained an independent study commissioned by the regulatory body overseeing the reconstitution of failed banks, which had cleared the president and former governor.⁷²

After Congress reauthorized the independent counsel statute, a three-judge panel appointed Kenneth Starr, a respected former solicitor general, to go over the same ground.⁷³ Starr spent three years investigating Whitewater and was unable to find any prosecutable wrongdoing by either the president or Mrs. Clinton.⁷⁴ When he submitted his final report to the House Judiciary Committee to urge impeachment, he scarcely mentioned the Whitewater matter. Instead, he offered the results of a lengthy investigation into charges of sexual misconduct by the president.⁷⁵

A former White House employee, who befriended a former White House intern and became her confidante, began secretly taping their conversations at the suggestion of a literary agent who was prominent among anti-Clinton

68. David Johnston, *Counsel Granted a Broad Mandate in Clinton Inquiry*, N.Y. TIMES (Jan. 21, 1994), <https://www.nytimes.com/1994/01/21/us/counsel-granted-a-broad-mandate-in-clinton-inquiry.html> [https://perma.cc/7JKY-888A].

69. See An Act to Reauthorize the Office of Government Ethics, and for Other Purposes, Pub. L. No. 100-598, 102 Stat. 3031 (1988) (reauthorizing the office of the independent counsel, but including a sunset provision that would cause the statute to lapse after five years).

70. Johnston, *supra* note 68.

71. ROBERT B. FISKE, JR., REPORT OF THE INDEPENDENT COUNSEL: IN RE VINCENT W. FOSTER, JR. (1994).

72. The *Wall Street Journal* reported these findings in June 1995. Ellen Joan Pollock, *Clintons Are Vindicated in New Report*, WALL ST. J., June 26, 1995, at B5. Notably, the *New York Times* did not report these findings until many months later.

73. Sara Fritz, *Fiske Ousted in Whitewater Case; Move is Surprise: Investigation: Federal Three-Judge Panel Names Kenneth Starr as New Special Counsel. Switch Is Seen as Prolonging Probe. The Action Stuns Clinton's Advisers*, L.A. TIMES (Aug. 6, 1994), http://articles.latimes.com/1994-08-06/news/mn-24261_1_independent-counsel [https://perma.cc/6MCW-2NCQ].

74. Dan Froomkin, *Untangling Whitewater*, WASH. POST, <https://www.washingtonpost.com/wp-srv/politics/special/whitewater/whitewater.htm> [https://perma.cc/TTL4-7DJ7].

75. REFERRAL FROM KENNETH W. STARR, INDEPENDENT COUNSEL, TO THE U.S. HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 105-310 (1998), <https://www.gpo.gov/fdsys/pkg/CDOC-105hdoc310/pdf/CDOC-105hdoc310.pdf> [https://perma.cc/BZ6D-LQWR].

partisans.⁷⁶ Part of the conversations concerned sex the intern had had with the president. Frustrated at her inability to insinuate reports of the president's misconduct into mainstream news outlets, the confidante gave the story to lawyers representing a former Arkansas state employee, Paula Jones.⁷⁷ Jones had brought suit against the president alleging crass sexual behavior while he was governor,⁷⁸ and the suit eventually morphed from an effort to restore the plaintiff's self-respect into an effort to harass and humiliate the president.⁷⁹ This lawsuit eventually brought together various anti-Clinton forces who, though they wished to drive the president from office, probably never thought this would be accomplished through impeachment based on Jones's claims, which were ultimately dismissed by the trial court.⁸⁰

This picture changed in early January 1998, when a former law school classmate of one of the members of the group financing the Jones suit went to work for the independent counsel.⁸¹ Informed about the secret taping, the independent counsel authorized contact with the confidante⁸² and also sought approval from the DOJ and the panel that had appointed him to expand his jurisdiction⁸³ on the grounds that a friend of the president, allegedly linked to

76. David Streitfeld & Howard Kurtz, *Literary Agent Was Behind Secret Tapes*, WASH. POST (Jan. 4, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/storyo12498.htm> [<https://perma.cc/VVU4-M96R>].

77. Peter Baker, *Linda Tripp Briefed Jones Team on Tapes*, WASH. POST (Feb. 14, 1998), <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/trippo21498.htm> [<https://perma.cc/HAF8-DTMT>].

78. Dan Froomkin, *Case Closed*, WASH. POST (Dec. 3, 1998), <http://www.washingtonpost.com/wp-srv/politics/special/pjones/pjones.htm> [<https://perma.cc/Q7ZJ-XZMW>].

79. One interrogatory served by the plaintiff demanded that Clinton state the name, address, and telephone number of each and every individual other than Mrs. Clinton with whom he had had sexual relations since 1977. See *Jones's Second Set of Questions for Clinton*, WASH. POST (Oct. 1, 1997), <https://www.washingtonpost.com/wp-srv/politics/special/pjones/docs/inter2.htm> [<https://perma.cc/3W79-T294>].

80. Francis X. Clines, *Paula Jones Case Is Dismissed; Judge Says Even If Tale Is True, Incident Was Not Harassment*, N.Y. TIMES (Apr. 2, 1998), <https://partners.nytimes.com/library/politics/040298clinton-jones.html> [<https://perma.cc/Z88M-QXBV>].

81. Don Van Natta Jr. & Jill Abramson, *The Testing of a President: The Investigation; Starr Said to Have Received Tip on Affair Before Call by Tripp*, N.Y. TIMES (Oct. 4, 1998), <https://www.nytimes.com/1998/10/04/us/testing-president-investigation-starr-said-have-received-tip-affair-before-call.html> [<https://perma.cc/4DH6-32HZ>].

82. Roberto Suro, *Questions Raised About Starr Team Talks with Jones Camp*, WASH. POST (Mar. 3, 1999), <https://www.washingtonpost.com/wpsrv/politics/special/clinton/-stories/starr030399.htm> [<https://perma.cc/TU6Q-NME4>].

83. John Mintz & Toni Locy, *Starr's Probe Expansion Draws Support, Criticism*, WASH. POST (Jan. 23, 1998), <https://www.washingtonpost.com/archive/politics/1998/01/23/starrs-probe>

the Whitewater investigation, had also attempted to help the intern find postgovernment employment.⁸⁴ Starr's deputy apparently falsely assured the deputy attorney general that there had been no contact with the Jones attorneys.⁸⁵ When the expanded authorization was given,⁸⁶ events quickened. Clinton was due to be questioned by Paula Jones's attorneys just two days later, on January 17, and they now could ask him about the intern.⁸⁷ The day before this deposition, the intern's confidante⁸⁸ led her into an ambush: FBI agents and three of the independent counsel's deputies confronted her at a hotel in Arlington, Virginia.⁸⁹ There seems little question that, as a postmortem by the Department of Justice later put it, lawyers for the independent counsel exercised poor judgment in negotiating with the former intern without her counsel present.⁹⁰ Preventing her from informing her lawyer about the trap into which she had been lured, however, was essential to ensnaring the president.⁹¹ In a sworn deposition on January 17, 1998, Clinton denied having

-expansion-draws-support-criticism/6b907a9b-4db3-481d-8202-76db89360ab3/?utm_term=.9aof3d7de552 [https://perma.cc/5NJ5-RTSM].

84. H.R. DOC. NO. 105-310, at 7.

85. Suro, *supra* note 82.

86. *Id.*

87. H.R. DOC. NO. 105-310, at 116.

88. Suro, *supra* note 82.

89. Don Van Natta Jr., *Agents' Talk with Ex-Intern Provokes Anger*, N.Y. TIMES (Jan. 24, 1998), <https://events.nytimes.com/library/politics/012498clinton-lewinsky-fbi.html> [https://perma.cc/3GAL-2VVN].

90. JO ANN HARRIS & MARY FRANCES HARKENRIDER, REPORT OF THE SPECIAL COUNSEL CONCERNING ALLEGATIONS OF PROFESSIONAL MISCONDUCT BY THE OFFICE OF INDEPENDENT COUNSEL IN CONNECTION WITH THE ENCOUNTER WITH MONICA LEWINSKY ON JANUARY 16, 1998, at 2 (Dec. 6, 2000), <https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/10/23/National-Politics/Graphics/specialcounselreport.pdf> [https://perma.cc/W2EF-FMJ9].

91. Lewinsky's lawyer would have aborted the filing of what would then have appeared to be a false affidavit, which he unwittingly forwarded to the federal court in the Jones matter. See *The Lewinsky Affidavit*, WASH. POST (Mar. 13, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/pjones/docs/lewinskyaffidavit.htm> [https://perma.cc/JL42-RSAK]. Moreover, her lawyer would have informed other counsel to the lawsuit, including the President's lawyers. Had the President known that his erstwhile paramour was discussing immunity from criminal charges with the independent counsel, it is most unlikely he would have failed to tell the truth about their relationship. Instead he was enticed into falsely testifying before the grand jury by closed-circuit television as to the truth of an affidavit filed by the intern denying their relationship. In his testimony, the President also lied about their relationship in a line of questioning that was of dubious relevance to the Jones lawsuit: no one, including the intern, ever claimed that their relationship was nonconsensual. See *Testing of a President; Excerpts from the Clinton Deposition in Jones Sexual Misconduct Suit*, N.Y. TIMES

sexual relations with the intern; claimed he could not remember ever having been alone with her; and permitted his lawyer to state on the basis of an earlier, false deposition by the intern that there was no sex in any manner between the two.⁹² Starr concluded that Clinton had committed perjury and submitted his findings to Congress.⁹³

That report itself was without precedent and, especially in light of the ultimate resolution by the Senate, should not serve as a model for future reports by either independent counsels (authorized by statute) or special counsels appointed by the Department of Justice. Leon Jaworski, when he was a special prosecutor in the Watergate matter, scrupulously sent to the House only a few factual files on President Nixon, accompanied by no recommendations whatsoever.⁹⁴ Starr, instead, urgently pressed the House to impeach Clinton, both in his report⁹⁵ and in testimony to the House Judiciary Committee.⁹⁶ The Judiciary Committee conducted few real hearings of its own, choosing instead to rely mostly on the independent counsel's report as a basis for impeachment.

The full House considered four charges. The bases of these charges were that the president had (1) abused his office by using staff to facilitate sexual liaisons with other personnel, (2) used his office to buy silence by offering jobs or threatening to embarrass others, and (3) lied under oath and given false statements to the public to cover up his misconduct and thus to obstruct the

(1998), <https://www.nytimes.com/1998/03/16/us/testing-president-excerpts-clinton-deposition-jones-sexual-misconduct-suit.html> [https://perma.cc/DL38-XC8S]. Nor did she ever provide a predicate to question the President about their relationship apart from the Jones case; in fact, she would ultimately testify before the grand jury, and steadfastly maintain the position, that "no one ever asked me to lie, and I was never promised a job for my silence." Peter Baker, *Clinton Defenders Quote Lewinsky*, WASH. POST (Sept. 23, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/monica092398.htm> [https://perma.cc/6XDU-2CRD]. It is notable that in the lengthy report by the independent counsel to the House of Representatives that sought to serve as a basis for impeachment, there is no mention of this testimony. See H.R. DOC. NO. 105-310 (1998).

92. H.R. DOC. NO. 105-310, at 116-17.

93. H.R. DOC. NO. 105-310, at 6-7.

94. See *In re* Report & Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C. 1974); see also Anthony Ripley, *Jury Named Nixon a Co-Conspirator but Didn't Indict*, N.Y. TIMES (June 7, 1974), <https://www.nytimes.com/1974/06/07/archives/jury-named-nixon-a-coconspirator-but-didnt-indict-st-clair-confirms.html> [https://perma.cc/7JBZ-BERY].

95. H.R. DOC. NO. 105-310, at 7.

96. Alison Mitchell, *Testing of a President: The Overview; Rancorous House Panel Hears Starr's Case For Impeachment*, N.Y. TIMES (Nov. 20, 1998), <http://www.nytimes.com/1998/11/20/us/testing-president-overview-rancorous-house-panel-hears-starr-s-case-for.html> [https://perma.cc/K346-TPJH].

pursuit of a lawful investigation and prosecution (which supported two of the charges).⁹⁷ The House ultimately adopted two Articles of Impeachment: perjury to a grand jury, and obstruction of justice.⁹⁸ Two other Articles failed: the second count of perjury in the Jones case, and one accusing Clinton of abuse of power.⁹⁹ A trial in the US Senate began immediately after the seating of the 106th Congress.¹⁰⁰ A vote of 67 senators was required to remove Clinton from office.¹⁰¹ In the event, 50 senators voted to convict the president on the obstruction of justice charge and 45 voted to uphold the perjury charge.¹⁰² No Democratic senator voted guilty on either charge.¹⁰³ Thus Clinton, like Andrew Johnson, was acquitted on all charges.¹⁰⁴

In their summations, neither counsel for the president nor counsel for the House managers addressed the issue of whether the president had committed a constitutional crime: whether a nexus had been shown between his official duty to uphold the Constitution and a concerted effort by him to imperil the country through acts that undermined his unique duties as president.

It may well be that, two decades later, in the atmosphere of public outrage over sexual misconduct by powerful men, Bill Clinton would have been driven from office by his own party. Does that mean that the constitutional law of impeachment has changed? Does greater sensitivity to rather crass and manipulative sexual behavior elevate that behavior to a crime against the perpetuation of the order and ethos of the State, even accepting that such predations have enormous political and cultural consequences?

It is sometimes said nowadays that no corporate board member would hesitate to remove a CEO found guilty of the president's behavior. The Senate, however, is not a board of directors, and it does not appoint the president. If we know little about how the Framers and ratifiers of Article II would answer this corporatist question, we know this: they decisively rejected removal of the

97. *Articles of Impeachment and Judiciary Committee Roll Call Votes*, WASH. POST (Dec. 19, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impeachvote121198.htm> [<https://perma.cc/2UZW-EB4J>].

98. 144 CONG. REC. 28110 (Dec. 19, 1998); 144 CONG. REC. 28111 (Dec. 19, 1998).

99. See *id.* at 28111; *Articles of Impeachment and Judiciary Committee Roll Call Votes*, *supra* note 97.

100. See *Clinton Impeachment Trial Convenes*, 7 Jan 1999, C-SPAN (Jan. 7, 1999), <https://www.c-span.org/video/?c4479598/clinton-impeachment-trial-convenes-7-jan-1999> [<https://perma.cc/G2AB-HSFG>].

101. U.S. CONST. art. I, § 3, cl. 6.

102. 145 CONG. REC. S1458-59 (daily ed. Feb. 12, 1999).

103. See *id.*

104. *Impeachment*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm [<https://perma.cc/Y4TG-U79D>].

president for simple maladministration, and they rejected also the subordination of the president to the Congress that such a power would imply.¹⁰⁵ But do their intentions really matter when we have a new, perhaps more equitable consciousness? Or should that consciousness be reflected in elections rather than in prosecutions and trials conducted by the Congress? The aggressive change to more confrontational tactics between the branches of government initiated and championed by the Speaker of the House at the time of the Clinton impeachment is still with us, even to a heightened degree. The news media's adversarial mode (I have in mind the *New York Times* as much as any cable news channel) was much in evidence in the Clinton catastrophe and is with us still. But the Democrats who rallied around the president then would be in a very different position today.

It is true that they protected the presidency from a fortuitous conspiracy that would have changed the balance of constitutional power between the branches. Starr even wanted to make the exercise of executive privilege an impeachable offense—as did the equally aggressive members of the Judiciary Committee during Watergate. Perhaps the Democrats were at fault for failing to find common ground with their Republican colleagues by forcing a resignation—as the Republicans did to Nixon—especially since there was a competent vice-president in the wings who had also been elected by the American people.

Ultimately, the Clinton impeachment carries very little doctrinal or precedential authority, because the House indictment was decisively rejected by the Senate and because of the indictment's peculiar grounds. If the answer to the wrong question is not a wrong answer but no answer at all, then the questions put to the Senate by the prosecution established no rules for the future. There is a cautionary tale here, but its lessons are largely negative. They urge us not to repeat this disgraceful episode.

If, for example, the president were knowingly to make bombastic and false statements in public, or in private to his subordinates, that were neither crimes in themselves nor related to his performance in office, he should not be entrapped by federal officials asking him whether he knew the statements to be untrue or be forced to reiterate them in sworn testimony. Only if the false statement is part of a concerted effort to commit an impeachable offense—that is, a constitutional crime—can such deceptions serve as the predicate for impeachment.

105. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1911) [hereinafter 2 FARRAND'S RECORDS] (quoting Madison, as saying, "So vague a term will be equivalent to a tenure during pleasure of the Senate.").

There are, however, less substantive issues as to which the Clinton impeachment did provide precedents. One was whether a Bill of Impeachment adopted by the House of one Congress is sufficient to trigger a trial in the Senate after a new Congress has convened—or whether a new bill must be voted by the House. In the ordinary course of legislation, if a bill passes only one house before a Congress ends, it must be reenacted by both houses of a new Congress in order to be sent to the president for signing. In the case of Andrew Johnson, the Bill of Impeachment was passed by the House and tried by the Senate during the same Congress. In the Clinton case, a new Congress might have made a difference, as the new House had more Democrats, and the second Article of Impeachment barely passed the old House—although in the event the new House continued to back the impeachment managers. But the Senate chose to rely on Thomas Jefferson’s *Manual of Parliamentary Practice*¹⁰⁶—written when Jefferson presided over the Senate as vice-president—and the precedents of judges impeached and tried by different Congresses.¹⁰⁷ Because the Senate could have decided the other way, we may take the Clinton precedent to be that a House from one Congress can validly refer an impeachment to the Senate of another.

The Senate formulated an initial set of rules governing proceedings in the run-up to President Johnson’s impeachment, and that framework largely survived through the Clinton trial. In 1935, the Senate amended these rules to include what is now Rule XI, which provides:

That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine.¹⁰⁸

Charles Black disapproved of this measure, arguing that the text of Article I—“the Senate shall have the sole Power to try all impeachments”—left no scope for subgroups.¹⁰⁹ His views were not rejected in *United States v. Nixon* so much as left open, when the Supreme Court accepted the argument that the

¹⁰⁶. THOMAS J. WICKHAM, CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 114-192 (2017).

¹⁰⁷. This does not mean that the *offenses* for which a President may be impeached are identical to those for judges (or for other civil officers), and the Senate acquittal in the Clinton impeachment would appear to reject this proposition. See *infra* Section II.G.

¹⁰⁸. RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS, S. DOC. NO. 104-1 (1996).

¹⁰⁹. See BLACK & BOBBITT, *supra* note 18, at 12-13 (referring to the “dubious constitutionality” of an evidence or testimony committee).

Senate's power to try impeachments included the nonreviewable discretion to determine how to conduct its trials.¹¹⁰ This is consistent with the court's jurisprudence that it should avoid expressing opinions on matters delegated to other branches. During the Clinton impeachment trial, evidence was presented to the whole Senate, not to a Rule XI committee, and so it is probably correct to say that the constitutionality of such committees—at least where the presidency is at stake—remains untested. The Senate may well be the final determinant of its own rules, but its recent practice suggests some ambivalence about employing Rule XI procedures in a presidential impeachment.

The impeachment and acquittal of Bill Clinton in 1998-99 are the only comprehensive precedents for the impeachment process since the impeachment and acquittal of Andrew Johnson in 1868, which was itself the first impeachment of the president since the creation of the office of the presidency in 1789. Accordingly, the Clinton debacle, from which no one walked away unscathed, will shape the development of the impeachment clauses more than any other events to date, including the Nixon resignation. This development gives reason for concern, for it reflects the effects of concerted attempts to criminalize American politics, weaponizing our legal processes by evading or even discarding the constitutional bases of those processes. Clinton's impeachment may be partly responsible for the contempt in which many Americans hold their political institutions.

D. Bush and the Iraq War

On February 19, 2008, the New Hampshire House of Representatives took up House Resolution 24, a bill to petition Congress to commence impeachment proceedings against President George W. Bush and his vice-president, on charges that included taking the United States to war against Iraq. The New Hampshire House had heard testimony supporting “a legal theory that a state legislature can in fact force the US House to begin impeachment proceedings.”¹¹¹ This theory was based on “section 603 of Jefferson's *Manual of Parliamentary Practice* [which] states that an impeachment may be set in

110. *Nixon v. United States*, 506 U.S. 224, 238 (1993).

111. H.R. 24, 2008 Gen. Ct., Reg. Sess. (N.H. 2008), <http://www.gencourt.state.nh.us/legislation/2008/HR0024.html> [<https://perma.cc/E3V8-WDPA>]; Timothy Horrigan, *I Testified in Favor of Impeaching Bush & Cheney*, TIMOTHY HARRIGAN (Feb. 19, 2008), <http://www.timothyhorrigan.com/documents/impeach-bush.080219.html> [<https://perma.cc/NM4M-QS27>].

motion by the United States House of Representatives by charges transmitted from the legislature of a state.”¹¹²

The New Hampshire proceedings appear to have arisen from several embedded confusions. Jefferson’s *Manual* was created from materials he assembled and used as an aid when presiding over the US Senate.¹¹³ They included notes he took while a student at William and Mary College as well as his comments on British parliamentary procedure, and he augmented them throughout his tenure as vice president. He published them as a single work, intended for future vice-presidents, in 1801; a second edition with added material was printed in 1812.¹¹⁴ Although prepared for the US Senate, the *Manual* was formally incorporated by the House of Representatives into its rules in 1837.¹¹⁵

The sponsors of the New Hampshire resolution calling for the impeachment of President Bush appeared to have relied on House commentary on Jefferson’s *Manual*, not as they claimed on his actual text. That text provides that “the Commons, as the grand inquest of the nation, becomes suitors for penal justice. The general course is to pass a resolution containing a criminal charge against the supposed delinquent, and then to direct some member to impeach them by oral accusation, at the bar of the House of Lords, in the name of the Commons.”¹¹⁶ The commentary adds that “in the House various events have been credited with setting an impeachment in motion: . . . A resolution introduced by a Member and referred to a committee . . . ; Charges transmitted from the legislature of a State or territory or from a grand jury; or facts developed and reported by an investigating committee of the House.”¹¹⁷

There are several problems here: the text relied upon is not Jefferson’s *Manual*; even if it were, the *Manual* is an authority for the rules of the House only to the extent that these have not been modified by later precedents; and in any case the *Manual* was written for the Senate and is largely a commentary on

112. *Id.*

113. THOMAS JEFFERSON, JEFFERSON’S MANUAL OF PARLIAMENTARY PRACTICE, <https://www.gpo.gov/fdsys/pkg/HMAN-112/pdf/HMAN-112-jeffersonman.pdf> [https://perma.cc/Y5HU-3CDX].

114. Wendell H. Ford, *A Note About This Edition* of THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES, at xi (1993), <https://www.senate.gov/artandhistory/history/resources/pdf/SDoc103-8.pdf> [https://perma.cc/T6H4-8TQN].

115. *Id.* at xii.

116. H. DOC. NO. 114-192, at 319 § 602.

117. *Id.* at 319 § 603. The version of the *Jefferson Manual* in effect in 2008 contained the same relevant text. H. DOC. NO. 109-157, at 316 § 603 (2007).

British parliamentary practices of the time, which, with respect to the grounds for impeachment, are quite irrelevant. Furthermore, no rule of the House could possibly force the House to commence impeachment proceedings. House rules can always be changed or amended by the members, and more importantly, any compulsion is probably incompatible with the provision of Article I, section 2, clause 5 that the “House of Representatives shall have the sole Power of Impeachment.”¹¹⁸ Perhaps for these reasons, some commentators have mocked the New Hampshire resolution and its sponsors.¹¹⁹

This would be a mistake. While it was an error to purport to rely on Jefferson’s *Manual*, the commentary on the *Manual* on which the authors of the resolution should have relied is, if anything, more relevant than the original provisions of the *Manual*. That commentary cites Volume 3 of *Hinds’ Precedents of the House of Representatives of the United States*, sections 2469 and 2319, which do indeed appear to offer precedents in which referrals from the legislature of a state or territory have served as the basis for Congressional consideration of an impeachment inquiry.¹²⁰

On February 20, 2008, the New Hampshire bill was ruled “Inexpedient to Legislate,” and it was tabled on April 16, never to be revived.¹²¹ But in an era in which the federalism of the US constitutional structure has empowered more assertive state legislatures, and as the US population continues to sort itself geographically by political and cultural preferences, this route to impeachment may someday be reactivated.

E. Obama and Executive Discretion

Two developments—the appearance of cities and states that refuse to cooperate with federal immigration officials, and the legalization of marijuana by many states despite federal narcotics laws criminalizing its use—are harbingers of a deeper change in the constitutional order of the American State,

¹¹⁸ U.S. CONST. art. I, § 2, cl. 5.

¹¹⁹ Jeff Chidester, *New Hampshire to Vote on Impeachment*, A RENDEZVOUS WITH DESTINY (Apr. 9, 2008), <https://arendezvouswithdestiny.blogspot.com/2008/04/new-hampshire-to-vote-on-impeachment.html> [<https://perma.cc/FDR7-H8Z4>].

¹²⁰ H. DOC. NO. 114-192, at 319 § 602. But it should be noted that in neither case was the individual actually impeached—and in one case the Congress actually decided not to even investigate the matter.

¹²¹ 30 N.H. HOUSE REC. 21 (N.H. Mar. 14, 2008), http://www.gencourt.state.nh.us/house/caljournals/calendars/2008/houcal2008_21.html [<https://perma.cc/4RED-RUS2>]; 30 N.H. HOUSE REC. 31 (N.H. Apr. 16, 2008), http://www.gencourt.state.nh.us/house/caljournals/journals/2008/houjou2008_31.html [<https://perma.cc/RE2B-RW3R>].

to which I alluded in the preceding section. The increasing polarization and paralysis of Congress only speeds this change. What if the president, unable to push his reform agenda through the Congress, simply refused to enforce the laws he could not get repealed? Would that constitute an impeachable offense?

One of the proposed charges drafted by the House Judiciary Committee at the time of the Nixon impeachment was the claim that the president had refused to spend appropriated funds¹²² for projects and operations to which he was opposed on grounds of policy but that had been passed over his opposition and sometimes his veto.¹²³ This charge of “impoundment” turned on the president’s intent. It was not uncommon for presidents to decline to spend funds authorized by the Congress; Thomas Jefferson had done so in 1803,¹²⁴ and the power was generally regarded as inherent in the executive.¹²⁵ Jefferson’s case involved his refusal to spend money authorized for the acquisition of warships for the US Navy. He reported that “the favorable and peaceable turn of affairs on the Mississippi rendered an immediate execution of [the authorized funds] unnecessary.”¹²⁶ Nixon, however, used impoundment to override congressional policies with which he disagreed. He had tried to impound funds for an environmental project that he had opposed and then vetoed, and to which his veto had been overridden.¹²⁷ In the end, the Judiciary Committee refused to forward to the whole House the charge of impoundment as a separate impeachable offense. Later, in *Train v. City of New York* (1975), the Supreme Court held that the impoundment power cannot be used as a kind of irrefutable veto.¹²⁸

122. See Norman Pine, *The Impoundment Dilemma: Crisis in Constitutional Government*, 3 YALE REV. L. & SOC. ACTION 99 (1973) (describing the Nixon Administration’s refusal to spend funds that Congress had appropriated).

123. Richard Nixon, *Veto of the Federal Water Pollution Control Act Amendments of 1972*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/ws/index.php?pid=3634> [https://perma.cc/K2AS-FZKS].

124. Letter from Elmer B. Staats, Comptroller General of the United States, to Sam J. Ervin, Jr., Chairman, Subcomm. on Separation of Powers of S. Comm. on the Judiciary (July 26, 1973), <https://www.gao.gov/products/475952#mt=e-report> [https://perma.cc/AD28-Z2R4].

125. 3 ALBERT GALLATIN, THE WRITINGS OF ALBERT GALLATIN 117 (H. Adams ed., 1879); 7 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 256-57 (H. Lodge ed., 1904); 4 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 529-30, 533 (H. Washington ed., 1854).

126. 13 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES: EIGHTH CONGRESS 12-14 (1852).

127. *Train v. City of New York*, 420 U.S. 35, 35 (1975).

128. *Id.* at 48-49.

For my part, I believed at the time that impoundment could provide a strong predicate for impeachment when the president used his discretionary power over expenditures for the purpose of dismantling or crippling programs regularly enacted in lawful form. Charles Black, however, was careful to call this a “gray area.”¹²⁹ The president might think that if cuts were needed to ensure fiscal stability, they ought to come where they might be least hurtful. Moreover, Black noted, many appropriation statutes authorize but do not mandate spending. Anticipating *Train*, he concluded that the president might believe that by impounding funds he was merely referring a doubtful matter to the courts.¹³⁰

The Obama presidency was criticized for a not dissimilar tactic: using its prosecutorial discretion to decline to enforce statutes with which the president disagreed. In 2009, the Department of Justice simply ceased enforcing federal narcotics laws against persons whose actions complied with “existing state laws providing for the medical use of marijuana.”¹³¹ But the most far-reaching of the administration’s actions in this vein was the president’s decision, announced on June 15, 2012, not to enforce the removal provisions of the Immigration and Nationality Act against an estimated 800,000 to 1.76 million persons who were illegally present in the United States.¹³²

The criteria used by the Obama administration tracked those proposed by the Development, Relief, and Education for Alien Minors Act (DREAM Act), first proposed in 2001, which Congress had repeatedly failed to adopt.¹³³ The constitutional problem for such a presidential strategy arises from Article II, section 3, which provides that the president shall “take Care that the Laws be faithfully executed.” In the words of an early nineteenth-century commentator, William Rawle, “Every individual is bound to obey the law, however

¹²⁹. BLACK & BOBBITT, *supra* note 18, at 39.

¹³⁰. *Id.*

¹³¹. Memorandum for Selected United States Attorneys from David W. Ogden, Deputy Attorney Gen., U.S. Dep’t of Justice 2 (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<https://perma.cc/PY8M-U6LX>].

¹³². Memorandum from Janet Napolitano, Sec’y of Homeland Sec., U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/2LCE-GC4B>].

¹³³. The Administration’s program, Deferred Action for Childhood Arrivals (DACA) is the executive version of the legislation known as the DREAM Act. As of September 2017, 690,000 persons had registered through DACA. Gustavo Lopez & Jens Manuel Krogstad, *Key Facts About Unauthorized Immigrants Enrolled in DACA*, PEW RES. CTR. (Sept. 25, 2017), <http://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca> [<https://perma.cc/75HQ-5SQU>].

objectionable it may appear to him: the executive power is bound not only to obey, but to execute.”¹³⁴ There seems to have been from the very beginning of our constitutional life a consensus that the Take Care Clause imposed a duty on the president to enforce laws whether or not he considered them wise as a matter of policy.

This view of the Take Care Clause is strengthened by the broad language of the Vesting Clause that puts in the hands of the president all “executive Power”¹³⁵—in contrast to the language of Article I, which gives the Congress only those “legislative Powers herein granted,”¹³⁶ and the even more restricted judicial power of Article III.¹³⁷ In light of Article II’s broad grant of power, the Take Care Clause can scarcely be an additional grant of authority, and instead is generally read to underscore the responsibility of the president to exercise his power to ensure that the laws of the United States are actually executed.

This construction is further strengthened by the Presidential Oath Clause, which prescribes the following: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States . . . ”¹³⁸

Finally, the history of the adoption of the Take Care Clause at Philadelphia further supports the view that this clause requires the president to enforce the laws adopted by Congress regardless of his view of their merits (excepting constitutionality). As the influential Framers James Wilson, who introduced and advocated the principal ideas of Article II,¹³⁹ put it some years later, the clause established that the president has “authority, not to make, or alter, or dispense with the laws, but execute an act of the laws, which [are] established.”¹⁴⁰

None of this is to deny that an ineradicable element of the executive function is discretion and the prerogative to carry out the purpose of statutes as effectively as possible. As with impoundment, however, it is a matter of intent. If the president concludes that a lack of available personnel, or contradictory directions from Congress, or changed circumstances compel him to give

134. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA*, 147 (2d ed. 1829).

135. U.S. CONST. art. II, § 1, cl. 1.

136. U.S. CONST. art. I, § 1.

137. See U.S. CONST. art. III, § 1.

138. U.S. CONST. art. II, § 1, cl. 8.

139. See Daniel J. McCarthy, *James Wilson and the Creation of the Presidency*, 17 *PRESIDENTIAL STUD. Q.* 689 (1987).

140. 2 JAMES WILSON, *Lectures on Law: Of the Executive Department*, in *THE WORKS OF THE HONOURABLE JAMES WILSON* 183, 191 (Clark, N.J., Lawbook Exchange, Ltd. 2005) (1804).

priority to the enforcement of some provisions and not others, that is one thing. If his argument is not made in good faith, it follows almost ineluctably that the laws have not been “faithfully” executed. As two critics of the administration put it, “for if the president can refuse to enforce a federal law against the class of 800,000 to 1.76 million individuals, what discernible limits are there to prosecutorial discretion? . . . Can a president who wants tax cuts that a recalcitrant Congress will not enact decline to enforce the income tax laws? Can a president effectively suspend the environmental laws by refusing to sue polluters, or workplace and labor laws by refusing to fine violators?”¹⁴¹

F. Before and After

When Alexander Hamilton wrote in *Federalist* #65 that the jurisdiction of impeachment covers “offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust,”¹⁴² did he mean that the actions for which an official can be impeached must take place while that person is in office? Presumably a private person—perhaps even one seeking office—is not yet a public person. On this line of thinking, an impeachable offense may be committed only by someone who can be impeached—just as the Code of Military Conduct can be violated only by someone who is or has been in the armed forces.¹⁴³ There must be someone to whom the prohibition applies when the act occurs; and by this reasoning, the impeachment of a public official cannot be based on her acts before entering public life.

Supporting this view is the ordinary construction we give to the term “high” in the phrase “high Crimes and Misdemeanors.” Like the notorious High Sheriff of Nottingham, or the Lord High Executioner of Gilbert and Sullivan, this term here applies to government officials and their duties. Just as we must distinguish “high Crimes and Misdemeanors” from the ordinary crimes found in statute books, we must be equally careful in determining who precisely is subject to these prohibitions.

It should be noted that in the precedents of the Nixon and Clinton impeachments, the House Judiciary Committee took care to exclude Articles of

¹⁴¹. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013).

¹⁴². THE FEDERALIST NO. 65, *supra* note 58, at 396 (Alexander Hamilton).

¹⁴³. 10 U.S.C. § 802(a) (2018); *see also* Exec. Order 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955) (Code of Conduct for members of the Armed Forces of the United States).

Impeachment that arose from acts that occurred before their subjects took office.¹⁴⁴

Those who argue that acts prior to assuming the presidency are relevant to impeachment note that people seeking the office of president must submit to many legal restrictions as to how they run their campaigns, receive money, what their financial disclosures must report, and so forth. If not uncovered during the campaign, violations of such restrictions should be a matter for Congress, it is said, once the conspiracy is exposed. There's something to this, but I don't think that consideration necessarily lies in the role of Congress as the assessor of the legal culpability of the successful candidate—whose criminal conduct, at any rate, can always be prosecuted in the criminal system, even if this must wait until the end of his term.

Some also argue that offenses committed by the civilian, if they are serious enough, would if discovered render the office of the presidency nonviable. Of course that may be true, but this nonviability seems to be political rather than legal, and thus a matter for public judgment, not for trial by a coordinate branch of the government. A congressional judgment of nonviability would bring us perilously close to making maladministration a ground for impeachment—a basis that was decisively rejected at the Constitutional Convention. And finally it is urged that once in office a president can make investigation of his earlier offenses difficult and time-consuming even if the initial disclosure of these offenses has otherwise undermined his legitimacy. Invoking executive privilege and relying on his authority to control the work of the Department of Justice, a president could rescue an administration that is foundering and ought to be dispensed with. So it is argued that impeachment must be available as a remedy even though the original acts which now occasion such contempt occurred before the inauguration. However strong a motive the exposure of earlier misdeeds might provide for public impatience or even revulsion, it scarcely satisfies a legal standard for prosecution and conviction to say that a great many voters are experiencing buyer's remorse. Our institutions, based on a respect for the rule of law, demand that mercurial judgments of approval are insufficient to overturn the constitutional mandate of a presidential election. Moreover, obstruction that was itself official misconduct could still provide a basis for impeachment even though the incident of the obstruction was not itself an official act, that is, occurred before the president assumed office.

144. I think this argument proves too much, although I'm not persuaded that its opposite—that the subject of impeachment was a public or private citizen at the time of the alleged acts for which he is to be punished is irrelevant—is correct, either. Here, also, its advocates oversimplify out of a desire for a bright-line rule.

Before offering what I believe to be the best rule to resolve the before/after dilemma, let us look at an actual historical case rather than a series of hypotheticals: the incident of the so-called Chennault Affair that received renewed attention in 2017.

In the autumn of 1968, encouraged by Soviet channels, President Lyndon Johnson decided to offer Hanoi a complete cessation of US bombing in Vietnam, believing that, for the first time, the North Vietnamese were willing to agree to the basic framework the Johnson administration insisted was a precondition for American withdrawal.¹⁴⁵ Having made his decision, he discovered that the Nixon campaign was sending messages to the South Vietnamese ambassador via a prominent Asian-American Republican activist, Anna Chennault.¹⁴⁶ These messages encouraged the Saigon government to refuse to participate in the peace talks then under way by promising that a Nixon administration would take a harder line against Hanoi.¹⁴⁷ Johnson ordered government surveillance of Chennault, the South Vietnamese embassy in Washington, and the president of South Vietnam's offices in Saigon.¹⁴⁸

The LBJ Presidential Library has made available tapes of conversations between Johnson and Senator Richard Russell that disclose Johnson's awareness of Nixon's conspiracy. Johnson received FBI surveillance reports detailing contacts between Chennault and the South Vietnamese ambassador in which she advised him she had received a message from Nixon saying, "Hold on. We are going to win Please tell your boss [the South Vietnamese president] to hold on." LBJ is also recorded telling Everett Dirksen, the Republican leader of the Senate, "I'm reading their hand, Everett. This is treason," to which Dirksen replied, "I know."¹⁴⁹

145. See William P. Bundy, Letter to the Editor, *The Real Story of '68 Bombing Halt*, N.Y. TIMES (June 13, 1991), <https://www.nytimes.com/1991/06/13/opinion/l-the-real-story-of-68-vietnam-bombing-halt-821191.html> [https://perma.cc/QD88-YHN7]. See generally FRANCIS BATOR, NO GOOD CHOICES: LBJ AND THE VIETNAM/GREAT SOCIETY CONNECTION (2007).

146. David Taylor, *The Lyndon Johnson Tapes: Richard Nixon's 'Treason'*, BBC NEWS (Mar. 22, 2013), <https://www.bbc.com/news/magazine-21768668> [https://perma.cc/PA93-R2K8].

147. *Id.*

148. Memorandum from Tom Charles Huston to President Richard Nixon 4-5 (Feb. 25, 1970), <https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/releases/may15/may15/vietnam02.pdf> [https://perma.cc/843E-4JSB].

149. John A. Farrell, Opinion, *Nixon's Vietnam Treachery*, N.Y. TIMES (Dec. 31, 2016), <https://www.nytimes.com/2016/12/31/opinion/sunday/nixons-vietnam-treachery.html> [https://perma.cc/BJL4-79CR].

Although the election was only days away, Johnson refused to take these revelations to the public.¹⁵⁰ Perhaps he feared that the administration's surveillance of an ally and a candidate for the presidency would poison his successor's presidency, whoever won the election. Without conclusive proof of Nixon's knowledge or collusion that he could make public, Johnson spoke to Nixon directly. "I would never do anything to encourage [Saigon] not to come to the table," Nixon told Johnson.¹⁵¹ In a famous interview, he later elaborated: "I did not authorize [Chennault] and I had no knowledge of any contact with the South Vietnamese at that point I couldn't have done that in conscience."¹⁵² But notes taken by H. R. Haldeman, Nixon's chief of staff, suggest that Nixon was in fact the mastermind behind the conspiracy.¹⁵³ These notes record Nixon's direction to Haldeman on October 19 that the South Vietnamese president was feeling "tremendous pressure" from Johnson and that the South Vietnamese wanted the Republicans to determine what the "quid pro quo" would be for their cooperation in stalling the peace talks.¹⁵⁴ Nixon said, "Keep Anna Chennault working on South Vietnam."¹⁵⁵

What might have happened in the war, or in the election, if this conspiracy had been exposed, one cannot say.

The Chennault Affair contains many strands that my brief account necessarily ignores, but let us assume that the charge against Nixon is accurate: while running for the presidency in 1968, he persuaded a foreign government to delay peace negotiations in order to advance his candidacy. This gives us a paradigm case, because it involves an attempt to pervert the course of an election. Does it matter whether Nixon would have lost the election had his schemes been unsuccessful, or whether he actually swayed the South Vietnamese? Is it enough that he believed the election was in the balance and that his conspiracy might make the difference in a very close race (which it was)¹⁵⁶? In such a case, the before/after distinction seems beside the point. The constitutionally significant elements in the conspiracy are not confined to Nixon's subsequent acts in public office but clearly include the effects on a

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. John A. Farrell, *When a Candidate Conspired with a Foreign Power to Win an Election*, POLITICO (Aug. 6, 2017), <https://www.politico.com/magazine/story/2017/08/06/nixon-vietnam-candidate-conspired-with-foreign-power-win-election-215461> [<https://perma.cc/XX4G-HDKV>].

155. Farrell, *supra* note 149.

156. <http://www.presidency.ucsb.edu/showelection.php?year=1968>

public event of great constitutional significance—a presidential election. Perverting the course of an election—or attempting to do so—either by illicit means, such as stealing documents in an effort to embarrass an opponent (as in Watergate), or improper means, such as torpedoing peace negotiations by the existing government, cries out for a clear rule. During the 1787 Philadelphia Convention, Virginia delegate George Mason asked, “Shall the man who has practiced corruption and by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?”¹⁵⁷ What rule do we apply if we don’t know whether the office was in fact successfully procured by corrupt means? Suppose Nixon would have won anyway? Suppose his collaborators in Saigon didn’t need any further incentives to frustrate the Johnson peace talks?

The sensible rule ought to be that when a substantial attempt is made by a candidate to procure the presidency by corrupt means, we may presume that he at least thought this would make a difference in the outcome, and thus we should resolve any doubts as to the effects of his efforts against him. Yet we must confine the operation of such a rule to truly substantial constitutional crimes, lest we ensnare every successful campaign in an unending postmortem in search of nonconstitutional misdeeds.

On this rule, the president could not be impeached for insider trading in securities, or for a narcotics violation if these occurred before he entered the White House. Doubtless there are middle cases that may or may not provide grounds for impeachment, such as a conspiracy to disturb the course of justice by promising pardons to win political support of their beneficiaries (which may amount to bribery) or concocting tax fraud schemes. These crimes would affect government operations, but unless the president takes some official act once he is in office, they do not in themselves amount to the constitutional crimes envisaged by our Framers and ratifiers.

This rule of construction also avoids an otherwise absurd conundrum: conspiracy with agents of a foreign state is not a problem before an election because there is no crime of electoral collusion on the federal statute books, but the obstruction of an investigation after an election also poses no problem for the conspirator because although it is a crime, a sitting president cannot be prosecuted¹⁵⁸ and could thus serve out his term.

¹⁵⁷. 2 FARRAND’S RECORDS, *supra* note 105, at 65.

¹⁵⁸. See *infra* text accompanying notes 212.

II. CHAPTER EIGHT: SEVEN FALLACIES

Though much has changed in the practices of the US government and in the expectations of the public since 1974, much abides. From the very beginning of our life as a republic under a constitution ratified by our people, there have been six fundamental methods taken from English common law by means of which the Constitution has been applied. These six forms of argument—history, text, structure, doctrine, prudence, and ethos—are sometimes called “modalities,”¹⁵⁹ the philosophical term for the ways in which a proposition is determined to be true.¹⁶⁰ In the constitutional law of the United States these six modalities determine whether a proposition of constitutional law is deemed to be true—whether the assertion of a particular constitutional principle accurately states the law. Together these six archetypal forms of argument compose the standard model by which judges, lawyers, officials, and citizens determine the law of the Constitution.¹⁶¹ Indeed, that is the point of this book: impeachment is a matter of constitutional *law* and for this reason Charles Black’s analysis remains as potent today as when it was written, despite the changes in American political society. One of these modalities—doctrine, or precedent—is applied according to the rule that the latest in time by the most authoritative source is dispositive. Thus the increased aggressiveness shown by the House in 1999 is now part of our law as to what the House may lawfully deem an impeachable offense. Another of the modalities—prudence, or the calculation of cost and benefits—also applies to a present context that is

159. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11-12 (1991). Within the constitutional context, each modality can help provide legitimacy to an argument by helping us assess the validity of a particular constitutional interpretation. For example, in *Berger v. New York*, 388 U.S. 41 (1967), a court assessing the constitutionality of wiretapping under the Fourth Amendment employed a historical argument, which considers the ratifiers’ intentions, concluding that “[t]he purpose of . . . the . . . Fourth Amendment [is] to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed.” *Id.* at 59.

160. In logic, we determine whether the truth of a proposition is necessary, contingent, or impossible by applying logical rules; in epistemology, we determine whether a proposition is known, unknown, or known to be untrue by applying epistemic rules; in ethics, to say that a proposition is obligatory, permissible, or forbidden is to apply a deontic mode. Thus, the conflicts mentioned in the note above should not dismay us: a proposition that is true in a deontic mode—thou shalt not kill—may not be the case in an epistemic mode—that persons will in fact kill. Considering and reconciling modal claims is the mark of a civilized human being.

161. See, e.g., Akhil Reed Amar, *How America’s Constitution Affirmed Freedom of Speech Even Before the First Amendment*, 38 CAP. U. L. REV. 503 (2010); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013).

constantly shifting as the country's social, political, and economic situation changes. The public's demand for influence on events, effectuated by polling or social media, for example, and the media's demand for greater transparency in government, reflected in the deplorable anonymous release of confidential grand jury information, are as much the drivers of this change as they are its manifestations.

Case law and political calculation, however, are not the only forms of legitimate constitutional argument. Thus there are counter pressures to recent developments to be found in the *Federalist Papers* (history); in Black's lucid technical mastery of the ways in which the terms of a legal document are construed, like the rule of *eiusdem generis* (text); in the basic, though always contested, relations between a Congress that may not remove the president merely because a majority of its members have lost confidence in the administration, and the president who may not abuse his powers simply because he is unable to work the machinery of legislation effectively (structure); and in the tradition of the rule of law that is supreme over politics where constitutional rules are to be applied (ethos). These modalities are just as potent as doctrine and prudence, perhaps even more so when we are searching for firmer ground as the earth moves beneath our feet.¹⁶²

Moreover, even recent doctrine by an authoritative tribunal like the US Supreme Court can be wrong because the court's reasoning is found to be flawed. As a doctrinal matter, the limitation of *Bush v. Gore*¹⁶³ to its own facts¹⁶⁴

162. And the earth is moving. There has been a global shift within countries in the twenty-first century from nation states toward market states. The nation state, a structure that dates back to the second half of the nineteenth century, promises to improve the financial well-being of its citizens against the backdrop of an open market and the equal rights. The period was marked by an increase in enfranchisement, free education, public funding of science, and other efforts that reflected nations' presumptions that their citizens derived welfare strictly from the state. In the twenty-first century, however, there have been shifts towards market states in response to international trade and communications, recognition of norms of human rights, changes in warfare, and other changes. This new structure promises to maximize opportunity, rather than material well-being, in exchange for being given power. It enables and assists citizens' choices rather than trying to direct them, and it changes the type of warfare and defense that the state is able to engage in. For further discussion of this transition from late-nineteenth and twentieth century industrial nation states to twenty-first century informal market states, see PHILIP BOBBITT, *THE GARMENTS OF COURT AND PALACE: MACHIAVELLI AND THE WORLD THAT HE MADE* 172-76 (2013); PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 85-90 (2008); see also generally PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY* (2002).

163. 531 U.S. 98 (2000) (per curiam).

164. See *id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

is a fatal admission of its vacuity as a precedent, and the Supreme Court has never relied on the case since it was handed down. Or the decision may remain contested because the various modalities point to different holdings. Even the unanimous holding in *Clinton v. Jones*¹⁶⁵ will not save it from ridicule because of its prudentially naïve dismissal of the impact of a civil suit on the presidency. These observations may sound like technical matters, or subjects more fit for a treatise on jurisprudence than a handbook on the methods of impeachment, but they go to the heart of Black's book: impeachment is a matter of decision according to law, and there are some decisions we can make—according to the law of the Constitution—that will guide us even in terrain where the law is currently undecided. There are also some propositions of constitutional law that are demonstrably false and can be shown to be so. It might be well to dispose of them before we proceed to the application of constitutional law to our contemporary predicaments.

I've chosen seven of the most seductive of these fallacies (some constitutional scholars call them "myths"¹⁶⁶). Clearing them away will help us see the matter of impeachment more perspicuously. That some are widely and tenaciously held does not validate them, but is rather an implicit criticism of law professors and journalists whose job it is to inform and educate the public. That many people believe them is, while troubling, not dispositive; as the saying goes, ten times zero is still zero.

These fallacies are:

1. Impeachment is a political question, not a legal one.
2. The grounds for impeachment are whatever the House of Representatives determines them to be by voting a Bill of Impeachment and sending it to the Senate.
3. A criminal act by the president is an essential predicate to impeachment.
4. Any serious criminal act by the president is grounds for impeachment.
5. Congress cannot remove a president via impeachment for exercising or declining to exercise authorities that are constitutionally committed to the president's discretion.
6. Acts authorized by Congress cannot provide a predicate for the impeachment of the president who carries out these acts.

¹⁶⁵. 520 U.S. 681 (1997).

¹⁶⁶. See Jane Chong, *Impeaching Trump: Four Eternal Myths*, LAWFARE (Sept. 1, 2017, 1:30 PM), <https://www.lawfareblog.com/impeaching-trump-four-eternal-myths> [<https://perma.cc/S24F-7HNY>].

7. What constitutes a “high Crime or Misdemeanor” does not vary with the office of the person being impeached.

Sometimes these fallacies interlock. A person who thinks impeachment is a political, not a legal, matter may be inclined to believe that customary legal determinations like the assessment of motive or state of mind have no place in an impeachment inquiry, and therefore she may also accept the fallacy that a president cannot be impeached for his discretionary acts, whatever his purposes. Similarly, believing that impeachment is a political rather than a legal act gives grounds for concluding that an impeachable offense is whatever the House claims it is.

One fallacy may also share an erroneous assumption with another. If you think impeachment is fundamentally a response to the commission of an ordinary crime, not a constitutional crime, you may be more likely to conclude that impeachable offenses must be found in Title 18, “Crimes and Criminal Procedure,” of the United States Code, and that Title 18 offenses provide a sufficient basis for impeachment.

The reason these fallacies endure is simply that their perpetrators haven’t bothered to apply the legal methods to correctly assess them, perhaps because they don’t ultimately believe impeachment *is* a matter of law and indeed may not believe that there is anything we can call “law” that is not politics. To someone taking this position, it may be unpersuasive to retort that that belief is incompatible with the US Constitution, which places law above political action in Article VI (among other places), because to such a skeptic the Constitution itself was little more than a snare for the gullible.¹⁶⁷ But if that is the case, why bother with impeachment? Why not just march to the White House and arrest the president? And why should the president, who actually has armed forces at his command, sit still for an impeachment proceeding if not out of deference to the rule of law? Such views lead inevitably to violence and authoritarianism. Once law has been swept away, there remains no restraint on the competition for power. That these views are often urged by the advocates for the people who would be most vulnerable in the face of such violence is merely an irony.

¹⁶⁷. See, e.g., JAMES D. ZIRIN, SUPREMELY PARTISAN: HOW RAW POLITICS TIPS THE SCALES IN THE UNITED STATES SUPREME COURT (2016); Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 656-59 (1999) (arguing that legislators’ avowedly constitutional positions in impeachment cases are merely partisan, and that all constitutional interpretation of indeterminate standards is driven by political preference).

A. Fallacy 1: Impeachment Is a Political Question, not a Legal One

John Tyler, a former Democrat from Virginia, was added to the Whig ticket headed by William Henry Harrison in 1839. After succeeding to the presidency upon Harrison's death in 1841,¹⁶⁸ he surprised many Whigs when he vetoed two important groups of Whig legislation on policy grounds (as opposed to constitutional grounds, which had hitherto generally been the basis for presidential vetoes).¹⁶⁹ On July 12, 1842, an impeachment resolution was introduced in the House and a House select committee, headed by former president John Quincy Adams, was formed to consider the issue. Though Adams was a harsh critic of Tyler's and appears to have been persuaded of the necessity of eventual impeachment, he refused to press for the adoption of an impeachment resolution on the grounds that it would have been defeated in the Senate.¹⁷⁰ This is the first example of an impeachment attempt against a president, and it appears to have been resolved on political rather than legal

^{168.} Prior to Tyler's succession of Harrison upon the latter's death, there was uncertainty surrounding the degree to which a Vice President would assume the presidential powers if the President were removed. Article II of the Constitution states that "In Case of the Removal of the President from Office . . . the Same [Powers and Duties of the said Office] shall devolve on the Vice President" who "shall act accordingly, until the Disability be removed, or a President shall be elected." U.S. CONST. art. II, § 1. The ambiguity in the terms left open the question of whether a Vice President would simply exercise the presidential powers while remaining in his role, or whether he would fully assume the role as President in his own right. When Tyler fully assumed the presidential power and role, simultaneously vacating his vice-presidential powers of presiding over the Senate, he set a clear and lasting precedent. Although now fully accepted precedent, the move was controversial, against Harrison's cabinet, who favored labeling Tyler as "Vice President, acting as President," and Whig party leaders, who also saw Tyler as only an "acting president." JOHN FEERICK, *THE TWENTY-FIFTH AMENDMENT* 6 (1992).

^{169.} The reestablishment of a Bank of the United States was a central goal for the Whig party. Tyler, however, was politically more inclined to give priority to state sovereignty and the claims of the states against federal power to establish a national bank. While the Whig leader Senator Henry Clay championed the creation of the bank, Tyler twice vetoed bills for its creation: first Clay's bill, and later a similar bill passed by Congress. The Whig party so strongly opposed Tyler's actions regarding the bank that they responded by expelling Tyler from the party. The impeachment proceeding against Tyler began after he again positioned himself against the Whigs by vetoing a tariff bill for what he considered to be "the soundest considerations of public policy," according to his August 9, 1842 veto message. President John Tyler, *Veto Message Regarding Import Duties* (Aug. 9, 1842), <https://millercenter.org/the-presidency/presidential-speeches/august-9-1842-veto-message-regarding-import-duties> [https://perma.cc/A6R2-Y5AT]. After a second veto of a tariff bill, Tyler finally agreed to the bill that ultimately became the Tariff Act of 1842.

^{170.} Lonnie E. Maness & Richard D. Chesteen, *The First Attempt at Presidential Impeachment: Partisan Politics and Intra-Party Conflict at Loose*, 10 *PRESIDENTIAL STUD. Q.* 51, 56 (1980).

grounds. What constitutional support is there for such a resolution, that is, the decision on political grounds not to go forward with an otherwise valid case for impeachment?

First, the determinations to indict and to convict are made by two political bodies, not by the courts. Second, as a matter of recent precedent, there is ample evidence that most commentators in the Congress and the media today assume that the impeachment question is “more political than legal,” though the basis for this belief is rarely stated. Third, the passage of the Seventeenth Amendment, which took the selection of senators out of the hands of state legislatures and gave it directly to the voters, has suggested to some that for the Senate to resolve an impeachment indictment by the House on legal rather than political grounds would create a “countermajoritarian difficulty”—meaning that it would risk thwarting the will of the popular majority.¹⁷¹ Fourth, and possibly most influential, is the idea that law is just politics anyway,¹⁷² and appeals to constitutional legal standards are little more than a charade, a cover for the reliance on political calculation. As a prominent constitutional lawyer put it in the *New York Times* in 2013,

Law is just politics by a different name, and most Supreme Court justices are result-oriented, and choose legal theories (originalism, judicial activism and the like) as window dressing while they go where they want to go. Although these illusory labels can be treated as serious methodologies and may be of interest to law professors, the American legal system [is] just another part of government neither higher nor lower than the other two branches, and one that must be muscled.¹⁷³

Well, if that is true of the judicial system, what hope is there for the Congress when its members are called upon to act as judges and jurors? Finally, there is the Clinton precedent, which suggests that the acquittal of the

171. The countermajoritarian objection to judicial review is premised on the majoritarian belief that a democracy’s legitimacy arises from its ability to carry out the majority’s will. The objection states that the power of judicial review undermines the democracy’s legitimacy on the basis that appointed judges are able to undermine or overturn laws passed by the elected legislature. For the classic exposition of this theory, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). However, this objection overlooks the fact that judicial review preserves the legitimacy of the Constitution, thereby protecting democratic representation. It is also important to notice that the Constitution itself places boundaries on some majoritarian notions.

172. See Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233 (1989).

173. Martin Garbus, Letter to the Editor, *Law and Politics*, N.Y. TIMES (May 23, 2013), <http://www.nytimes.com/2013/05/26/books/review/law-and-politics.html> [https://perma.cc/KA36-LX9M].

president, on charges whose legal grounds were admittedly slight, was ultimately determined by his popularity with the public, which itself was based on factors that could scarcely be called *legal*.

Against the view that impeachment is principally or wholly a political matter is an important exchange at the Constitutional Convention—even though this exchange is frequently misconstrued to provide support for the claim that impeachment is not a legal matter. This exchange occurred when George Mason objected to limiting the grounds for impeachment to bribery and treason—the original formulation.¹⁷⁴ He proposed adding the term “maladministration” which appeared in six of the thirteen state constitutions as a ground for impeachment, including that of Mason’s own state of Virginia. After James Madison objected to the vagueness of “maladministration,” Mason substituted “high Crimes and Misdemeanors.” This phrase is defined in Blackstone’s *Commentaries on the Laws of England*—a book the Framers knew well—as including, among other things,¹⁷⁵ maladministration, and so quite a few persons have concluded that, at least to this extent, there is a permissible political basis for impeachment. In fact, the reason Madison gave for his objection to this term was that it would make the presidency equivalent to “a tenure during the pleasure of the Senate.” But if the House may not impeach a president on grounds so general that they amount to his service at the mere consent of the Senate (as, for example, a prime minister can be removed by failing to win a vote of confidence in Parliament), then mere political grounds for impeachment cannot be the mandate of the Constitution.

Moreover, if the language is in some contexts open to competing constructions, there is one thing the text does not provide. As Akhil Amar has astringently noted, “The Constitution does not say that a president may be ousted when half the House and two-thirds of the Senate want him out.”¹⁷⁶

In addition to these historical and textual arguments, there is the powerful precedent that since 1789, only nineteen federal officials have been impeached by the House, and of these only eight have been convicted by the Senate. Of the

174. 2 FARRAND’S RECORDS, *supra* note 105, at 550 (“Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.”).

175. 4 WILLIAM BLACKSTONE, COMMENTARIES *121 (“The first and principal [high misdemeanor] is the *mal-administration* of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment . . .”).

176. AKHIL REED AMAR, THE CONSTITUTION TODAY 300 (2016). *But see* Klarman, *supra* note 167.

eight persons impeached and convicted, all were judges, and none were indicted on political grounds. In the same period, only two presidents—Andrew Johnson and Bill Clinton—were tried by the Senate, and neither was found guilty. As Jane Chong observes, for “35 percent of our history, a US president has coexisted with a House controlled by the opposing party (that’s 80 of the past 228 years since the start of the Washington administration) [O]nly two presidents have suffered the disgrace of impeachment. Those two . . . were Democrats who were each ultimately acquitted by a Republican-controlled Senate.”¹⁷⁷ If the grounds for impeachment were political, one would expect it to be used more often for partisan reasons.

Finally, a passage from the *Federalist Papers*, often quoted out of context, appears to support the conclusion that impeachment is a political matter but actually does no such thing. This is the observation by Alexander Hamilton in *Federalist* #65 that “the subjects of [impeachments] are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”¹⁷⁸

Read in context, however, Hamilton’s reflection has the opposite import to that for which it is so often cited. In #65, Hamilton is at pains to show that the Senate can act in “their judicial character as a court for the trial of impeachments.”¹⁷⁹ Indeed he introduces the paper by saying that he will conclude his discussion “with a view of the judicial character of the Senate.”¹⁸⁰ A bit defensively, he continues,

[A] well constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community and to divide into parties more or less friendly or inimical to the accused. In many cases it will connect itself with pre-existing factions and will enlist all their animosities, partialities, influence and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of the parties, than by the real demonstrations of innocence or guilt.¹⁸¹

¹⁷⁷. Chong, *supra* note 166.

¹⁷⁸. THE FEDERALIST NO. 65, *supra* note 58, at 396 (Alexander Hamilton).

¹⁷⁹. *Id.*

¹⁸⁰. *Id.*

¹⁸¹. *Id.*

The entire essay is an attempt to show that the Senate can *overcome* its political nature as an elected body—chosen at the time by the members of the state legislatures—and act as a proper “court for the trial of impeachments.” That is why Hamilton goes to great lengths to show that the Supreme Court is an inappropriate alternative—since it could be involved in subsequent criminal proceedings against the impeached president—and thus cannot substitute for the Senate.

Yet Justice Samuel Chase and President Andrew Johnson were impeached on political grounds—and they were cases of “first impression,” that is, they were without precedent. What are we to make of this?

I think the resolution lies in differentiating the roles of the House and Senate. While the grounds for impeachment must be legal in nature, the decision whether to bring a Bill of Impeachment lies within the political discretion of the House, as John Quincy Adams urged. This is an extension of the analogy of the House proceedings to those of a grand jury, before which prosecutors have considerable leeway in determining what charges to press and which to decline to prosecute. The Senate, by contrast, sits as a law court: its proceedings are convened and presided over by the chief justice of the Supreme Court. More importantly, unlike the members of the House, senators take a special oath in addition to the oath of office that commands their fidelity to the Constitution. This second oath binds each member of the Senate to swear to “do impartial justice, according to the Constitution and laws: So help me God.”¹⁸²

B. Fallacy 2: The Grounds for Impeachment Are Whatever the House Determines Them to Be

In 1968, President Lyndon Johnson nominated an associate justice to be chief justice of the Supreme Court to fill the vacancy created by the retirement of Earl Warren.¹⁸³ In an effort to block this appointment, ethical charges were made against the nominee, Abe Fortas, that were sufficient to hold over the vacancy until after the election of Richard Nixon.¹⁸⁴ This maneuver set in train a series of events,¹⁸⁵ including the nomination and rejection of a capable

¹⁸². S. DOC. NO. 104-1, at 184.

¹⁸³. *Filibuster Derails Supreme Court Appointment*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Filibuster_Derails_Supreme_Court_Appointment.htm [https://perma.cc/4FLB-4CZA].

¹⁸⁴. *Id.*

¹⁸⁵. Indeed, we have not seen the end of this sequence yet; consider the Senate Majority Leader’s refusal to hold hearings on the nomination of Judge Merrick Garland to the Supreme Court

appeals court judge, Clement Haynsworth, and then the rejection of his replacement, Harold Carswell, on grounds that infuriated partisans of the nominees.¹⁸⁶ In the maelstrom of those confirmation fights, the Republican minority leader of the House, Gerald Ford, bruited the idea of impeaching the most liberal member of the court, William O. Douglas.¹⁸⁷ It has been suggested that Ford thought a threatened impeachment could be a bargaining chip to be traded to the Democrats to get them to abandon their opposition to the Nixon nominees.¹⁸⁸

To preempt the creation of a select committee, which would divert jurisdiction from the Judiciary Committee, the Democratic chairman of that committee contrived to have a resolution of impeachment introduced against Douglas for “[h]igh crimes and misdemeanors and misbehavior in office.”¹⁸⁹ Ford, perhaps in frustration at this maneuver, spoke on April 15, 1970, to demand action by the Judiciary Committee. As to whether Douglas’s alleged wrongs provided a sufficient basis for impeachment, Ford stated that “the only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history.”¹⁹⁰

In his speech, Ford leveled five major charges against Douglas:

- Douglas had improperly failed to disqualify himself from the obscenity cases of a publisher who had paid him \$350 for an article on folk singing that appeared in one of the publisher’s magazines;
- Douglas’s book, *Points of Rebellion*, violated standards of good behavior and was “an inflammatory volume”;
- *Evergreen* magazine, which had published an excerpt from *Points of Rebellion*, also printed pornography;

in 2016 on the grounds that delay could—as it did—deliver the seat to the choice of the next President.

186. Bruce H. Kalk, *The Making of “Mr. Justice Haynsworth”? The Rise, Fall, and Revival of Judge Clement F. Haynsworth Jr.*, 117 S.C. HIST. MAG. 4, 5 & 26 (2016).

187. Marjorie Hunter, *Ford Asks Douglas’s Ouster*, N.Y. TIMES (Apr. 16, 1970), <https://www.nytimes.com/1970/04/16/archives/ford-asks-douglass-ouster-ford-calls-for-removal-of-douglas-from.html> [<https://perma.cc/9KXG-2DP2>].

188. RICHARD SACHS, LEG. RES. SERV., *ROLE OF VICE-PRESIDENT DESIGNATE GERALD FORD IN THE ATTEMPT TO IMPEACH ASSOCIATE SUPREME COURT JUSTICE WILLIAM O. DOUGLAS* 4-5 (Oct. 24, 1973), <https://www.fordlibrarymuseum.gov/library/document/0023/1687418.pdf> [<https://perma.cc/7M9M-YSYY>].

189. H.R. Res. 920, 91st Cong. (1970).

190. 116 CONG. REC. 11913 (1970) (statement of Rep. Ford).

- Douglas had a relationship with a private foundation that had paid him a director's fee (a similar arrangement with a nonprofit foundation had been the basis for charges against Fortas);
- the Center for the Study of Democratic Institutions, of which Douglas was chairman, was a "leftish" organization and a focal point for militant student unrest.¹⁹¹

Ultimately, the Judiciary Committee refused to support Douglas's removal, and the midterm elections, in which the Democrats gained seats, and Ford's own lack of enthusiasm for the project caused the impeachment effort to fade away. But Ford's off-the-cuff remark that the grounds for impeachment are "whatever a majority of the House . . . considers [it] to be at a given moment" is apparently imperishable. What support is there for this widely held view?

There seems to be only one argument in support of Ford's claim. Because the decision to impeach is not reviewable by a court, any vote to impeach must go unexamined—it is argued—even if it is based on political or even personal animus. A Bill of Impeachment that dispensed with valid legal charges altogether would nevertheless be referred to the Senate for a trial, if the bill was approved by a House majority.

Perhaps nowhere than in reply to this insidious argument is there greater salience to Charles Black's words in this book that "we have to divest ourselves of the common misconception that constitutionality is discussable or determinable only in the courts."¹⁹² A corollary to this widely credited but nonetheless destructive misconception seems to be that outside the process of litigation in the courts, no government actor is bound by law.¹⁹³ On the contrary, using the modalities of constitutional argument I have described earlier, it is possible for government officials—and the public and the media that assess their actions—to determine the legality of those acts and their

191. Richard Sachs, *Role of Vice-President Designate Gerald Ford in the Attempt to Impeach Associate Supreme Court Justice William O. Douglas*, LIBR. CONGRESS (Oct. 24, 1973), <https://www.fordlibrarymuseum.gov/library/document/0023/1687418.pdf> [<https://perma.cc/SSA7-RQBT>].

192. BLACK & BOBBITT, *supra* note 18, at 22.

193. See Philip Bobbitt, *The ACLU Goes to War*, JUST SECURITY (Nov. 25, 2016), <https://www.justsecurity.org/34885/aclu-war> [<https://perma.cc/KQW9-KK6U>]; Philip Bobbitt, *The Bobbitt Version*, JUST SECURITY (Dec. 7, 2016), <https://www.justsecurity.org/35305/bobbitt-version1> [<https://perma.cc/3V6H-UYG4>] (arguing that the "assumption that the Executive would exist in a law-free environment absent litigation is . . . vulnerable logically . . ."); Jameel Jaffer, *Philip Bobbitt's War Without Tears*, JUST SECURITY (Nov. 29, 2016), <https://www.justsecurity.org/34994/philip-bobbitts-war-tears> [<https://perma.cc/4QG7-EWBU>] ("In times of war, it's sometimes said, the laws fall silent . . .").

constitutionality. In fact I would go further: it is incumbent upon the office holders and citizens of a democratic republic to do so.

Consider for a moment some of the objections to Congressman Ford's maxim. If it were true, then the House could impeach a federal official on account of her religious beliefs, despite the explicit provision of Article VI that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."¹⁹⁴ Moreover, members of the judiciary would hold their posts at the pleasure of the Congress, in defiance of the system of sequenced and linked powers of the tripartite structure of the federal government.¹⁹⁵ And as we have seen, Ford's rule would contradict the intention of the Framers and ratifiers that the basis for impeachment and removal from office be founded on evidence of bribery, treason, or similar offenses against the constitutional viability of the State.¹⁹⁶

What could possibly be meant by the requirement that Congress is bound by its oath to uphold the Constitution, if this applies only in adjudicated cases? Could the House attach a bill of attainder (a legislative act declaring a specific person guilty without trial)¹⁹⁷ to the impeachment resolution forwarded to the Senate? Could it violate the prohibition on ex post facto laws by inventing a new high crime and misdemeanor—such as serving on the board of a "leftish" think tank—that few reasonable people would have anticipated would constitute grounds for removal by impeachment?

These points are so obvious that I must assume that they have not been overlooked by the advocates for Ford's dictum. Perhaps what these advocates really believe is that a majority of the members of the House of Representatives are prepared to lie about the true basis of their votes. But even if this were the case, it is not as damaging as Ford's claim that they needn't bother to do so.

C. Fallacy 3: A Criminal Act by the President Is an Essential Predicate to His Impeachment

Since 1936, virtually all successful judicial impeachments have involved criminal behavior,¹⁹⁸ but that is hardly dispositive of the question whether the

¹⁹⁴. A textual argument.

¹⁹⁵. A structural argument.

¹⁹⁶. An historical argument. See *infra* text accompanying note 212.

¹⁹⁷. These legislative acts declare a person or persons guilty of a crime, generally treason, without trial and are constitutionally prohibited. U.S. CONST., art. I, § 9.

¹⁹⁸. In the 19th century, the grounds for the impeachment of judges was confined to constitutional misdemeanors, as in the examples of Pickering, Chase, Peck, Delahay, and

same standard should be applied to the president. Although the text is identical, the standards for impeachment of the president might well be unique because the *constitutional crimes* that can be committed by a president are unique. Moreover, the removal of the president reverses a national election (in most cases) and thus is a far graver step in a democracy than the removal of a single member of the judiciary.¹⁹⁹

Ironically, it may be this fact of uniqueness, the sense that a grave, historic step is being taken, that has intimidated members of the House, who may then wish to defend themselves against charges of having acted arbitrarily by relying on the explicit certainties of federal or state criminal codes. For example, one of the most constitutionally consequential charges against Richard Nixon was his use of the impoundment power—or “rescission”—as a super veto that could not be overridden. Instead of rescinding expenditures of funds appropriated and authorized by Congress owing to changed circumstances, as had been the practice since Jefferson, Nixon simply refused to spend the funds when appropriations were passed by the Congress over his veto.²⁰⁰ This is a constitutional crime that only the president can commit; it is unlikely to be in the statute books. Not only does it defy the Supreme Court’s holding in the line item veto case,²⁰¹ it takes that maneuver one step further by creating a veto that cannot be overridden. Had succeeding presidents emulated Nixon, impoundment would have unilaterally changed the allocation of powers created by Articles I and II. Nevertheless, all of the charges against Nixon adopted by the House were also common crimes. The House managers of the case against Bill Clinton were also anxious to stress the criminal aspect of the

Humphreys; more recently, common crimes have provided the basis for impeachment, as in the examples of Ritter, Claiborne, Hastings, Nixon, Kent, and Porteous. The cases of Swayne (1904), Archbold (1912), English (1926), and Louderbach (1932) are ambiguous insofar as the charges of abuse of power are mingled with allegations of common crimes and thus are perhaps transitional precedents to the more recent cases.

199. See *infra* Section II.G.

200. See *supra* Section I.E.

201. The Line Item Veto Act of 1996 allowed the president to cancel certain spending and tax benefit measures within a bill without having to veto the entire bill. See Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996). When President Clinton exercised this power to cancel certain provisions of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, and the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 787, a case was brought challenging the constitutionality of the Line Item Veto Act. The Supreme Court held that the Act was unconstitutional, as it allowed the President unilateral authority to change the content of a statute, signing into law a statute whose text was not voted on by either House of Congress, in violation of Article I, Section 7. See *Clinton v. City of New York*, 524 U.S. 417 (1998).

perjury charges leveled against him; they refused to include the abuse of power allegations recommended to them by the independent counsel.

The erroneous assumption that commission of a crime is an essential predicate for impeachment altered the course of the select committee to investigate the Iran-Contra affair. Democrats in the House who were anxious to impeach President Reagan felt compelled to demonstrate that he had been aware of the transfer of funds from the sale of missiles by Israel to Iran into accounts used to fund the Contra insurgency in Nicaragua, and thus that he had committed the common crime of misappropriation. Given President Reagan's management style, this was a difficult assignment, but, far more importantly, the effort to do so diverted the investigation away from the more consequential *constitutional* crime committed by the president when he set up a private covert action agency, run by the government but funded from private funds, including those from foreign countries.²⁰²

Yet requiring investigators to show that a common crime has been committed may be useful as a check on hyperpartisanship in the impeachment process. Charles Black wrote that we "feel more comfortable when dealing with conduct clearly criminal in the ordinary sense, for as one gets further from that area it becomes progressively more difficult to be certain, as to any particular offense, that it is impeachable."²⁰³ But if this clarity and avoidance of partisan behavior provide prudential reasons for such a requirement, the Clinton impeachment does not support this surmise. All of the charges forwarded to the Senate alleged crimes, but the actual vote in the House fell almost strictly along partisan lines.²⁰⁴

One need only consider a few hypothetical cases to realize how inadequate such a requirement would be for impeachment. What if the president required that all cabinet members affirm their belief in the divinity of Christ? Or that he devolved to his personal financial adviser classified intelligence about upcoming decisions of the Federal Reserve? Because the president can declassify any material he wishes, there is nothing *per se* illegal about this.

202. See *supra* Section I.B.

203. BLACK & BOBBITT, *supra* note 18, at 32.

204. All but ten of the fifty-five Republican Senators voted "guilty" on the obstruction-of-justice article of impeachment. Only five Republican Senators voted "not guilty" on the perjury article. Meanwhile, every single Democratic Senator voted "not guilty" on both articles. See 145 CONG. REC. 2376-77 (1999). Prior to the vote, Senator Russell Feingold of Wisconsin stood as the only Democratic Senator to vote against a motion by Senator Robert C. Byrd of West Virginia to dismiss the charges against Clinton, and to support a motion to take depositions from three witnesses. See 145 CONG. REC. 1397 (1999) (roll call votes on the motions); 145 CONG. REC. 2383 (1999) (statement of Senator Feingold explaining his vote on the motions).

What if the president announced that under no circumstances would he respond to the invocation of NATO's Article 5, which calls upon the signatories to the North Atlantic Treaty to aid each other when they are attacked? Or suspended habeas corpus after Congress had refused to do so and while Congress was in session? Suppose a candidate for the presidency conspired with foreign intelligence agencies to provide him with sophisticated data analytics in order that they could more effectively assist his campaign. This may or may not be a crime, depending on whether information from a foreign government amounts to the "contribution or donation of money or other thing of value" to the campaign,²⁰⁵ but it can scarcely be doubted that it is a high crime in the circumstances of a presidential election. As Black wrote after giving his own hypotheticals, "the limitation of impeachable offenses to those offenses made generally criminal by statute is unwarranted – even absurd."²⁰⁶

This conclusion accords with James Wilson's observation that "our President . . . is amenable to [the laws] in his private character as a citizen, and in his public character by impeachment."²⁰⁷ It is also consistent with Justice Joseph Story's conclusion that the harms to be reached by impeachment are those "offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence."²⁰⁸

D. Fallacy 4: Any Serious Criminal Act by the President Is Grounds for His Impeachment

Perhaps because bribery and treason are crimes, some have inferred that any crime could serve as the basis for impeachment of the president. This view is inconsistent, however, with the notion of a "high crime." Bribing a maître d' to get a good table at a restaurant might excite an overzealous prosecutor, but it could scarcely serve as a predicate for action by the House to remove a president. Like treason, the impeachable offense of bribery—like other impeachable offenses that are also common crimes—must be an act that actually threatens the constitutional stability and security of the State.

²⁰⁵. See 52 U.S.C. § 30121(1)(a) (2018).

²⁰⁶. BLACK & BOBBITT, *supra* note 18, at 32.

²⁰⁷. 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 480 (Washington, D.C., 2d ed. 1836).

²⁰⁸. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 (5th ed. 1891).

Here we have, fortunately, an important precedent, though not one decided by a court. As Chief Justice Rehnquist wrote in his own study of impeachment, *Grand Inquests*: the impeachment acquittals of Justice Chase and President Johnson were cases “decided not by the courts but by the United States Senate.”²⁰⁹

Aaron Burr, vice-president during Jefferson’s first term, killed Alexander Hamilton in a duel on July 11, 1804. There is some dispute as to whether Hamilton fired into the air before being shot in the spleen and liver by Burr, but there is no doubt that dueling was illegal both in New York, where both men were residents and where Hamilton was taken to die, and in New Jersey, where the duel took place. For the killing, Burr was indicted in both jurisdictions. (In New York, dueling was a capital offense.)

Yet after first fleeing to South Carolina, Burr returned to Washington to complete his term as vice-president. Not only was he not impeached by a Congress controlled by the president, who despised him, but in his role as vice-president, he subsequently presided over the first impeachment, against the Federalist judge Samuel Chase, and was given high marks for his judicial temperament and impartiality.

When construing the Constitution on the grounds of historical argument, we give great weight to the actions of the first few Congresses and presidents because they were familiar with the understandings on the basis of which our people ratified the governing document. It is obviously true, with respect to judges, that any serious crime is a sufficient predicate for bringing a Bill of Impeachment; as we have seen, nine members of the judiciary have been impeached, mainly on the basis of having committed common crimes. But what about Burr? Whether we say that the vice-president stands with the president, perhaps because he too is elected by the entire nation, or whether we place him on some lesser pedestal nearer the judges, the fact that Burr was not impeached suggests that at the very least a president cannot be lawfully impeached for the commission of an ordinary crime—even murder. Charles Black found it inconceivable that “a president who had committed murder could not be removed by impeachment.”²¹⁰ He came to this conclusion because such a crime “would so stain a president as to make his continuance in office dangerous to public order We could punish a traitorous or corrupt president after his term expired; we *remove* him principally because we fear he . . . is not thinkable as a national leader.”²¹¹

209. REHNQUIST, *supra* note 17, at 278.

210. BLACK & BOBBITT, *supra* note 18, at 35.

211. *Id.* at 36.

What looks like a paradoxical precedent can actually be harmonized with the standards we have thus far derived. An impeachable offense is one that puts the Constitution in jeopardy. This act might also be a common crime, but the reason we impeach is not to punish common crimes. In the Burr case, the insignificant role of the vice-president in that period, the nearness of his term's end, perhaps even the alienation between Burr and Jefferson all militated against impeachment.

This analysis also explains Congress's rough treatment of the judges. It wasn't simply because they had committed common crimes that they were impeached and removed from office. Rather it was because having committed a common crime, they had undermined their own ability to serve in the judiciary where they must assess and render judgment on the common crimes of others.

Perhaps this is the place to reaffirm Black's position that a serving president must be impeached before he or she can be indicted and tried for an ordinary crime. This point is made repeatedly in the *Federalist Papers*. In #65, Hamilton observes that

the punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. *After* having been sentenced to perpetual ostracism from the esteem and confidence, and honors and emoluments of his country; he will still be liable to prosecution and punishment in the ordinary course of law.²¹²

This point is made again in *Papers* #69 and #77, which assert that the president could not be prosecuted as a criminal until he had left office, a point confirmed in the first Congress by both Oliver Ellsworth²¹³ and Vice-President John Adams.²¹⁴

Moreover, as a prudential matter this surely cannot be an open question. Does anyone really think, in a country where common crimes are usually brought before state grand juries by state prosecutors, that it is feasible to subject the president—and thus the country—to every district attorney with a reckless mania for selfpromotion? Have we forgotten Jim Garrison already?

Thus the question, which I will take up in the next chapter, whether a president's obstruction of the operations of the Department of Justice must track the requirements of the criminal statutes that prohibit the obstruction of justice in order to serve as the basis for impeachment, misses the point. As Black observed, the constitutional significance of the fact that an impeachable

²¹². THE FEDERALIST NO. 65, *supra* note 58, at 398-99 (Alexander Hamilton).

²¹³. At that time a senator, later Chief Justice.

²¹⁴. See AMAR, *supra* note 176, at 287.

offense may share elements with a common crime is only that judges and executive officials are put on notice of the impropriety of certain acts.²¹⁵

In any case, we no longer have to make this choice because the Twenty-Fifth Amendment allows us a way out. If a crime is sufficiently shaming as to make the president “not thinkable as a national leader,” we may presume that the vice-president and a majority of the principal officers of the executive branch (or some other body that Congress has designated) have grounds to declare that the president is unable to discharge the powers and duties of his office. Should the president resist, Congress must determine whether the president is fit to continue in office. It may transfer his powers to the vice-president by a two-thirds vote of both houses.

E. Fallacy 5: Congress Cannot Remove a President for Exercising Authorities that Are Constitutionally Committed to His Discretion

Certain authorities are granted by Congress to the president, for instance by the Authorization for the Use of Military Force after 9/11. In the next chapter I will discuss whether Congress can impeach a president who acts pursuant to such powers in the absence of countervailing statutes. But other powers are granted directly to the president by the Constitution, including those accorded to him as head of the executive departments and thus as chief law enforcement officer, the pardon power, and authority over the armed forces as commander in chief. Can Congress impeach a president for acts committed pursuant to power that is exclusively his?

Interestingly, in light of the importance of the early Congresses, the House in the first session of the first Congress discussed impeachment extensively. The issue was whether the president had to return to the Congress for permission to remove the head of an executive department appointed by him and confirmed by the Senate. If a cabinet appointment required the participation of the Senate, did dismissal also require Senate action?

On the floor of the House, James Madison argued that the Constitution vested the power of removal exclusively in the president. He went on to say that this was “absolutely necessary” because “it will make him, in a peculiar manner, responsible for [their] conduct.” This responsibility, Madison argued, would “subject [the president] to impeachment himself, if he suffers them to perpetrate with impunity High crimes or misdemeanors against the United

²¹⁵. Salil Dudani, Response to Charles Black’s Impeachment: A Handbook 2 n.8 (Dec. 13, 2017) (unpublished paper) (on file with author).

States, or neglects to superintend their conduct, so as to check their excesses.”²¹⁶

This might seem a surprising position to those who hold the erroneous view that the president has constitutional immunity from impeachment for his discretionary exercise of powers granted him exclusively by the Constitution. Those enticed by this fallacy draw support—if wrongly—from the constitutional crisis that led to the impeachment of Andrew Johnson. By adopting the Tenure of Office Act, Congress sought to require President Johnson to seek senatorial consent before removing his secretary of war. Johnson, citing the “power and authority vested in me as President by the Constitution,” nevertheless removed Edwin Stanton, a Lincoln appointee, without seeking or obtaining the Senate’s consent.²¹⁷ The House cited this action as grounds for Johnson’s impeachment. The first Article of Impeachment claimed that Johnson was “unmindful . . . [when he issued an order] for the removal of Edwin M. Stanton” of the Constitution’s requirement that the laws be faithfully executed.²¹⁸ The general consensus today, ratified by the Supreme Court in *Myers v. United States*,²¹⁹ is that Madison and Johnson were right. The president does not have to return to the Senate to remove an executive official who was confirmed by that body. Does this mean that the power specifically allocated to the president grants him a kind of constitutional immunity to impeachment for the exercise of that power?

It has been claimed, for example, that the president cannot be impeached for acts that in another’s hands would amount to obstruction of justice—for example, trying to dissuade the director of the FBI or the attorney general from pursuing a particular criminal investigation—because the president has the exclusive authority to direct the officials of the Justice Department to pursue prosecutions. As a lawyer for the president pithily put it, “he cannot obstruct himself.”²²⁰

216. 1 ANNALS OF CONG. 387 (1789) (Gales & Seaton eds., 1834).

217. S. JOURNAL, 40th Cong., 2d Sess. app. 963 (1867).

218. *The Impeachment of Andrew Johnson (1868) President of the United States: Articles of Impeachment*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm#7 [<https://perma.cc/ZE3X-VCM5>].

219. *Myers v. United States*, 272 U.S. 52, 134 (1926) (“The moment that [the President] loses confidence in the intelligence, ability, judgment or loyalty of any one of [the Senate-confirmed officers] he must have the power to remove him without delay.”).

220. Brad Heath & David Jackson, *Trump’s Lawyers Mount a New Defense: A President Cannot Obstruct Justice. Is that True?*, USA TODAY (Dec. 4, 2017), <https://www.usatoday.com/story/news/politics/2017/12/04/trumps-lawyers-mount-new-defense-president-cant-obstruct-justice-true/921380001> [<https://perma.cc/4329-R7UR>] (quoting an email from John Dowd, then-personal lawyer for President Donald Trump, to USA TODAY).

Or can the president be impeached for according recognition to the government of a foreign state? It seems obvious that the Congress could not require the president to recognize a particular foreign state; that power is his exclusively. How, then, could his exercise of such a power be the basis for impeachment? How, in other words, can the Congress coerce the president via impeachment to take steps that it would be unconstitutional for the Congress to require by statute?

These questions are confused by failing to differentiate between the exercise of a lawful power, and the unlawful exercise of such a power. For example, the president could clearly be impeached were he to take bribes from a foreign state in exchange for recognition. The grounds for impeachment lie not in the exercise of the power *per se* but in its corrupt exercise. In Andrew Johnson's case, the claim wasn't so much that the president had behaved improperly in exercising his constitutional powers; on the contrary, those very constitutional powers were at issue. If Johnson's claim to have the exclusive right to dismiss executive officials was correct, then to hold otherwise would mean that the command to "take care that the laws be faithfully executed" included executing laws that were unconstitutional—that is, laws that were not US law.

But Johnson's case, like the purchase of a pardon or the treasonous exercise of the president's power as commander in chief, is easy. What if a foreign power somehow induced the president to order US-led forces in Syria to stand aside when Kurdish forces allied with the United States were attacked? What if the president, instead of ordering the Department of Justice to stop investigating the White House, instead used his power over the CIA to direct the Agency to mislead DOJ investigators? Let's go back to Madison's argument for giving the president exclusive authority in the first place. Madison argued that such authority would ensure the president's impeachment if he permitted misconduct. This is in sympathy with James Wilson's argument that the virtue of locating executive authority in one person was that it would ensure his accountability.²²¹ That the president is responsible for the actions of executive officials makes him responsible when these actions are unlawful, and makes him impeachable when they are constitutional crimes. This leads us to conclude that the constitutional crimes he directs others to commit can provide the basis for his impeachment.

221. "[W]e have a responsibility in the person of our president; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes." 2 ELLIOT, *supra* note 207, at 480.

F. Fallacy 6: Acts Authorized by Congress Cannot Provide a Predicate for the Impeachment of the President Who Carries out These Acts

A slightly different point from Wilson's and Madison's was raised by Elbridge Gerry during the colloquy quoted in the previous section concerning the impeachability of the president for his discretionary acts. Gerry said that a president could not be impeached when he was "doing an act which the Legislature has submitted to his discretion"²²²—that is, when the president's power to perform the act is delegated by statute rather than exclusively assigned to the executive by the Constitution. This raises the question of whether Congress is estopped (prevented by its own acts) from pursuing an impeachment in such circumstances. Suppose, having been fully informed by the executive, Congress provided funds for a paramilitary covert action that went horribly wrong. Surely the president could not be impeached for his oversight of such an enterprise on the grounds that the undertaking was too risky.

Similarly, it has been argued that a president's violations of the Emoluments Clause could readily be rebuffed by congressional legislation against conflicts of interest. Does it make sense to use the drastic weapon of impeachment when the Congress has refused the less consequential but equally effective method of statutory action? Could the president argue that congressional inaction—and implicit congressional complicity in the example above—can mislead the president, even entrap him? This may be what Charles Black had in mind when he wrote that the impeachment of Richard Nixon for secret military operations in Cambodia, of which the leaders of the Congress were well aware and to which they had not objected, was close to the line.

But a rule that estopped Congress from impeaching in such circumstances would run afoul of one of the most basic precepts of the US Constitution: one Congress cannot bind another to its decisions. One often hears politicians promise that a particular statute will force Congress to live within certain limits, such as a revenue cap at a certain percentage of GDP. Apart from the moral suasion and the political reaction that might befall a transgressor, there is no reason this should be true. A Congress cannot even bind itself, and it can always repeal earlier action using the same procedures by which the earlier legislation was adopted. A rule that prevented impeachment owing to prior acts of congressional duplicity or even encouragement by the Congress would amount to an unconstitutional, if ineffectual, restraint on future action by the Congress.

222. 1 ANNALS OF CONG., *supra* note 216, at 522.

Furthermore, impeachment and legislation, even when directed toward the same object—to prevent corruption in the case of emoluments—are far different modes of action. Statutory action has a policy purpose, correcting a past wrong or deterring a future one; impeachment is a “National Inquest,” as Hamilton termed it,²²³ that exposes constitutional crimes and has no particular policy purpose other than protecting the State. A rule that estopped congressional action would waive the public’s right to the exposure of wrongdoing that comes with the trial (and the defense against such charges on the grounds that the president has been unjustly accused).

The rule in such circumstances ought to be: Congress may impeach on grounds that would be impeachable, regardless of any other congressional acts.

G. Fallacy 7: What Constitutes a “high Crime or Misdemeanor” Does Not Vary with the Office of the Person Being Impeached

The study of constitutional law should enable the student to master all the conventional forms of American constitutional argument—text, history, structure, prudence, ethos, and doctrine. That is because while all these forms usually cohere and reinforce each other—as, for example, they do in answering the important question of the legitimacy of judicial review—sometimes they do not.

Sometimes the text will be especially authoritative and can override the distant murmurs of history. Article I, section 6 of the Constitution refers to “Treason, Felony, and Breach of the Peace”; Article IV, section 2 speaks of “Treason, Felony, or other Crime.”²²⁴ We know that in writing the Impeachment Clause, the Framers took the phrase “high Crimes and Misdemeanors” from British impeachment practice, yet we also know that this practice had become odious by the time the Americans drafted their Constitution, and little of the purpose of British impeachment—removing ministers of the Crown who were protected by the king—is relevant to the American government. A comparison of the three texts, however, shows us that

223. THE FEDERALIST NO. 65, *supra* note 58, at 397 (Alexander Hamilton).

224. U.S. CONST. art. I, § 6; U.S. CONST. art. IV, § 2; *see also* AMAR, *supra* note 176, at 302 (discussing both Article I and Article IV treason clauses). Article I, Section 6 provides in relevant part, “[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses . . .” And Article IV, Section 2 provides in relevant part, “A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.” U.S. CONST. art. IV, § 2.

whatever the Framers and ratifiers had in mind, “high Crimes and Misdemeanors” most likely did not mean common crimes like felonies or breaches of the peace.

Sometimes we will want ethos and structure to provide distinctions that the framework language of a Constitution does not. Nothing in the text of the Constitution specifically forbids a state from taxing the operations of the federal government. The notion, however, that a legislative body can tax only those persons who are represented in that body—or who seek its protection—is a fundamental principle of our constitutional ethos and the structure of federalism.²²⁵ The same sort of analysis applies to the confirmation of judges and cabinet members: the text makes no distinction between them, but lifetime appointment to a coordinate branch of government demands much stricter scrutiny than the fulfillment of a president’s judgment in choosing his subordinates.

This marshaling of the forms of argument helps us dismiss the suggestion that the standards for the impeachment of a president are the same as they are for judges and other civil officers. Here, too, the text makes no distinction, but as a structural matter, equal standards would be nonsensical. The grounds for the expulsion of the one person elected by the entire nation to preside over the executive cannot be the same as those for one member of the almost four-thousand-member federal judiciary. Unlike criminal proceedings, which are designed to treat all defendants alike regardless of their station, impeachment is not a criminal proceeding—that’s why double jeopardy doesn’t forbid the subsequent trial of an impeached official. Impeachment is the attack of one office on another; civilians cannot be impeached. Thus the relative responsibilities of the official to be impeached are automatically drawn into the question. The duties of the president—especially with respect to foreign and military affairs—make it obvious that the threats to the State posed by presidential misconduct are unique. The language of the text provides a floor, not a ceiling.

This is a profound structural difference, and it militates against the broader array of errors for which we would remove a judge, who is unelected. Discussion of impeachment and of the presidency in the *Federalist Papers*, our best resource for historical argument about the intentions behind the original, unamended text, stresses the unique responsibilities of the president and his unique vulnerabilities. Almost nothing is said of the other civil officers subject to impeachment, yet we can readily infer that the basis for removing judges and magistrates also arises from their unique responsibilities. Ambassadors are

225. *McCulloch v. Maryland*, 17 U.S. 316, 435 (1819).

vulnerable to seduction by foreign interests; regulators to being co-opted by those they regulate; and judges, whose behavior in conducting court proceedings requires a reputation for probity, can be removed for arbitrariness or want of personal dignity.²²⁶

Prudential values are also at stake. We wouldn't want to pause the nation's business to search for presidential peccadilloes; nor would we want to cripple the country's authority in foreign negotiations by casting doubt on the viability of "the chief organ of foreign relations" unless he posed some historic threat to our constitutional order.

This is further confirmed by doctrine. Although prosecutors in the House have repeatedly attempted to ensnare presidents in alleged wrongs having little to do with any official transgression—from Andrew Johnson to Bill Clinton—they have been uniformly rebuffed. The Senate has refused to convict on such charges, while evidencing no such compunction about charges against judges.

The impeaching House and the trying Senate derive their power from the consent of the governed, and it is a cardinal principle of our constitutional life that governments are created to protect the rights of the governed—including the right to have their consent manifested in the persons chosen to govern. That means protecting the electorate's choice of president, unless the very destruction of the protecting State and its constitutional norms is at stake. In this way too, the president is in a very different position from that of a federal magistrate or cabinet member.

III. CHAPTER NINE: PARTICULAR PROBLEMS

In 1974, introducing his chapter entitled "Application to Particular Problems," Charles Black wrote:

226. For example, Judge John Pickering was impeached in 1803 and convicted by the Senate in 1804 on charges of intoxication on the bench and unlawfully handling property claims. ASHER HINDS, 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, at 681-82, §2319 (1907). Judge Harry Claiborne was impeached and convicted by the Senate in 1986 for having falsified his tax returns, a crime for which he had already been criminally convicted and sentenced two years in prison in 1984. He was removed while imprisoned, despite his intention to return to the bench after his sentence. *The Impeachment Trial of Harry E. Claiborne* (1986) U.S. District Judge, Nevada, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Claiborne.htm [<https://perma.cc/C6LK-JWBF>]. Walter Nixon was impeached and convicted by the Senate in 1989 for perjury before a federal grand jury. Neil Lewis, *Senate Convicts U.S. Judge, Removing Him From Bench*, N.Y. TIMES (Nov. 4, 1989), <https://www.nytimes.com/1989/11/04/us/senate-convicts-us-judge-removing-him-from-bench.html> [<https://perma.cc/2UPB-TQM8>]; see also 145 CONG. REC. 495 (1999) (trial memorandum of William Jefferson Clinton).

In what follows, I do not intend in any way to judge any real-life issue. Questions of exact fact and of evidence are always crucial, and it is not in any case my wish here to decide anything. But some questions are inevitably suggested by events, and can be dealt with tentatively.²²⁷

In this similarly titled chapter, I intend to apply the analysis thus far outlined to some issues around impeachment that are on people's minds today but that did not preoccupy the public in 1974. This can be helpful by giving concrete form to our methods and also to indicate why and in what ways the context for impeachment has altered since then.

The principal changes in context that have brought these hitherto obscure questions to the fore are (1) new technologies of information, (2) new political norms of behavior that both drive and derive from our changing culture of governance, and (3) the emergence of political leaders whose habits reflect an entrepreneurial rather than a managerial or legal background.

Some of these new challenges test one's previous constitutional commitments, in my case, for example, to the unitary executive, that is, the idea that the president as chief executive has control over all the acts of the officials of the various departments. Similarly, Nixon's invocation of executive privilege tested Black's commitment to preventing the Congress from weakening the structural integrity of the presidency. Should one's constitutional sense of how things ought to be done—what is appropriate and well adapted to our constitutional system—change in a new era of political competition, or with new technologies for campaigning, or in light of unprecedented practices by candidates? A constitution is intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. But it is also meant to provide the methods for achieving legitimacy to those adaptations, and—except in the greatest crises—that means providing continuity with our legal traditions rather than chasing the curve balls thrown by novel and even apparently threatening developments.

A. Burglary

In May 1972, a team directed by the Nixon campaign broke into the Democratic National Committee (DNC) headquarters, located in the Watergate office complex.²²⁸ There they planted two listening devices and stole

227. BLACK & BOBBITT, *supra* note 18, at 37.

228. Alfred E. Lewis, *5 Held in Plot to Bug Democrats' Office Here*, WASH. POST (June 18, 1972), <http://www.washingtonpost.com/wp-dyn/content/article/2002/05/31/AR2005111001227.html> [<https://perma.cc/TUX8-46ZU>].

copies of confidential documents. When the telephone bugs failed to operate properly, the team reentered the Watergate on June 17 in order to photograph documents and to plant two new microphones in an office adjacent to that of DNC and campaign chairman Lawrence O'Brien. The burglars were arrested by police as they left the premises.

In March 2016, the email account of Hillary Clinton's campaign chair was hacked, and a vast trove of communications was stolen. In June and July, DCLeaks and WikiLeaks released emails taken from the Democratic National Committee. More were subsequently obtained by WikiLeaks and released in October and November 2016. Ultimately, more than 150,000 emails were published, stolen from more than a dozen Democrats.²²⁹

Taken as a whole, it is remarkable how benign, though occasionally petty, and how earnest, though occasionally disenchanted, these emails are. But carefully culled, phrases and sentences can be made to seem more sinister, and these were picked up by American social media and US news organizations, some hostile to the Clinton campaign, and Russian troll farms to give the impression of a bigger story than the facts warranted. Classification labels like "Confidential" were pasted in to make the stolen documents more enticing to journalists. Juxtaposed in this way, it seems obvious that the Watergate break-ins of 1972 were a precursor for the electronic break-ins of 2016. Only the revolution in information technology, which made possible the vast change in scale and the relative immunity of the burglars, is different.

For our purposes, the question is what culpability is laid at a candidate's door if he uses the fruits of these thefts in the closing days of a presidential election and even publicly (and perhaps privately) encourages the thefts. For example, in New Hampshire the day before the general election, the Republican candidate said, "[My opponent] has shown contempt for the working people of this country. [In] WikiLeaks they have spoken horribly about Catholics and evangelicals and so many others. They got it all down, folks. WikiLeaks. WikiLeaks."²³⁰ And the day before in Iowa, "Just today we learned [my opponent] was sending highly classified information through her

229. Jonathan Martin & Alan Rappeport, *Debbie Wasserman Schultz to Resign D.N.C. Post*, N.Y. TIMES (July 24, 2016), <https://www.nytimes.com/2016/07/25/us/politics/debbie-wasserman-schultz-dnc-wikileaks-emails.html> [<https://perma.cc/Y6JC-JZ9A>].

230. Chuck Todd et al., *Trump Has Been Strikingly Consistent in Denying Russian Hacking Role*, NBC NEWS (Jan. 6, 2017), <https://www.nbcnews.com/politics/first-read/trump-has-been-strikingly-consistent-denying-russian-hacking-role-n703866> [<https://perma.cc/RU86-RYSQ>].

maid. WikiLeaks!”²³¹ Four days before in Florida, “Out today, WikiLeaks just came out with a new one, it’s just been shown that a rigged system with more collusion, possibly illegal, between the Department of Justice, [my opponent’s] campaign, and the State Department.”²³²

Exploiting negative information about a political opponent, even if that information is the fruit of a burglary—as the WikiLeaks release clearly was—does not furnish grounds for an impeachment. In the WikiLeaks case, the information was enthusiastically picked up by the *New York Times* and other mainstream outlets, carefully dripping revelations on their front pages day by day, despite their editors’ knowing the illegal provenance of the materials they were releasing.²³³ How could the House penalize a candidate for repeating—even exaggerating—information in the public domain? Where there is no evidence of a conspiracy between the campaign and the burglars, or no evidence that the candidate was aware of such a conspiracy, much less orchestrated it, there is no constitutional crime. Were the burglary commissioned or facilitated by the campaign’s leadership, that might well serve as the basis for counts of impeachment. One might reasonably argue, in that case, that impeachment is the only equitable remedy, because the result of the election is the fruit of the crime. In that case, we simply cannot know what the true result of the voting would have been, because the election’s outcome was perverted by unlawful acts.

But imagine a different hypothetical. Suppose such a burglary— a cyberburglary—were part of a pattern of long-standing efforts by a foreign power to ensnare and inculcate a private party by granting his enterprises favorable governmental rulings and advantageous loans, with the aim of acquiring influence by compromising an otherwise innocent party. We are on alert for this sort of thing in our domestic politics, but in *Federalist* #68, Hamilton observed that “cabal, intrigue, corruption... might naturally have

231. Chuck Todd, Mark Murray & Carrie Dann, *How Donald Trump Pushed the ‘Treasure Trove’ of Hacked Emails*, NBC NEWS (Dec. 15, 2016), <https://www.nbcnews.com/politics/first-read/how-donald-trump-pushed-treasure-trove-hacked-emails-n696351> [https://perma.cc/S8KE-8WG9].

232. *Id.*

233. See, e.g., Amy Chozick & Nicholas Confessore, *Hillary Clinton’s Campaign Strained to Hone Her Message, Hacked Emails Show*, N.Y. TIMES (Oct. 10, 2016), <https://www.nytimes.com/2016/10/11/us/politics/hillary-clinton-emails.html> [https://perma.cc/6KS5-9Q8V]; Rosalind Helderman & Tom Hamburger, *Hacked Emails Appear to Reveal Excerpts of Speech Transcripts Clinton Refused to Release*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/hacked-emails-appear-to-reveal-excerpts-of-speech-transcripts-clinton-refused-to-release/2016/10/07/235c26ac-8cd4-11e6-bf8a-3d26847eed4_story.html [https://perma.cc/7ZVV-HX3J].

been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils.”²³⁴ Then the indictment by the House and the fact-finding to be tried by the Senate would be a more complex undertaking. The Senate would have to determine whether the president was influenced by such sympathetic support—including but not limited to the burglary, whether or not he was aware of the foreign state’s intention.

There can be little doubt that the remedy for acting on such inducements would be impeachment. At the Philadelphia Convention in 1787, Gouverneur Morris explained why he changed his mind about the need for an impeachment provision in the Constitution: “[N]o 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.”²³⁵

B. Bots

There is no longer any doubt that Russian agents distributed information through social media to networks and virtual communities: posting articles on false Facebook pages, deploying a battalion of trolls, directing tens of thousands of bots to simulate waves of reaction and aim them at susceptible opinion, and to retweet false information from fake sources.²³⁶ In a creative twist on “hybrid warfare,” the Russians over many years have developed an increasing sophistication in the digitalization of disinformation.

US counterintelligence reports in March 2017 disclosed that the Russian government had used these tactics to influence key aides of members of Congress.²³⁷ Disinformation was broadcast on social media, which were then carefully monitored to see how the targets responded in an attempt to find those susceptible persons who might unwittingly support Russian objectives.²³⁸ The reports detailed how on August 7, 2016, a story was circulated that Hillary Clinton had Parkinson’s disease. That story went viral in August and exploded after Clinton nearly fainted from pneumonia and

²³⁴. THE FEDERALIST NO. 68, at 380 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

²³⁵. 5 ELLIOT, *supra* note 207, at 343.

²³⁶. See “Disinformation: A Primer in Russian Active Measures and Influence Campaigns: Hearing Before the Sen. Select Comm. on Intelligence,” 115th Cong. 30-31 (2017) (statement of Clint Watts, Robert A. Fox Fellow, Foreign Policy Research Institute).

²³⁷. See Massimo Calabresi, *Inside Russia’s Social Media War on America*, TIME (May 18, 2017, 3:48 PM), <http://time.com/4783932/inside-russia-social-media-war-america/> [<https://perma.cc/PGL9-KM32>].

²³⁸. *Id.*

dehydration in early September.²³⁹ Other false stories were circulated saying that Pope Francis had endorsed the Republican nominee and that Hillary Clinton had engineered the murder of a DNC staffer.

Counterintelligence officials have found evidence that during the campaign Russia targeted influential persons who would spread damaging stories fed to them. Russian operatives used algorithmic techniques to target the social media accounts of particular reporters, bought ads on Facebook to target propaganda at specific populations, and funded computer-mediated technologies and fake news outlets, which they targeted with increasing precision on voters in swing districts, notably in Michigan, Wisconsin, and Pennsylvania.²⁴⁰

The campaign manager for the Republican nominee on August 14 cited an attack on the US base at Incirlik, Turkey—a bit of fake news that originated with Russia.²⁴¹ The nominee himself at various times picked up misinformation from a *Sputnik* news agency site and legitimated it by repeating it to his followers.²⁴² False information pushed by Russian fronts was repeated by the Republican nominee's team in campaign briefings; hacks and leaks by the Russians were synchronized with actions taken in the nominee's campaign. The campaign of the Republican nominee often picked up fake news items and false lines presented by the Russians, and the Russians would repeat false information that originated with his campaign.²⁴³ The exploitation of the WikiLeaks disclosures of thousands of hacked emails from the DNC and the leadership of the Clinton campaign was one part of this pattern.

The implications for the impeachment process depend on whether the nominee, later the president, was aware of these operations; if so, when did he become aware of them; and what, if anything, did he do to encourage them, collaborate with them, or help conceal them. These inquiries are analogous to Senator Howard Baker's famous questions about President Nixon and the

²³⁹. *Id.*

²⁴⁰. *Id.*

²⁴¹. See Craig Timberg, *Russian Propaganda Effort Helped Spread 'Fake News' During Election, Experts Say*, WASH. POST (Nov. 24, 2016) https://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe_story.html [<https://perma.cc/DME4-GZEA>].

²⁴². Brian Naylor, *Trump Apparently Quotes Russian Propaganda to Slam Clinton on Benghazi*, NAT'L PUB. RADIO (Oct. 11, 2016), <https://www.npr.org/2016/10/11/497520017/trump-apparently-quotes-russian-propaganda-to-slam-clinton-on-benghazi> [<https://perma.cc/97MW-8UQ9>].

²⁴³. Ben Nimmo, *How Russia Is Trying to Rig the US Election*, CNN (Nov. 4, 2016), <https://www.cnn.com/2016/11/02/opinions/kremlin-trying-to-rig-election-nimmo-opinion/index.html> [<https://perma.cc/manage/create?folder=4028>].

Watergate break-in: “What did the president know and when did he know it?”²⁴⁴

Let’s apply these questions to a hypothetical. Assume three groups of actors: FBI personnel, Republican campaign officials, and Russian intelligence agents. Suppose the campaign officials shuffle information between the two intelligence agencies—giving the FBI information obtained by the Russian agents (without identifying the source) about potentially unlawful activities conducted by the Democratic campaign, and also giving the Russian agents information from the FBI to assist the Russians’ ongoing disinformation campaign about the Democrats. Suppose further that Russian agents possess incriminating information on the Democratic campaign, and have promised to release it in exchange for favorable policy positions in the Republican party platform—relief of sanctions against Russia and tacit acceptance of Russia’s annexation of Crimea, for example. If these discussions occurred, it might well be that Republican campaign officials saw nothing wrong either with their participation in the WikiLeaks operation or with their collaboration with friendly agents in the FBI. Since all the leading media outlets had relished publishing WikiLeaks material, what is wrong with giving information about possible crimes to the FBI? Whether it shows an alarming naïveté on the part of the campaign or an equally alarming sophistication on the part of the Russians, it is easy to see how, step by step, campaign personnel could have been led to participate in these disinformation efforts. That this made the Republican campaign leadership into a kind of “cut-out,” or insulating intermediary, for Russian intelligence does not mean that the candidate himself directed or even understood what was happening.

Given such a set of hypothetical facts, it is difficult to see how the candidate could, if elected, be found liable to impeachment absent definitive evidence that he directed his subordinates to conspire with agents of a hostile foreign power or proof of his promise to adopt the policy positions urged on him by those collaborating in the disinformation campaign. Moreover, it would be very hard to show that there was an exchange of promises. As we have seen countless times in our domestic politics, the recipient of assistance can always say, often credibly, that he would have taken the position desired by his patron anyway.

Whether or not these operations were undertaken in a conspiracy with a hostile foreign power, they do not amount to treason. The Framers, wary of the

244. Connie Cass, Associated Press, *Remembering Howard Baker, Whose Famous Question Embodied the Watergate Hearings*, PBS (June 26, 2014), <https://www.pbs.org/newshour/politics/remembering-howard-baker-whose-famous-question-embodied-watergate-hearings> [https://perma.cc/KY7F-XTAD].

danger that this legal concept might be used as a political weapon, enshrined in the Constitution itself a highly restrictive and binding definition:

“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”²⁴⁵

If we are not in a formal state of war with a hostile power – even if Russia is to be considered such a power – the giving of “Aid and Comfort” to that power in its campaign to defeat a US presidential candidate would not serve as a basis for a charge of treason.

Putting aside issues of evidence, as a matter of constitutional law, a conspiracy to pervert the course of a presidential election – whether by sophisticated technological means or simple vote stealing, and whether in league with a hostile foreign power or not – is an impeachable offense. That it may have occurred prior to the president’s taking office does not matter. The legal basis for impeachment would be overwhelming.

The instructions of the *Federalist Papers* could not be clearer that impeachment is a punishment for a political crime.²⁴⁶ In a democratic republic, whose legitimacy depends upon frequent popular elections, there could scarcely be a more manifest example of such a crime. The constitutional language of “high Crimes,” which refers to the damage done to the State’s legitimacy when its officials are bribed or suborned by foreign enemies, confirms the seriousness with which the Framers viewed this matter. The structure of the federal government deploys the Congress – with its broad representational mandate – in a judicial function when it indicts, tries, and convicts a president; that this is appropriate for a constitutional crime seems obvious. As a matter of prudence, an illegitimately elected president could not expect the allegiance of his subordinates – some of whom would be subject to criminal process – or of the People. As Black put it, “Who would salute?”²⁴⁷ As an ethical matter, it would be intolerable to allow a president to profit by such a crime, just as we do not permit a murderer to collect the insurance on the deceased; it is an ancient maxim that one cannot benefit from one’s crime (*commodum ex injuria sua nemo habere debet*). Finally, as a doctrinal matter, while there is no precise precedent, the Nixon impeachment suggests that tampering with the electoral process is *prima facie* a high crime or misdemeanor.

²⁴⁵. U.S. CONST. art. III, § 3.

²⁴⁶. See THE FEDERALIST NO. 65 (Alexander Hamilton).

²⁴⁷. BLACK & BOBBITT, *supra* note 18, at 48.

C. Obstruction

Whether or not a president was aware of foreign digitalized disinformation operations before they were exposed, if he attempted to impede valid government investigations of these activities in an effort to forestall their exposure and prosecution—for example, by directing subordinates to make false statements to DOJ investigators, or by offering various incentives to DOJ officials to end their investigations of those operations—these facts would be important to determine. It may well be that the Republican candidate and his senior team were unaware of any of the developments described in the previous section, or that they discounted reports of them; let's assume that. Yet at some point, the president-elect must have learned of these facts, even if he refused to believe that they affected the outcome of the election.

Many commentators at the time professed to be baffled as to what happened after the acting attorney general went to the White House to warn that the new national security advisor had been lying to the FBI about his contacts with the Russian ambassador and that the Russians were aware of this.²⁴⁸ Why was no action immediately taken? Didn't the president take these warnings seriously? Shouldn't he have been alarmed by the charge that his national security advisor might be vulnerable to Russian blackmail?

Putting to one side the much more serious issue of collaboration with Russia to manipulate the election, or a possible effort to cover up that collaboration, suppose that the following lay behind the events. The president-elect instructed his soon-to-be national security advisor to tell the Russian ambassador not to be too upset about the previous administration's sanctions against Russia because he planned to reverse them once he became president. The president-elect saw no problem with undermining the previous administration's policy—after all there would be a new president in a few weeks. Not until a *Washington Post* article appeared exposing these pre-inauguration contacts was the president forced to dismiss his agent.²⁴⁹

248. Or, as one reporter for the *Washington Post* put it, “How the White House could have failed to heed [those] damning warnings about [former national security advisor for President Donald Trump Michael] Flynn is particularly puzzling . . .” Aaron Blake, *Sean Spicer's Admission: Trump Dismissed Obama's Warning About Michael Flynn as Sour Grapes*, WASH. POST (May 8, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/05/08/why-did-trump-ignore-obama-and-sally-yates-about-michael-flynn-because-they-were-losers-apparently/> [https://perma.cc/MP96-FVHW].

249. Greg Miller et al., *National Security Adviser Flynn Discussed Sanctions with Russian Ambassador, Despite Denials, Officials Say*, WASH. POST (Feb. 9, 2017), <https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6>

In this hypothetical, the president would not be moved by the attorney general's warning; he knew his national security advisor couldn't be blackmailed with the threat of exposure to the president because there was nothing to expose. Nevertheless, the president may have begun to realize that pre-inauguration contacts with the Russians, while intended to be merely reassuring, had given the Russians a weapon to get their own way should they threaten the disclosure of these contacts to the public. Coupled with the collusion charges then beginning to surface, the possibility of such a disclosure might well have motivated the new president to make efforts to quell any investigation into the matter, including firing his own national security advisor.

Perhaps this hypothetical even helps us analyze other situations in which a president is grappling with a crisis of legitimacy that may be only partly of his making.

One sometimes neglected element in our construction of the impeachment term "bribery" is that, as Black put it, "bribery may mean the *taking* as well as the *giving* of a bribe."²⁵⁰ "Is it 'bribery,'" he asks, "to suggest to a federal judge, engaged in trying a case crucial to the executive branch, that the directorship of the Federal Bureau of Investigation might be available?"²⁵¹ It all depends on the motive and intent of the president.

Imagine further that a president invited the FBI director to dinner at the White House, and in the course of their discussion the director asked whether he would be kept on, and the president said, "I'll think about it" and then immediately asked whether he was the subject of an FBI investigation. This might put the president on dangerous ground. The fact that he could simply order the FBI director to cease any such investigation does not alter the fact that offering an inducement to act—by, for example, suggesting that the director's future in his official position might hinge on his shutting down an investigation of the president—comes perilously close to offering a bribe. It is no defense to say that the appointment, unlike the secret payment, is made in public: the bribe is not the appointment, but the promise to appoint in exchange for the performance of an official act.

Suppose, then, the president expressed the hope that the FBI director would drop the investigation into the dismissed national security advisor (whose lying to federal officials about pre-inauguration contacts with the Russians may well have been done at the president's direction). In the context

-ee11-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.529646692e09
/PG5S-MCYY].

[<https://perma.cc/PG5S-MCYY>].

250. BLACK & BOBBITT, *supra* note 18, at 25.

251. *Id.*

of the pending reappointment (or dismissal) of the director, this, too, could be construed as a quid pro quo. The fact that the president could have simply ordered the FBI to drop the investigation actually counts against him: it makes it appear that he was loath to give that order and was seeking some extraconstitutional way to bring about the same result. This construction is confirmed if the president has tried to get other agencies, like the National Security Agency and the office of the director of national intelligence, to interfere with the FBI. Because the investigation concerns the president's own conduct, these actions suggest that rather than taking care to see that the laws are faithfully enforced, he is, for self-serving and possibly even sinister motives, trying stealthily to derail their enforcement. Suppose, as well, we learned from a National Security Council memorandum of the president's conversation with Russian diplomats and that he told them, "I just fired the head of the FBI. I faced great pressure because of Russia. That's taken off."

It's worth recalling that Article 1, section 4 of the Articles of Impeachment against President Nixon accused him of "interfering or endeavouring to interfere with the conduct of investigations by the Department of Justice [and] the Federal Bureau of Investigation."²⁵² From this we have another famous phrase of the era — "It's not the crime, it's the cover-up."

Legal commentators who think the key question is whether the president's actions violated Title 18 U.S.C. 73 miss the point.²⁵³ "Obstruction of justice" does not appear in the Constitution. Whether it can serve as a basis for an impeachment depends on whether the president's actions constitute the kind of wanton constitutional dereliction captured by the phrase "high Crimes and Misdemeanors," not on whether they conform to the prohibitions contained in a criminal statute. Attempting to distort an otherwise valid investigation of the executive by the Department of Justice and the FBI is a basis for impeachment that is affirmed by the precedent of Nixon's impeachment.

The standards of a criminal statute, which are supposed to be quite rigorous in our system, and which generally require *scienter*,²⁵⁴ or knowledge of wrongdoing, on the part of the defendant, cannot substitute for the standards of impeachment by the House and conviction by the Senate. The standards for impeachment need not depend upon the president's actual intent to commit a crime, constitutional or otherwise. The Framers repeatedly stated that the

²⁵². H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 2 (1974).

²⁵³. See 18 U.S.C. §§ 1501-1521 (2018) (criminal statutes prohibiting obstruction of justice).

²⁵⁴. See SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 258-59 (10th ed. 2017).

president could be impeached for the acts of his subordinates, whether or not he directed them in their misdeeds.

That doesn't mean that the president's motives are irrelevant, only that the inquiry for a statutory crime is not the same as for a constitutional crime. Once out of office, a president can always be prosecuted for his statutory violations, and if convicted, his conviction can be contested and appealed. But the damage done by undoing an election through an impeachment that depends on too many inferences from behavior that may have been innocent cannot be so easily remedied. Motives count, even if they need not be as specific as those demanded by the ordinary criminal processes.

D. Pardons

In September 1974, President Gerald Ford pardoned his predecessor Richard Nixon for all crimes that Nixon had “committed or may have committed or taken part in” with regard to the Watergate scandal. Although the *New York Times* editorial board proclaimed this a “profoundly unwise, divisive, and unjust act,”²⁵⁵ most persons today looking back at that action—which clearly cost Ford the presidential election in 1976—see it as a decent, humane, and courageous step toward healing the nation and getting the administration back to the business of governing.²⁵⁶ It was just such purposes that were contemplated by the Framers, who in drafting the pardon power mixed mercy with a shrewd eye to repairing political division. As Hamilton wrote in *Federalist* #74, “Humanity and good policy conspire” in the pardon

255. Editorial, *The Failure of Mr. Ford*, N.Y. TIMES (Sept. 9, 1974), <https://www.nytimes.com/1974/09/09/archives/the-failure-of-mr-ford.html> [<https://perma.cc/W6CN-NMAV>].

256. Adam Clymer, *Ford Wins Kennedy Award for ‘Courage’ of Nixon Pardon*, N.Y. TIMES (May 22, 2001), <https://www.nytimes.com/2001/05/22/us/ford-wins-kennedy-award-for-courage-of-nixon-pardon.html> [<https://perma.cc/6ZUV-ZWXN>] (quoting Sen. Ted Kennedy: “I was one of those who spoke out against his action then. But time has a way of clarifying past events, and now we see that President Ford was right. His courage and dedication to our country made it possible for us to begin the process of healing and put the tragedy of Watergate behind us.”); see also Mark Updegrove, *How Gerald Ford Healed a Nation Post-Watergate*, CBS NEWS (July 27, 2014, 9:59 AM), <https://www.cbsnews.com/news/how-gerald-ford-healed-a-nation-post-watergate> [<https://perma.cc/KP5H-VDEB>]. A Gallup poll showed a majority of Americans approved of the pardon by 1984, the last time the question was asked. Joseph Carroll, *Americans Grew to Accept Nixon’s Pardon*, GALLUP (May 21, 2001), <https://news.gallup.com/poll/3157/americans-grew-accept-nixons-pardon.aspx> [<https://perma.cc/63BQ-FQ25>].

power.²⁵⁷ George Washington's pardon of the participants in the Whiskey Rebellion remains the paradigm.²⁵⁸

Yet the increasingly degraded culture of American politics may someday present a novel set of possibilities: a cornered president may pardon his coconspirators, and even attempt to pardon himself. Such scenarios would have been unthinkable in the past.

Article II, section 2 of the Constitution provides that the president "shall have the Power to grant Reprieves and Pardons for offenses against the United States, except in cases of Impeachment." From this spare text we can draw several legal conclusions: (1) that the power is unlimited with respect to federal crimes but does not extend to federal civil actions, state crimes, or impeachments; and (2) that a pardon cannot extend to a future act, there being no "offense" to which a pardon may be applied. This reading was confirmed by a 1975 federal district court ruling that upheld the Ford pardon, citing an 1867 US Supreme Court decision during the administration of Andrew Johnson.²⁵⁹ We can also conclude (3) that apart from the explicit terms of the text, a pardon cannot prevent impeachment because impeachment is not a criminal process.

Does that mean, as some have written, that a president may not be impeached for exercising his "unlimited" power to pardon? It most certainly does not. To take the most obvious case, summoned up by Black, suppose that a pardon were procured through bribery, or that "the president granted a set of pardons to assist a foreign adversary in waging war against the United States."²⁶⁰ In these cases and in other clear examples—Black asks us to contemplate a president who announces a policy of granting pardons to all police who kill anyone in the line of duty in Washington, D.C., whatever the circumstances of the killing²⁶¹—the president could certainly be impeached, and following conviction, he could be indicted and tried (including as an

257. THE FEDERALIST NO. 74, *supra* note 58, at 447 (Alexander Hamilton).

258. Jeffrey Crouch, *The Law: Presidential Misuse of the Pardon Power*, 38 PRESIDENTIAL STUD. Q. 722, 724-25 (2008) ("The first president to use the pardon power, George Washington, showed mercy toward the Whiskey Rebels, illustrating his sensitivity to justice and the public interest and providing a precedent for his successor.").

259. *Murphy v. Ford*, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975).

260. Jane Chong, *Impeachment-Proof? The President's Unconstitutional Abuse of Constitutional Powers*, LAWFARE (Jan. 2, 2018, 11:00 AM), <https://www.lawfareblog.com/impeachment-proof-presidents-unconstitutional-abuse-his-constitutional-powers> [https://perma.cc/YYX8-UT86].

261. BLACK & BOBBITT, *supra* note 18, at 31.

accessory after the fact, that is, as someone who may not have been aware of the original plan to commit a crime but who facilitated escape).

It has actually been proposed—even, I am sorry to say, by two of my successors at the Office of White House Counsel—that a president could pardon himself. This, too, is a “vacancy” sign of the times. Not only is self-pardon ethically ridiculous, it is legally absurd as a construction of the Constitution. Let us see why.

In the first place, the constitutional text employs the term “grant” to denote the power exercised by the president. A grant is a conveyance or act by which a chattel or status—some good—is generally taken from one party and given to another. A president cannot, any more than anyone else, be both grantor and grantee of precisely the same thing. As a matter of original intent, the concept of a pardon power was borrowed by the Framers from the British monarchy, which over many centuries held it to be an act of clemency, a Christian act of forgiveness that one can hardly award to oneself.²⁶² (I am indebted to the constitutional scholar Akhil Amar for the Zeno-esque observation that if the grant of a pardon for illicit purposes can be a crime, then a president who pardons himself must then issue another pardon to insulate that pardon, and another one to protect him from prosecution for that pardon, and so on infinitely.) Moreover, as a matter of the American constitutional ethos, we have a long-standing principle, applying not only to reprieves and pardons but to prosecutions, judgments, and even jury participation, that no one can be a judge in his own cause. This is captured by the familiar legal phrase “*nemo judex in causa sua*.”

Nor should it be dismissed that giving the president the power of self-pardon effectively licenses him to commit any crime with impunity, subject

262. See Austin Sarat, *At the Boundaries of Law: Executive Clemency, Sovereign Prerogative, and the Dilemma of American Legality*, 57 AM. Q. 611, 615 (2005) (“As Blackstone noted, the power to grant reprieves and pardons was ‘one of the great advantages of monarchy in general; that there is a magistrate, who has it in his power to extend mercy, whenever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exception from punishment.’ [Alexander] Hamilton constructed his defense of the pardon power . . . [on the ground] that without such a power ‘justice would wear a countenance too sanguinary and cruel.’ To the framers, the power to pardon was necessary because of the way the law was applied. In England, . . . [j]udges often applied a death sentence, having no choice, but applied for a Royal Pardon in the same [breath]. This is what Hamilton was referring to when, in Federalist 74, he mentioned ‘necessary severity’ and ‘unfortunate guilt.’” (first quoting 4 BLACKSTONE, *supra* note 175, at *397-402; and then quoting THE FEDERALIST NO. 74, *supra* note 58, at 447 (Alexander Hamilton))); see also Brian C. Kalt, Note, *Pardon Me: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 782-89 (1996) (advancing an originalist argument against the validity of presidential self-pardons).

only to impeachment which he might then by illegal means—including the arrest and detention of members of Congress—evade.

Furthermore, at the Convention Edmund Randolph made the proposal that treason be exempted from the scope of the pardon power. “The President may himself be guilty The Traytors may be his own instruments.” In response to this concern, James Wilson replied that were the president “himself a party to the guilt, he can be impeached and prosecuted.” With this assurance, Randolph’s concern was set aside and no exemption for treason was made to the pardon power of the president.²⁶³ Obviously, a self-pardon is inconsistent with this colloquy.

Finally, we have the Nixon precedent. Had Nixon been able to pardon himself, there was little reason for him not to do so, thereby sparing Ford the political cost of pardoning him and avoiding the possibility that Ford would decline to do it (as President George W. Bush declined to pardon a White House subordinate of his²⁶⁴).

Putting aside, however, the moral opprobrium that would cling to such an action, there is cause for circumspection on the part of the president regardless of his sensitivities. A self-pardon, like any other pardon, might imply to the public that a crime has been committed, a concession the president might not wish to make if he has any doubts about the validity of his reprieve.

Nor are pardons entirely beneficial for a White House hoping to free itself of an entangling investigation. Once potential witnesses are pardoned, they may no longer claim Fifth Amendment immunity when testifying before Congressional tribunals, because they are already immunized from prosecution.²⁶⁵ Here, the road to presidential impeachment may lie directly through his pardon of others, who in addition to losing some shields of due process may also lose their incentive to protect him.

It remains only to observe that for the president to grant a pardon to a potential witness in order to protect himself in such circumstances would itself be an impeachable offense. It would constitute a bribe and a patent refusal to see that the duties of the chief law enforcement officer have been faithfully executed.

263. *Madison Debates*, September 15, 1787, AVALON PROJECT (2008) http://avalon.law.yale.edu/18th_century/debates_915.asp [<https://perma.cc/8V3Z-YA3C>].

264. See Amy Goldstein, *Bush Commutes Libby’s Prison Sentence*, WASH. POST (July 3, 2007) <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070200825.html> [<https://perma.cc/VGZ5-MEYV>].

265. See, e.g., Asha Rangappa, *Trump’s Pardon Power Is a Double-Edged Sword*, CNN (June 6, 2018, 11:45 AM), <https://www.cnn.com/2018/06/05/opinions/what-pardon-power-means-to-trump-rangappa-opinion/index.html> [<https://perma.cc/AVQ2-8RLP>].

E. Incitement

It is an open question—but not one that we lack the methods to answer—whether incitements to violence against protestors, the news media, ethnic or religious groups, or members of the bureaucracy and the judiciary amount to “high Crimes and Misdemeanors.” I suppose it would depend on the consistency and persistence of the incitements, the practical effects on the body politic of such septic exhortations, and even the seriousness with which they are made (and taken). Such a fact-centered inquiry is analogous to the investigation of a president’s motives to determine whether he has committed bribery. In both cases, the same acts might or might not serve as a valid predicate for impeachment, depending on context and circumstances. It would be primarily a prudential constitutional inquiry, examining the practical effects of such incitements and whether they put the country at risk of civil conflict. We have never had to confront such a possibility, but the increasing vituperation of public life and the lack of scruple with which accusations are made from many quarters can create an atmosphere in which a president who both contributes to and benefits politically from this debased condition might be removed from office after a historic tragedy.

F. Intimidation

For nearly a year in 1988, the Speaker of the House, Jim Wright, was the subject of philippics by a then little-known congressman from Georgia, Newt Gingrich, who called Wright, among other things, “a crook.”²⁶⁶ The House Ethics Committee subsequently asserted that it found numerous examples of Wright’s having accepted personal gifts and of a possible evasion of limits on outside income through a publishing arrangement, and it made other accusations,²⁶⁷ all of which Wright denied. The Democratic caucus was shaken, however, by Gingrich’s vituperative charges and sought to replace Wright with a more avuncular member, Thomas Foley, who it was thought might be less of a lightning rod for criticism going into the midterm elections.²⁶⁸ In a floor

266. Dan Balz & Ruth Marcus, *Gingrich Calls Criticism ‘Grotesque,’* WASH. POST (Jan. 21, 1995), https://www.washingtonpost.com/archive/politics/1995/01/21/gingrich-calls-criticism-grotesque/e17603bo-96e6-4d72-8668-375ce6228752/?utm_term=.8918466bcd4e [https://perma.cc/L6LK-A3TM].

267. H. COMM. ON STANDARDS OF OFFICIAL CONDUCT, 101ST CONG., STATEMENT OF ALLEGED VIOLATION IN THE MATTER OF REP. JAMES C. WRIGHT, JR. 36, 63-74 (Comm. Print 1989).

268. Michael Oreskes, *Foley’s Law*, N.Y. TIMES (Nov. 11, 1990), <https://www.nytimes.com/1990/11/11/magazine/foley-s-law.html> [https://perma.cc/3P9F-RR6X].

speech on April 30, 1989, that ended with his dramatic resignation, Wright called for an end to the “mindless cannibalism” and the “manic idea of a frenzy of feeding on other people’s reputations.”²⁶⁹ By the time Gingrich himself was ejected from the speakership by his caucus—and had been the subject of far more serious ethics charges than Wright—the permissible grounds of political attack among officeholders had changed. It didn’t help that the impeachment of Bill Clinton—led by Speaker Gingrich—arose from an embarrassing sexual affair, revealing a character blemish that, it turned out, was shared by the Speaker,²⁷⁰ his chosen successor as Speaker,²⁷¹ his successor as Speaker,²⁷² the chief House manager of the impeachment,²⁷³ and other House members who had voted to impeach Clinton.²⁷⁴

If impeachment was the catalyst for this deplorable loss of decorum, it was also a consequence. Should we now expect the impeachment process to have further consequences? That is, should we be alert to changes in the president’s behavior that mirror these developments in Congress? Claims of criminal wrongdoing are far less significant when made by a House committee or a member than when they are made by an executive with the power to prosecute. What if the president directed the Department of Justice to initiate investigations to punish or disgrace his political adversaries?

Throughout 2017 and into 2018 the president repeatedly claimed that serious crimes had been committed by the Democratic nominee for the presidency in 2016;²⁷⁵ by the director of the FBI;²⁷⁶ by the former director of

269. 135 CONG. REC. 10440 (1989) (Question of Personal Privilege—Jim Wright, Speaker of the House).

270. Ben Evans, *Gingrich Had Affair During Clinton Probe*, WASH. POST (Mar. 8, 2007, 11:04 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/08/AR2007030801847.html> [https://perma.cc/DTY6-UV9E].

271. Katharine Q. Seelye, *Livingston Quits Over Adultery Admission*, N.Y. TIMES (Dec. 20, 1998), <https://archive.nytimes.com/www.nytimes.com/library/politics/122098impeach-livingston.html> [https://perma.cc/38KG-SV4E].

272. Monica Davey et al., *Dennis Hastert Sentenced to 15 Months, and Apologizes for Sex Abuse*, N.Y. TIMES (Apr. 27, 2016), <https://www.nytimes.com/2016/04/28/us/dennis-hastert-sentencing.html> [https://perma.cc/TM7T-BT2D].

273. Howard Kurtz, *Report of Hyde Affair Stirs Anger*, WASH. POST (Sept. 17, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/hyde091798.htm> [https://perma.cc/RG8P-E6VX].

274. *Id.*

275. Daniel Politi, *As Pressure Mounts, Trump Predictably Lashes Out Against Hillary Clinton Yet Again*, SLATE (Dec. 3, 2017, 9:17 AM), www.slate.com/blogs/the_slatest/2017/12/03/as_pressure_mounts_trump_predictably_lashes_out_against_hillary_clinton.html [https://perma.cc/H5WH-FTQS].

the CIA;²⁷⁷ by the former director for National Intelligence;²⁷⁸ by the ranking Democratic member of the House Intelligence Committee;²⁷⁹ by the ranking member of the Senate Intelligence Committee;²⁸⁰ by the former chairman of the Senate Intelligence Committee;²⁸¹ by the former attorney general;²⁸² and, perhaps most egregiously, by his predecessor, the former president, who he claimed had illegally wiretapped him.²⁸³

If a president followed up such political rhetoric by initiating actual prosecutions of charges he knew or should have known to be baseless, there might well be grounds that he had abused his powers as the chief law enforcement officer to such a degree that he had committed a “high Crime.”

G. Emoluments

It ought to be obvious that not every violation of a duty or prohibition whatsoever specified by the Constitution is necessarily an impeachable offense. If the president garbles the words of the Oath of Office, he can scarcely be impeached for it, although the duty is specific and unqualified. Suppose, then, that a president with a worldwide commercial enterprise based on the

-
- 276. Kelsey Tamborrino, *Trump Tweets Comey Leaked Classified Info: ‘That Is so Illegal,’* POLITICO (July 10, 2017, 7:07 AM), <https://www.politico.com/story/2017/07/10/trump-tweet-james-comey-classified-information-240350> [https://perma.cc/5VZP-WESD].
 - 277. Eli Watkins, *Donald Trump Slams CIA Director Brennan over Plea for ‘Appreciation’ of Intel Community*, CNN (Jan. 16, 2017, 9:44 AM), <https://www.cnn.com/2017/01/15/politics/john-brennan-cia-donald-trump/index.html> [https://perma.cc/B498-2295].
 - 278. Alana Abramson, *This Former Intelligence Official Questioned Trump’s Fitness for Office. So Trump Tweeted at Him*, TIME (Aug. 24, 2017), <http://time.com/4914130/james-clapper-donald-trump-fitness/> [https://perma.cc/W8GA-T4QY].
 - 279. Maegan Vazquez, *Trump Takes Aim at Schiff Ahead of Push to Release Democrats’ Memo*, CNN (Feb. 8, 2018), <https://www.cnn.com/2018/02/05/politics/trump-little-adam-schiff-tweet/index.html> [https://perma.cc/3CW6-H6YS, 7:25 PM ET].
 - 280. Brett Samuels, *Trump Blasts Warner Joke About Mueller Probe*, HILL (June 25, 2018, 7:35 PM), <https://thehill.com/homenews/administration/394063-trump-blasts-warner-joke-about-mueller-probe> [https://perma.cc/58UZ-BS5Y].
 - 281. Shannon Pettypiece & Steven Dennis, *Trump Says ‘Sneaky’ Feinstein Testimony Release May Have Been Illegal*, BLOOMBERG (Jan. 10, 2018, 2:39 PM), <https://www.bloomberg.com/news/articles/2018-01-10/trump-says-sneaky-feinstein-testimony-release-possibly-illegal>.
 - 282. Politico Staff, *Trump Claims Lynch Acted Illegally and Gave Clinton a ‘Free Pass,’* POLITICO (June 13, 2017, 9:10 AM), <https://www.politico.com/story/2017/06/13/trump-loretta-lynch-tweet-239478> [https://perma.cc/F664-RZLV].
 - 283. Jeremy Diamond et al., *Trump’s Baseless Wiretap Claim*, CNN (Mar. 5, 2017, 6:59 AM) <https://www.cnn.com/2017/03/04/politics/trump-obama-wiretap-tweet/index.html> [https://perma.cc/6FL6-J3SV].

marketing of his surname as a brand refused to cease his involvement with this enterprise on entering office. Does the recognition and protection of his trademarks by foreign governments constitute an “emolument” forbidden by Article I?²⁸⁴ Suppose this global enterprise also sells and rents residential and commercial real estate, and that foreign governments or their corrupt allies in authoritarian states surge to buy these properties when the new president is inaugurated. Does his retention of his interests, however passive, amount to a prohibited emolument?

The attitude of the Framers and ratifiers can be gleaned from American reaction to the XYZ Affair, which precipitated the first international war of the United States. The affair embarrassed the Adams administration, which had sought diplomatic negotiations with France only to be rebuffed until payments were made to the French foreign minister, Talleyrand. This was a common European practice at the time, although Talleyrand seems to have exceeded even the capacious moral boundaries of the age; he was known to receive a vast retainer from the czar even during periods of Franco-Russian conflict. One of his methods of earning income was to sell or rent châteaux to government officials, who felt obliged to comply.²⁸⁵

The application of the Emoluments Clause to the president has been disputed on textual grounds.²⁸⁶ It is said that the president does not hold an “Office . . . under the United States” because the presidency is created by Article II of the Constitution and not by the Congress, whereas other parts of the Constitution that employ this phrase do not refer to constitutionally created offices.²⁸⁷ Recent precedent—President Obama’s receipt of the Nobel Prize, for example—goes the other way and requires divestiture.

284. “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.” U.S. CONST. art. I, § 9, cl. 8.

285. ROBIN HARRIS, TALLEYRAND: BETRAYER AND SAVIOUR OF FRANCE 131-33, 331 (2007); see also Andrew Roberts, *Talleyrand: The Old Fraud*, 25 NEW CRITERION 4, 6-7 (2007).

286. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114-15 (1995); Seth Barrett Tillman & Steven Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 137-40 (2008), <https://www.pennlawreview.com/online/157-U-Pa-L-Rev-PENnumbra-134.pdf> [https://perma.cc/G6GF-LX87].

287. For example, neither the President nor the Vice President receives commissions, although Article II requires the President to “Commission all the Officers of the United States.” U.S. CONST. art. II, § 3.

For our purposes, the issue is slightly different: Even assuming that a president's refusal to divest himself of profitable commercial ventures that are engaged with foreign governments is inconsistent with the Emoluments Clause, is it a valid ground for impeachment? That is, is it a constitutional crime that strikes at the stability and viability of the State? *Federalist* #73 seems to advise a complete disposition of any problematic assets. The purpose of the Emoluments Clause, we are told, is to ensure that the president "can have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution."²⁸⁸ It seems that we are left to decide whether the president's financial interests abroad—or their entanglement with foreign interests at home—truly jeopardize the integrity of the United States. This is a fact-based inquiry by the Senate, the constitutionally designated trier of fact in impeachments.

Perhaps the recent interest in the Emoluments Clause is not, however, merely an artifact of having a wealthy commercial promoter and businessman in high office but arises instead from a growing concern about the commodification of politics and its effects on the legitimacy of government. That these doubts have been stoked by the businessman's campaign—charging that the system is "rigged," that millions of votes were cast illegally, that his opponent should be sent to prison, and so forth²⁸⁹—may simply be an example of the old football adage that the "best defense is a good offense." In any case, the unease that pervades the current assessment of our institutions and their vitality is not going away.

We are moving, I believe, from the sort of State we have had since the Civil War—and a constitutional order that we share with other states that is committed to enforcing the values and improving the welfare of the dominant national group through law and the regulation of the market—to an informational state that prefers to use the market when it can, in preference to law, in order to maximize the wealth of society and the opportunities of individuals. That we should have harvested an entrepreneurial leader with no

²⁸⁸. THE FEDERALIST NO. 73, *supra* note 58, at 442 (Alexander Hamilton).

²⁸⁹. Michael D. Shear & Maggie Haberman, *Trump Claims, with No Evidence, That 'Millions of People' Voted Illegally*, N.Y. TIMES (Nov. 27, 2016), <https://www.nytimes.com/2016/11/27/us/politics/trump-adviser-steps-up-searing-attack-on-romney.html> [https://perma.cc/B9RS-SDNV]; Sophie Tatum, *Trump Responds to "Lock Her Up" Chants, Cites "Rigged System,"* CNN (Dec. 9, 2017, 6:59 AM), <https://www.cnn.com/2017/12/08/politics/donald-trump-rigged-system-florida-rally> [https://perma.cc/YJ56-DFJT]; Jane C. Timm, *Trump Again Claims Massive Vote Fraud. A Massive Search for Evidence Finds None*, NBC NEWS (Apr. 5, 2018, 4:46 PM), <https://www.nbcnews.com/politics/donald-trump/trump-again-claims-massive-vote-fraud-massive-search-evidence-finds-n863096> [https://perma.cc/Q2ZE-CT2F].

commitment to the political status quo—or to customary legal practices, for that matter—should not surprise us. Our task will be to harmonize these historic developments with the commitments of the Constitution, and that task cannot begin with simply rejecting what will seem to many to be very unsettling events.

H. Incapacitation: The Twenty-Fifth Amendment

The same forces that have brought an entrepreneurial leader to the White House are reflected in many other changes in the American constitutional order. Industrial nation-states used law and regulation to tame the market. State-owned enterprises abounded: airlines, energy companies, transportation networks, telecoms.²⁹⁰ Most industrial nation-states had a national health service and a system of public universities with modest student fees. Banks were heavily regulated, and in many countries the same organization could not conduct both depositary and investment operations.²⁹¹ The price of gold and the relative values of currencies were negotiated by states.²⁹² The international movement of capital was strictly controlled.

With the end of the Cold War and the development of technologies that empowered globalization, all that began to change, and a new, insurgent constitutional order began to emerge. This new constitutional order—the informational market-state—relied on the market rather than attempting to control it and steadily abandoned the industrial nation-state’s legal enforcement of the dominant national group’s moral commitments. The legitimacy of the informational market-state was based on the premise that success in the postwar world would accrue to the state that maximized its society’s total wealth by providing sustained economic growth, and that the way to do that was to increase the opportunities for all citizens. New policies and practices began to appear as harbingers of this new constitutional order.²⁹³

290. Carina Schmitt & Herbert Obinger, *The Rise and Decline of Public Enterprises in Western Democracies*, in STATE TRANSFORMATIONS IN OECD COUNTRIES 19, 20 (Heinz Rothgang & Steffen Schneider eds., 2015).

291. See, e.g., DAVID CARPENTER ET AL., CONG. RESEARCH SERV., THE GLASS-STEAGALL ACT: A LEGAL AND POLICY ANALYSIS (Jan. 19, 2016), <https://fas.org/sgp/crs/misc/R44349.pdf> [<https://perma.cc/3CLM-XQWD>]; Misao Tatsuta, *Securities Activities of Japanese Banks*, 4 U. PA. J. INT’L L. 259 (1982).

292. Maurice Obstfeld, *International Currency Experience: New Lessons and Lessons Learned*, 1995 BROOKINGS PAPERS ON ECON. ACTIVITY 1, at 119, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.321.1761&rep=rep1&type=pdf> [<https://perma.cc/VX9S-RE8C>].

293. See generally BOBBITT, THE SHIELD OF ACHILLES, *supra* note 162; BOBBITT, TERROR AND CONSENT, *supra* note 162, at 85-124.

When states go from a reliance on law and regulation, so characteristic of the industrial nation-state, to deregulation not only of industries but, far more importantly, of women's reproduction²⁹⁴; when they move from armies raised by conscription to an all-volunteer force, as all the most powerful states have done²⁹⁵; when they end their policies of tuition-free higher education in favor of tuition fees and need-based and merit-based scholarships²⁹⁶; when they go from providing direct cash transfers like unemployment compensation to job-skills training to get workers back into the labor market²⁹⁷; when state-owned enterprises are replaced by sovereign wealth funds²⁹⁸; when market-based regimes of direct democracy like referenda, recall votes, political polling, and voter initiatives begin to spread in preference to representational systems,²⁹⁹ turning citizens of a polity into consumers of its political products—when all this happens, we are seeing the beginnings of a change in the constitutional order.

One such change may be the adaptation of the Twenty-Fifth Amendment as a supplement to impeachment, triggering action in Congress, rather like voter initiatives that can propose statutes and thus prompt legislative action.

294. See generally Liz Ford, *Families, Fertility and Feminism: Landmarks in Women's Rights*, GUARDIAN (July 27, 2017 2:00 AM), <https://www.theguardian.com/global-development/2017/jul/27/families-fertility-feminism-landmarks-in-womens-rights-timeline> [https://perma.cc/U22T-T7V9].

295. See Cindy Williams, *From Conscripts to Volunteers: NATO's Transitions to All-Volunteer Forces*, 58 NAVAL WAR C. REV., Winter 2005, at 39, 39 ("Since the Cold War ended, twelve of NATO's twenty-six member states have suspended compulsory military service or announced plans to phase it out, thus joining the United States, Canada, the United Kingdom, and Luxembourg in the family of nations with all-volunteer armed forces (AVFs).").

296. Philip G. Altbach, Liz Reisberg & Laura E. Rumbley, *Trends in Global Higher Education: Tracking an Academic Revolution—A Report Prepared for the UNESCO 2009 World Conference on Higher Education*, UNESCO xii (2009), <http://unesdoc.unesco.org/images/0018/001831/183168e.pdf> [https://perma.cc/YK6S-JBWP].

297. Jochen Clasen, *Motives, Means and Opportunities: Reforming Unemployment Compensation in the 1990s*, 23 W. EUR. POL. 89, 90 (2000) ("The distinguishing feature is not so much a decrease in generosity as the introduction of an obligatory transition from cash benefit receipt to participation in schemes such as training, education, work experience or job creation.").

298. Larry Catá Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprise, and the Chinese Experience*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 3 (2010).

299. See John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185, 185-86 (2005).

The Twenty-Fifth Amendment was a direct consequence of the assassination of President John F. Kennedy.³⁰⁰ After the disputed succession of John Tyler, it had been accepted that a vice-president would accede to the office of the presidency on the death or removal from office of the president.³⁰¹ But what if Kennedy had lived in an incapacitated state, as James Garfield did for almost three months? Or what if Lyndon Johnson, who had had a near fatal heart attack in 1955, was felled by a debilitating but not fatal stroke, like the one that left Woodrow Wilson an invalid for the last seventeen months of his term?³⁰² These questions were addressed by the Twenty-Fifth Amendment, which provides, among other things,³⁰³ that if the vice-president and a majority of the cabinet (or such other body as Congress may designate) inform the Senate and House that the president is “unable to discharge the power and duties of his office,” the vice-president shall immediately assume those authorities. If the president disputes this action, Congress shall decide, by a two-thirds vote of both Houses, whether the vice-president shall continue as acting president or the president shall resume his powers.

Although the intention behind the Amendment was clearly to address physical disabilities, its language is not so limited. Unlike impeachment, the grounds for removal are not specified. It may be that some future president will be removed when two-thirds of the Congress wish to do so on grounds of maladministration or even over policy differences. This would be a large step toward a parliamentary government,³⁰⁴ because the Senate can control the membership of the cabinet, and in any event, the Congress can designate the group that along with the vice-president—who is hardly a disinterested party—is charged with certifying the president’s inability to govern.

300. Joel K. Goldstein, *Introduction to* JOHN D. FEERICK, *TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATION*, at xi (2013) (“[The] assassination of President John F. Kennedy . . . formed the context in which the [Twenty-Fifth] Amendment was conceived, proposed, and ratified.”).

301. See FEERICK, *supra* note 300, at 5-24.

302. Howard Markel, *When a Secret President Ran the Country*, PBS NEWSHOUR, (Oct. 2 2015, 1:42 PM), <https://www.pbs.org/newshour/health/woodrow-wilson-stroke> [<https://perma.cc/2VKV-AH94>].

303. Section 1 provides for the Vice President to take the place of the President when the latter is removed from office; Section 2 establishes the procedure for filling vacancies in the Office of Vice President; and Section 3 enables the President to transfer responsibility for discharging presidential duties to the Vice President by transmitting a written affirmation to the President Pro Tempore of the Senate and the Speaker of the House of Representatives. U.S. CONST. amend. XXV, §§ 1-3.

304. See Lloyd N. Cutler, *To Form a Government*, FOREIGN AFF. (1980), <https://www.foreignaffairs.com/articles/united-states/1980-09-01/form-government> [<https://perma.cc/F5CE-Y9GQ>].

It does not matter that such a revolutionary change is incompatible with the plan of the Framers and ratifiers of the unamended text; it's the intentions of the Framers and ratifiers of the Amendment and the text of that Amendment that count. The check on such an alteration in our constitutional plan might then lie with the judiciary, which could affirm or deny an extraordinary writ brought to determine the identity of the lawful occupant of the presidential office.

All this lies pregnant in our Constitution; let us hope it has a long gestation period.

IV. DECISION ACCORDING TO LAW

Is the decision to impeach and then to convict the president a matter of law?

The first question must be: Are we bound by the legal interpretation of the Constitution on any subject that has not been, and may never be, adjudicated by the US Supreme Court? If the answer is no, doesn't this simply amount to "might makes right," the ancient notion that whoever has the ultimate power to make a decision is *ipso facto* correct as to the law? On this view, sovereignty simply lies with the effective decider.³⁰⁵ If that is true, then it would seem to apply to the Supreme Court as well, whose decisions are, after all, not reviewable. But then why do our various deciders bother with judicial opinions, presidential statements, congressional resolutions, rules, or precedents?

There are those who do not shrink from such conclusions; like most cynics, they call themselves "realists." But is their account an accurate description of the way things really operate in the American constitutional system? (It's interesting that the persons who make such claims rarely have experience in government service.) Is the Supreme Court—or the Congress, with respect to impeachment—infalible *because* it is final? If not, if other branches and our people must concur and accept the decisions of government, then perhaps such decisions are not as final as they seem. If *that* is the case, how do they—and we—determine what is right when the mighty disagree, or fumble for reasons to account for their actions? The whole theory of American government, limned in the Declaration of Independence and given operational form in the

305. See PLATO, REPUBLIC 338c (G.M.A. Grube trans., Hackett Publ'g Co. 1992) (381 B.C.) ("Listen, then. I say justice is nothing other than the advantage of the stronger."); CARL SCHMITT, POLITICAL THEOLOGY 5 (George Schwab trans., Univ. of Chi. Press 2005) (1922) ("Sovereign is he who decides on the exception.").

Constitution, is that power alone does not legitimate, that legitimacy can only come from the adherence to the rule of law by means of which our People have accorded power to government. This theory will always be tested. Each generation will live out the experiments that verify or falsify it. It may ultimately prove a tragedy, but it is not farce or a charade—not yet, anyway.

Are there neutral, general principles for all constitutional questions? If there are, why should they guide us? And if they should, how would that guidance work? If after a conscientious attempt to discern and apply the law, we disagreed and found the law insufficiently determinate to compel a consensus, how would we resolve that conflict? Why wouldn't such an impasse show that the whole enterprise was a waste of time—or worse, a mystifying facade?³⁰⁶

We begin by insisting that we really are trying to be neutral, general, and principled in applying the rules we can agree on. With respect to impeachment, we must imagine that the president to be impeached is of the opposite party to the one being tried. If we think the Emoluments Clause forbids substantial income to the incumbent of the White House outside his salary, we must ask ourselves whether we would also have required the Clinton Foundation to dissolve itself in order to avoid the appearance of transgression. We must imagine that a similar case could come up in the future for which the impeachment today would serve as a controlling precedent. If we say that a president cannot be impeached for actions he took while a candidate, we must be willing to apply that rule to candidates we admire as much as to those we dislike. We must be able to state a clear and coherent principle. An example might be *Actions taken before holding office cannot serve as the grounds for the impeachment of a president unless they bear on the electoral process itself*. Is that statement sufficiently robust to be applied by other deciders than ourselves? What does “bear on the electoral process” mean?

Thus we test our fidelity to the rule of law by imagining whether we would be willing and able, in the case of crafting a workable principle, to apply rules to presidents toward whom we might feel differently than we do toward the incumbent.

How do we derive these principles? We begin with the six fundamental forms of argument, which can be found just as clearly in *McCulloch v. Maryland*³⁰⁷ as in Charles Black's *Handbook*: history, text, structure, doctrine, prudence and ethos. But that doesn't end the matter, nor should it. Our system

306. See, e.g., PHILIP BOBBITT, *The Age of Consent*, in THE AGES OF AMERICAN LAW 131-35 (with Grant Gilmore., 2d ed. 2014).

307. 17 U.S. (4 Wheat) 316 (1819).

of government presumes that the individual conscience will play a decisive role, whether it is the conscience of the member of Congress trying a case of impeachment, a juror trying a civil or criminal matter, or an appellate judge drafting an opinion. We cannot preclude the role of the individual decision maker, nor should we want to. To see this necessity as a flaw is to miss the historic character and meaning of our system,³⁰⁸ which structures our decisions according to legal argumentation but ultimately requires a conscientious choice by the decider once those structures have done their work.

So we are compelled to ask: What weight do we give to previous impeachments? How do we complete the series “treason, bribery, [and other such offenses]”? What weight should we give the removal from office of executives of the state governments before the Constitution was ratified? What are the implications for impeachment of the Framers’ and ratifiers’ rejection of the parliamentary practice of the vote of no-confidence? Do we actually wish to divert executive resources through constant investigation and harrying of executive officials? What weight should we give the texts of the crucial Civil War amendments in construing the earlier provisions those amendments were meant to modify? And what of the intentions of the framers and ratifiers of those amendments? What weight should we give statements at the Constitutional Convention relative to the statements in the *Federalist Papers* regarding impeachment? Does it matter that the language of the grounds for impeachment is the same for members of the executive as well as the judiciary? How should we understand earlier presidents’ actions during times of crisis—Jefferson’s purchase of Louisiana without an appropriation from Congress,³⁰⁹ Lincoln’s suspension of habeas corpus,³¹⁰ FDR’s warrantless interception of international communications during World War II³¹¹—that might otherwise be grounds for impeachment? What rules do we want to craft now that can be applied in future instances of presidential misbehavior (or can deter such misbehavior)?³¹²

308. See, e.g., BOBBITT, *supra* note 159, at 184-86.

309. *The Senate Approves for Ratification the Louisiana Purchase Treaty*, U.S. SENATE (Oct. 20, 1803), https://www.senate.gov/artandhistory/history/minute/Senate_Approves_Louisiana_Purchase_Treaty.htm [<https://perma.cc/YZ24-E6QR>].

310. James Dueholm, *Lincoln’s Suspension of the Writ of Habeas Corpus, An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASSOC. 47, 49 (2008).

311. Neal Katyal and Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1047 (2008).

312. To see a fine example of this analysis with respect to one of the important questions raised by impeachment, one might look at Daniel Hemel’s analysis of whether a sitting president can be indicted. He writes,

Suppose that, in all good conscience, we still disagree. Does that mean that impeachment isn't a matter of law? That our attempts to craft a constitutional rule amount to no more than, as one law professor put it, constitutional "fetishism"?

It's a good thing that our attention is drawn to these questions, because otherwise we might be inclined to forget the answers. It in fact reflects the insight and wisdom of our Framers and ratifiers that in the most difficult cases, the rule of law in America is made to depend on our individual consciences. These difficult cases are rarer than the skeptic would have us believe, but they are just as important as he claims. Rather than growing dispirited, however, we should feel inspired. That's what the legal term "inalienable" requires: that the most consequential decisions are ultimately up to us and can't be delegated.

The most important contribution of *Impeachment: A Handbook* was to insist on the legal nature of the indictment and trial of the president by the Congress, and to show how this should be done according to law even though there were no authoritative judicial precedents. This perspective has many implications for partisanship and for citizenship. It bears on issues of executive privilege, the office of an independent counsel, and many other questions collateral to impeachment itself.

A final angle is to ask whether a court *should* rule that a sitting president can be indicted We might ask: What inferences can be drawn from the structure of our constitutional system and from the text itself that bear on the president's indictability? Do the shared ethical commitments of Americans across generations point us toward an answer? What is the rule that best balances the costs of indictment (e.g., interference with the president's ability to fulfill his constitutional responsibilities) against the benefits (e.g., vindicating the proposition that no man or woman is above the law)? What insights can we glean from the framers and ratifiers themselves and from the last two and quarter centuries of experience? And even if there is no precedent that answers the question directly, how do the principles embedded in constitutional doctrine shape our thinking on the matter?

. . . .

In sum, instead of asking "can a sitting president be indicted?" or "can the president pardon himself?", we ought to ask: would a good-faith interpreter of the Constitution, approaching the question through the accepted modalities of constitutional argument, conclude that a sitting president can be indicted or that a president can grant a valid self-pardon? Framing the question this way does not make it all that much easier to answer. But at least it ensures that we are not talking past each other, and that we are having a conversation of lasting relevance.

Daniel Hemel, *The One Question Worth Asking*, TAKE CARE (July 25, 2017), <https://takecareblog.com/blog/the-one-question-worth-asking> [<https://perma.cc/M9K3-D4JL>].

* * * * *

Out of the turbulence of the sea,
 Flower by brittle flower, rises
 The coral reef that calms the water
 — Archibald MacLeish³¹³

The architects that preceded us in ceaseless labor, life after life, built on the inherited acropolis of law a constitutional structure ever-changing, ever-enduring, unfinished, in parts neglected and decaying, obdurate yet imagined. Their legacy resides in the methods by which, case by case, generation by generation, the barriers of law channel the tumults of politics and power toward justice and equality, and away from violence and cruel oppression. Their genius was to deliver to us a temple whose innermost chamber contains a question. They could not decide for us, but they could give us the ways our decisions are assessed and explained. Having mastered the ways of the law that they taught us, we must in the end find our own answers to the awesome questions that mastery poses but cannot resolve.

Someday, if we're lucky, our descendants will struggle as we do with such decisions. Will they make them according to law or will they sell, or barter, or give them away to those who are only too happy to decide without having to explain?

I, for one, am an optimist. That, you may recall, is how we began—how I began these chapters, how we began this country.

The preceding chapters are taken from a new edition of Impeachment: A Handbook (Yale University Press 2018) by the late Charles L. Black, Jr. and Philip Bobbitt. Charles Black was Sterling Professor of Law at the Yale Law School; Philip Bobbitt is the Herbert Wechsler Professor of Federal Jurisprudence at the Columbia Law School and Distinguished Senior Lecturer at the University of Texas Law School. Professor Bobbitt wishes to acknowledge the research assistance of Mr. Andrew Elliott and Mr. Philippe Schiff. Their intelligence, insight, and conscientiousness have moved them from valuable research assistants to treasured colleagues. The judges for whom they will clerk, and the lawyers with whom they will collaborate, are to be envied. He also wishes to thank Ms. Zoe Jacoby, Mr. Jordan Goldberg, and Mr. Salil Dudani of the Yale Law Journal for their assistance in producing this version of the Impeachment chapters for publication in the Journal. Because Professor Black's original text had no accompanying notes, the publisher decided to continue this format in the new edition. It therefore fell to the Journal to print these chapters with extensive notes in order to provide a resource for students, scholars, lawyers, journalists, and public officials.

313. ARCHIBALD MACLEISH, *Reasons for Music*, in COLLECTED POEMS: 1917-1982, at 431-32 (1985).