

VII. Presidential Impeachment in the Constitutional Order

Having reviewed some of the powers of, and the limits on, each of the three branches of the federal government, we close this chapter with a brief case study that implicates all three branches in an especially interesting way. Article II, section 4 states that "The President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Article I prescribes that the House of Representatives is entrusted with the power to impeach, the Senate with the power to try impeachments, and the Chief Justice of the Supreme Court acts as the presiding officer at Presidential impeachments.

All of these features came into operation in 1998 and 1999, when President Clinton was impeached by the House and acquitted by the Senate. The controversy grew out of Paula Jones' lawsuit against President Clinton, *Clinton v. Jones*, 117 S.Ct. 1636 (1997), discussed in Chapter 5. After the Supreme Court's holding that the litigation could proceed, the lawyers for Paula Jones began discovery, attempting to prove that Clinton had a history of extramarital sexual advances and sexual affairs. During a deposition in that lawsuit, Clinton denied having "sexual relations" with a White House intern, Monica Lewinsky. By that point, however, Independent Counsel Kenneth Starr learned through tape recordings of conversations between Linda Tripp and Lewinsky, that there was evidence that Lewinsky had in fact engaged in various forms of intimate physical relations with the President. The day before Clinton's testimony, Starr received permission from Attorney General Janet Reno to expand his investigation to include possible perjury, subornation of perjury, obstruction of justice, or witness tampering by Lewinsky or others in connection with the Jones lawsuit. Starr subsequently convened a grand jury to investigate the matter, and eventually reached an immunity agreement with Lewinsky, in which she offered to testify about her affair with Clinton. Clinton testified before the grand jury that his statements during the Jones deposition were technically accurate (because of the convoluted definition of "sexual relations" and related terms that the attorneys had agreed to in that case). However, he admitted to "inappropriate contact" with Lewinsky.

In September 1998, based on the results of his investigations, Starr, pursuant to the Independent Counsel Act, informed the House of Representatives that he was in possession of "substantial and credible information ... that may constitute grounds for impeachment." The House held hearings, which were marked by acrimony between Democrats and Republicans.

In the November 1998 mid-term elections, the Republicans lost five seats in the House. Opposition parties in the sixth term of a presidency usually gain twenty or more seats, so this was regarded as an unusually poor showing. Many commentators blamed the rebuff on the national party's decision to make Clinton and the Lewinsky affair an issue in selected House races; and public opinion polls suggested that the public was wearying of

months of media coverage of the scandal and that a substantial majority opposed impeachment. Apparently, although the public had a low opinion of Clinton's ethics, his approval ratings as President remained high. Nevertheless, the House hearings continued after the election under the leadership of the lame duck Congress,⁵⁹ and in December 1998, a bitterly divided Congress passed two of four proposed articles of impeachment, essentially along party lines, with almost all Republicans supporting impeachment and almost all Democrats opposing it. The two articles accused Clinton of perjuring himself before the grand jury and of obstructing justice. On February 12, 1999, the Senate voted to acquit Clinton of both charges. The vote was 55 for acquittal and 45 for conviction on the perjury count, and 50-50 on the obstruction of justice count. Once again the votes were strongly partisan: all 45 Democrats voted for acquittal on both counts and most Republicans voted for conviction.

The Clinton impeachment raised a number of important questions about the meaning of the Constitution and its structure. Most of these issues were questions directed not at the judicial branch, but at conscientious House and Senate members, as well as the general public. The President also had to make important constitutional decisions about how to respond to moves made by the other branches.

1. The House's Role.

Under Article I, the House can impeach the president by a simple majority. Note that conviction by the Senate requires a two-thirds vote. Does this suggest that the standard of proof for the House is different than for the Senate? One possible argument is that the House is equivalent to a grand jury considering an indictment. Under this analogy, it needs only probable cause to believe that the President (or other officer) has committed an impeachable offense. On the other hand, there are significant differences between the House and a grand jury. There is no prosecutor to guide the House; thus House members must play both the role of prosecutor and grand jury. (Query: Why couldn't an Independent Counsel like Kenneth Starr play that role? Think about the separation of powers discussions following *Morrison* and *Edmond*).

Because the House must play two roles, its considerations are arguably different from those of a grand jury. Moreover, the House is an elected body which owes some responsibility to its constituents. Here the differences between impeachments of presidents and judges become important. The House must decide whether it is worth it to put the country through a presidential impeachment. Obviously, impeachments of both presidents and judges cost the Senate valuable time, but presidential impeachments in particular are likely to consume the lion's share of the Senate's time and attention.

Should a conscientious House member vote against impeachment if he or she believes that the Senate will not convict? Or should the member vote for impeachment on the grounds that there is an independent constitutional duty to say what the appropriate

⁵⁹The new Congress, with a smaller Republican majority, did not take office until January 1999.

legal standard is? Consider the possibility that House members in Clinton's case might have voted for impeachment on the ground that (1) they knew the Senate would not convict, or (2) that they wanted to show their disapproval of Clinton akin to a motion for censure. Is either, or both of these reasons constitutionally appropriate?

2. Impeachment as a Political Act

To what extent should impeachment and conviction depend on the President's popularity? On the public's view whether he or she should not be impeached and/or convicted? Compare Charles L. Black, Jr., *Impeachment: A Handbook* 20 (1974) ("taking, at intervals, of public opinion polls on guilt or innocence, should be looked on as an unspeakable indecency.") with Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 *Va. L. Rev.* 631 (1999) ("If popular majorities get to elect a President, it is hard to see why they should be ignored on the question of whether he remains fit to hold office.") During the impeachment proceedings, President Clinton's approval ratings were quite high, particularly for a President in his sixth year in office. They got even higher as a response to the House's impeachment resolutions. By contrast, President Nixon was deeply unpopular by the time he resigned in August 1974, and politicians of both parties were calling for his resignation.

Consider the following arguments and counterarguments:

(a) *Constitutional obligations*. Impeachment and conviction are constitutional obligations of the House and the Senate, respectively. They cannot be shirked no matter how popular a president is or what his poll numbers might be. A House member must vote for impeachment if there are reasonable grounds for impeachment, and a Senator must convict if he or she believes that the President has committed a high crime or misdemeanor judged by the appropriate standard of proof.

(b) *Prosecutorial Discretion and Jury Deliberation*. Impeachment is a prosecutorial act. Prosecutors engage in prosecutorial discretion all the time, and they should do so in the interests of the public. (See the discussion of the *Cox* and *Nixon* cases *supra* for a list of justifications for prosecutorial discretion). Hence the House must consider whether proceeding with impeachment is for the good of the country. An important consideration is whether House members are going against the will of the people who elected the President to office. Textually, note that Article I, Section 3 gives the House the sole *Power* of Impeachment but says nothing about any *duty* to impeach. Intratextually, note that the Framers knew how to use the word *duty*--indeed they used it twice in Article II. On this view, House impeachment is about power, not duty--about choices, not obligations. A related point: The House's inherent power of mercy is all the more vital given that the ordinary locus of pretrial mercy in our constitutional system--the president's pardon power--is inapplicable. As we have seen, under Article II, Section 2, a president may ordinarily pardon at any time and for any reason (recall Gerald Ford's pretrial pardon of Nixon and George Bush's pretrial pardon of Caspar Weinberger), but not "in cases of impeachment." Thus, in impeachment prosecutions, the Framers took the power of executive clemency away from the president and gave it to the House.

Similarly, Senators must consider whether conviction and removal would be in the best interests of the country. If House members are roughly in the role of prosecutors, Senators are roughly in the role of jurors. Like any ordinary criminal juror, each Senator is free to be merciful for a wide variety of reasons--because she thinks the defendant has suffered enough, or because the punishment doesn't fit the crime, or because punishing the defendant would impose unacceptable costs on innocent third parties. Moreover unlike ordinary jurors, Senators are elected, and thus they are also free to consult their constituents. Sometimes, deferring to "the masses" might be irresponsible--for example, if the citizenry were ignorant of the facts or incapable of thinking through the complicated legal question at hand. But Senators should not ignore their constituents where these circumstances do not apply. The circumstances surrounding President Clinton's impeachment were among the most heavily documented, covered, and discussed in the history of the American news media. During 1998 and 1999 it was impossible to avoid coverage of them.

(c) *The "Coup' D'Etat" Argument*: Because presidential impeachment is a fundamentally political decision to remove an elected president from office, it has elements of a revolution and therefore should not be undertaken without solid popular support. Although solid popular support may not be sufficient to justify impeachment, it is necessary because impeachment overturns the results of a national election; at the very least it involves a transfer of the most important office in the country without direct popular approval.

Consider the following response: Because of the twelfth and twenty-fifth amendments, the successor to the president will most likely be a member of his own party. (Note that if the President and Vice President are both impeached, the presidency would fall to the Speaker of the House. But see the discussion of presidential succession supra). Because in the case of Clinton, Democrat Al Gore would have become the next president, charges of usurpation or coup d'etat are ungrounded. Moreover, Gore would have been a sitting incumbent when he ran for President in 2000.

Contrast this to the Johnson impeachment. Johnson was a War Democrat hostile to the Radical Republican Congress. As Lincoln's successor before the twenty-fifth amendment, he had no vice-president, whether of his own party or of another. His successor would have been Ben Wade, the Speaker of the House and a Radical Republican who would, most likely, have let the Congress accelerate the process of Reconstruction. (Would this have been a good thing or a bad thing from the standpoint of American democracy?) Note also that Johnson himself had never been elected President by the American people.

Even if a Vice President of the same party succeeds the President, one can still argue that impeachment is a counter-majoritarian assertion that should not proceed without broad popular support. The opposition party may have good reasons to prefer the Vice-President in office, even if he is thereby strengthened for a subsequent run at the presidency. A successful conviction may weaken the presidency and confirm the power of the opposition party. (Consider whether successful conviction of Andrew Johnson in 1868 or Bill Clinton in 1999 would have confirmed the dominance of the Republican Party in either era).

However, the "coup d'etat" objection to impeachment in the face of popular opposition may run deeper than a concern over which party gains the presidency:

Revolutions depend on popular support and mass mobilization. But a coup is a power grab of elites, by elites, and for elites. In coups elites topple other elites out of spite, vengeance, or the naked thirst for power. They assume that the quiescent masses will simply accept the substitution of one generalissimo for another. In a revolution the people are a central source of legitimacy for political change. In a coup the people are strictly optional.⁶⁰

(d) *The Asymmetrical Importance of Popular Will*. Consider the argument that popular will is most important in cases where it speaks against impeachment and removal of a President:

If in her heart a Congressperson or Senator thinks the President is innocent in fact (he actually didn't do it) or in law (even if he did it, it is not a "high crime or misdemeanor"), then she *must* vote not guilty--even if she thereby offends her constituents, who want the man's head. She has taken a solemn oath to do justice, and she would violate that oath if she voted to convict a man she believed innocent. [Moreover, in the Senate] impeachment rules are not symmetric between conviction and acquittal. It takes 67 votes to convict, but only 34 to acquit. On this view, although no Senator may vote to convict a man she deems innocent, any Senator may vote to acquit a man she deems guilty.⁶¹

(e) *The Political context in which impeachment occurs*. Consider the fact that the Johnson impeachment occurred in the wake of the Civil War, the Nixon resignation during the height of the Cold War, and the Clinton impeachment after the Cold War. Note also the "dog that didn't bark"-- the Iran Contra scandal of 1986-87, which did not lead to impeachment proceedings against Ronald Reagan, and which also occurred during the Cold War. To what extent do foreign policy and global military obligations of the United States affect the willingness of Congress to proceed against a sitting President? The Johnson impeachment seems to have been largely about the Republican Congress's desire to have its way on Reconstruction against a President bent on undermining that Reconstruction. (See the discussion of the procedural history of the Fourteenth Amendment in Chapter 4, supra). Is the failure of the Iran-Contra scandal to result in impeachment in part explained on the grounds that Democrats lacked the political will to attack a popular president during the height of the Cold War unless there was clear proof of the very gravest offenses? If so, what explains the proceedings against Nixon, which also occurred during the Cold War?

One obvious answer is that the offenses in Nixon's case were simply more serious than either Reagan's or Clinton's. However, consider the possibility that Nixon and Clinton had something in common that differentiated them from Reagan. Unlike Reagan, both Nixon and Clinton portrayed themselves as moderates who actively co-opted many of

⁶⁰Jack M. Balkin, "An Implosion of Democracy," Boston Globe, January 17, 1999, at C07.

⁶¹Akhil Reed Amar, The People's Court, Legal Times, Feb. 1, 1999.

the opposition party's ideas, which infuriated members of the opposition. With the political center effectively occupied by their (despised) ideological opponent, the opposition party turned to scandal as the most effective means of combatting the President. Cf. Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (1993)(describing problems presented by various presidential leadership styles). The danger of such a strategy, however, is that impeachment can make the opposition party look even more partisan than ever. Without capitulation by members of the President's own party, the attack will not succeed and may even backfire.

3. The Senate Trial

When a president is not being tried, the Constitution specifies in Article I, section 3 that the presiding officer is the Vice President of the United States (who also serves as the president of the Senate.) In presidential impeachments, however, the Chief Justice of the United States, who plays no role in any other impeachment, must "preside" over the Senate trial. There are good structural reasons for this: the Framers excluded the Vice-President from a trial that could end with his winning the defendant's job. This mandatory recusal rule made even more sense at the Founding, when presidents did not handpick their vice presidents, who were more likely to be rivals than partners.

The Constitution specifies that the Chief Justice "shall" preside. Can the Chief Justice refuse, if he or she thinks that the trial is unfair and improper? Could the trial properly proceed without the presence of its constitutionally-prescribed presiding officer? Note that another reason for the chief's presence is also structural: It reminds the Senators that this inherently political trial must be scrupulously fair to the president in both reality and appearance. Not only the American people, but other countries around the world will be watching this test of American democracy. Note that these questions do not arise so urgently in the case of judicial impeachments.

The role of the Chief Justice has profound implications for the proper ethical relations between senators and the president. Suppose a sudden illness were to require the chief to resign. Although the senior associate justice might presumably fill in temporarily,⁶² at some point a new chief would need to be installed. According to Article II, section 2, the President would appoint, with the advice and consent of the Senate, a new chief. In other words, even in the middle of a trial, the judges and the judged might need to confer and collaborate to pick the permanent presiding officer!

This points up a unique feature of Presidential impeachments: the need for coordination between the two branches even as they are at loggerheads. The Senate and the president must work together to do the people's business. Vacant appointments must be filled, treaties considered, laws enacted, budgets approved, foreign policy--even war--conducted. (Note that as the House was considering impeachment of the President

⁶²What, precisely, is the basis for this presumption? Pure pragmatism? A structural inference of sorts? The traditions of the Supreme Court, or the history of predecessor courts in England?

President Clinton was launching airstrikes against terrorist camps halfway around the globe.) Even as senators sit as detached judges and jurors over a presidential defendant every afternoon (bound by an oath of impartiality as prescribed under Article I, section 3), they must as legislators work closely with the president every morning. This also suggests an important difference from impeachments of federal district judges. In these low-level impeachments, senators are more likely to shun all contact with the defendant, analogizing such meetings to "jury tampering."

Presidential and nonpresidential impeachments also tend to differ because other officers can be and often are indicted and convicted before impeachments begin. Indeed, in two of the three district judge impeachments during the 1980s, Senate trials occurred after the judges had been tried and convicted of statutory crimes in ordinary courts.

Although the Constitution does not require this sequence, the Framers expected that it would often make sense for geographic reasons. District judges in the late eighteenth century would be scattered across the continent, as would the evidence and witnesses to their wrongdoing. Congress, by contrast, would sit in the capital, weeks away from the most remote hinterlands. Given this geography, the Founders anticipated that the easiest venue to gather all the evidence and witnesses would often be in a trial held in the judge's home district. See Maria Simon, Note, Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges, 94 Colum. L. Rev. 1617 (1999). After such a trial, the Senate's job in impeachment would be much easier--senators could simply take as given the facts duly found beyond reasonable doubt in an ordinary court following strict evidentiary rules and affording procedural rights and other safeguards to the defendant.

These assumptions do not hold in presidential impeachments. First of all, as discussed below, it is doubtful that an indictable offense is required for impeachment and conviction of the President. Given his unique and awesome constitutional powers, the president can often inflict great harm on the nation without violating any specific criminal statute. As a result, presidential impeachments are less likely to simply track ordinary prosecutions and may more often charge the chief executive with abuses of power beyond the criminal code.

More fundamentally, there are strong arguments that under Article II a sitting president may not be forced to stand trial in an ordinary criminal court. (See also the discussion following *Clinton v. Jones*, *supra*). In two Federalist Papers (Numbers 69 and 77), Hamilton suggested that an incumbent president must first be tried in the Senate; only after his removal (via conviction or resignation or the natural expiration of his term) would ordinary courts have a opportunity to prosecute him.⁶³ As noted in the discussion of

⁶³See The Federalist No. 69 ("The President . . . would be liable to be impeached, tried, and upon conviction . . . would *afterwards* be liable to prosecution and punishment in the ordinary course of law.") (emphasis added); Id. No. 77 (discussing presidential impeachment and "*subsequent* prosecution in the common course of law") (emphasis added). Note that Hamilton here was trying to reassure his readers that the President would not be overly powerful; if he in fact believed that a sitting President could be forced to stand trial in an ordinary criminal prosecution, he had a strong incentive to say

Clinton v. Jones, the rule also makes good structural sense. A president represents the nation and may need to pursue sound national policies that will render him unpopular in certain localities-- consider Lincoln's popularity in South Carolina in early 1861. While in office, the president should not be obstructed by a grand or petit jury from any one locality, whether Charleston or Little Rock or the District of Columbia. The House and the Senate represent the entire nation, and therefore are the only grand and petit juries that a sitting president must answer to.

However, if the President is not subject to trial before impeachment, a Senate trial will (and did in Clinton's case) pose enormous complications concerning issues of evidentiary procedure and proof. The Senate will not be able to simply point to an earlier

so, but in fact he said the opposite. This impeachment-first rule has a strong bipartisan pedigree--affirmed two centuries ago by Senator (and later Chief Justice) Oliver Ellsworth, Vice President John Adams, and President Thomas Jefferson. See *The Diary of William Maclay and Other Notes on Senate Debates 168* (Kenneth R. Bowling & Helen E. Veit eds., 1988) (reporting that Adams and Ellsworth argued that a sitting President could be impeached, but "no other process [w]hatever lay against him. . . . When he is no longer President, [y]ou can indict him."); *10 Works of Thomas Jefferson* 404 (Paul L. Ford ed., 1905) (Letter to George Hay, June 20, 1807) ("The leading principle of our Constitution is the independence of the Legislature, executive, and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, [and] to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south [and] east to west.").

The point was reiterated during the Nixon impeachment crisis by then-Solicitor General Robert Bork on the right and Professor Charles Black on the left. See John Hart Ely, *On Constitutional Ground* 140-41 (1996) (detailing Robert Bork's argument that the President could not be indicted prior to being impeached.); Charles L. Black, Jr., *Impeachment: A Handbook* 40 (1974)("[A]n *incumbent* president cannot be put on trial in the ordinary courts for ordinary crime, and if the crime he is charged with is not an impeachable offense, the simple and obvious solution would either be to indict him and delay *trial* until after his term has expired, or to delay *indictment* until after his term, with the statute of limitations tolled . . . until the president's term is over."). See also Alexander M. Bickel, *The Constitutional Tangle*, *New Republic*, Oct. 6, 1973 (the "presidency cannot be conducted from jail, nor can it be effectively carried on while an incumbent is defending himself in a criminal trial"); Terry Eastland, *The Power to Control Prosecution*, 2 *Nexus* 43, 49 (1997) ("the President may be prosecuted, but . . . only to the extent he allows himself to be"); Stephen G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 *Minn. L. Rev.* 1421 (1999) ("the President cannot be prosecuted until he has first been impeached and removed"). But see Ronald D. Rotunda, *Can a President Plumbing the Constitutional Depths of Clinton v. Jones be Imprisoned?*, *Legal Times*, July 21, 1997 ("Clinton v. Jones thus establishes that a sitting president may be [criminally] indicted and tried"). Compare the discussion in Chapter 5 *supra* pointing out some ways in which *Jones* seems distinguishable.

judicial proceeding that clearly established the relevant facts beyond reasonable doubt. Instead, the Senate is obliged to find the facts for itself. In Clinton's trial, the Senate elected not to hear live witnesses, but instead relied on the record compiled by the House (which drew heavily on the Independent Counsel's report) and videotapes and transcripts of depositions of three witnesses conducted by the House Managers in charge of the President's prosecution. The Senate is not (unless it chooses to be) bound by federal rules of evidence, including the hearsay rules, which express (with many exceptions) a preference for live testimony subject to cross-examination. Why do you think the Senate did not choose to call witnesses in Clinton's case (and in particular live testimony of Monica Lewinsky, which would, presumably, involve discussions of her affair with President Clinton on national television)? Does this confirm the inherently political nature of presidential impeachments?

By contrast, in the 1980's impeachments of judges the Senate delegated fact-gathering to a committee. Could the Senate do so constitutionally in the case of presidential impeachments? Would it be politically possible to do so even if it were constitutional? Consider whether the committee could meet outside of the presence of the Chief Justice, or whether, on the other hand, the Chief Justice could preside over such a "rump" Senate?

Acting as the jury in an impeachment trial, the Senate also exercises discretion. Even if it considers the President's crimes technically impeachable, it need not vote to convict unless it also thinks that the punishment--mandatory removal from office, under Article II, section 4--fits the crime. (Analogously, every criminal trial jury has the inherent power to acquit against the evidence if it deems punishment unjust.). As you read Article II, can the Senate convict the President without removing him from office? Can the Senate pass a censure motion in lieu of conviction? Some Senators and Congressmen argued that because the Constitution says nothing about censure, a censure motion was unconstitutional. Why doesn't the fact that the Constitution says nothing about censure mean that nothing prohibits censure? (Note that Andrew Jackson was censured in 1834 by a Whig-controlled Senate for his opposition to the Second Bank, but when the Democrats came to power they removed the censure.).

4. What are High Crimes and Misdemeanors?

One of the central questions in the Clinton impeachment trial was whether perjury about his sexual affair with Monica Lewinsky was a "high Crime and Misdemeanor" under the meaning of Article II section 4. (Note that similar questions apply, *mutatis mutandis*, to the obstruction of justice charge, which was based on essentially the same factual predicates as the perjury charge). One can further hone the question by asking whether perjury by a President about matters not related to his official duties is impeachable. Finally, one can distinguish between perjury before a deposition in a civil matter and perjury before a grand jury convened by the Independent Counsel. Finally, one can ask whether Clinton's behavior--concealing the affair, lying about it to the American people for months, and engaging in evasive maneuvers before Congress and a grand jury constitute impeachable offenses even if they do not technically constitute criminal

offenses. There are several ways of approaching these questions, corresponding to familiar modalities of constitutional argument.

Historical Arguments. The original understandings of the impeachment power are provocative but inconclusive. Several proposals at the Constitutional Convention attempted to limit the grounds for impeachment to neglect of duty or abuse of official power. One proposal argued for limiting the power to "treason or bribery." George Mason opposed this formula and proposed adding "maladministration" to the grounds for impeachment and removal. Madison in turn opposed Mason's amendment, arguing that "[so] vague a term will be equivalent to a tenure during the pleasure of the Senate." Mason then withdrew his motion and moved to substitute the words "treason, bribery and other high crimes or misdemeanors against the State," which was accepted by the convention. This wording was later changed to "against the United States." Finally, the Committee of Style and Arrangement eliminated the words "against the United States" apparently on the grounds that these words were redundant.

What relevance, if any, should this history have in interpreting Article II, section 4?

Consider the following arguments:

(a) Impeachable offenses must be offenses against the State similar to treason and bribery. Perjury, especially about matters unrelated to the President's duties is much less damaging to the State and hence is not impeachable.

(b) Impeachable offenses must be offenses against the State. Bribery is impeachable only because the President might trade secrets with the enemy or compromise the national interest for private gain. Perjury about matters unrelated to the President's duties is not a crime against the State and is therefore not impeachable.

(c) The President is the chief law enforcement officer of the United States and therefore perjury in official proceedings is an offense against the State because it fundamentally undermines confidence in his office and in the government of the United States.

(d) Given the language of Article II, section 4, impeachable offenses need not be crimes against the State. A President who fundamentally disgraces his office, for example, by raping a person on the White House lawn can be impeached and removed. The question whether the matter is a "public" abuse of power or part of his "private" life is irrelevant.

(e) The question of what a "high Crime and Misdemeanor" consists in is fundamentally political. It is up to the American people, through their elected representatives, to determine when a President has so lost the confidence of the People that he can no longer remain in office.

Textual Arguments. The argument that not every crime is impeachable would seem to be bolstered by the following textual argument: Ordinary citizens can be tried and convicted for any crime, but the President may be impeached and removed only for "high" crime. This word must have limiting significance: In two other places in the Constitution (Article I, Section 6 and Article IV, Section 2), the Framers speak about treason and other crimes without using the word "high." This suggests that the adjective was added to the

impeachment clause of Article II, Section 4 to make clear that not all crime is impeachable. This argument, however, does not mean that only crimes are impeachable. The word "misdemeanor" is easily read to mean misbehavior or misconduct generally, though it, too, must be "high" misconduct to warrant impeachment.

Precedential and Structural Arguments. Another approach to the question is to look for precedents in past practice. However, this approach is deeply complicated by the question whether presidential impeachments are similar to or different from impeachments of other officers, including federal judges. As a result, precedential arguments about the meaning of "high Crimes and Misdemeanors" cannot be easily extricated from structural arguments. (And, as we shall see, each also relies on a series of textual arguments). Hence we consider them together.

During the impeachment proceedings against Richard Nixon, the House Impeachment Committee considered and rejected an article that accused Nixon of backdating his tax returns in order to take advantage of more favorable tax laws. Does this indicate that perjury for private gain is not an impeachable offense? On the other hand, during the 1980's two federal judges, Walter Nixon (no relation to Richard) and Alcee Hastings, were impeached and removed for perjury. Note that Walter Nixon had already been convicted, sentenced, and imprisoned by an ordinary criminal court. One could argue that House impeachment and Senate conviction merely reaffirmed the commonsensical notion that Nixon should not continue to get paid for being a judge while doing no judicial business behind bars. Hastings was impeached and removed for lying under oath-- not about some sexual matter but about financial misconduct that in turn suggested judicial corruption. Although Hastings had earlier won an acquittal in a bribery trial, the House that impeached him and the Senate that convicted him believed that he had lied in that trial and elsewhere.

The precedential argument that perjury is a high crime and misdemeanor for presidents as well as judges rests on a further textual argument: The language of Article II, section 4 states that "[t]he President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The argument would be that because Article II, section 4 lumps together presidential impeachments with all others (vice presidents, judges, justices, Cabinet officers, inferior officers) and uses the same linguistic standard (high crimes), the test is the same.

However, there is a textual argument that points in the other direction. According to Article II, section 2, "by and with the Advice and Consent of the Senate, the president shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and ... other Officers of the United States." Under the same reasoning, it would follow that the Senate must give the exact same deference to a president's choice for Supreme Court justice that it would give to a president's choice for his Cabinet, and that the Senate should never apply a stricter standard when considering a nomination to the Supreme Court than to a district court. However, this has not been the Senate's practice, and for sound structural reasons, given the different roles that different officers play: For example, cabinet officers are part of the president's executive branch team under Article II. They answer to him (quite literally, in the Article II, section 2 Opinions Clause) and will

leave when he leaves. Federal judges, though perhaps appointed to further the president's agenda, are not part of the president's team in the same sense. Their independence is secured by life tenure under Article III--a separate article for a separate branch. In light of these important constitutional differences, the Senate has always given the president far more leeway in naming his own executive team than in proposing judicial nominees. And, even within a single branch, the Senate scrutinizes a nominee to the Supreme Court more intensely than a nominee to some lower court. Perhaps the best example is the close scrutiny given to the Bork nomination in 1987.

Consider, however, Laurence Tribe's response to this textual argument:
[A]lthough the Appointments Clause calls in the same words for the Senate's advice and consent regardless of the office involved, that clause says nothing about what standard the Senate is to employ in giving or withholding its consent in any particular category of appointments, and might best be read as agnostic on the question whether that standard is the dependent on the office to which an appointment has been made or is instead to be office-independent. The Impeachment Clause, in contrast, purports to specify the standard for impeachment and removal and seemingly does so in the same terms --"high Crimes and Misdemeanors"-- for judges and presidents alike.⁶⁴

Akhil Amar argues that, quite apart from text, there are good structural grounds for treating presidents and judges differently:

When senators remove one of 1,000 federal judges (or even one of nine justices), they are not transforming an entire branch of government. [A] long and grueling impeachment trial [of a judge] itself inflicts no great trauma on the country--but, again, the case of a president is very different. (And don't forget the disruption of the chief justice's schedule, and the commandeering of the entire Senate, given the inability to shunt things off to committee.) Presidential impeachments involve high statecraft and international affairs--the entire world is watching--in a manner wholly unlike other impeachments. Most important, when senators oust a judge, they undo their own prior vote (via advice and consent to judicial nominees). When they remove a duly elected president, they undo the votes of millions of ordinary Americans on Election Day. This is not something that senators should do lightly, lest we slide toward a kind of parliamentary government that our entire structure of government was designed to repudiate. Although the Philadelphia Framers may not have anticipated the rise of a populist presidency, later generations of Americans restructured the Philadelphians' electoral college, via the Twelfth Amendment and other election reforms, precisely to facilitate such a presidency. Narrow arguments from the high crimes clause in isolation fail to see how holistic constitutional analysis must take account of post-Founding constitutional developments.⁶⁵

⁶⁴1 Laurence H. Tribe, American Constitutional Law 165-69 & n.57 (3rd ed. 1999).

⁶⁵Amar, Trial and Tribulation, The New Republic, Jan. 18, 1999. See also Tribe,

For a similar effort to ponder post-Founding presidential precedents, see Cass R. Sunstein, *Impeaching the President*, 147 U. Pa. L. Rev. 279 (1998). Sunstein concludes that "historical practice suggests a broader congressional power to impeach judges than presidents, and indeed, it suggests a special congressional reluctance to proceed against the President."

With Amar and Sunstein, compare John O. McGinnis, *Impeachment: The Structural Understanding*, 67 Geo. Wash. L. Rev. 650, 660 (1999) (pointing to certain antipopulist features of the original Constitution, and rejecting the argument that the "legal standard for impeaching a President should be higher than the legal standard for impeaching a judge because the President has been elected by the people whereas a judge has been appointed. . . . Indeed, important considerations of constitutional structure might well suggest the opposite conclusion, that we should be more loathe to retain a President in office who has breached the public trust than any other official, including a judge.").

Finally, assuming that perjury can be a "high Crime and Misdemeanor," does it follow that a President who commits perjury should be removed from office? Consider the following structural argument:

[E]ven if the Senate decides that all perjury--of any sort, by any officer--is an impeachable high crime, senators must further decide whether a given perjury warrants removal as a matter of sound judgment and statesmanship. In making this decision, they must be sensitive to the ways in which the presidency is a very different office from a federal district judgeship. Where extremely "high crimes" are implicated--treason or tyranny-- senators should probably be quicker to pull the trigger on a bad president, whose office enables him unilaterally to do many dangerous things. (A single bad judge, by contrast, is hemmed in by colleagues and higher courts.) But where borderline or low "high crimes" are involved, the Senate would be wise to spare the people's president--especially if his crimes reflect character flaws that the people duly considered before voting for him, or if the people continue to support him even after the facts come to light.

supra:

[Even though Article II section 4 defines impeachable offenses for all federal officers], the Constitution nowhere mandates that the *definition* of a high crime be independent of the nature of the office from which it is proposed that someone be removed-- independent for example, . . .of the mode of the office's selection (whether by the people in a national election, for example, or by the President with the concurrence of the Senate)[A judge may well be] removable for conduct that would not warrant removal of a president, particularly since Senate removal of a judge entails reversing the Senate's own action in confirming the judge whereas Senate removal of a president entails reversing an action of the entire national electorate.

Thus the relevant precedents for conscientious senators to ponder are *presidential* precedents. To counterbalance the 1980s trio of impeachments, let's look at a trio of presidents over the centuries who had their own troubles with Congress. Begin with Andrew Jackson, who killed a man in a duel before he was elected president. Technically, this was a crime, although it was rarely prosecuted in Jackson's day. Should Congress have impeached and removed Jackson even if the people who elected him knew about his crime and voted for him anyway? The duel Jackson fought concerned his wife's honor and chastity. Suppose Jackson had lied under oath to protect his wife's honor. Again, suppose the people knew all this when they voted for him. Should Congress have undone the people's votes on a theory that all crime is high crime, and that all perjury is the same? Now consider the next presidential Andrew--Johnson, that is. Given our structural analysis, it seems relevant that Johnson was never elected president in his own right and that he was in fact working to undo the policies of the man the people did elect, Abraham Lincoln. If ever our structural argument cautioning restraint in ousting an elected president were weak, it was here, since Johnson lacked a genuine electoral mandate. And his policies toward unrepentant rebels could have been viewed as akin to treason, giving aid and comfort to men who were--not to mince words--traitors. And yet even here--an unelected president cozying up to actual traitors--the Senate acquitted. Finally, consider President Nixon, whose extremely "high crimes" and gross abuses of official power posed a threat to our basic constitutional system. Although Nixon was elected by the people, his own unprecedented use of political espionage and sabotage tainted his mandate, in the same way that bribing electors would have. When all the facts were brought to light and the tapes came out, the people did indeed turn against him, prompting leaders of both parties to conclude that the time had come for him to go.

William Jefferson Clinton is not above the law. But the law that the Senate must apply is the law applicable to presidents, not the law applicable to district judges. In trying a man whose name has eerily intertwined with that of Nixon again and again, the Senate must remember that Bill Clinton is best judged in light of the case of Richard Nixon, not the case of Walter Nixon.⁶⁶

⁶⁶Amar, *supra* .