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CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS MINORITY VIEWS

REPORT BY THE MINORITY STAFF OF THE IMPEACHMENT INQUIRY

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

HENRY J. HYDE, *Chairman*
JOHN CONYERS, JR., *Ranking Minority Member*

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I. INTRODUCTION

This report has been prepared by the Minority Staff and Minority Investigative Staff of the Committee on the Judiciary to address the constitutional standards for impeachment that should govern the inquiry resulting from the September 9, 1998 Referral by the Office of Independent Counsel Kenneth W. Starr (hereinafter the "OIC").

The Majority's Report, entitled *Constitutional Grounds for Presidential Impeachment: Modern Precedents* (hereinafter "Majority Staff Report"), attempts to update the report on impeachment standards prepared by Committee staff during the Watergate proceedings.[1] However, in our view, this affirms the emphasis that the Minority has always placed on a threshold inquiry into the proper constitutional understanding of "other high Crimes and Misdemeanors." During debate in the Committee and on the floor of the House on H. Res. 581,[2] Minority Members offered alternative impeachment inquiry resolutions that would have commenced the instant inquiry with a detailed consideration of the constitutional standards governing removal of a president.[3] Minority Members explained that such a thorough review might well lead to the conclusion that none of the allegations contained in the Referral, even if taken as true, would rise to the level of an impeachable offense, thereby eliminating the need for further inquiry. In this regard, therefore, we would have hoped that any effort to update the Watergate Staff Report would have been undertaken in a bipartisan and serious manner.

Unfortunately, the Majority Staff Report—rather than providing an "update" of the Watergate Staff Report—attempts to re-write more than two hundred years of history without any input from the Minority[4] in a transparent effort to broaden the historically accepted standards for presidential impeachment. The mere fact that the

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[1] Staff of House Comm. on the Judiciary, 93rd Cong., 2d Sess. (Comm. Print 1974) *Constitutional Grounds For Presidential Impeachment ("Watergate Staff Report").*

[2] On September 11, 1998, the House of Representatives passed H. Res 525, which directed the Committee to receive and review the OIC's Referral, and to "determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be commenced." On October 8, 1998, the House passed H. Res. 581, which directed the Committee to "investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach William Jefferson Clinton, President of the United States of America." The resolution further instructed the Committee to "report to the House of Representatives such resolutions, articles of impeachment, or other recommendations as it deems proper."

[3] On November 11, 1998, Representatives Conyers and Scott, the Ranking Members on the Committee and the Subcommittee on the Constitution, asked that this issue be resolved before the Committee moved on into what could be a drawn out and polarizing factual inquiry. Letter from John Conyers, Jr., Ranking Minority Member, House Committee on the Judiciary, and Robert C. Scott, Ranking Minority Member, Subcommittee on the Constitution, to Henry H. Hyde, Chairman, House Committee on the Judiciary (Nov. 11, 1998). Chairman Hyde rejected that request by letter dated November 13, 1998.

[4] The Minority was first formally notified about this undertaking on November 5, when a draft copy of the Majority Staff Report was presented to the Minority staff. The Minority was not asked to contribute to or participate in the drafting process. The following day, November 6, the Majority Staff Report was published as a Committee print and posted on the Internet.

Majority Staff Report was released before the November 9 hearing on impeachment standards indicates that the Majority is more interested in reaching a pre-set conclusion than in engaging a more contemplative consideration of relevant precedent.

The Majority Staff Report reaches four conclusions: (1) since 1974, making false and misleading statements under oath has been the most common basis for impeachment; (2) the standard for impeachable offenses is the same for federal judges as it is for presidents; (3) impeachable offenses can involve both personal and professional misconduct; and (4) impeachable offenses do not have to be federal or state crimes.[5] Other than the fourth finding, which was a conclusion of the Watergate Staff, the Majority's conclusions are misleading if not outright false. Contrary to the positions taken in the Majority Staff Report, this report will show that historical precedent establishes that impeachable offenses should be closely tied to official, not private misconduct unrelated to office; and past judicial impeachments do not serve as precedent for impeaching a president based on private misconduct.

II. Historical Precedent Establishes that Impeachable Offenses Should be Closely Tied to Official, not Private Misconduct

The Majority Staff Report attempts an "end run" around the constitutional requirement that there be a substantial nexus between alleged misconduct by a chief executive and his official duties before such misconduct can rise to the level of an impeachable offense. Although there are no judicial precedents which spell out the meaning of the Constitution's impeachment clause, an examination of the historical precedents, including the Watergate Staff Report and impeachment proceedings against President Nixon, clearly establishes that a president should only be impeached for conduct which constitutes an abuse or subversion of the powers of the executive office.

Under Article II, Section 4 of the Constitution, impeachment is only warranted for conduct which falls within the constitutional parameters of "Treason, Bribery, or other high Crimes and Misdemeanors."[6] As an initial matter, it is important to note that the juxtaposition of such serious offenses of Treason and Bribery with the phrase "other high Crimes and Misdemeanors" serves as an important indicator of how the latter term should be defined. In other words, it seems clear that the Framers intended that such "other high Crimes and Misdemeanors" must be in the nature of large scale abuses of public office—similar to treason and bribery.[7] Indeed a review by the Congressional Research Service of nearly 700 years of precedent from English and American impeachment prece-

[5] *Majority Staff Report, supra* at 16–17.

[6] Treason is defined in the Constitution, art. III, Sec. 3, cl. 1, and in statute, 18 U.S.C. § 2381, to mean levying war against the United States or adhering to their enemies, giving them aid and comfort. Bribery is not defined in the Constitution, although it was an offense at common law. The First Congress enacted a bribery statute, the Act of April 30, 1790, 1 Stat. 112, 117, which, with some amendment, is now codified at 18 U.S.C. § 201.

[7] This reading is an example of the standard rule of construction known in Latin as "*eiusdem generis,*" or "of the same kind." It basically provides that when a general word occurs after a number of specific words, the meaning of the general word is limited to the kind or class of things in which the specific words fall.

dent was unable to reveal a single impeachment case based solely on private misconduct.

It is also important to note that the word "high" modifies both "Crimes" and "Misdemeanors." As the history of that term makes clear, the Framers did not entrust Congress with the power to impeach a popularly elected President simply upon a showing that the executive committed a "misdemeanor" crime as we now understand the term—as a minor offense usually punishable by a fine or brief period of incarceration. Instead, an examination of the relevant historical precedents indicates that a president may only be impeached for conduct which constitutes an egregious abuse or subversion of the powers of the executive office.

A. INTENT OF THE FRAMERS

A historical review indicates that the Framers intended the operation of the impeachment clause to be premised on grave abuse of executive authority. This is evident by the use of the terms "other high Crimes and Misdemeanors" in English Parliamentary history, its actual drafting at the Constitutional Convention, the ratification debates in the states, and subsequent comments and actions by the Framers.

At the time of the Constitutional Convention, the phrase "high Crimes and Misdemeanors" had been in use for over 400 years in impeachment proceedings in the English parliament. The phrase was a term of art in English parliamentary practice and had a special historical meaning different from the ordinary meaning of the discrete terms "crimes" and "misdemeanors." In particular, "high misdemeanors" referred to a category of offenses that subverted the system of government.[8]

In its report on the historical roots of the impeachment process, the staff of the Watergate impeachment inquiry offered the following summary of these English historical precedents:

> First, the particular allegations of misconduct alleged damage to the state in such forms as misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament's prerogatives, corruptions and betrayal of trust. Second, the phrase "high Crimes and Misdemeanors" was confined to parliamentary impeachments, it had no roots in the ordinary criminal law, and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions or crimes.[9]

With regard to the actual drafting of the Constitution's impeachment clause, it is clear the Framers intended impeachment to be a very limited remedy, reserved for the most egregious misconduct subversive of government. This is why at the outset, delegates such as Gouvernor Morris and James Madison objected to the use of broad impeachment language. Morris argued that "corruption & some few other offences to be such as ought to be impeachable; but

[8] Historians have traced the earliest use of the terms "high Crimes and Misdemeanors" to the impeachment of the Earl of Suffolk in 1386. *See* Raoul Berger, Impeachment: The Constitutional Problems, 59 (1973) ("Berger").

[9] *Watergate Staff Report, supra* note 1, at 7.

thought the cases ought to be enumerated & defined,"[10] while Madison noted that impeachment was only necessary to be used to "*defend[] the Community* against the incapacity, negligence or perfidy of the chief Magistrate."[11]

The critical drafting occurred on September 8, 1787, and is described in the Watergate Staff Report:

> Briefly, and late in the Convention, the framers addressed the question how to describe the grounds for impeachment consistent with its intended function. They did so only after the mode of the President's election was settled in a way that did not make him (in the words of James Wilson) "the Minion of the Senate."
>
> The draft of the Constitution then before the Convention provided for his removal upon impeachment and conviction for "treason or bribery." George Mason objected that these grounds were too limited:
>
>> Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings [an English official being impeached in India] 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.
>
> Mason then moved to add the word "maladministration" to the other two grounds. Maladministration was a term in use in six of the thirteen state constitutions as a ground for impeachment, including Mason's home state of Virginia.
>
> When James Madison objected that "so vague a term will be equivalent to a tenure during pleasure of the Senate," Mason withdrew "maladministration" and substituted "high crimes and misdemeanors agst. the State," which was adopted eight states to three. . . .[12]

It is important to emphasize the narrowness of the phrase "other high Crimes and Misdemeanors" was confirmed by the addition of the language "against the State." Madison wrote that the delegates revised the phrase to "other high Crimes and Misdemeanors *against the United States*" in order to "remove ambiguity."[13] This language reflects the Convention's view that only offenses against the political order should provide a basis for impeachment. Although the phrase "against the United States" was eventually deleted by the Committee of Style that produced the final Constitution,[14] the Committee of Style was directed not to change the

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[10] Berger, *supra* note 8, at 65.
[11] *Id.* (emphasis added).
[12] *Watergate Staff Report, supra* note 1, at 11–12 (citations omitted).
[13] 2 Max Farrand, The Records of the Federal Convention of 1781, 551 (Rev. ed. 1967) (emphasis added).
[14] *Id.* at 600

meaning of any provision.[15] It is therefore clear that the phrase was dropped as a redundancy and its deletion was not intended to have any substantive impact.[16]

The ratification debates in the states also serve to highlight the narrow purpose and scope of the impeachment clause. For example, the Virginia ratifiers believed that possible impeachment counts would lie against the president where he had received "emoluments" from a foreign power,[17] pardoned his own crimes or crimes he advised,[18] or had summoned the representatives of only a few states to ratify a treaty.[19] Likewise, the North Carolina Assembly thought that concealing or giving false information to the Senate in order to bring about legislation harmful to the country could constitute an impeachable offense.[20]

The construction that "other high Crimes and Misdemeanors" should be limited to serious abuses of official power is further confirmed by the commentary of prominent Framers and early constitutional commentators. Supreme Court Justice James Wilson, who played a major role at the Constitutional Convention, wrote: "[I]mpeachments are proceedings of a political nature . . . confined to political characters charging only political crimes and misdemeanors and culminating only in political punishments."[21]

Significantly, Alexander Hamilton, another leading Framer, wrote in Federalist No. 65 that impeachable offenses "proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust." He stressed that those offenses "may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[22]

Hamilton's view was endorsed a generation later by Justice Joseph Story in his *Commentaries on the Constitution* when he wrote, "[impeachable offenses] are committed by public men in violation of their public trust and duties. . . . Strictly speaking, then, the impeachment power partakes of a political character, as it respects injuries to the society in its political character."[23] Justice Story added that impeachable offenses "peculiarly injure the commonwealth by the abuse of high offices of trust."[24]

The improprieties of Alexander Hamilton and Congress' reaction, shortly after the adoption of the Constitution, serve to illuminate further the Framers' narrow intent. During the winter of 1792–1793, while Congress was investigating the alleged financial misdealings of then Secretary of Treasury Alexander Hamilton, he was forced to admit that he had made improper payments to James Reynolds in order to prevent public disclosure of an adulterous relationship Hamilton had engaged in with Reynolds' wife. Hamilton

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[15] *Id.* at 553.

[16] *See Fenton, The Scope of the Impeachment Power,* 65 N. W. L. Rev. 719, 740 (1970). *See also* summary of impeachment precedents prepared by David Overlock Stewart, Peter K. Levitt, and Marc L. Kesselman of Ropes & Gray, Sept. 29, 1998 (on file with Minority Staff) ("Ropes & Gray Memorandum").

[17] Edmund Randolph, 3 J. Elliot, The Debate in the Several State Conventions on the Adoption of the Federal Constitution 486 (reprint of 2d ed.) (Virginia Convention).

[18] George Mason, 3 Elliot 497–98 (Virginia Convention).

[19] James Madison, 3 Elliot 500 (Virginia Convention).

[20] James Iredell, 4 Elliot 127 (North Carolina Convention).

[21] James Wilson, The Works of James Wilson 426 (R. McCloskey, ed., 1967).

[22] Alexander Hamilton, The Federalist Papers, 65 (C. Rossiter, ed., 1991).

[23] 2 Joseph Story, Commentaries on the Constitution § 744 (1st ed. 1833).

[24] *Id.*

even went to the length of having Mrs. Reynolds burn incriminating correspondence and promised to pay for the Reynolds' travel costs to leave town. When Congress learned of this course of events, they decided the matter was private, not public, and did not pursue any impeachment proceedings.[25]

B. WATERGATE STAFF REPORT

Contrary to the position taken in the Majority Staff Report, a fair reading of the Watergate Staff Report does not support equating impeachable offenses with personal misconduct unrelated to public office.[26] We do agree that it is clear—as the Majority Staff Report states—that one of the principal conclusions of the Watergate Staff Report is that a violation of the criminal laws is not a prerequisite for impeachment.[27] Far more significant for purposes of the OIC Referral, however, is that the Watergate Staff Report went on to conclude that the mere occurrence of criminal misconduct does not necessarily support a charge of impeachment. Instead, the Watergate Staff Report asserts that in order to justify presidential impeachment, it is necessary to establish that the misconduct is so grave as to threaten our constitutional form of government or the president's duties thereunder:

> Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. *Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.* [28]

It is also important to note that during the Watergate inquiry, the Republican Minority did not disagree with this latter contention. Although the Republicans unsuccessfully argued that criminal misconduct should be a prerequisite to impeachment, they did not challenge the proposition that the misconduct must rise to constitutional proportions to warrant impeachment. In their separate views prepared to the Committee's Report on the final articles of impeachment, Minority members wrote: "[I]t is our judgment, based upon . . . constitutional history that the framers . . . intended that the President should be removable by the legislative branch *only for serious misconduct dangerous to the system of government established by the Constitution.*" [29]

Similarly, during the Committee debate voting out articles of impeachment, the Republican Ranking Member, Rep. Hutchinson (R–

[25] Richard N. Rosenfield, *Founding Fathers Didn't Flinch—Alexander Hamilton's Misstep was Deemed a Private Matter that didn't Affect his Service to the Nation,* L.A. Times, Sept. 18, 1998, at B9. *See also* The Papers of Alexander Hamilton (Harold C. Syrett, ed. 1974).

[26] *Majority Staff Report, supra* at 16.

[27] *See, e.g., Watergate Staff Report, supra* note 1, at 24.

[28] *Id.* at 27 (emphasis added).

[29] *Impeachment of Richard M. Nixon, President of the United States,* H.R. Rep. No. 93–1305, 93rd Cong., 2d Sess. 10, at 365 (1974) ("*Watergate Committee Report*") (citations omitted) (emphasis added).

MI), explicitly embraced a similar definition of "impeachable offenses" by arguing that "a president can be impeached for the commission of crimes and misdemeanors, which like other crimes to which they are linked in the Constitution, treason and bribery, *are high in the sense that they are crimes directed against or having great impact upon the system of government itself.*"[30]

C. PRESIDENTIAL IMPEACHMENTS

Historical presidential impeachment precedent also demonstrates that, for offenses to be impeachable, they must arise out of a president's public, not private, conduct. As an initial matter, it is instructive to consider the 1868 impeachment of President Andrew Johnson, a Democrat who arose to the presidency after President Lincoln's assassination. He was impeached by the House Republicans because he had removed the Secretary of War, Edwin M. Stanton, who had disagreed with his post-Civil War reconstruction policies. Stanton's removal was said to be inconsistent with the Tenure in Office Act, requiring Senate approval for removal of certain officers.[31]

Although the impeachment of President Andrew Johnson failed in the Senate, it is informative to note that all of the impeachment articles related to alleged public misconduct. The eleven articles of impeachment related to Johnson's removal of Stanton, the impact of that removal on Congressional prerogatives, and its impact on post-Civil War Reconstruction. Accordingly, it is fair to state that although motivated by politics, the impeachment was nonetheless premised on official presidential conduct and alleged harms to the system of government.[32]

During the Senate trial, the President's defenders argued that impeachment could only be based on "a criminal act directly subversive of fundamental principles of government or the public interest."[33] President Johnson was acquitted on May 16, 1868 by a one vote margin. Of particular note, William Pitt Fessenden, a senior Republican, warned of the dangers that a weakly grounded impeachment could have on the Nation:

> [T]he offence for which a Chief Magistrate is removed from office, . . . should be of such a character to commend itself at once to the minds of all right thinking men as, beyond all question, an adequate cause. It should be free from the taint of party; leave no reasonable ground of suspicion upon the motives of those who inflict the penalty, and address itself to the country and the civilized world as a measure justly called for by the gravity of the crime and the necessity for its punishment. Anything less [would] shake the faith of the friends of constitutional liberty in

[30] Howard Fields, High Crimes and Misdemeanors 120 (1978) (emphasis added).

[31] Act of March 2, 1867, ch. 154, § 6, 14 Stat. 430. *See also* William H. Rehnquist, Grand Inquests 212–16 (1992).

[32] *Cong. Globe Supp.,* 40th Cong. 2d Sess., 3–5 (1868). *See also* Michael Les Benedict, The Impeachment and Trial of Andrew Johnson 114–15 (1973); Ropes & Gray Memorandum, *supra* note 16.

[33] *Cong. Globe Supp.,* 40th Cong. 2d Sess. V. II, at 139–40 (April 23, 1868) and 286–89 (April 29, 1868). *See also Cong. Globe Supp.,* 40th Cong. 2d. Sess., at 286–310 (1868).

> the permanency of our free institutions and the capacity of man for self-government.[34]

The circumstances surrounding the proposed impeachment of President Nixon also support the view that impeachment should be limited to threats that undermine the Constitution, not ordinary criminal misbehavior unrelated to a president's official duties. All three of the articles of impeachment approved by the House Judiciary Committee involved misuse of the President's official duties. The First Article—alleging that President Nixon coordinated a cover-up of the Watergate break-in by interfering with numerous government investigations, using the CIA to aid the cover-up, approving the payment of money and offering clemency to obtain false testimony—qualified as a high Crime and Misdemeanor, because "[the President used] *the powers of his high office* [to] engage . . . in a course of conduct or plan designed to delay, impede, and obstruct [the Watergate investigation]."[35] The Second Article—alleging that the President used the IRS as a means of political intimidation and directed illegal wiretapping and other secret surveillance for political purposes—described "*a repeated and continuing abuse of the powers of the Presidency* in disregard of the fundamental principle of the rule of law in our system of government."[36] The Third Article—alleging that President Nixon refused to comply with subpoenas issued by the Judiciary Committee in its impeachment inquiry—was considered impeachable because such subpoena power was essential to "Congress' [ability] to act as the ultimate safeguard against improper presidential conduct."[37]

Even more telling are the circumstances by which the Committee rejected articles of impeachment against President Nixon relating to allegations of income tax evasion. The Majority Staff Report contains no detailed discussion of the debate on this proposed article of impeachment. This omission is surprising considering the Majority's public pronouncements on this issue. For example, a Judiciary Committee spokesman for the Majority recently took issue with an assertion by White House counsel that Judiciary Committee Democrats involved in the Watergate impeachment inquiry voted against including tax evasion charges in the articles of impeachment on the grounds that it involved private, rather than official, misconduct:

> The problem with [Counsel to the President's] statement is that there is absolutely no discussion in the historical record of the Watergate proceedings to support that assertion. In fact, the record indicates that most members voted against the article, not because they considered it private conduct and therefore unimpeachable, but because there was insufficient evidence for the charge or they preferred to focus on the core charges against President Nixon.[38]

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[34] *Id.* at 30.

[35] *Watergate Committee Report, supra* note 29, at 133 (emphasis added).

[36] *Id.* at 180 (emphasis added).

[37] *Id.* at 213. A fourth proposed article citing the covert use of the military in Cambodia was rejected "because Nixon was performing his constitutional duty" as Commander-in-Chief, because "Congress had been given sufficient warning of the bombings," and "because the passage of the War Powers Resolution mooted the question raised by the Article." *Id.* at 219.

[38] Legal Times, *Craig is "Rewriting History" On Impeachment Issues* (Nov. 2, 1998) at 27.

In point of fact, the historical record of the Watergate proceedings demonstrates that the lack of a nexus between the tax evasion charges and President Nixon's official duties played an important role in the Committee's ultimate rejection of this proposed article of impeachment. On July 30, 1974, the Judiciary Committee debated a proposed article of impeachment alleging that President Nixon had committed tax fraud when filing his federal income tax returns for the years 1969 through 1972 (tax returns are filed under penalty of perjury). All seventeen Republican members of the Committee joined with nine Democratic members to defeat this proposed article by a vote of 26–12.[39] The primary ground for rejection was that the Article related to the President's private conduct, not an abuse of his authority as President.

The crux of the impeachment article related to allegations that the President understated his income and overstated his deductions for the years 1969 through 1972.[40] In examining the President's tax returns for those four years, the IRS found that he had underreported his taxable income by $796,000; in doing its own calculations, Congress's Joint Committee on Internal Revenue Taxation put the figure at $960,000.[41] The underreporting derived from a $576,000 tax deduction the President had claimed during those years for a gift of his papers to the National Archives.[42]

In the ensuing debate on the article of impeachment concerning this issue, one of the most important themes leading to its rejection was the lack of any sufficient connection between these charges of alleged criminal conduct and the President's official duties. Opponents of this article raised three primary objections: (1) there was no evidence the President had committed tax evasion; (2) tax evasion should be addressed through the criminal law, not impeachment; and (3) tax evasion was not an impeachable offense.[43]

The first argument against the article was that there was no clear and convincing evidence that the President had committed tax fraud.[44] Because the President had relied upon his attorneys and agents in determining his tax responsibilities, he was said to have not fraudulently filed a false tax return and had not committed a criminal act.[45] Only Republican members of the Committee (and only eleven of the seventeen Republicans at that), spoke against the article on the grounds that there was insufficient evidence of tax evasion.[46] This group constituted only eleven of the twenty-six votes against the proposed article; therefore, it is not possible to say that a majority of the votes against the Article opposed it for insufficiency of evidence.[47]

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[39] *Hearings Before the House Comm. on the Judiciary Pursuant to H. Res. 803,* 93d Cong. 2d. Sess. 527 (1974) ("*Debate on Articles of Impeachment*").

[40] The second article of impeachment provided: "[President Nixon] knowingly and fraudulently failed to report certain income and claimed deductions in the years 1969, 1970, 1971, and 1972 on his Federal income tax returns which were not authorized by law, including deductions for a gift of papers to the United States valued at approximately $576,000." *Watergate Committee Report, supra* note 29, at 220.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Debate on Articles of Impeachment, supra* note 39, at 522, 532.

[46] *See id.* at 517–60.

[47] At the time it considered articles of impeachment, the Committee was aware that according to the former Chief of the Criminal Tax Section at the Department of Justice "in the case of

Continued

The opponents also maintained that because tax evasion could be addressed through the criminal law, it was an inappropriate vehicle for determining the President's culpability.[48] As Democratic Member Ray Thornton (D–AR) acknowledged, "there [had] been a breach of faith with the American people with regard to incorrect income tax returns. . . . But . . . these charges may be reached in due course in the regular process of law. This committee is not a tax court nor criminal court nor should it endeavor to become one."[49]

The opponents' final and ultimately most compelling reason for rejecting this article was that tax fraud was not an abuse of power that impeachment was designed to remedy.[50] Republican congressmen explicitly emphasized that personal misconduct could not give rise to an impeachable offense. Congressman Tom Railsback (R–IL) noted that there was "a serious question as to whether something involving [the President's] personal tax liability has anything to do with his conduct of the office of the President."[51] Congressman Lawrence J. Hogan (R–MD), quoted from the impeachment inquiry staff report:

> As a technical term, high crime signified a crime against the system of government, not merely a serious crime. *This element of injury to the commonwealth, that is, to the state itself and to the Constitution, was historically the criteria for distinguishing a high crime or misdemeanor from an ordinary one.*[52]

Also, Congressman Wiley Mayne (R–IA) reasoned:

> Now, *even if criminal fraud had been proved, . . . then we would still have the question whether it is a high crime or misdemeanor sufficient to impeach under the Constitution,* because that is why we are here, ladies and gentlemen, to determine whether the President should be impeached, not to comb through every minute detail of his personal taxes for the past 6 years, raking up every possible minutia which could prejudice the President on national television.[53]

Similarly, Democratic Congressman Jerome Waldie (D–CA) echoed the Republican distinction between public and private conduct,[54] and opposed the proposed article because "the impeachment process is a process designed to redefine Presidential powers in cases where there has been enormous abuse of those powers and then to limit the powers as a concluding result of the impeachment process."[55]

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an ordinary taxpayer, on the facts as we know them in this instance, the case would be referred to a Grand Jury for prosecution." *Id.* In fact, the President's advisers were criminally prosecuted for their roles in Nixon's tax evasion. *United States* v. *DeMarco,* 394 F. Supp. 611, 614 (D.D.C. 1975).

[48] *Watergate Committee Report, supra* note 29, at 222.
[49] *Debate on Articles of Impeachment, supra* note 39, at 549.
[50] *Watergate Committee Report, supra* note 29, at 222.
[51] *Debate on Articles of Impeachment, supra* note 39, at 524.
[52] *Id.* at 541 (emphasis added).
[53] *Id.* at 545 (emphasis added).
[54] *Id.* at 548.
[55] *Id.*

It is also informative to consider the various incidents over the last 50 years involving alleged presidential impropriety for which impeachment proceedings were *not brought* or considered. This is not to say that impeachment should have been initiated in these cases, merely that the Congress showed restraint in failing to pursue these lines by way of impeachment inquiry. These incidents include the following:

• With regard to Iran-Contra, President Reagan initially declared on national television that there was no arms for hostages transfer. Subsequently, in a January 1987 interview with the Tower Commission, pursuant to the Commission's Iran-Contra investigation, President Reagan stated that he approved an August shipment of arms by Israel to Iran. Then, in a February 1987 interview with the Commission, he recanted his prior statements and said he did not approve the shipment. He also said, contrary to his January statements, that he was surprised when he learned Israel had shipped arms to Iran. Finally, when questioned by Walsh in February, 1990, President Reagan denied any detailed knowledge of the Iran-Contra matter.

• In a deposition with the Office of Independent Counsel Lawrence Walsh, then-Vice President George Bush denied knowledge of the diversion of Iranian arms-sale proceeds to the Contras and denied knowledge of Lieutenant Colonel Oliver North's secret Contra-supply operation. The OIC subsequently found evidence contradicting the Vice President's statements, but he refused to submit to further interviews. Moreover, on December 24, 1992, President Bush pardoned (1) former Defense Secretary Caspar Weinberger; (2) former CIA official Duane R. Clarridge; (3) former National Security Adviser Robert McFarlane; (4) former CIA official Alan D. Fiers, Jr; (5) former State Department official Elliott Abrams; and (6) former CIA official Clair George even though they had all either been indicted or pled guilty pursuant to Lawrence Walsh's Iran-Contra investigation.

• There were widespread claims of a secret "deal" between President Ford and President Nixon, culminating in the pardon received by President Nixon.

• It was widely believed that President Kennedy was involved in a series of illicit sexual relationships while in office, including an illicit sexual relationship with a woman simultaneously associated with a member involved in organized crime. Some have suggested that this relationship could have potentially compromised Department of Justice law enforcement activities.

• Before passage of the Lend-Lease Act, the sale of arms to other nations, including Britain, was prohibited by law. Nonetheless, it is generally agreed that President Roosevelt was secretly and unlawfully transferring arms—including over 20,000 airplanes, rifles, and ammunition—to England.[56]

D. VIEWS OF THE SCHOLARS

A review of the writings by prominent scholars concerning the issue of impeachment further confirms that for presidential wrong-

[56] *The Background and History of Impeachment: Hearing on H. Res. 581 Before the Subcomm. On the Constitution, 105th Cong., 2d Sess. (1998)* (Nov. 9, 1998) (forthcoming) ("Subcommittee Hearing") (Written testimony of Professor Cass Sunstein at 9–10) (citations omitted).

doing to rise to the level of an impeachable offense, it should stem from serious official misconduct against the government. At the outset, it is interesting to note that the question of whether private presidential misconduct could be impeachable was presaged twenty-five years ago by Professor Charles Black, in his seminal work, *Impeachment: A Handbook,* when he posited the following hypothetical:

> Suppose a President transported a woman across a state line or even (as the Mann Act reads) from one point to another within the District of Columbia, for what is quaintly called an "immoral purpose.". . . Or suppose the president actively assisted a young White House intern in concealing the latter's possession of three ounces of marijuana—thus himself becoming guilty of "obstruction of justice." Would it not be preposterous to think that any of this is what the Framers meant when they referred to "Treason, Bribery, and other high Crimes and Misdemeanors," or that any sensible constitutional plan would make a president removable on such grounds? [57]

In a similar vein, Professor Black addresses the question of whether obstruction of justice will always constitute an impeachable offense:

> Here the question has to be whether the obstruction of justice has to do with public affairs and the political system; I would not think impeachable a president's act in helping a child or a friend of his to conceal misdeeds, unless the action were so gross as to make the president unviable as a leader. In many cases his failure to protect some people at some times might result in his being held in contempt by the public. I would have to say the protection of their own people is in all leaders, up to a point, a forgivable sin, and perhaps, even an expectable one; this consideration may go to the issue of "substantiality." [58]

More recently, a large group of legal scholars and academics have offered their views regarding the impeachability of the misconduct alleged by the OIC. On November 6, four hundred thirty Constitutional law professors wrote: "Did President Clinton commit 'high Crimes and Misdemeanors' warranting impeachment under the Constitution? We . . . believe that the misconduct alleged in the report of the Independent Counsel . . . does not cross that threshold. . . . [I]t is clear that Members of Congress would violate their constitutional responsibilities if they sought to impeach and remove the President for misconduct, even criminal misconduct, that fell short of the high constitutional standard required for impeachment." [59]

One week earlier, four hundred historians issued a joint statement warning that because impeachment has traditionally been reserved for high crimes and misdemeanors in the exercise of execu-

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[57] Charles L. Black, *Impeachment: A Handbook* 35–36 (1974) ("Black").

[58] *Id.* at 45–46.

[59] Letter from more than 400 Constitutional law professors (Nov. 6, 1998) (submitted as part of the Subcommittee Hearing Record).

tive power, impeachment, based on the facts alleged in the OIC Referral, would set a dangerous precedent. "If carried forward, they will leave the Presidency permanently disfigured and diminished, at the mercy as never before of caprices of any Congress. The Presidency, historically the center of leadership during our great national ordeals, will be crippled in meeting the inevitable challenges of the future."[60]

Finally, the weight of credible evidence offered at the November 9 hearing on the Background and History of Impeachment also supports the view that impeachment should be limited to abuse of public office, not private misconduct. This point was made by several of the witnesses. For example, Chicago Law Professor Cass Sunstein summarized the standard as follows: "[w]ith respect to the President, the principal goal of the impeachment clause is to allow impeachment for a narrow category of large-scale abuses of authority that come from the exercise of *distinctly presidential powers.* Outside of that category of cases, impeachment is generally foreign to our traditions and prohibited by the Constitution."[61] Professor Sunstein went on to review English Parliamentary precedent, the intent of the Framers and subsequent impeachment practice as all supporting this bedrock principle. In his view, the only exception where purely private conduct would be implicated was in the case of a heinous crime, such as murder or rape:

> [B]oth the original understanding and historical practice converge on a simple principle. The basic point of the impeachment provision is to allow the House of Representatives to impeach the President of the United States for *egregious misconduct that amounts to the abusive misuse of the authority of his office.* This principle does not exclude the possibility that a president would be impeachable for an extremely heinous "private" crime, such as murder or rape. But it suggests that outside such extraordinary (and unprecedented and most unlikely) cases, impeachment is unacceptable.[62]

Father Drinan, a former House Judiciary Committee Member who participated in the Watergate impeachment process, and now a Professor of Law at Georgetown University, reached the same conclusion, testifying that, "the impeachment of a president must relate to some reprehensible exercise of *official* authority. If a president commits treason he has abused his executive powers. Likewise a president who accepts bribes has abused his official powers. The same misuse of official powers must be present in any consideration of a president's engaging in 'other high crimes and misdemeanors.'"[63] Eminent historian Arthur Schlesinger made the same basic distinction between private and public misconduct:

> The question we confront today is whether it is a good idea to lower the bar to impeachment. The charges levied

[60] *Statement Against the Impeachment Inquiry,* submitted to the Committee by more than 400 historians (Oct. 28, 1998) (submitted as part of the Subcommittee Hearing Record).

[61] *Subcommittee Hearing, supra* note 56 (Written Testimony of Professor Cass Sunstein at 2) (emphasis in original).

[62] *Id.* at 5,7, 8, 11, 12 (emphasis in original).

[63] *Id.* (Written Testimony of Robert F. Drinan, S.J. at 3–7).

> against the President by the Independent Counsel plainly do not rise to the level of treason and bribery. They do not apply to acts committed by a President in his role of public official. They arise from instances of private misbehavior. All the Independent Counsel's charges thus far derive entirely from a President's lies about his own sex life. His attempts to hide personal misbehavior are certainly disgraceful; but if they are to be deemed impeachable, then we reject the standards laid down by the Framers in the Constitution and trivialize the process of impeachment.[64]

Of course, the Majority will argue that these conclusions are not surprising since they were provided by witnesses called by Democratic Members. Aside from the fact that the conclusions of these witnesses are borne out by the great weight of the evidence as detailed above, this argument does not take account of the fact that the one witness jointly selected by the Majority and the Minority—William & Mary Law Professor Michael Gearhardt—concurred in the assessment offered by the Democratic witnesses. That is to say, Professor Gearhardt also testified that impeachment should principally be limited to abuse of public office:

> [There is a] widespread recognition that there is a paradigmatic case for impeachment consisting of the abuse of power. *In the paradigmatic case, there must be a nexus between the misconduct of an impeachable official and the latter's official duties.* It is this paradigm that Hamilton captured so dramatically in his suggestion that impeachable offenses derive from "the abuse or violation of some public trust" and are "of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. This paradigm is also implicit in the founders' many references to abuses of power as constituting political crimes or impeachable offenses.[65]

Even to the extent other Republican witnesses testified that private misconduct could be impeachable, some cautioned that discretion should be applied before applying this power in all situations. For example, Duke Law Professor William Van Alstyne stated that the allegations by Mr. Starr constituted "low crimes and misdemeanors" and that "[t]he further impeachment pursuit of Mr. Clinton may well not now be particularly worthwhile."[66]

The Constitution Subcommittee hearing also served to expose a number of the fallacies in the Republican arguments calling for a more expansive view of impeachment. For example, Professor McDonald sought to convince the Members that the term "Misdemeanor" in the phrase "high Crimes and Misdemeanors" was intended to incorporate "all indictable offenses which do not amount to a felony [including] perjury."[67] This contention can not only be rebutted by the absurd breadth of the resulting scope of the im-

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[64] *Id.* (Written Statement of Arthur Schlesinger, Jr. at 2).
[65] *Id.* (Written Testimony of Professor Michael Gearhardt at 13–14) (footnotes omitted) (emphasis added).
[66] *Id.* (Written Testimony of Professor William Van Alstyne at 6).
[67] *Id.* (Written Testimony of Professor Forrest McDonald at 7).

peachment clause, but by specific reference to English Parliamentary use as outlined in the Watergate Staff Report:

> Blackstone's *Commentaries on the Laws of England*—a work cited by delegates in other portions of the Convention's deliberations and which Madison later described (in the Virginia ratifying convention) as "a book which is in every man's hand"—included "high misdemeanors" as one term for positive offenses "against the king and government." . . . "High Crimes and Misdemeanors" has traditionally been considered a "term of art," like such other constitutional phrases as "levying war" and "due process."[68]

Another claim made by Majority witness Charles Cooper and Professors Parker and McDonald was that perjury must be considered a public impeachable offense because it is tantamount to bribery of the court, an offense so public in nature as to obviously be impeachable. Professor Tribe responded by clearly differentiating between the two offenses: "The fallacy, I think, is that bribery always, by definition, involves the corrupt use of official government powers, the powers of whoever is getting bribed. The fact that the officer being impeached acted privately as the briber, and not publicly as the bribee, is irrelevant, because the person who bribes is a full partner in a grave corruption and abuse of government power."

Another argument trotted out by the Republicans was that if the Committee fails to impeach the President for alleged private misconduct, they will be endorsing his actions and sending a signal that the President is "above the law." This is incorrect as a factual matter, as all of the witnesses agreed that the President would be subject to civil sanction while he is in office and criminal prosecution once he left office.[69] Mr. Starr acknowledged that he agreed with this legal interpretation when he testified at the full committee's November 19, 1998 hearing.[70]

Perhaps the response to this argument was most well put by Professor Schlesinger, in responding to a claim by Rep. Inglis (R–SC) that the Professor's view of the scope of impeachment would encourage presidents to lie:

> Far from advocating lying, I think lying is reprehensible. If you would bother to listen to my remarks or read my testimony, I say President Clinton's attempts to hide personal behavior are certainly disgraceful, but if they are deemed impeachable, then we reject a standard laid down by the Framers of the Constitution. That seems to be the nub of the case.

Finally, the argument has been made by Charles Cooper that the President's alleged misconduct, no matter how private in nature, should be treated as an impeachable offense because it violates the president's oath of office to uphold the Constitution and take care

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[68] *Watergate Staff Report, supra* note 1, at 12 (footnotes omitted).

[69] *See also* Arlen Specter, *Instead of Impeachment,* N. Y. Times, Nov. 11, 1998, at A27.

[70] *Minority Panel on Constitutional Issues Concerning Impeachment Before the House Judiciary Committee, 105th Cong. 2d Sess.* (October 15, l998).

that the laws are faithfully executed. As Professor Tribe observed, this argument proves far too much:

> It would follow, since the theory would be that any law violation by a sitting President is a violation of his oath and of the take-care clause, it would follow that you can impeach the President of the United States more easily than any other civil officer of the government. And making the President uniquely vulnerable to removal, especially on a fuzzy standard like virtue, seems to me to be profoundly unwise.

It is also important to recognize that the President's oath of office (I do solemnly swear . . . that *I will faithfully execute the Office of President* of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States[71]) does not address his responsibilities as a private litigant. The commitment memorialized by the oath of office is quite different from the generalized duty of each citizen to obey the law; rather it is an oath to discharge the constitutional responsibilities of the office.[72]

III. Past Judicial Impeachments Do Not Serve as Precedent for Impeaching a President Based on Private Misconduct

The Majority Staff Report attempts to cite selectively the three most recent judicial impeachments as a rationale for permitting the impeachment of a president for purely private misconduct. There are two major problems with the Majority's approach. First, as a general matter, it ignores the fact that the bases for and standards applicable to presidential impeachments are not the same as judicial impeachment. Judicial impeachment has a different pedigree and takes account of differing roles and responsibilities. Second, the Majority's approach mischaracterizes the factual history and context of judicial impeachments as being principally premised on perjury charges. In point of fact, there is nothing in the 1974 Watergate Staff Report which refers to perjury as constituting a standalone basis for impeachment, and a careful review of the more recent judicial impeachment cases reveals that they implicated more pervasive public misconduct than perjury.

A. General Distinctions Between Judicial and Presidential Impeachments

A review of the historical record and consideration of the differing responsibilities and roles of presidents and judges under the Constitution make it clear that the positions are and should be subject to differing impeachment considerations. As Professor Sunstein observes in his testimony, "historical practice suggests a

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[71] U.S. Const., art. II, sec. 1 (emphasis added).

[72] In 1866, the Supreme Court described the legal significance of the presidential oath of office as follows:

> [The President] is to "take care that the laws be faithfully executed." He is to execute the laws by the means and in the manner which the laws themselves prescribe. The oath of office cannot be considered as a grant of power. Its effect, is merely to superadd a religious sanction to *what would otherwise be his official duty,* and to bind his conscience against any attempt to *usurp power or overthrow the Constitution. Ex Parte Milligan,* 71 U.S. 2, 50–51 (1866) (emphasis added).

broader power to impeach judges than Presidents, and indeed it suggests a special congressional reluctance to proceed against the President."[73]

This is true for several reasons. First, almost all of the debate during the Constitutional Convention concerning impeachment focused on the power to remove the President. Judges and other civil officers were included as possible subjects of impeachment only near the end of the debate. According to noted impeachment scholar Raoul Berger:

> One thing is clear: in the impeachment debate the Convention was almost exclusively concerned with the President. The extent to which the President occupied center stage can be gathered from the fact that the addition to the impeachment clause of the "Vice president and all civil officers" only took place on September 8, shortly before the Convention adjourned.[74]

The absence of extended discussion makes clear that the historical debates on how to define impeachable offenses did not have judges in mind.

Second, the duties of the judicial office entail differing responsibilities than the president, which must be taken into account in developing impeachment standards. Although we would not go as far as to assert that judges are necessarily subject to a higher standard of impeachment by virtue of Article III's "good behavior" requirement[75]—as some have done[76]—it seems clear that the differing responsibilities attendant on the federal bench entail a different approach to impeachment. Likewise, constitutional scholars have long recognized that the nature of the responsibilities of the official facing impeachment play a crucial role in determining whether particular conduct may rise to the level of an impeachable offense. In his textbook on impeachment, Professor Gearhardt writes:

> [t]he different duties or circumstances of impeachable officials might justify different bases for their respective impeachments. In the case of federal judges, the good behavior clause is meant to guarantee not that they may be impeached on the basis of a looser standard than the president or other impeachable officials, but rather that they may be impeached on a basis that takes into account their special duties or functions.[77]

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[73] *Id.* at 12.

[74] Berger, *supra* note 8 at 100.

[75] Article III, Sec. 1 of the Constitution provides that judges "Shall hold their Offices during good Behaviour. . . ."

[76] For example, in proposing articles of impeachment against Supreme Court Justice William Douglas, then Minority Leader Gerald Ford maintained that, for members of the judicial branch, "an additional and much stricter requirement [than high crimes and misdemeanors] is imposed . . ., namely, "good behavior." *See* 3 Deschler's Precedents of the House of Representatives, H. Doc. 94–661, ch. 14, §2.11, at 452–55 (1974) (citing 116 Cong. Rec. 11912–14, 91st Cong. 2d Sess. (Sept. 17, 1970)). *See also Subcommittee Hearing, supra* note 56 (Written Testimony of Griffin B. Bell at 15–16) ("[the view] that federal judges are subject to a loose impeachment standard because they are removable for misbehavior while all other impeachable officials are removable—by impeachment—only for "Treason, Bribery, or other high Crimes and Misdemeanors" . . . appears to me to be the only one that makes sense.").

[77] Michael Gerhardt, *The Federal Impeachment Process,* 106–107 (1996).

The important role played by a federal district court judge, therefore, in administering oaths, sitting in judgment, and wielding the power to deprive citizens of their liberty or even their life make it especially appropriate that offenses against the judicial system or related offenses not directly tied to official acts may merit impeachment.

These same distinctions were at issue during the Watergate era. When the prospect of impeachment proceedings against President Nixon arose, one of the crucial questions was whether a President could be impeached for conduct that did not constitute a violation of criminal laws. Although judges had previously been impeached for non-criminal conduct, these precedents were of little relevance to the persons wrestling with the appropriate standards for presidential impeachments. According to John Labovitz, one of the principal drafters of the Watergate Staff Report:

> For both practical and legal reasons, however, these cases [involving the impeachment of judges] did not necessarily affect the grounds for impeachment of a president. The practical reason was that it seemed inappropriate to determine the fate of an elected chief executive on the basis of law developed in proceedings aimed at petty misconduct by obscure judges. The legal reason was that the Constitution provides that judges shall serve during good behavior. This clause could be interpreted as a separate standard for the impeachment of judges or it could be interpreted as an aid in applying the term "high crimes and misdemeanors" to judges. Whichever interpretation was adopted, it was clear that the clause made a difference in judicial impeachments, confounding the application of these cases to presidential impeachments.[78]

Third, the removal of an inferior federal judge does not involve the titanic confrontation between coordinate branches of government that arises in a presidential impeachment. The anti-democratic consequences of removing a popularly-elected president are not raised by removing an appointed federal judge. As Professor Tribe explained:

> [t]here is the brute fact that when we put the President on trial we are placing one federal branch in a position to sit in judgment on another, empowering the Congress essentially to decapitate the Executive Branch in a single stroke—and without the safeguards of judicial review. Neither of the other two branches of government is embodied in a single individual, so the application of the Impeachment Clause to the President of the United States involves the uniquely solemn act of having one branch essentially overthrow another. Moreover, in doing so, the legislative branch essentially cancels the results of the most solemn

[78] John R. Labovitz, *Presidential Impeachment* 92–93 (1978). *See also* Minority Views to Watergate Committee Report, *supra* note 29, at 370. (concluding that judicial impeachments "resting upon 'general misbehavior," in whatever degree, cannot be an appropriate guide for impeachment of an elected officer serving for a fixed term. The impeachments of federal judges are also different from the case of a President. . . .")

> collective act of which we as a constitutional democracy are capable: the national election of a president.[79]

As is accurately detailed in the Watergate Staff Report, one of the concerns voiced by the Framers in defining impeachable offenses was that if the definition was too expansive, then the balance of powers between the Executive and the Legislative branches of government would be tipped in favor of Congress, with disastrous results for the strong, centralized leadership that they envisioned.[80] Again, according to Professor Berger:

> [T]he framers did not adopt "misconduct in office" or "maladministration." "Maladministration" was in fact rejected on Madison's suggestion, and "high crimes and misdemeanors" was adopted in its place. True, the rejection was grounded on Madison's protest that "maladministration" would place tenure at "the pleasure of the Senate," as well it might if all petty misconduct in office were impeachable. But this interchange, it will be recalled, had reference to removal of the President, *which poses quite different problems from removal of judges.* [81]

These "balance of power" concerns, of course, are not in play to nearly the same degree when Congress is confronted with the question of judicial impeachments. It is not surprising, therefore, that such impeachments have been far more common in our history and have been triggered by misconduct that in some instances could not have justified presidential impeachments. There are some 900 federal judges, but only one president. Federal judges are appointed for life and cannot be removed by any alternative method apart from impeachment. Presidents serve at most for two fixed terms, and can be removed after one term by the will of the people.[82] No such accountability exists in cases involving judicial misconduct. Thus, for Congress to reverse the choice of the electorate and remove the nation's leader raises concerns of a wholly different magnitude than are at issue in judicial proceedings.

B. SPECIFIC DISTINCTIONS BETWEEN THE CONDUCT THAT FORMED THE BASIS FOR THE IMPEACHMENTS OF JUDGES CLAIBORNE, NIXON AND HASTINGS AND THE PRESIDENT'S ALLEGED MISCONDUCT

Despite the best efforts of the Majority Staff Report to recast the entire nature of impeachment as rising or falling on perjury in the three judicial impeachment cases that have occurred since 1974, a close review of the facts of these cases indicates that official misconduct remains the touchstone of judicial impeachment, and the recent judicial cases do not support the notion that a president may be impeached for private misconduct. Judge Claiborne was impeached, while he was in prison and collecting his judicial salary, for income tax evasion (which was specifically rejected as a ground for impeachment of President Nixon), and had previously been

[79] *Subcommittee Hearing, supra* note 56 (Written Testimony of Professor Laurence H. Tribe at 14).
[80] *See, e.g., Watergate Staff Report, supra* note 1, at 26.
[81] Berger, *supra* note 8, at 206 (emphasis added).
[82] As Gouvernor Morris assured his fellow delegates at the Constitutional Convention in Philadelphia, "an election every four years will prevent maladministration." Farrand, *supra* note 13, at 550.

charged with illegally soliciting a bribe. Judge Alcee Hastings and Walter Nixon committed perjury in connection with criminal proceedings concerning their public and official duties, not civil depositions into their private conduct. The statements by both Hastings and Nixon were directly material to the proceedings and to the underlying criminal charges against them.

1. Judge Harry Claiborne

After being convicted and sentenced to prison for filing false federal income tax returns, Judge Claiborne was impeached and removed from office in 1986. Judge Claiborne had signed written declarations that the returns were made under penalty of perjury. In addition to two articles charging him with filing false tax returns, Judge Claiborne was found guilty on an article of impeachment alleging that his willful tax evasion had "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts."[83] At the time of his impeachment, Judge Claiborne was serving time in federal prison while continuing to collect his annual judicial salary of $78,700.

Significantly, the Majority Staff Report completely fails to note that Judge Claiborne had also been prosecuted for bribery. Namely, he had allegedly received $30,000 from a Las Vegas brothel owner in return for being influenced in the performance of his official acts—*i.e.,* decisions regarding motions in a case pending before him.[84] Although a trial on this charge resulted in a hung jury, it is difficult to deny that evidence of serious public corruption informed the government's ultimate ability to prosecute and convict, and the Judiciary's and Congress' decision to seek and achieve Judge Claiborne's impeachment and removal from office.

Moreover, the debate on the House floor in the Claiborne case made it clear that the conduct justifying impeachment was closely linked to the special duties and responsibilities of a federal judge. The former chairman of the Judiciary Committee, Peter Rodino (D–NJ), summarized these sentiments in his statement on the House floor:

> As Members of this body have recognized in prior judicial impeachments, the judges of our Federal courts of law occupy a unique position of trust and responsibility in our system of government: They are the only members of any branch that hold their office for life; they are purposely insulated from the immediate pressures and shifting currents of the body politic. But with the special prerogative of judicial independence comes the most exacting standard of public and private conduct. . . . The high standard of behavior for judges is inscribed in article III of the Constitution, which provides that judges "shall hold their Offices during good behavior . . ."[85]

[83] *Majority Staff Report, supra* at 22 (citing 132 *Cong. Rec.* S15,760–61 (Oct. 9, 1986)).
[84] *See United States* v. *Claiborne,* 727 F.2d 842, 843.
[85] 132 *Cong. Rec.* H4712 (July 22, 1986). The Committee Report also observed that "Good behavior, as that phrase is used in the Constitution, exacts of a judge the highest standards of public and private rectitude. Those entrusted with the duties of judicial office have the high re-

Another recurring argument during the impeachment debate on the House floor was the impossibility of removing a federal judge, who serves a life term, without resort to the impeachment process. Several congressmen expressed special outrage that Judge Claiborne, while serving a prison term, was continuing to receive his full salary and would be entitled to return to the federal bench upon completing his prison term.[86]

Under these circumstances, it is clear that Judge Claiborne would have been unable to discharge credibly his judicial responsibilities upon his release from prison. It does not follow, however, that any income tax evasion by a future president would inevitably merit the drastic remedy of impeachment, which President Nixon's case powerfully confirms. As Professor Tribe observed at the Subcommittee hearing: "The theme of [Judge Claiborne's] impeachment, its whole theory, was not that private improprieties can lead to impeachment whenever they cast a general cloud over the individual's fitness and virtue; it was that private improprieties can justify impeachment when it renders the individual fundamentally unable to carry out his or her official duties. It is not too hard to see, without opening a Pandora's box, that a judge convicted of perjury could not credibly preside over trials for the rest of his life, swearing in witnesses, imprisoning or sentencing to death some that he finds guilty."

2. Judge Walter Nixon

The 1989 impeachment proceedings involving Walter Nixon of the Southern District of Mississippi are distinguishable on similar grounds. Like Judge Claiborne, he had already been convicted and sentenced to prison for perjury before his impeachment.[87] The underlying facts concerned Nixon's intervention with a local prosecutor to obtain favorable treatment for a drug case involving the son of one of Nixon's partners in lucrative oil and mineral investments. After investigation by the FBI, Judge Nixon appeared before a grand jury and denied any discussion of the drug charges with the prosecutor. Testimony by the prosecutor, as well as the business partner, was to the contrary. On these facts, Nixon was convicted on two counts of perjury, which formed the basis for his impeachment.

In sharp contrast to the false statements being alleged by the OIC, Judge Nixon's perjury was undoubtedly material to a criminal proceeding directed against him and his false statements were offered in direct rebuttal to charges that he had misused the powers of his office. The debate on Judge Nixon's articles of impeachment emphasized that his criminal misconduct was fundamentally inconsistent with his *judicial* responsibilities. Rep. Sensenbrenner (R–WI), in calling for Judge Nixon's impeachment, noted that "A Federal judge must decide the credibility of witnesses, and find the

sponsibility of ensuring the fair and impartial administration of justice, which in large part rest on the public confidence and respect for the judicial process." H. Rep. No. 99–688, at 23 (1986).

[86] *See generally, id.* (statements of Rep. Fish, Rep. Moorhead, Rep. Glickman, Rep. Mazzoli, Rep. DeWine, Rep. Rudd, Rep. Vucanovich).

[87] *See Majority Staff Report, supra* at 24 (discussing the articles and votes) (citations omitted).

truth in cases that come before him."[88] Senator Grassley (R–IA) made a similar point during the impeachment debate:

> To be entrusted with a lifetime office that has the potential power of depriving individuals of their liberty and property, is, indeed, a very great responsibility. Consequently, a Federal judge must subscribe to the highest ethical and moral standards. At a minimum, in their words and deeds, judges must be beyond reproach or suspicion in order for there to be integrity and impartiality in the administration of justice and independence in the operation of our judicial system.[89]

3. Judge Alcee Hastings

In 1981, Federal District Judge Alcee Hastings of the Southern District of Florida was tried and acquitted on charges of conspiracy to solicit and accept a bribe.[90] Several years later, on recommendation of the Judicial Conference of the United States, the House of Representatives adopted seventeen articles of impeachment charging Hastings with conspiracy, perjury, and fabrication of evidence. The Senate convened an impeachment trial committee to take evidence and then, after hearings in 1989, voted to convict on eight articles of impeachment.

The charges involved a conspiracy between Judge Hastings and a District of Columbia lawyer, William Borders, to obtain $150,000 from defendants convicted of racketeering and related offenses in exchange for sentences that did not require incarceration. The government's case at trial indicated that Borders had approached the defendants through an intermediary and had offered to be "helpful" with his friend Judge Hastings, who was presiding over the case. The intermediary informed the FBI, which subsequently obtained evidence through an undercover operation.

At his trial, Hastings claimed that his frequent conversations with Borders during the period in question related to other matters. The Committee found that claim to lack credibility under the circumstances. Because Hastings' perjury was found to have assisted his acquittal, it was the basis for his subsequent impeachment. A post-trial memorandum by the House of Representatives Judiciary Committee investigative staff concerning Judge Hastings emphasized that "[i]n each instance [of false testimony, Judge Hastings] was addressing a critical part of the case. In each instance, he needed to explain away incriminating evidence."[91]

As with Judge Nixon, the context of the Judge Hastings' alleged perjury was crucial. It concerned a defense to criminal charges alleging that he had sold his office for money. The central underlying allegation of bribery is, of course, one of the few impeachable offenses specifically designated in the language of the Constitution.

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[88] 135 *Cong. Rec.* S14493, S14499 (Nov. 1, 1989).

[89] 135 *Cong. Rec.* S14633, S14638 (Nov. 3, 1989) (statement of Sen. Charles E. Grassley).

[90] *See Majority Staff Report, supra* at 25 (discussing the articles and votes) (citations omitted). A challenge to the Senate procedure and a review of the impeachment history appear in *Hastings* v. *United States,* 802 F. Supp. 490 (D.D.C. 1992).

[91] United States House of Representatives, In re Impeachment of Judge Alcee Hastings, Post Trial Memorandum of the House Judiciary Investigative Staff, Sept. 25, 1989, at 95–96 (on file with Committee Staff). *See also* Ed Henry, *Top Dem Wants New Look at Hastings Impeachment,* Roll Call, May 19, 1997 (Discussing claim by a whistleblower that FBI agent may have lied in order to seek Hastings' conviction).

There was little doubt, therefore, that false statements designed to conceal such an offense qualified as grounds for impeachment when commited by a federal district court judge.

IV. Conclusion

Is the country now prepared to pursue the first ever impeachment of a president based on private misconduct unrelated to the powers of public office?

The very text of the Constitution provides most of the answer—simply put, it is difficult to argue credibly that the offenses alleged by the OIC can in any way be likened to the very public and very corrupt offenses of Treason and Bribery. The history and background of impeachment further confirm that if we are to remain true to the intent of the Framers, the 1974 Watergate Report, and our specific experiences with impeachment, Congress will not choose to take the Nation down the treacherous course of impeachment in a case where only non-official misconduct is alleged.

Efforts by the Majority to construe the OIC Referral as constituting an ever expanding series of statutory legal violations so that the President's conduct appears to pose a threat to our constitutional form of government are neither credible nor compelling. Nor do the facts alleged by the OIC approximate in scope or magnitude the very public wrongdoing alleged during Watergate.

Resort to judicial impeachment precedents does not take the OIC Referral any further as a constitutional matter. No amount of sophistry can detract from the historical fact, as the Watergate Staff Report concluded, that judicial impeachments are premised on misconduct which exceeds constitutional constraints, are grossly incompatible with office or constitute abuse of official power. And nothing in the three post-Watergate judicial impeachments contradicts these fundamental touchstones of impeachment.

Impeachment has been variously referred to as an "atom bomb" and a "caged lion." Now is not the time to unleash that lion's rage on an already weary nation, to alter fundamentally the balance of power between the executive and legislative branches, or to turn more than 200 years of impeachment precedent on its head.

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