Separation of Powers Law

Cases and Materials

FOURTH EDITION

Peter M. Shane
Jacob E. Davis and Jacob E. Davis II Chair in Law
The Ohio State University Moritz College of Law

Harold H. Bruff
Rosenbaum Professor of Law Emeritus and Dean Emeritus
University of Colorado Law School

Neil J. Kinkopf
Professor of Law
Georgia State University College of Law

Carolina Academic Press
Durham, North Carolina

ISBN 978-1-53100-259-6
eISBN 978-1-53100-260-2
LCCN 2017957040

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Chapter 3

Autonomy and Mutual Accountability among the Branches

This chapter reviews the ways each branch protects its autonomy from the others, and the compensating ways that the branches hold one another to account—thereby limiting and defining their autonomy. We begin by examining the power of Congress to determine the membership of all three branches. Impeachment is Congress's ultimate weapon against personnel of the other two branches. Congress also exercises power over its own membership. We then consider the immunities from suit of the members of each branch. This section introduces a process of implying immunities that continues in the following section's examination of the branches' implied privileges from disclosing information. Finally, we review the powers of Congress to adjust the accountability of all three branches by legislation.

A. Congressional Power over the Membership of the Branches

1. Impeachment

a. "High Crimes and Misdemeanors"

Article II, § 4 of the Constitution provides: "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." Under Article I, § 2, the House of Representatives "shall have the sole power of impeachment." Section 3 then grants the Senate "the sole power to try all impeachments." Conviction requires "the concurrence of two-thirds of the members present." Judgment "shall not extend further than to removal from office and disqualification" to hold future office, "but the party convicted shall nevertheless be . . . subject to indictment, trial, judgment, and punishment, according to law."

This laconic text raises a number of major issues. First, what is the substantive meaning of high crimes and misdemeanors? The main possibilities are: 1) all crimes; 2) all felonies; 3) some or all crimes that relate to performance of the office; 4) some or all abuses of power, whether or not technically criminal in nature; 5) whatever the necessary majorities in the House and Senate believe is sufficient (as then-Representative

Gerald Ford once famously argued). Second, what processes are appropriate for the two Houses to follow? That is, should the House conduct its own factfinding, or may it accept a record compiled by a prosecutor or in a criminal trial? Is the House like a grand jury, needing only reason to believe an impeachable offense has been committed, or should it find that an offense has occurred, and if so, under what standard of proof? What does it mean for the Senate to "try" someone? Should it act on a record compiled by the House or by some other institution, or should it hear witnesses? Again, what is the standard of proof—the criminal reasonable doubt standard, or something less? Third, are sanctions other than removal and disqualification available, such as censure? And fourth, may criminal prosecution, especially of a President, occur before removal, as it explicitly may afterwards?

Until the 1970s, modern Americans could be forgiven for regarding impeachment as a quaint holdover from British precedents, a process that had been rendered ineffective by two ill-advised and failed impeachments earlier in our history. These, of course, were the trials of Justice Samuel Chase in 1805 and President Andrew Johnson in 1868. *See* William H. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson (1992); David O. Stewart, Impeached: The Trial of President Andrew Johnson and The Fight for Lincoln's Legacy (2009). Both disputes were highly politicized. Chase was impeached by Republicans in Congress at the instigation of Thomas Jefferson as part of his war on the Federalist judiciary. Johnson was impeached by radicals in Congress as part of the battle over control of Reconstruction. Both were acquitted. The Chief Justice's book argues that these trials threatened the Framers' "two original contributions to the art of government"—the independent, not parliamentary executive, and the independent judiciary empowered to invalidate legislation. He concludes (at 278): "The importance of these two acquittals in our constitutional history can hardly be overstated. . . . [T]hese two 'cases'—decided not by the courts but by the United States Senate—surely contributed as much to the maintenance of our tripartite federal system of government as any case decided by any court." For valuable analyses of impeachment and its problems, see Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis (2d ed. 2000); Charles L. Black, Impeachment: A Handbook (1974).

Within twenty-five years at the close of the twentieth century, two Presidents faced impeachment. Richard Nixon resigned as the House prepared to impeach him; Bill Clinton survived impeachment and trial. As these controversies begin to recede into history, Americans need to assess what they have done to the presidency, to Congress, and to the nation. We begin with an analysis that was prepared to guide the House as it considered the impeachment of Richard Nixon in the wake of the Watergate scandal. Despite the dispassionate tone of the House Judiciary Committee staff report, the House was under Democratic control, and it is worth considering to what degree the study should be read as an advocacy document. The executive branch likewise proffered scholarly studies on impeachment, with the prefatory disclaimers that they were not to be regarded as taking an official position, and, indeed,

were not intended to reach "ultimate conclusions." Office of Legal Counsel, U.S. Department of Justice, Legal Aspects of Impeachment: An Overview (with 4 appendices) (1974). President Nixon argued that impeachment could be based only on criminal offenses. *See* James D. St. Clair, *et al.*, *Analysis of the Constitutional Standard for Presidential Impeachment, in* Presidential Impeachment: A Documentary Overview 40–73 (M. B. Schnapper ed., 1974). For another view generally concurring with the House study that follows, see Committee on Legislation, Association of the Bar of the City of New York, The Law of Presidential Impeachment (1974).

Constitutional Grounds for Presidential Impeachment

Report by the Staff of the Impeachment Inquiry of the House Committee on the Judiciary (Comm. Print), 93d Cong., 2d Sess. (1974)

I. Introduction

. . . This memorandum offers no fixed standards for determining whether grounds for [the] impeachment [of Richard Nixon] exist. The framers did not write a fixed standard. Instead they adopted from English history a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee.

II. The Historical Origins of Impeachment

The Constitution provides that the President ". . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The framers could have written simply "or other crimes" as indeed they did in the provision for extradition of criminal offenders from one state to another. They did not do that. If they had meant simply to denote seriousness, they could have done so directly. They did not do that either. They adopted instead a unique phrase used for centuries in English parliamentary impeachments, for the meaning of which one must look to history. . . .

A. THE ENGLISH PARLIAMENTARY PRACTICE

Alexander Hamilton wrote, in No. 65 of The Federalist, that Great Britain had served as "the model from which [impeachment] has been borrowed." . . . Parliament developed the impeachment process as a means to exercise some measure of control over the power of the King. An impeachment proceeding in England was a direct method of bringing to account the King's ministers and favorites — men who might otherwise have been beyond reach. Impeachment, at least in its early history, has been called "the most powerful weapon in the political armory, short of civil war." . . .

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 Parliament . . . .

Two points emerge from the 400 years of English parliamentary experience with the phrase "high Crimes and Misdemeanors." 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, corruption, 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.

B. THE INTENTION OF THE FRAMERS

The debates on impeachment at the Constitutional Convention in Philadelphia focus principally on its applicability to the President. The framers sought to create a responsible though strong executive; they hoped, in the words of Elbridge Gerry of Massachusetts, that "the maxim would never be adopted here that the chief Magistrate could do [no] wrong." Impeachment was to be one of the central elements of executive responsibility in the framework of the new government as they conceived it.

The constitutional grounds for impeachment of the President received little direct attention in the Convention; the phrase "other high Crimes and Misdemeanors" was ultimately added to "Treason" and "Bribery" with virtually no debate. There is evidence, however, that the framers were aware of the technical meaning the phrase had acquired in English impeachments. . . .

1. THE PURPOSE OF THE IMPEACHMENT REMEDY

Among the weaknesses of the Articles of Confederation apparent to the delegates to the Constitutional Convention was that they provided for a purely legislative form of government whose ministers were subservient to Congress. One of the first decisions of the delegates was that their new plan should include a separate executive, judiciary, and legislature. However, the framers sought to avoid the creation of a too-powerful executive. The Revolution had been fought against the tyranny of a king and his council, and the framers sought to build in safeguards against executive abuse and usurpation of power . . . . [T]he impeachability of the President was considered to be an important element of his responsibility. Impeachment had been included in the proposals before the Constitutional Convention from its beginning. A specific provision, making the executive removable from office on impeachment and conviction for "malpractice or neglect of duty," was unanimously adopted even before it was decided that the executive would be a single person.

The only major debate on the desirability of impeachment occurred when it was moved that the provision for impeachment be dropped, a motion that was defeated by a vote of eight states to two. . . . The one argument made by the opponents of impeachment to which no direct response was made during the debate was that the executive would be too dependent on the legislature—that, as Charles Pinckney put it, the legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence." That issue, which involved the forum for trying impeachments and the mode of electing the executive, troubled the Convention until its closing days. Throughout its deliberations on ways to avoid executive subservience to the legislature, however, the Convention never

reconsidered its early decision to make the executive removable through the process of impeachment.

2. ADOPTION OF "HIGH CRIMES AND MISDEMEANORS"

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 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, apparently with no further debate.

That the framers were familiar with English parliamentary impeachment proceedings is clear. . . . 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." The "first and principal" high misdemeanor, according to Blackstone, was "mal-administration of such high officers, as are in public trust and employment," usually punished by the method of parliamentary impeachment . . . .

3. GROUNDS FOR IMPEACHMENT

Mason's suggestion to add "maladministration," Madison's objection to it as "vague," and Mason's substitution of "high crimes and misdemeanors agst. the State" are the only comments in the Philadelphia convention specifically directed to the constitutional language describing the grounds for impeachment of the President. Mason's objection to limiting the grounds to treason and bribery was that treason would "not reach many great and dangerous offenses" including "[a]ttempts to subvert the Constitution." His willingness to substitute "high Crimes and Misdemeanors," . . . suggests that he believed "high Crimes and Misdemeanors" would cover the offenses about which he was concerned.

Contemporaneous comments on the scope of impeachment are persuasive as to the intention of the framers. In Federalist No. 65, Alexander Hamilton described the subject of impeachment as

> those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.

Comments in the state ratifying conventions also suggest that those who adopted the Constitution viewed impeachment as a remedy for usurpation or abuse of power or serious breach of trust. . . . [T]he framers who discussed impeachment in the state ratifying conventions, as well as other delegates who favored the Constitution, implied that it reached offenses against the government, and especially abuses of constitutional duties. The opponents did not argue that the grounds for impeachment had been limited to criminal offenses . . . .

C. THE AMERICAN IMPEACHMENT CASES

Thirteen officers have been impeached by the House since 1787; one President, one cabinet officer, one United States Senator, and ten Federal judges. In addition there have been numerous resolutions and investigations in the House not resulting in impeachment. However, the action of the House in declining to impeach an officer is not particularly illuminating. The reasons for failing to impeach are generally not stated, and may have rested upon a failure of proof, legal insufficiency of the grounds, political judgment, the press of legislative business, or the closeness of the expiration of the session of Congress. On the other hand, when the House has voted to impeach an officer, a majority of the Members necessarily have concluded that the conduct alleged constituted grounds for impeachment.

Does Article III, Section 1 of the Constitution, which states that judges "shall hold their Offices during good Behavior," limit the relevance of the ten impeachments of judges with respect to presidential impeachment standards as has been argued by some? It does not. The argument is that "good behavior" implies an additional ground for impeachment of judges not applicable to other civil officers. However, the only impeachment provision discussed in the Convention and included in the Constitution is Article II, Section 4, which by its express terms, applies to all civil officers, including judges, and defines impeachment offenses as "Treason, Bribery, and other high Crimes and Misdemeanors." . . .

Each of the thirteen American impeachments involved charges of misconduct incompatible with the official position of the officeholder. This conduct falls into three broad categories: (1) exceeding the constitutional bounds of the powers of the office in derogation of the powers of another branch of government; (2) behaving in a manner grossly incompatible with the proper function and purpose of the office; and (3) employing the power of the office for an improper purpose or for personal gain.

1. EXCEEDING THE POWERS OF THE OFFICE IN DEROGATION OF THOSE OF ANOTHER BRANCH OF GOVERNMENT

. . . . The impeachment of President Andrew Johnson in 1868 . . . rested on allegations that he had exceeded the power of his office and had failed to respect the prerogatives of Congress. The Johnson impeachment grew out of a bitter partisan struggle over the implementation of Reconstruction in the South following the Civil War. Johnson was charged with violation of the Tenure of Office Act, which purported to take away the President's authority to remove members of his own cabinet and specifically provided that violation would be a "high misdemeanor," as well as a crime. Believing the Act unconstitutional, Johnson removed Secretary of War Edwin M. Stanton and was impeached three days later. . . . The removal of Stanton[, however,] was more a catalyst for the impeachment than a fundamental cause. The issue between the President and Congress was which of them should have the constitutional—and ultimately even the military—power to make and enforce Reconstruction policy in the South. The Johnson impeachment, like the British impeachments of great ministers, involved issues of state going to the heart of the constitutional division of executive and legislative power.

2. BEHAVING IN A MANNER GROSSLY INCOMPATIBLE WITH THE PROPER FUNCTION AND PURPOSE OF THE OFFICE

Judge John Pickering was impeached in 1803, largely for intoxication on the bench. . . . Seventy-three years later another judge, Mark Delahay, was impeached for intoxication both on and off the bench but resigned before articles of impeachment were adopted. A similar concern with conduct incompatible with the proper exercise of judicial office appears in the decision of the House to impeach Associate Supreme Court Justice Samuel Chase in 1804. The [Democratic-Republican-controlled] House alleged that [federalist] Justice Chase had permitted his partisan views to influence his conduct of two trials held while he was conducting circuit court several years earlier. . . . Judge West H. Humphreys was impeached in 1862 on charges that he joined the Confederacy without resigning his federal judgeship. . . . Judicial favoritism and failure to give impartial consideration to cases before him were also among the allegations in the impeachment of Judge George W. English in 1926.

3. EMPLOYING THE POWER OF THE OFFICE FOR AN IMPROPER PURPOSE OR PERSONAL GAIN

Two types of official conduct for improper purposes have been alleged in past impeachments. The first type involves vindictive use of their office by federal judges; the second, the use of office for personal gain. Judge James H. Peck was impeached in 1826 for charging with contempt a lawyer who had publicly criticized one of his decisions, imprisoning him, and ordering his disbarment for 18 months. . . . Some of the articles in the impeachment of Judge Charles Swayne (1903) alleged that he maliciously and unlawfully imprisoned two lawyers and a litigant for contempt.

Six impeachments have alleged the use of office for personal gain or the appearance of financial impropriety while in office. Secretary of War William W. Belknap

was impeached in 1876 of high crimes and misdemeanors for conduct that probably constituted bribery and certainly involved the use of his office for highly improper purposes: receiving substantial annual payments through an intermediary in return for his appointing a particular post trader at a frontier military post in Indian territory. The impeachments of Judges Charles Swayne (1903), Robert W. Archibald (1912), and George W. English (1926) each involved charges of the use of office for direct or indirect personal monetary gain. . . .

III. The Criminality Issue

The phrase "high Crimes and Misdemeanors" may connote "criminality" to some. This likely is the predicate for some of the contentions that only an indictable crime can constitute impeachable conduct. Other advocates of an indictable-offense requirement would establish a criminal standard of impeachable conduct because that standard is definite, can be known in advance and reflects a contemporary legal view of what conduct should be punished. A requirement of criminality would require resort to familiar criminal laws and concepts to serve as standards in the impeachment process. Furthermore, this would pose problems concerning the applicability of standards of proof and the like pertaining to the trial of crimes.

The central issue raised by these concerns is whether requiring an indictable offense as an essential element of impeachable conduct is consistent with the purposes and intent of the framers in establishing the impeachment power and in setting a constitutional standard for the exercise of that power. . . . The impeachment of a President must occur only for reasons at least as pressing as those needs of government that give rise to the creation of criminal offenses. But this does not mean that the various elements of proof, defenses, and other substantive concepts surrounding an indictable offense control the impeachment process. Nor does it mean that state or federal criminal codes are necessarily the place to turn to provide a standard under the United States Constitution. Impeachment is a constitutional remedy. The framers intended that the impeachment language they employed should reflect the grave misconduct that so injures or abuses our constitutional institutions and form of government as to justify impeachment . . . .

Impeachment and the criminal law serve fundamentally different purposes. Impeachment is the first step in a remedial process — removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment; its function is primarily to maintain constitutional government. Furthermore, the Constitution itself provides that impeachment is no substitute for the ordinary process of criminal law since it specifies that impeachment does not immunize the officer from criminal liability for his wrongdoing.

The general applicability of the criminal law also makes it inappropriate as the standard for a process applicable to a highly specific situation such as removal of a President. The criminal law sets a general standard of conduct that all must follow. It does not address itself to the abuses of presidential power. In an impeachment proceeding a President is called to account for abusing powers that only a President possesses.

Other characteristics of the criminal law make criminality inappropriate as an essential element of impeachable conduct. While the failure to act may be a crime, the traditional focus of criminal law is prohibitory. Impeachable conduct, on the other hand, may include the serious failure to discharge the affirmative duties imposed on the President by the Constitution. Unlike a criminal case, the cause for the removal of a President may be based on his entire course of conduct in office. In particular situations, it may be a course of conduct more than individual acts that has a tendency to subvert constitutional government. To confine impeachable conduct to indictable offenses may well be to set a standard so restrictive as not to reach conduct that might adversely affect the system of government. Some of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law. . . .

Impeachment of Richard M. Nixon, President of the United States

H. Rep. No. 1305, 93d Cong., 2d Sess. (1974)

The committee on the Judiciary . . . recommends that the House exercise its constitutional power to impeach Richard M. Nixon, President of the United States, and that articles of impeachment be exhibited to the Senate as follows: . . .

ARTICLE I

In his conduct of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and to the best of his ability, preserve, protect and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice in that:

On June 17, 1972, and prior thereto, agents of the Committee for the Re-election of the President committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence. Subsequent thereto, Richard M. Nixon, using the powers of his high office, engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.

The means used to implement this course of conduct or plan included one or more of the following:

(1) making or causing to be made false or misleading statements to lawfully authorized investigative officers and employees of the United States;

(2) withholding relevant and material evidence or information from lawfully authorized investigative officers and employees of the United States;

(3) approving, condoning, acquiescing in, and counseling witnesses with respect to the giving of false or misleading statements to lawfully authorized investigative officers and employees of the United States and false or misleading testimony in duly instituted judicial and congressional proceedings;

(4) interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution Force, and Congressional Committees;

(5) approving, condoning, and acquiescing in, the surreptitious payment of substantial sums of money for the purpose of obtaining the silence or influencing the testimony of witnesses, potential witnesses or individuals who participated in such unlawful entry and other illegal activities;

(6) endeavoring to misuse the Central Intelligence Agency, an agency of the United States; . . .

(9) endeavoring to cause prospective defendants, and individuals duly tried and convicted, to expect favored treatment and consideration in return for their silence or false testimony or rewarding individuals for their silence or false testimony. . . .

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

ARTICLE II

Using the powers of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies.

This conduct has included one or more of the following:

(1) He has, acting personally and through his subordinates and agents, endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.

(2) He misused the Federal Bureau of Investigation, the Secret Service, and other executive personnel, in violation or disregard of the constitutional rights of citizens, by directing or authorizing such agencies or personnel to conduct or continue electronic surveillance or other investigations for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; . . . .

(3) He has, acting personally and through his subordinates and agents, in violation or disregard of the constitutional rights of citizens, authorized and permitted to be maintained a secret investigative unit within the office of the President, financed in part with money derived from campaign contributions, which unlawfully utilized the resources of the Central Intelligence Agency, engaged in covert and unlawful activities, and attempted to prejudice the constitutional right of an accused to a fair trial.

(4) He has failed to take care that the laws were faithfully executed by failing to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial, and legislative entities concerning the unlawful entry into the headquarters of the Democratic National Committee, and the cover-up thereof, ...

(5) In disregard of the rule of law, he knowingly misused the executive power by interfering with agencies of the executive branch, including the Federal Bureau of Investigation, the Criminal Division, and the Office of Watergate Special Prosecution Force, of the Department of Justice, and the Central Intelligence Agency, in violation of his duty to take care that the laws be faithfully executed. . . .

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

ARTICLE III

In his conduct of the office of President of the United States, Richard M. Nixon, contrary to his oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives on April 11, 1974, May 15, 1974, May 30, 1974, and June 24, 1974, and willfully disobeyed such subpoenas. The subpoenaed papers and things were deemed necessary by the Committee in order to resolve by direct evidence fundamental, factual questions relating to Presidential direction, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President. In refusing to produce these papers and things, Richard M. Nixon [assumed] to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives. . . .

Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office.

---

1. *Sufficiency of the Charges.* Do you believe that all of the counts contained in the first two articles of impeachment voted against Richard Nixon amounted to

impeachable offenses? (When you read material later in this chapter concerning executive privilege and Congress, consider the sufficiency of the proposed Article III, focusing on Nixon's resistance to congressional subpoenas. Would a President's refusal to obey Congress's subpoenas always amount to an impeachable offense, or would your conclusion depend on the nature of the congressional inquiry at issue?)

2. *Rejected Charges.* The House Committee also considered and rejected a series of other possible charges. We will discuss the most serious of these, allegations on the concealment of information about bombing operations in Cambodia, with materials on the Vietnam War in Chapter Six. The other charges concerned Nixon's personal enrichment through tax evasion and excess government expenditures to improve his private properties. We consider whether "private" derelictions should be impeachable offenses in connection with the Clinton impeachment, where the issue took center stage. For now, note that successful impeachments of federal judges often follow convictions for tax evasion. Do those cases provide good precedents for presidential impeachment, or should Presidents be held to some different standard?

3. *Wallowing in Watergate.* The story of the journalistic investigations that gave impetus to the Nixon impeachment efforts is told in Bob Woodward and Carl Bernstein, All the President's Men (1974). The same authors recount the President's resignation in the face of certain impeachment in The Final Days (1976). For a popular account of the work of the House Judiciary Committee in connection with Watergate, see Howard Fields, High Crimes and Misdemeanors (1978). An account of the scandal and Congress's response told by the Senate's most conspicuous leader during the Watergate period is Samuel J. Ervin, Jr., The Whole Truth: The Watergate Conspiracy (1980). And for a retrospective, see *Symposium, The Presidency: Twenty-five Years After Watergate*, 43 St. Louis U. L.J. 723 (1999).

President Nixon's resignation on the eve of impeachment left many issues tantalizingly unresolved. It is too much to say that the Clinton impeachment resolved them, but it certainly produced ample grist for analysis. As with the Nixon case, by the time Clinton faced impeachment and trial, the facts were widely known to the American public. What had happened was not as much in issue as whether impeachment was warranted.

The misconduct underlying President Clinton's impeachment was his illicit affair with White House intern Monica Lewinsky. By itself, this dalliance was the stuff of scandal not impeachment, but it acquired a legal overlay that eventually formed the basis for the charges against him. The unraveling began when the Supreme Court decided in *Clinton v. Jones* (excerpted later in this chapter) that a President has no constitutional immunity against civil litigation concerning conduct unrelated to his office, and occurring prior to its commencement. Discovery in Paula Jones's suit against Clinton for sexual harassment during his tenure as Governor of Arkansas then led to a deposition in which Clinton denied a sexual relationship with Monica Lewinsky.

Independent Counsel Kenneth Starr, whose charter to investigate the "Whitewater" matter had expanded to encompass issues related to the Jones case, brought Clinton before a grand jury to investigate whether he had perjured himself in the civil deposition. Starr also pursued allegations that Clinton had obstructed justice by offering to obtain employment for Ms. Lewinsky in order to buy her silence in response to Starr's investigation. As evidence of Clinton's affair with Lewinsky continued to emerge, his denials became more strained, and were eventually replaced with a confession of "inappropriate intimate contact." Starr then concluded his investigation and submitted a highly detailed report to the House of Representatives, with a recommendation that "there is substantial and credible information that President Clinton committed acts that may constitute grounds for impeachment." The House immediately made the report, with all its salacious material, public. The final version of the report, filed by Ken Starr's successor as Independent Counsel, Robert W. Ray, is: Final Report of the Independent Counsel In Re: Madison Guaranty Savings & Loan Association, Regarding Monica Lewinsky and Others, filed with the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels, Division No. 94-1 (2001), available at http://icreport.access.gpo.gov/lewinsky.html.

On December 19, 1998, the House, relying on the Starr report, voted to impeach Clinton for perjury before the grand jury and for obstruction of justice. Hence proposed articles I and III of the four recommended by the House Judiciary Committee (see below) became articles I and II before the Senate. Voting patterns on the impeachment proposals in the House of Representatives and the Senate are described in Peter M. Shane, *When Interbranch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial Coups*, 12 Cornell J. L. & Pub. Pol. 503, 523 (2003):

> Th[e] investigation ultimately resulted in the approval by the House Judiciary Committee of four Articles of Impeachment on December 16, 1998, all by straight party-lines vote, except for a single article — alleging perjury in the Paula Jones deposition — on which Republican Representative Lindsay Graham, a former criminal prosecutor, voted, "No." On December 19, the lame-duck House passed the article alleging grand jury perjury by a vote of 228–206, with five Democrats supporting the article and five Republicans opposing it. An obstruction of justice article passed 221 to 212, but would likely have been defeated if held upon the seating of the 106th Congress, in which the Democrats held five more House seats. The two other articles, alleging perjury in the Jones deposition and misstatements in Clinton's written responses to Judiciary Committee questions, were both rejected. On February 12, 1999, the Republican-controlled Senate voted to acquit Clinton by votes of 55–45 on the perjury count, and 50–50 on the obstruction of justice count. The Republicans, who would have needed 67 votes to prevail, could not achieve a clear majority on either article, even in a Senate in which they held 55 seats.

The Senate held proceedings lasting about a month, with one day resembling a trial in that videotaped depositions of three witnesses, including Monica Lewinsky, were presented. The rest was motions practice and arguments. After the Senate acquitted Clinton, a motion to censure the President lost on procedural grounds.

Materials surrounding the Clinton impeachment are voluminous. For selections see Merrill McLoughlin ed., The Impeachment and Trial of President Clinton: The Official Transcripts, from the House Judiciary Committee Hearings to the Senate Trial (1999); Emily Field Van Tassel & Paul Finkelman, Impeachable Offenses, A Documentary History from 1787 to the Present (1999). We include three items: the articles recommended by the House Judiciary Committee, the House Managers' presentation to the Senate urging conviction on the two articles that passed the House, and the President's defense brief in the Senate.

H. Res. 611

105th Congress, 2d Session, Report No. 105-830 (1998)

Resolved, That William Jefferson Clinton, President of the United States, is impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the United States Senate: . . .

ARTICLE I

In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration, impeding the administration of justice, in that:

On August 17, 1998, William Jefferson Clinton swore to tell the truth, the whole truth, and nothing but the truth before a Federal grand jury of the United States. Contrary to that oath, William Jefferson Clinton willfully provided perjurious, false and misleading testimony to the grand jury concerning one or more of the following: (1) the nature and details of his relationship with a subordinate Government employee; (2) prior perjurious, false and misleading testimony he gave in a Federal civil rights action brought against him; (3) prior false and misleading statements he allowed his attorney to make to a Federal judge in that civil rights action; and (4) his corrupt efforts to influence the testimony of witnesses and to impede the discovery of evidence in that civil rights action. . . .

Wherefore, William Jefferson Clinton, by such conduct, warrants impeachment and trial, and removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

ARTICLE II

In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration, impeding the administration of justice, in that:

(1) On December 23, 1997, William Jefferson Clinton, in sworn answers to written questions asked as part of a Federal civil rights action brought against him, willfully provided perjurious, false and misleading testimony in response to questions deemed relevant by a Federal judge concerning conduct and proposed conduct with subordinate employees.

(2) On January 17, 1998, William Jefferson Clinton swore under oath to tell the truth, the whole truth, and nothing but the truth in a deposition given as part of a Federal civil rights action brought against him. Contrary to that oath, William Jefferson Clinton willfully provided perjurious, false and misleading testimony in response to questions deemed relevant by a Federal judge concerning the nature and details of his relationship with a subordinate Government employee, his knowledge of that employee's involvement and participation in the civil rights action brought against him, and his corrupt efforts to influence the testimony of that employee. . . .

Wherefore, William Jefferson Clinton, by such conduct, warrants impeachment and trial, and removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

ARTICLE III

In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, and has to that end engaged personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him in a duly instituted judicial proceeding.

The means used to implement this course of conduct or scheme included one or more of the following acts:

(1) On or about December 17, 1997, William Jefferson Clinton corruptly encouraged a witness in a Federal civil rights action brought against him to execute a sworn affidavit in that proceeding that he knew to be perjurious, false and misleading.

(2) On or about December 17, 1997, William Jefferson Clinton corruptly encouraged a witness in a Federal civil rights action brought against him to give perjurious,

false and misleading testimony if and when called to testify personally in that proceeding.

(3) On or about December 28, 1997, William Jefferson Clinton corruptly engaged in, encouraged, or supported a scheme to conceal evidence that had been subpoenaed in a Federal civil rights action brought against him.

(4) Beginning on or about December 7, 1997, and continuing through and including January 14, 1998, William Jefferson Clinton intensified and succeeded in an effort to secure job assistance to a witness in a Federal civil rights action brought against him in order to corruptly prevent the truthful testimony of that witness in that proceeding at a time when the truthful testimony of that witness would have been harmful to him.

(5) On January 17, 1998, at his deposition in a Federal civil rights action brought against him, William Jefferson Clinton corruptly allowed his attorney to make false and misleading statements to a Federal judge characterizing an affidavit, in order to prevent questioning deemed relevant by the judge. Such false and misleading statements were subsequently acknowledged by his attorney in a communication to that judge.

(6) On or about January 18 and January 20–21, 1998, William Jefferson Clinton related a false and misleading account of events relevant to a Federal civil rights action brought against him to a potential witness in that proceeding, in order to corruptly influence the testimony of that witness.

(7) On or about January 21, 23 and 26, 1998, William Jefferson Clinton made false and misleading statements to potential witnesses in a Federal grand jury proceeding in order to corruptly influence the testimony of those witnesses. The false and misleading statements made by William Jefferson Clinton were repeated by the witnesses to the grand jury, causing the grand jury to receive false and misleading information. . . .

Wherefore, William Jefferson Clinton, by such conduct, warrants impeachment and trial, and removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

ARTICLE IV

Using the powers and influence of the office of President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has engaged in conduct that resulted in misuse and abuse of his high office, impaired the due and proper administration of justice and the conduct of lawful inquiries, and contravened the authority of the legislative branch and the truth seeking purpose of a coordinate investigative proceeding, in that, as President, William Jefferson Clinton refused and failed to respond to certain written requests for admission and willfully

made perjurious, false and misleading sworn statements in response to certain written requests for admission propounded to him as part of the impeachment inquiry authorized by the House of Representatives of the Congress of the United States. William Jefferson Clinton, in refusing and failing to respond and in making perjurious, false and misleading statements, assumed to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives and exhibited contempt for the inquiry. . . .

Wherefore, William Jefferson Clinton, by such conduct, warrants impeachment and trial, and removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

Trial Memorandum of the United States House of Representatives

> In The Senate Of The United States, Sitting as a Court of Impeachment, In Re Impeachment of President William Jefferson Clinton. Now comes the United States House of Representatives, by and through its duly authorized Managers, and respectfully submits to the United States Senate its Brief in connection with the Impeachment Trial of William Jefferson Clinton, President of the United States.

The President is charged in two Articles with: 1) Perjury and false and misleading testimony and statements under oath before a federal grand jury (Article I), and 2) engaging in a course of conduct or scheme to delay and obstruct justice (Article II).

The evidence contained in the record, when viewed as a unified whole, overwhelmingly supports both charges.

Perjury and False Statements Under Oath. President Clinton deliberately and willfully testified falsely under oath when he appeared before a federal grand jury on August 17, 1998. Although what follows is not exhaustive, some of the more overt examples will serve to illustrate.

At the very outset, the President read a prepared statement, which itself contained totally false assertions and other clearly misleading information.

The President relied on his statement nineteen times in his testimony when questioned about his relationship with Ms. Lewinsky . . . .

He falsely claimed that his actions with Ms. Lewinsky did not fall within the definition of "sexual relations" that was given at his deposition.

He falsely testified that he answered questions truthfully at his deposition concerning, among other subjects, whether he had been alone with Ms. Lewinsky . . . .

Obstruction of Justice. The President engaged in an ongoing scheme to obstruct both the Jones civil case and the grand jury. Further, he undertook a continuing and concerted plan to tamper with witnesses and prospective witnesses for the purpose of causing those witnesses to provide false and misleading testimony. Examples abound:

The President and Ms. Lewinsky concocted a cover story to conceal their relationship, and the President suggested that she employ that story if subpoenaed in the Jones case.

The President suggested that Ms. Lewinsky provide an affidavit to avoid testifying in the Jones case, when he knew that the affidavit would need to be false to accomplish its purpose . . . .

The President attempted to influence the expected testimony of his secretary, Ms. Currie, by providing her with a false account of his meetings with Ms. Lewinsky.

The President provided several of his top aides with elaborate lies about his relationship with Ms. Lewinsky, so that those aides would convey the false information to the public and to the grand jury. When he did this, he knew that those aides would likely be called to testify, while he was declining several invitations to testify. By this action, he obstructed and delayed the operation of the grand jury . . . .

The President lied repeatedly under oath in his deposition in the Jones case, and thereby obstructed justice in that case . . . .

The President employed the power of his office to procure a job for Ms. Lewinsky after she signed the false affidavit by causing his friend to exert extraordinary efforts for that purpose.

The foregoing are merely accusations of an ongoing pattern of obstruction of justice, and witness tampering extending over a period of several months, and having the effect of seriously compromising the integrity of the entire judicial system.

The effect of the President's misconduct has been devastating in several respects. 1) He violated repeatedly his oath to "preserve, protect and defend the Constitution of the United States." 2) He ignored his constitutional duty as chief law enforcement officer to "take care that the laws be faithfully executed." 3) He deliberately and unlawfully obstructed Paula Jones's rights as a citizen to due process and the equal protection of the laws, though he had sworn to protect those rights. 4) By his pattern of lies under oath, misleading statements and deceit, he has seriously undermined the integrity and credibility of the Office of President and thereby the honor and integrity of the United States. 5) His pattern of perjuries, obstruction of justice, and witness tampering has affected the truth seeking process which is the foundation of our legal system. 6) By mounting an assault in the truth seeking process, he has attacked the entire Judicial Branch of government.

The Articles of Impeachment that the House has preferred state offenses that warrant, if proved, the conviction and removal from office of President William Jefferson Clinton. The Articles charge that the President has committed perjury before a federal grand jury and that he obstructed justice in a federal civil rights action. The Senate's own precedents establish beyond doubt that perjury warrants conviction and removal. During the 1980s, the Senate convicted and removed three federal judges for committing perjury. Obstruction of justice undermines the judicial system in the same fashion that perjury does, and it also warrants conviction and removal. Under our Constitution, judges are impeached under the same standard as

Presidents—treason, bribery, or other high crimes and misdemeanors. Thus, these judicial impeachments for perjury set the standard here. Finally, the Senate's own precedents further establish that the President's crimes need not arise directly out of his official duties. Two of the three judges removed in the 1980s were removed for perjury that had nothing to do with their official duties. . . .

This case is not about sex or private conduct. It is about multiple obstructions of justice, perjury, false and misleading statements, and witness tampering—all committed or orchestrated by the President of the United States. Before addressing the President's lies and obstruction, it is important to place the events in the proper context. If this were only about private sex we would not now be before the Senate . . . .

Some "experts" have questioned whether the President's deportment affects his office, the government of the United States or the dignity and honor of the country. . . . [T]he President is the spokesman for the government and the people of the United States concerning both domestic and foreign matters. His honesty and integrity, therefore, directly influence the credibility of this country. . . . Again: there is no such thing as non-serious lying under oath. Every time a witness lies, that witness chips a stone from the foundation of our entire legal system. Likewise, every act of obstruction of justice, of witness tampering or of perjury adversely affects the judicial branch of government. . . . Apart from all else, the President's illegal actions constitute an attack upon and utter disregard for the truth, and for the rule of law. Much worse, they manifest an arrogant disdain not only for the rights of his fellow citizens, but also for the functions and the integrity of the other two co-equal branches of our constitutional system. . . . The President mounted a direct assault upon the truth-seeking process which is the very essence and foundation of the Judicial Branch. Not content with that, though, Mr. Clinton renewed his lies, half-truths and obstruction to this Congress when he filed his answers to simple requests to admit or deny. In so doing, he also demonstrated his lack of respect for the constitutional functions of the Legislative Branch. . . .

The Articles state offenses that warrant the President's conviction and removal from office. The Senate's own precedents establish that perjury and obstruction warrant conviction and removal from office. Those same precedents establish that the perjury and obstruction need not have any direct connection to the officer's official duties. In the 1980s, the Senate convicted and removed from office three federal judges for making perjurious statements. . . .

To avoid the conclusive force of these recent precedents—and in particular the exact precedent supporting impeachment for, conviction, and removal for perjury—the only recourse for the President's defenders is to argue that a high crime or misdemeanor for a judge is not necessarily a high crime or misdemeanor for the President. The arguments advanced in support of this dubious proposition do not withstand serious scrutiny. The Constitution provides that Article III judges "shall hold their Offices during good Behavior," U.S. Const. Art. III, 1. Thus, these arguments suggest that judges are impeachable for "misbehavior" while other federal officials are only impeachable for treason, bribery, and other high crimes and misdemeanors.

The staff of the House Judiciary Committee in the 1970s and the National Commission on Judicial Discipline and Removal in the 1990s both issued reports rejecting these arguments. . . . Moreover, even assuming that presidential high crimes and misdemeanors could be different from judicial ones, surely the President ought not be held to a lower standard of impeachability than judges. In the course of the 1980s judicial impeachments, Congress emphasized unequivocally that the removal from office of federal judges guilty of crimes indistinguishable from those currently charged against the President was essential to the preservation of the rule of law. If the perjury of just one judge so undermines the rule of law as to make it intolerable that he remain in office, then how much more so does perjury committed by the President of the United States, who alone is charged with the duty "to take Care that the Laws be faithfully executed." . . . When a President, as chief law enforcement officer of the United States, commits perjury, he violates this constitutional oath unique to his office and casts doubt on the notion that we are a nation ruled by laws and not men . . . .

Although Congress has never adopted a fixed definition of "high crimes and misdemeanors," much of the background and history of the impeachment process contradicts the President's claim that these offenses are private and therefore do not warrant conviction and removal. Two reports prepared in 1974 on the background and history of impeachment are particularly helpful in evaluating the President's defense. Both reports support the conclusion that the facts in this case compel the conviction and removal of President Clinton . . . .

That the President's perjury and obstruction do not directly involve his official conduct does not diminish their significance. The record is clear that federal officials have been impeached for reasons other than official misconduct. . . . Nothing in the text, structure, or history of the Constitution suggests that officials are subject to impeachment only for official misconduct. Perjury and obstruction of justice—even regarding a private matter—are offenses that substantially affect the President's official duties because they are grossly incompatible with his preeminent duty to "take care that the laws be faithfully executed." Regardless of their genesis, perjury and obstruction of justice are acts of public misconduct—they cannot be dismissed as understandable or trivial. Perjury and obstruction of justice are not private matters; they are crimes against the system of justice, for which impeachment, conviction, and removal are appropriate. . . .

This is a defining moment for the Presidency as an institution, because if the President is not convicted as a consequence of the conduct that has been portrayed, then no House of Representatives will ever be able to impeach again and no Senate will ever convict. The bar will be so high that only a convicted felon or a traitor will need to be concerned. Experts pointed to the fact that the House refused to impeach President Nixon for lying on an income tax return. Can you imagine a future President, faced with possible impeachment, pointing to the perjuries, lies, obstructions, and tampering with witnesses by the current occupant of the office as not rising to the level of high crimes and misdemeanors? If this is not enough, what is? . . .

Answer of President William Jefferson Clinton to the Articles of Impeachment

January 11, 1999

. . . The charges in the two Articles of Impeachment do not permit the conviction and removal from office of a duly elected President. The President has acknowledged conduct with Ms. Lewinsky that was improper. But . . . [t]he charges in the articles do not rise to the level of "high Crimes and Misdemeanors" as contemplated by the Founding Fathers, and they do not satisfy the rigorous constitutional standard applied throughout our Nation's history. Accordingly, the Articles of Impeachment should be dismissed.

President Clinton denies that he made perjurious, false and misleading statements before the federal grand jury on August 17, 1998. . . . There is a myth about President Clinton's testimony before the grand jury. The myth is that the President failed to admit his improper intimate relationship with Ms. Monica Lewinsky. The myth is perpetuated by Article I, which accuses the President of lying about "the nature and details of his relationship" with Ms. Lewinsky.

The fact is that the President specifically acknowledged to the grand jury that he had an improper intimate relationship with Ms. Lewinsky. He said so, plainly and clearly: "When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong. These encounters . . . did involve inappropriate intimate contact." The President described to the grand jury how the relationship began and how it ended at his insistence early in 1997—long before any public attention or scrutiny. . . . The President read a prepared statement to the grand jury acknowledging his relationship with Ms. Lewinsky. The statement was offered at the beginning of his testimony to focus the questioning in a manner that would allow the Office of Independent Counsel to obtain necessary information without unduly dwelling on the salacious details of the relationship. The President's statement was followed by almost four hours of questioning. If it is charged that his statement was in any respect perjurious, false and misleading, the President denies it. The President also denies that the statement was in any way an attempt to thwart the investigation. . . . The President was truthful when he testified before the grand jury that he did not engage in sexual relations with Ms. Lewinsky as he understood that term to be defined by the *Jones* lawyers during their questioning of him in that deposition. The President further denies that his other statements to the grand jury about the nature and details of his relationship with Ms. Lewinsky were perjurious, false, and misleading. . . .

---

1. *Criminal Prosecution and Impeachment.* Article I, § 3 of the Constitution provides explicitly that impeachment may be followed by criminal prosecution. But may prosecution *precede* impeachment? For lesser officials, such as district judges, it often has come first. The Watergate Special Prosecutor declined to seek the indictment of President Nixon; nor did Independent Counsel Starr seek to indict President

Clinton. Could a sitting President be subjected to criminal prosecution? Professor Philip B. Kurland, in WATERGATE AND THE CONSTITUTION 135 (1978), thought not, because the President "is the sole indispensable man in government." *Accord* Akhil Reed Amar, *On Prosecuting Presidents*, 27 HOFSTRA L. REV. 671 (1999). For the contrary view, see Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677 (1999), and by the same author, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?* 20 HASTINGS CONST. L.Q. 7 (1992).

2. *The Executive Branch's Position*. In 1973, the Office of Legal Counsel undertook a review of the amenability to criminal prosecution of all civil officers. OLC concluded that the president is immune from criminal prosecution while in office, but that every other civil officer is subject to criminal prosecution while in office. The reasoning of the opinion is in line with Professor Kurland's view: Because the president is the single head of the executive branch, a criminal prosecution of the president would debilitate that branch uniquely and prevent it from performing its constitutional functions. *See* Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973). The issue arose later that year when grand jury proceedings commenced against sitting Vice President Spiro Agnew. When Agnew's lawyers moved to enjoin the proceedings, the Department of Justice filed a brief opposing Agnew and reiterating the view of the OLC memo that only the president is immune from criminal prosecution while in office. Agnew resigned his office and pleaded guilty to tax evasion. More recently, and for reasons that are not at all clear, OLC decided to reexamine the question. It opined that the 1973 memo's conclusions "remain sound and that subsequent developments in the law validate both the analytical framework applied and the conclusions reached at that time." *See A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 OP. O.L.C. 222, 223 (October 6, 2000).

3. *Low Crimes and Misdemeanors*? Many scholars weighed in on the issue of the constitutional sufficiency of the charges against President Clinton. *See Symposium, Background and History of Impeachment*, 67 GEO. WASH. L. REV. 601 (1999), reproducing testimony given by leading constitutional scholars before the House Judiciary Committee in November 1998; see also *Symposium, The Constitution Under Clinton: A Critical Assessment* (Neil Kinkopf, special ed.), 63 LAW & CONTEMP. PROBS. 1 (2000); *A Symposium on the Impeachment of William Jefferson Clinton: Reflections on the Process, the Results, and the Future*, 28 HOFSTRA L. REV. 291 (1999). Not surprisingly, a range of views has emerged. Professor Cass R. Sunstein, in *Impeaching the President*, 147 U. PA. L. REV. 279 (1998), argues that the focus of the impeachment clause is to pursue "a narrow category of egregious or large-scale abuses of authority that comes from the exercise of distinctly presidential powers." Other crimes, he argues, should usually be prosecuted after the President leaves office, and he regards the issue whether any ordinary crimes are impeachable as undecided to date. In agreement is Professor Michael J. Gerhardt, *The Lessons of Impeachment*

History, 67 Geo. Wash. L. Rev. 603 (1999), referring to the constitutional text as "technical terms of art that refer to political crimes . . . serious abuses of official power or serious breaches of the public trust." From this premise it is an easy step to conclude, as does Professor Jack N. Rakove, in *Statement on the Background and History of Impeachment*, *id.* at 682, that Clinton's misconduct was "essentially private and non-official even if subsequent proceedings gave it a legal and public character." Rakove, emphasizing the framers' fear of congressional domination of the presidency, counsels against an expansive reading of the clause.

Taking the opposite tack, Professor Stephen B. Presser asks *Would George Washington Have Wanted Bill Clinton Impeached?, id.* at 666, and answers yes. He emphasizes that the allegations were of comprehensive "criminal interference with the legal process," resembling many of the English precedents, and overall "a pattern of conduct that involved injury to the state and a betrayal of his constitutional duties" for personal gain. For further development of the view that impeachment need not be limited to abuses of office, see two articles by Professor Jonathan Turley, *The Executive Function Theory, The Hamilton Affair, and other Constitutional Mythologies*, 77 N. C. L. Rev. 1791 (1999), and *Reflections on Murder, Misdemeanors, and Madison*, 28 Hofstra L. Rev. 439 (1999) (a public/private dichotomy is a "mere artificiality in a process designed to deal with the perceived legitimacy of a President to govern").

4. *Impeachment Process: Politics or Law?* Closely related to the issue of defining impeachable offenses is the issue of the appropriate conduct of the House and Senate in impeachment cases. For federal judges, the process has been lawyerly, typically asking whether a particular felony conviction should support impeachment. For Presidents, however, the sanitized air of a trial is probably impossible to achieve—and may be undesirable as well. Professor John O. McGinnis, in *Impeachment: The Structural Understanding*, 67 Geo. Wash. L. Rev. 650 (1999), argues that the framers assigned impeachment to the deeply political institution of Congress because they sought the "prudential" judgment of that body, to address "any objective misconduct so serious that it poses an unacceptable risk to the public rather than . . . some fixed list of offenses or a set of offenses determined by some abstract rule." For similar views, see Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, *id.* at 735 ("Ultimately, an impeachment says more about the values and expectations of a society than it does about the conduct of a President."); and *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 Duke L.J. 1 (1999). If presidential impeachments are at bottom political in the larger sense of the term, it is inevitable that Congress will receive public pressure concerning its own behavior—pressure that may determine the outcome. *See* Frank O. Bowman III & Stephen L. Sepinuck, *"High Crimes and Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment*, 72 S. Cal. L. Rev. 1517, 1563 (1999), arguing that the Clinton acquittal was "a vehicle to express disapproval of a method of politics more destructive of the public welfare than the continuance in office of one severely flawed individual."

For procedural reviews and analysis of the Clinton case, see Asa Hutchinson, *Did the Senate Trial Satisfy the Constitution and the Demands of Justice?* 28 Hofstra L. Rev. 393 (1999) ("No," in the view of one of the House Managers); Charles Tiefer, *The Senate Impeachment Trial for President Clinton, id*. at 407 (1999). For an argument that Chief Justice Rehnquist's restrained role as presiding officer was *too* restrained to properly shape the trial, see Michael F. Williams, *Rehnquist's Renunciation? The Chief Justice's Constitutional Duty to "Preside" Over Impeachment Trials*, 104 W. Va. L. Rev. 457 (2002).

5. *The Censure Alternative*. Professor Joseph Isenbergh, in Impeachment and Presidential Immunity from Judicial Process (1998), argued that removal and disqualification were not the only remedies available to Congress in a formal impeachment; conviction followed by censure was also permissible. For a debate over this issue, see Akhil Reed Amar, *On Impeaching Presidents, Appendix, A Constitutional Conversation*, 28 Hofstra L. Rev. 291, 317–41 (1999). A perhaps blunter appraisal is Peter M. Shane, *A Detour into Constitutional Absurdity*, N.Y. Times, Jan. 27, 1999, at A27.

6. *Impeachment and the Future*. In the wake of the Clinton impeachment, Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 192–94 (2d ed. 2000), concludes that impeachment has not been abused in America. Its use has been rare, he notes, and he speculates that the Clinton acquittal may have strengthened the presidency by identifying "a zone of misconduct for which presidents . . . are not potentially impeachable." *See also* Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions that Judged President Clinton*, 63 Law & Contemp. Probs. 143 (2000) ("The constitutional design worked reasonably well."). Do you concur? Does any presidential impeachment, even a failed one, make this a more "thinkable" option? If so, is that effect good or bad?

7. *The Bottom Line: A Plague on Both Their Houses*? Judge Richard Posner, in An Affair of State: The Investigation, Impeachment, and Trial of President Clinton 91–92 (1999), observes that the Clinton imbroglio offers:

> two diametrically opposed narratives to choose between. In one, a reckless, lawless, immoral President commits a series of crimes in order to conceal a tawdry and shameful affair, crimes compounded by a campaign of public lying and slanders. A prosecutor could easily draw up a thirty-count indictment against the President. In the other narrative, the confluence of a stupid law (the independent counsel law), a marginal lawsuit begotten and nursed by political partisanship, a naïve and imprudent judicial decision by the Supreme Court in that suit, and the irresistible human impulse to conceal one's sexual improprieties, allows a trivial sexual escapade (what Clinton and Lewinsky called "fooling around" or "messing around") to balloon into a grotesque and gratuitous constitutional drama. The problem is that both narratives are correct.

So where do you come out on all this? For still more opinions, see Leonard V. Kaplan & Beverly I. Moran, eds., Aftermath: the Clinton Impeachment and

THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE (2001); JEFFREY TOOBIN, A VAST CONSPIRACY (1999).

8. *Apology or Apologia?* At the end of the day, Clinton admitted wrongdoing and accepted suspension from the Arkansas bar and a waiver of any right to legal fees in return for Independent Counsel Ray's agreement not to indict. He said, "I acknowledge having knowingly violated Judge Wright's discovery orders in my deposition in that case. I tried to walk a fine line between acting lawfully and testifying falsely, but I now recognize that I did not fully accomplish this goal and that certain of my responses to questions about Ms. Lewinsky were false." "I Hope My Actions Today Will Help Bring Closure," WASH. POST, Jan. 20, 2001, at A19, available at 2001 WL 2538067. In light of this admission, was his lawyers' trial statement in the Senate problematic in any respect?

9. The "*Russia Thing*." The Trump Administration has been embroiled in scandal from its inception over the influence of Russia in the 2016 election. About a month before the election, the Obama administration revealed that the U.S. government believed Russia was behind computer hacks directed at the Democratic National Committee and Hillary Clinton campaign Chairman John Podesta, and was trying to interfere with the election. An FBI counterintelligence investigation begun in July, 2016 brought to light that a number of individuals closely associated with the Trump campaign had had contacts with Russian officials, Eugene Kiely, *Timeline of Russia Investigation*, POLITICO (June 7, 2017, updated), http://www.factcheck.org/2017/06/timeline-russia-investigation/, a fact that the campaign had repeatedly denied. It has also since been revealed that "Russian agents intending to sow discord among American citizens" made extensive use of social media; for example, they "disseminated inflammatory posts that reached 126 million users on Facebook, published more than 131,000 messages on Twitter and uploaded over 1,000 videos to Google's YouTube service." Mike Isaac and Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html.

The story took a dramatic turn just as this volume was going to press. On October 30, 2017, the office of the Justice Department Special Counsel who was appointed to investigate the matter revealed that George Papadopoulos, a former foreign policy adviser to the Trump campaign, had pleaded guilty in July, 2017, to lying to the FBI about campaign outreach to the Russians. Specifically, court documents, available at https://www.justice.gov/file/1007346/download, detail Papadopolous's efforts to contact Russian officials, who claimed to possess thousands of Democratic emails and other "dirt" on Hillary Clinton. Mr. Papadopolous's conviction and the fact of his ongoing cooperation with the Justice Department were revealed on the same day that Paul Manafort, President Trump's former campaign manager, was indicted on charges of conspiracy to launder money, conspiracy against the United States, being an unregistered agent of a foreign principal, false and misleading statements under the Foreign Agents Registration Act, and other charges.

This is not likely to be end of what President Trump has dismissively called "the Russia thing." For example, although not indicted as of early November, 2017, another campaign adviser, General Michael Flynn, is known to have held meetings—in potential violation of the Logan Act—with Russian officials during the transition period to set up a back channel for U.S.-Russian communications once President-elect Trump was inaugurated. General Flynn, who had been named to be Trump's National Security Adviser, applied for renewal of his security clearance in February 2017, but failed to disclose these contacts or to report income he had received from Russian sources. When reports to this effect began to surface, Flynn misled Trump Administration officials, including Vice President Mike Pence, regarding his connections with the Russian government. On February 13, President Trump fired General Flynn for lying to the Vice President.

Other associates of the Trump campaign with significant ties to the Russian government include advisers Carter Page and Roger Stone, and son-in-law Jared Kushner. In addition, the first Senator to endorse Donald Trump for president was now-Attorney General Jeff Sessions. During the campaign Sen. Sessions twice met with Russian Ambassador Sergey Kislyak. After President Trump nominated Senator Sessions to be Attorney General, Sessions testified at his confirmation hearings that he "did not have communications with the Russians." After the fact of his meetings with Ambassador Kislyak became public, Mr. Sessions recused himself from the investigation into Russian involvement in the 2016 presidential campaign.

At the time President Trump took office, the official in charge of the federal investigation of Russian influence in the 2016 presidential election was FBI Director James Comey. Director Comey had already achieved broad public notoriety. After George W. Bush appointed him to serve as Deputy Attorney General, Comey (along with Attorney General John Ashcroft and Assistant Attorney General Jack Goldsmith) stood up to the White House in refusing to re-authorize an aspect of the Administration's Terrorist Surveillance Program. This episode helped Comey solidify a reputation for integrity and non-partisanship and largely explains why President Obama appointed this Republican to be FBI Director.

In July 2016, Director Comey announced that the FBI was recommending that the Justice Department not pursue charges against Hillary Clinton for conducting official business as Secretary of State over a private email server she maintained in the basement of her home, even though classified material appeared on the server. The announcement had two unusual elements. First, the FBI typically does not make its recommendations public, but rather leaves the final decision and the announcement to one of the FBI director's superiors—the Attorney General or the Deputy Attorney General—at Main Justice. Second, Comey went beyond announcing that there would be no charges and criticized Secretary Clinton's carelessness in handling classified information. Such commentary is highly unusual under any circumstances, but especially so when the subject of the comments is a candidate for president. Then on October 28, 2016, as the presidential campaign was drawing to a close, Comey announced that the FBI was re-opening the investigation of Secretary Clinton

because of additional emails that were found in the course of an unrelated investigation into the husband of one of Secretary Clinton's advisers. On November 6, just days before the election, Comey announced that the reopened investigation was again being closed.

On May 9, 2017, President Trump fired James Comey as FBI Director. The initial White House announcement stated that the firing was because of a memorandum prepared by newly appointed Deputy Attorney General Rod Rosenstein. The memo recommended that Comey be terminated because of his mishandling of the Hillary Clinton email investigation. The memo specifically asserted that Comey had overstepped his authority making the July 2016 announcement recommending against prosecution and in commenting further on Clinton's carelessness. President Trump almost immediately undermined this narrative, however. In an interview, the President stated that he made his decision to fire Comey independently of the Deputy Attorney General's memorandum and that his reason for the firing had nothing to do with the Clinton email investigation. Rather, President Trump declared that he had fired Comey because of "this Russia thing."

On June 8, 2017, James Comey testified before the Senate Intelligence Committee, which had opened its own inquiry into possible Russian interference in the 2016 presidential election. Comey's dramatic testimony included a number of significant claims. First, at the conclusion of a national security briefing by top executive officials in the oval office, President Trump asked to speak to Director Comey alone. He specifically raised the FBI's reported investigation of General Flynn and said, "I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go." Comey testified that, despite the "I hope" phrasing, he understood President Trump to be issuing an order to cease the investigation. For his part, President Trump denied making the statement or in any way indicating that Comey should stop the investigation. Second, in two subsequent telephone conversations with Director Comey, President Trump described the Russia investigation as "a cloud" that was impairing the President's ability to do his job. Previous to these discussions, President Trump had a private dinner with Comey in the White House at which time the President informed Comey that "I need loyalty, I expect loyalty." This pattern of conduct led Comey to conclude, "I was fired because of the Russia investigation. I was fired, in some way, to change, or the endeavor was to change, the way the Russia investigation was being conducted." President Trump has denied that he endeavored to affect the Russia investigation.

Further legal developments will no doubt continue to unfold even as this volume heads to publication, and it is far too early to predict specific outcomes. The investigations of the Department of Justice, which have been turned over to a Special Counsel, and the Senate and House Intelligence Committees remain in full force. Moreover, what evidence we have regarding the President's personal involvement—principally the Comey testimony—is contested. The matter nonetheless illuminates a number of important points and raises important questions about the impeachment power. Because of the incomplete and contested nature of the

information we have, we regard the following discussion as hypothetical and do not mean to express a view on the "Russia thing."

a. *Does an offense have to be a formal crime to be impeachable?* Much of the commentary on events recounted by former FBI Director Comey has focused on the issue of whether the President's conduct fits the legal definition of obstruction of justice. 18 U.S.C. § 1503 (prohibiting conduct that "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.") Suppose President Trump endeavored to impede the investigation but did not do so in a manner that falls within the statutory definition of "corrupt" or "threatening." Should the President then be insulated from impeachment or should Congress be understood to have the authority to protect the nation from a President who obstructs the due administration of justice?

b. *Can unintentional conduct be impeachable?* Aside from the President's conduct relating to the Russia investigation, it is clear that quite a few of the President's close advisers have had some contacts with the Russian government or individuals and entities connected with the Kremlin. Assuming the worst case with respect to these advisers—that they are willful agents of the Russian government—but that the President was unaware of these advisers' true motives, would such circumstances provide legal grounds for the House to initiate impeachment proceedings? In such an instance, the President lacks ill-intent and therefore, in all likelihood, the *mens rea* requisite to commit a significant crime. It is conceivable that the House would regard the President as having jeopardized the nation by employing a coterie of disloyal advisers and so to be unfit to remain in office—not because the President is personally endeavoring to do harm, but because the President cannot be trusted to protect the nation against the machinations of foreign powers. Should this be sufficient grounds for impeachment?

c. *The political safeguards of separation of powers.* The two preceding notes raise questions that might incline one to take a relatively expansive view of what constitutes "high crimes and misdemeanors." The concern about doing so is that an open-ended impeachment power could render the President subservient to Congress. James Madison raised this objection to an early draft of the Constitution, which empowered Congress to impeach the president for "maladministration." Madison considered maladministration "so vague a term [that it] will be equivalent to tenure during [the] pleasure of the Senate." 2 Max Farrand, Records of the Federal Convention of 1787, 550 (1911). The most practically significant check against congressional abuse of the impeachment power is not the legal definition of "high crimes and misdemeanors" but the impeachment process itself. While the House of Representatives holds the power to impeach a civil officer by a simple majority, no consequence follows from an impeachment vote. In order for an impeachment to have a legal consequence, it must be presented to the Senate for a trial and vote of conviction, which vote requires a two-thirds supermajority. This process has operated to ensure that an officer may be removed from office through impeachment

only where there is broad bipartisan agreement that the officer has actually engaged in conduct that justifies this sanction.

Consider what this means in the context of the Russia matter as set forth above. One of the more explosive charges leveled during Mr. Comey's testimony is that the President pressured him to drop the investigation of General Flynn (again, President Trump denies this). But note what Comey relates the President as having said: "I hope you can see your way to letting . . . Flynn go." Comey asserts that in context he understood this as conveying a clear order from the President. Be that as it may, the actual words the President used do not expressly issue an order, and getting to that conclusion requires construction that may or may not be justified. Faced with competing plausible constructions of the statements and events, is it not realistic to think members of the President's party in Congress will choose the innocent construction? Doesn't the constitutional process—especially the supermajority requirement—operate to establish a strong presumption of presidential innocence?

d. *Impeachment as a remedy for pre-presidential misconduct.* Imagine that a candidate for President colludes with a foreign power to hack into the United States's balloting system (which is not maintained by the federal government but rather is maintained by the states) in order to directly rig the outcome of the presidential election. This would seem to be clear grounds for impeachment. It is not clear, however, that the impeachment power extends to conduct undertaken by one who is not, at that time, a civil officer of the United States. Somewhat analogously, the Senate has twice refused to convict a former official who acted corruptly in office but who resigned before the Senate could conclude a trial of the matter. *See* Michael J. Gerhardt, The Federal Impeachment Process, *supra* at 79. It is noteworthy that conviction in this circumstance would not be a futile gesture because the punishment for conviction can, at the Senate's discretion, extend beyond removal from office to include a disability to hold office ever again. *See* U.S. Const. art. I, § 3, cl. 7. These precedents indicate a reluctance to apply the impeachment power in a way that covers consequences falling outside the term of office. Moreover, as discussed in note 3 *supra*, some commentators have argued that the scope of impeachable offenses should be limited to those that involve the abuse of official power. *See* Cass Sunstein, *Impeaching the President*, 147 U. Pa. L. Rev. 279 (1998), *but see* Neil J. Kinkopf, *The Scope of "High Crimes and Misdemeanors" after the Impeachment of President Clinton*, 63 Law & Contemp. Probs. 201 (2000). The presidential candidate we have hypothesized does not hold office and so cannot have engaged in conduct that abuses the power of office in conspiring with a foreign power to fix an election.

e. *Is Election-Related Misconduct a Special Case?* It is standard to note that the impeachment and removal power co-exists in serious tension with our democratic commitments, at least when applied to a sitting president, because the removal of a president undoes the result of an election and, in this very direct sense, subverts the will of the people. Congress has frequently cited this as a reason for being hesitant to pursue presidential impeachments. Should this impulse to defer to democracy, so to

speak, apply with equal force where the alleged misconduct goes to the legitimacy of the election itself?

b. A Judicial Role?

If a President contends that the "offenses" alleged against him are not "high crimes and misdemeanors" under the Constitution, should he be able to seek judicial review of that question? Before a Senate trial? After conviction? The following case, involving not President Nixon but a federal judge also named Nixon, clearly was decided with the former President's case in mind.

Nixon v. United States

506 U.S. 224 (1993)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Walter L. Nixon, Jr., asks this court to decide whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, § 3, cl. 6. That Clause provides that the "Senate shall have the sole Power to try all Impeachments." But before we reach the merits of such a claim, we must decide whether it is "justiciable," that is, whether it is a claim that may be resolved by the courts. We conclude that it is not.

Nixon, a former Chief Judge of the United States District Court for the Southern District of Mississippi, was convicted by a jury of two counts of making false statements before a federal grand jury and sentenced to prison. The grand jury investigation stemmed from reports that Nixon had accepted a gratuity from a Mississippi businessman in exchange for asking a local district attorney to halt the prosecution of the businessman's son. . . .

On May 10, 1989, the House of Representatives adopted three articles of impeachment for high crimes and misdemeanors. The first two articles charged Nixon with giving false testimony before the grand jury and the third article charged him with bringing disrepute on the Federal Judiciary. After the House presented the articles to the Senate, the Senate voted to invoke its own Impeachment Rule XI, under which the presiding officer appoints a committee of Senators to "receive evidence and take testimony." The Senate committee held four days of hearings, during which 10 witnesses, including Nixon, testified. Pursuant to Rule XI, the committee presented the full Senate with a complete transcript of the proceeding and a report stating the uncontested facts and summarizing the evidence on the contested facts. Nixon and the House impeachment managers submitted extensive final briefs to the full Senate and delivered arguments from the Senate floor during the three hours set aside for oral argument in front of that body. Nixon himself gave a personal appeal, and several Senators posed questions directly to both parties. The Senate voted by more than the constitutionally required two-thirds majority to convict Nixon on the first

two articles. The presiding officer then entered judgment removing Nixon from his office as United States District Judge.

Nixon thereafter commenced the present suit, arguing that Senate Rule XI violates the constitutional grant of authority to the Senate to "try" all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings. . . . The District Court held that his claim was nonjusticiable, and the Court of Appeals for the District of Columbia Circuit agreed.

A controversy is nonjusticiable—i.e., involves a political question—where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . ." *Baker v. Carr*, 369 U.S. 186, 217, (1962). But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed. *Powell v. McCormack*, 395 U.S. 486, 519, (1969). As the discussion that follows makes clear, the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

In this case, we must examine Art. I, § 3, cl. 6, to determine the scope of authority conferred upon the Senate by the Framers regarding impeachment. . . . The language and structure of this Clause are revealing. The first sentence is a grant of authority to the Senate, and the word "sole" indicates that this authority is reposed in the Senate and nowhere else. The next two sentences specify requirements to which the Senate proceedings shall conform. . . . Petitioner argues that the word "try" in the first sentence imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial . . . . The word "try," both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it . . . . Based on the variety of definitions, . . . we cannot say that the Framers used the word "try" as an implied limitation on the method by which the Senate might proceed in trying impeachments. . . .

[T]he first sentence of Clause 6 . . . provides that "the Senate shall have the sole Power to try all Impeachments." We think that the word "sole" is of considerable significance. Indeed, the word "sole" appears only one other time in the Constitution—with respect to the House of Representatives' "*sole* Power of Impeachment." Art. I, § 2, cl. 5. The common sense meaning of the word "sole" is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted . . . .

The history and contemporary understanding of the impeachment provisions support our reading of the constitutional language. The parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers. This silence is quite meaningful in light of the several explicit references to the availability of judicial review as a check on the Legislature's power with respect to bills of attainder, ex post facto laws, and statutes.

The Framers labored over the question of where the impeachment power should lie. Significantly, in at least two considered scenarios the power was placed with the Federal Judiciary. *See* 1 Farrand 21–22 (Virginia Plan); *id.*, at 244 (New Jersey Plan). Indeed, Madison and the Committee of Detail proposed that the Supreme Court should have the power to determine impeachments. Despite these proposals, the Convention ultimately decided that the Senate would have [it]. According to Alexander Hamilton, the Senate was the "most fit depositary of this important trust" because its members are representatives of the people. *See* The Federalist No. 65, p. 440 (J. Cooke ed., 1961). The Supreme Court was not the proper body because the Framers "doubted whether the members of that tribunal would, at all times, be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task" or whether the Court "would possess the degree of credit and authority" to carry out its judgment if it conflicted with the accusation brought by the Legislature — the people's representative. *See id.*, at 441. . . .

There are two additional reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments. First, the Framers recognized that most likely there would be two sets of proceedings for individuals who commit impeachable offenses — the impeachment trial and a separate criminal trial. In fact, the Constitution explicitly provides for two separate proceedings. *See* Art. I, § 3, cl. 7. The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments. . . . Certainly judicial review of the Senate's "trial" would introduce the same risk of bias as would participation in the trial itself. Second, judicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature. On the topic of judicial accountability, Hamilton wrote:

> "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.*" *Id.*, No. 79, pp. 532–33 (emphasis added).

Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.

Nevertheless, Nixon argues that judicial review is necessary in order to place a check on the Legislature. . . . The Framers anticipated this objection and created two constitutional safeguards to keep the Senate in check. The first safeguard is that the whole of the impeachment power is divided between the two legislative bodies, with the House given the right to accuse and the Senate given the right to judge.

This split of authority "avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution from the prevalency of a factious spirit in either of those branches." The second safeguard is the two-thirds supermajority vote requirement. . . .

In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability. We agree with the Court of Appeals that opening the door of judicial review . . . would "expose the political life of the country to months, or perhaps years, of chaos." This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim? . . .

For the foregoing reasons, the judgment of the Court of Appeals is Affirmed.

Justice WHITE, with whom Justice BLACKMUN joins, concurring in the judgment.

. . . [I would] reach the merits of the claim. I concur in the judgment because the Senate fulfilled its constitutional obligation to "try" petitioner. It should be said at the outset that, as a practical matter, it will likely make little difference whether the Court's or my view controls this case. This is so because the Senate has very wide discretion in specifying impeachment trial procedures and because it is extremely unlikely that the Senate would abuse its discretion and insist on a procedure that could not be deemed a trial by reasonable judges. . . . When asked at oral argument whether [the Constitution] would be satisfied if, after a House vote to impeach, the Senate, without any procedure whatsoever, unanimously found the accused guilty of being "a bad guy," counsel for the United States answered that the Government's theory "leads me to answer that question yes." . . . I would not issue an invitation to the Senate to find an excuse, in the name of other pressing business, to be dismissive of its critical role in the impeachment process. . . .

[T]here can be little doubt that the Framers came to the view at the Convention that the trial of officials' public misdeeds should be conducted by representatives of the people; that the fledgling judiciary lacked the wherewithal to adjudicate political intrigues; that the judiciary ought not to try both impeachments and subsequent criminal cases emanating from them; and that the impeachment power must reside in the Legislative Branch to provide a check on the largely unaccountable judiciary.

The majority's review of the historical record . . . does not explain, however, the sweeping statement that the judiciary was "not chosen to have any role in impeachments." Not a single word in the historical materials . . . addresses judicial review of the Impeachment Trial Clause. . . . What the relevant history mainly reveals is deep ambivalence among many of the Framers over the very institution of impeachment,

which, by its nature, is not easily reconciled with our system of checks and balances. As they clearly recognized, the branch of the Federal Government which is possessed of the authority to try impeachments, by having final say over the membership of each branch, holds a potentially unanswerable power over the others. In addition, that branch, insofar as it is called upon to try not only members of other branches, but also its own, will have the advantage of being the judge of its own members' causes . . . .

The historical evidence reveals above all else that the Framers were deeply concerned about placing in any branch the "awful discretion, which a court of impeachments must necessarily have." The Federalist No. 65, p. 441 (J. Cooke ed., 1961). Viewed against this history, the discord between the majority's position and the basic principles of checks and balances underlying the Constitution's separation of powers is clear. In essence, the majority suggests that the Framers conferred upon Congress a potential tool of legislative dominance yet at the same time rendered Congress' exercise of that power one of the very few areas of legislative authority immune from any judicial review. . . . [I]t is the Court's finding of nonjusticiability that truly upsets the Framers' careful design. In a truly balanced system, impeachments tried by the Senate would serve as a means of controlling the largely unaccountable judiciary, even as judicial review would ensure that the Senate adhered to a minimal set of procedural standards in conducting impeachment trials.

The majority also contends that the term "try" does not present a judicially manageable standard. . . . The majority's conclusion that "try" is incapable of meaningful judicial construction is not without irony. One might think that if any class of concepts would fall within the definitional abilities of the judiciary, it would be that class having to do with procedural justice. Examination of the remaining question—whether proceedings in accordance with Senate Rule XI are compatible with the Impeachment Trial Clause—confirms this intuition.

Petitioner bears the rather substantial burden of demonstrating that, simply by employing the word "try," the Constitution prohibits the Senate from relying on a fact-finding committee. It is clear that the Framers were familiar with English impeachment practice and with that of the States. . . . It is also noteworthy that the delegation of fact-finding by judicial and quasi-judicial bodies was hardly unknown to the Framers. Jefferson, at least, was aware that the House of Lords sometimes delegated fact-finding in impeachment trials to committees and recommended use of the same to the Senate. T. Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States §LIII (2d ed. 1812). The States also had on occasion employed legislative committees to investigate whether to draw up articles of impeachment. . . . Particularly in light of the Constitution's grant to each House of the power to "determine the Rules of its Proceedings," the existence of legislative and judicial delegation strongly suggests that the Impeachment Trial Clause was not designed to prevent employment of a factfinding committee. . . .

Justice SOUTER, concurring in the judgment.

I agree with the Court that this case presents a nonjusticiable political question . . . [T]he functional nature of the political question doctrine requires analysis of "the precise facts and posture of the particular case," and precludes "resolution by any semantic cataloguing." Whatever considerations feature most prominently in a particular case, the political question doctrine . . . [derives] in large part from prudential concerns about the respect we owe the political departments. . . . [A]pplication of the doctrine ultimately turns, as Learned Hand put it, on "how importunately the occasion demands an answer." *L. Hand, The Bill of Rights* 15 (1958).

This occasion does not demand an answer. . . . It seems fair to conclude that the Clause contemplates that the Senate may determine, within broad boundaries, such subsidiary issues as the procedures for receipt and consideration of evidence necessary to satisfy its duty to "try" impeachments. . . . One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply " 'a bad guy,' " judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. . . .

[The concurring opinion of Justice STEVENS is omitted]

---

1. *Political Question or Constitutional Discretion?* Justice White remarks that it probably makes "little difference" whether his approach or the majority's is taken, in view of the wide procedural discretion he would recognize in the Senate. Indeed, the Justices seem to be arguing not about Judge Nixon, who received plenty of fair process, but about other impeachment controversies that loom in recent history or in the imagination. Given the majority's concern about reviewing presidential impeachments, is the real basis of its opinion not the two strands of political question doctrine that it discusses most, but the residual institutional considerations that often seem to play so strong a role in these cases? In view of the extensive consideration given by the majority to the text and history of the Constitution, how far removed is their actual determination from Justice White's? (Recall the view of some observers that the doctrine is a poorly disguised judgment that a branch is within its constitutional discretion.)

2. *Reviewing Impeachments*. Considering our overall constitutional structure, how should we regard judicial review of impeachments—would it be adding an inappropriate and unwarranted check, or would it be preserving the overall balance of the system in the same way that judicial review does otherwise? Would judicial review have been a help or a hindrance if it had followed a conviction of Justice Chase, or of Presidents Johnson, Nixon, or Clinton? Consider the Justices' debate about the "bad guy" hypothetical—did the Solicitor General give the best answer?

Suppose, as was once proposed, that former Justice Douglas had been impeached for marrying too often and writing leftish books. Should the Court have reviewed whether those are impeachable offenses? That is, are both procedural and substantive issues about impeachments now political questions?

3. *Committee Process.* What do you think of the use of a committee to perform part of the impeachment process? Are there substantial arguments that this delegation is bad *per se*, or should one's view depend on how it operates? For a critique of the current procedures as unfair, see Note, *Committee Impeachment Trials: The Best Solution?* 80 Geo. L.J. 163 (1991).

4. *Disciplining Federal Judges.* The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035, codified at 28 U.S. Code §§ 331–32, 372, 604, created a mechanism to consider and respond to complaints against federal judges. If a complaint about a judge's conduct is filed with the appropriate court of appeals, the judicial council of the circuit is empowered, after various preliminary investigative steps, to punish the judge by means such as a reprimand, a temporary suspension, or a transfer of the judge's cases. If the situation appears to warrant removal, the inquiry moves to the Judicial Conference of the United States for reporting to the House of Representatives. For analysis of the Act, see Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 100–102 (2d ed. 2000); Robert W. Kastenmeier & Michael Remington, *Judicial Discipline: A Legislative Perspective*, 76 Ky. L.J. 763 (1987–88).

After having impeached and removed three federal judges within just over two years, Congress decided broadly to address issues of judicial discipline. It created a National Commission on Judicial Discipline and Removal to study the problems and report recommendations (Pub. L. No. 101-650, 104 Stat. 5124). The Commission, a distinguished group chaired by former Congressman Robert W. Kastenmeier, issued its Report of the National Commission on Judicial Discipline and Removal (1993). The Commission did not recommend constitutional reform. It concluded that federal judges could constitutionally be prosecuted, convicted, and jailed by federal or state authorities, but that statutes attempting to provide for removal of federal judges by means other than impeachment would be unconstitutional. The Commission thought that the circuit councils could control the caseload of judges under inquiry, but that a statute suspending compensation in the event of a conviction would be unconstitutional. Regarding impeachment proceedings, the Commission urged better cooperation between executive and congressional authorities in potential removal situations and suggested some ways to streamline and to ensure the fairness of the process. It did not call for abandonment of the Senate's Rule XI process for delegating trial responsibilities to a committee. *See* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. Pa. L. Rev. 209 (1993); Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. Ill. L. Rev. 809.