

A FORMIDABLE WEAPON OF FACTION? THE LAW AND POLITICS OF IMPEACHMENT

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This Essay draws on recent studies of the federal impeachment power and the issues swirling around the presidency of Donald Trump to consider the law and politics of impeachments. The impeachment process is inescapably political, but that does not mean that there are no constitutional rules, standards, and considerations that can and will shape how the politics unfurl. The most challenging constitutional questions surrounding the impeachment power relate to the scope of impeachable offenses. It is possible to rule out some interpretations of the constitutional language of “high crimes and misdemeanors,” but the standard for impeachable offenses that we are left with will still require contestable political judgment to apply in any particular case. Knowing whether a given act could be regarded as an impeachable offense is only the first step in determining whether an individual should be impeached and ultimately convicted and removed from office.

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I. INTRODUCTION

There are those who have been quite desperate to truncate Donald Trump’s tenure as President. Even before he was officially elected, Democratic activists lobbied the presidential electors to cast their ballots at the meeting of the Electoral College for a more fit candidate, whether that be Hillary Clinton or John Kasich.¹ Talk show host Rosie O’Donnell endorsed the idea of Barack Obama

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1. See Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 50 ARIZ. L. REV. 903, 903–04, 936 (2017).

declaring martial law and delaying Trump's inauguration.² When the president was inaugurated, the singer Madonna confessed to the Women's March on the National Mall her fantasy of blowing up the White House.³ A Yale psychiatry professor suggested less than a year into President Trump's term that Trump should be forcibly seized and involuntarily committed as a danger to himself and others.⁴ As Trump's first midterm election approached, Democratic presidential aspirant Elizabeth Warren recommended that members of the president's Cabinet should "do their job," invoke the Twenty-Fifth Amendment, declare Trump incapacitated, and strip the president of the powers and duties of his office.⁵ An anonymous administration official claimed that members of the Cabinet had already contemplated taking such a step.⁶

More credible than the threat of a military coup or a Cabinet revolt is the possibility of impeachment and removal. Remarkably, books were being written calling for Trump's impeachment before he had even taken any official acts as president.⁷ Democratic "megadonor" Tom Steyer launched a public campaign to mobilize support for impeaching the president less than a year after Trump's election.⁸ Democratic, and even some Republican, members of Congress have endured a constant barrage of questions about where they stood on the impeachment question. With the Republicans routed in the midterm elections, a newly elected member of the House Democratic caucus captured some free publicity by calling the president a choice expletive and promising to impeach him, even as

2. Brooke Seipel, *Rosie O'Donnell Calls For 'Martial Law' to Stop Trump Inauguration*, HILL (Jan. 12, 2017, 5:19 PM), <https://thehill.com/blogs/in-the-know/in-the-know/314070-rosie-odonnell-supports-imposing-martial-law-to-stop-trump>.

3. Eric Levenson, *In R-Rated Anti-Trump Rant, Madonna Muses About Blowing Up White House*, CNN (Jan. 21, 2017, 4:55 PM), <https://www.cnn.com/2017/01/21/politics/madonna-speech-march/index.html>.

4. Elaine Godfrey, *The Psychiatrist Telling Congress Trump Could Be Involuntarily Committed*, ATLANTIC (Jan. 12, 2018), <https://www.theatlantic.com/politics/archive/2018/01/bandy-lee/550193/>.

5. Victor Morton, *Elizabeth Warren Calls for Trump's Removal from Office Under 25th Amendment: 'It's Time'*, WASH. TIMES (Sept. 6, 2018), <https://www.washingtontimes.com/news/2018/sep/6/elizabeth-warren-calls-donald-trumps-removal-offic/>.

6. See Anonymous, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html>.

7. See, e.g., Darren Samuelsohn, *Could Trump Be Impeached Shortly After He Takes Office?*, POLITICO (Apr. 17, 2016, 2:10 PM), <https://www.politico.eu/article/could-donald-trump-be-impeached-shortly-after-he-takes-office-us-presidential-election-2016-american-president-impeachment/>.

8. Raymond Arke, *Liberal Megadonor Tom Steyer's Lobbying Campaign to Impeach Trump Persists*, OPENSECRETS.ORG (May 21, 2019), <https://www.opensecrets.org/news/2019/05/tom-steyer-lobbying-to-impeach-trump/>.

the Democratic leadership in the House of Representatives tried to play down impeachment talk as a distraction from their substantive agenda.⁹

We apparently live in an age of impeachment. If actual use of the impeachment power has not yet become commonplace, the power lies ominously on the political stage waiting to be used like Chekhov's gun.¹⁰ The air is filled with impeachment talk.¹¹ Much of it is ill-informed and ill-conceived. Fortunately, we have also gained some serious scholarship out of it, and one can always hope that such work can help elevate the political discourse.

Thomas Jefferson had rather mixed feelings about the impeachment power.¹² As Vice President, Jefferson prepared himself to preside over the first federal impeachment trial, the impeachment of Senator William Blount.¹³ Blount was accused of plotting with the British to conquer Spanish territory on the southern border of the United States.¹⁴ Regardless of the merits of Blount's case, Jefferson was unhappy with the political maneuverings in the Senate and thought the impeachment power had been revealed as nothing "but the most formidable weapon for the purposes of a dominant faction that ever was contrived" and "the most effectual [weapon] for getting rid of any man whom they consider as dangerous to their views . . ." ¹⁵ The Americans were discovering what the British already knew, that impeachment was "an engine more of passion than justice." ¹⁶

A few years later, the tables had turned. The Federalists were now the minority party, and Jefferson himself was now the President

9. Rachel Bade et al., *Dems Livid After Tlaib Vows to Impeach the Motherf—er*, POLITICO (Jan. 4, 2019, 9:27 PM), <https://www.politico.com/story/2019/01/04/dems-livid-tlaib-impeachment-comment-1081370>. Admittedly, I began to write about President Trump's impeachment problem shortly after the president fired FBI director James Comey and then disclosed sensitive national security information in a private Oval Office meeting with Russian government officials. Keith E. Whittington, *An Impeachment Should Not Be a Partisan Affair*, LAWFARE (May 16, 2017, 9:03 PM), <https://www.lawfareblog.com/impeachment-should-not-be-partisan-affair>.

10. *Chekhov's Gun and Impeachment*, NEWS TODAYS (Mar. 17, 2019), <https://newstodays128.blogspot.com/2019/03/chekhovs-gun-and-impeachment.html>.

11. See DAVID E. KYVIG, *THE AGE OF IMPEACHMENT 2* (2008); see also LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY* xiii, 66 (2018) (discussing the increased conversation about impeachment and the Emoluments Clause during the Trump Era).

12. 7 THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 202 (Paul Leicester Ford ed., 1896).

13. *Id.* at 192–93.

14. *Blount Expulsion*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/expulsion_cases/Blount_expulsion.htm (last visited Apr. 29, 2020).

15. JEFFERSON, *supra* note 12, at 202.

16. *Id.* at 203.

of the United States. In their effort to stave off the Jeffersonian insurgency, the Federalists had empowered the federal courts to imprison newspaper editors for seditious libel.¹⁷ Associate Justice Samuel Chase distinguished himself in his zeal for throwing Jeffersonians in jail in the final years of the eighteenth century and did not bother to hide his contempt for them after they won an electoral landslide in 1800.¹⁸ President Jefferson thought it proper to ask his lieutenant in the House of Representatives whether “this seditious and official attack on the principles of our Constitution” ought “to go unpunished.”¹⁹

The House did eventually decide to go forward with impeachments not only of Chase, but also of a Federalist trial court judge, John Pickering, who appeared to be suffering from dementia yet whose friends and family refused to encourage him to voluntarily relinquish the bench and leave a vacancy for Jefferson to fill.²⁰ The Senate reluctantly agreed to convict and remove Judge Pickering but failed to convict Chase.²¹ Neither impeachment was satisfactory to President Jefferson. He complained that impeachment was a “bungling way of removing judges” and a “farce” that would never be tried again.²²

Americans have struggled with the impeachment power from the beginning. As the libertarian Cato Institute’s Gene Healy has recently emphasized, impeachment has been thought of as an “indispensable remedy” to abusive governmental officials, echoing the sentiment of James Madison.²³ At other times, it has been thought of either as a “farce” or as a tool of partisan mischief, as Jefferson feared. Since the impeachment power is inevitably entangled with politics, such mixed feelings about the use of that power are unlikely to go away. Given the environment of deep partisan polarization within which we currently operate, any consideration of the use of the impeachment power is likely to invoke fears of its partisan abuse. It would be unrealistic to expect that the question of impeachment alone would rise above the fray of partisan politics. The ordinary features of politics will inevitably intrude on how Congress approaches the exercise of the impeachment power. Nonetheless, we can hope that statesmanship and constitutional principles will have a role as well.

17. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 43 (1999).

18. *Id.*

19. Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725, 740 (2010).

20. Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, 756 (2001).

21. *Id.* at 757–58.

22. WILLIAM PLUMER, JR., *THE LIFE OF WILLIAM PLUMER* 325 (A. P. Peabody ed., 1856).

23. GENE HEALY, *INDISPENSABLE REMEDY: THE BROAD SCOPE OF THE CONSTITUTION’S IMPEACHMENT POWER* 2 (2018).

In recent years we have seen a steady stream of both popular and scholarly works about the impeachment power. A fair number have been the works of advocates, often calling for an impeachment and occasionally trying to defend against one. Since the impeachment of President Bill Clinton in 1998,²⁴ building the case for presidential impeachment has become a routine feature of partisan warfare. Ann Coulter rose to public prominence making the case for impeaching Clinton.²⁵ George W. Bush,²⁶ Barack Obama,²⁷ and Donald Trump²⁸ have all inspired writers to beat the drum for impeachment. It is probably an indication of the seriousness of the impeachment threat against Donald Trump that he has also motivated the publication of a sharp-elbowed rebuttal,²⁹ though perhaps in the future we should anticipate partisans on both sides selling impeachment polemics to their respective bases during every presidency. Negative partisanship moves product.³⁰

It is certainly a sign of Trump's vulnerability that he has inspired more serious scholarly examinations of the impeachment power that should still be of interest after the current occupant has cleaned out his desk in the Oval Office. Watergate gave us two classic book-length studies of the impeachment power, one providing a deep dive into history³¹ and the other providing an accessible introduction.³² Charles Black's "handbook" was reissued with new introductions during both the Clinton and the Trump Administrations. The Clinton

24. Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L. J. 1, 97–98 (1999).

25. ANN H. COULTER, HIGH CRIMES AND MISDEMEANORS: THE CASE AGAINST BILL CLINTON 22 (1998).

26. JOHN C. BONIFAZ, WARRIOR-KING: THE CASE FOR IMPEACHING GEORGE W. BUSH 77 (2003); DAVID LINDORFF & BARBARA OLSHANSKY, THE CASE FOR IMPEACHMENT: THE LEGAL ARGUMENT FOR REMOVING PRESIDENT GEORGE W. BUSH FROM OFFICE 15 (2006); JOHN NICHOLS, THE GENIUS OF IMPEACHMENT: THE FOUNDERS' CURE FOR ROYALISM 56–57 (2006).

27. ANDREW C. MCCARTHY, FAITHLESS EXECUTION: BUILDING THE CASE FOR OBAMA'S IMPEACHMENT 14 (2014).

28. RONALD A. FEIN ET AL., THE CONSTITUTION DEMANDS IT: THE CASE FOR THE IMPEACHMENT OF DONALD TRUMP 131 (2018); NEAL KATYAL, IMPEACH: THE CASE AGAINST DONALD TRUMP 74 (2019); ALLAN J. LICHTMAN, THE CASE FOR IMPEACHMENT 233 (2018).

29. ALAN M. DERSHOWITZ, THE CASE AGAINST IMPEACHING TRUMP 1–2 (2018).

30. Indeed, we have reached the point in our present age of impeachment in which the pundits and activists calling for the removal of the other party's president are now repeat players who seemingly can always find a reason to call for the removal of the other party's president.

31. *See generally* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973) (providing a detailed history of the impeachment power).

32. *See generally* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK (1974) (discussing the rationale for presidential impeachment with particular application to Richard Nixon).

scandals prompted shorter reexaminations of the impeachment power.³³

The Trump presidency has likewise yielded some works that hope to look beyond the present moment but that are written with the non-specialist in mind.³⁴ Michael Gerhardt, who was the sole bipartisan congressional expert during the Clinton impeachment due to his prior work on the impeachment process, has written a new guide to the federal impeachment process.³⁵ Using an interesting question-and-answer format, Gerhardt walks the reader through over one hundred questions, ranging from what the word “impeachment” means to whether Trump’s tweeting is impeachable.³⁶ Cass Sunstein, who was a Democratic expert witness during the Clinton impeachment, has produced a short “citizen’s guide” on the power to impeach presidents.³⁷ The impeachment power becomes a vehicle for Sunstein to elaborate on the republican inheritance of the American Revolution and the conceptual framework underlying the Constitution. Although Sunstein takes pains to reemphasize that Clinton should not have been impeached, and Trump clearly hovers over the book, Sunstein avoids a direct discussion of the immediate issues surrounding the Trump presidency. Laurence Tribe, also a Democratic witness during the Clinton impeachment, has joined with his former student, Joshua Matz, who runs the *Take Care* website of anti-Trump legal analysis, to produce an introduction to the presidential impeachment power.³⁸ Tribe and Matz are more willing to delve into the particulars of the Trump presidency and its myriad scandals (while also taking care to reaffirm that Clinton should never have been impeached), but the bulk of the book is dedicated less to building the case for impeaching Trump than to developing an understanding of the impeachment power that would facilitate the impeachment of Trump. They might not beat the pithiness of Black’s handbook or the historical depth of Berger’s study, but all three

33. See Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 325 (1999); Turley, *supra* note 24, at 98–99; Keith E. Whittington, “*High Crimes*” After Clinton: Deciding What’s Impeachable, 99 POL’Y REV. 27, 39–40 (2000).

34. Interestingly, the post-Clinton environment has also spurred a broader discussion of “how to get rid” of unpopular presidents or dysfunctional presidents. BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 61–82 (2012); DAVID PRIESS, HOW TO GET RID OF A PRESIDENT: HISTORY’S GUIDE TO REMOVING UNPOPULAR, UNABLE, OR UNFIT CHIEF EXECUTIVES 12 (2018).

35. MICHAEL J. GERHARDT, IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW 1 (2018).

36. *Id.* at 6, 188.

37. CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN’S GUIDE 2 (2017).

38. Tribe & Matz, *supra* note 11, at 58.

enrich our understanding of the purposes and complexities of the impeachment power.³⁹

This Essay will use these recent books to examine the scope and nature of the federal impeachment power. It will first take a look at the relevant constitutional text that sets up the power and the history of how the impeachment power has been used by Congress. It will then lay out the impeachment process and consider why Congress might want to unleash the impeachment power. Finally, it will examine the debate over how best to interpret the congressional power to impeach for “high crimes and misdemeanors.”⁴⁰ This Essay will not attempt to answer the question of whether President Trump should have been impeached, but it does seek to clarify the legal, political, and constitutional issues that would surround a presidential impeachment.

II. THE TEXT

The constitutional text regarding the impeachment power is sparse. This, of course, is not out of character for the U.S. Constitution, which is notoriously brief. Chief Justice John Marshall famously asserted that a constitution should not “partake of the prolixity of a legal code” and that only the “great outlines” of governance should be marked out in that foundational text.⁴¹ In this case, the constitutional drafters seemed to have preferred to err on the side of saying too little rather than to err on the side of saying too much. They could in part rely on the fact that the Constitution was written against the backdrop of a preexisting British and American practice of legislative impeachment of executive officers, but the British history has to be used cautiously when reading the document since the Americans were also self-consciously modifying the British practice.

The Constitution traces out the impeachment power across several different provisions in the text. Article I, which generally describes Congress, specifies that the House of Representatives shall have the “sole Power of Impeachment”⁴² and that the Senate shall have the “sole Power to try all Impeachments.”⁴³ The senators shall take an oath when sitting at trial, and the Chief Justice shall sit as presiding officer in the case of presidential impeachments.⁴⁴ A vote of two-thirds of the present members of the Senate is necessary to convict on impeachment charges, but judgment shall extend no

39. Also worthy of note, though published too late for inclusion here, is FRANK O. BOWMAN III, *HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* (2019).

40. *See infra* note 47.

41. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

42. U.S. CONST. art. I, § 2, cl. 5.

43. U.S. CONST. art. I, § 3, cl. 6.

44. *Id.*

further than removal from office and possibly disqualification from future federal office.⁴⁵ The convicted are still liable to criminal proceedings for any offenses against the ordinary law.⁴⁶

Article II, which generally describes the executive branch, provides the Constitution's only additional provisions relating to the impeachment power. The president is specifically barred from granting pardons "in Cases of Impeachment."⁴⁷ Finally, at the end of Article II, the Constitution specifies that the president, vice president, and "all civil Officers of the United States" are subject to impeachment and "shall be removed from Office" upon impeachment and conviction for "Treason, Bribery, or other high Crimes and Misdemeanors."⁴⁸ Of arguable additional relevance is the provision in Article III granting federal judges a term of office "during good Behaviour,"⁴⁹ though Congress has assumed that executive and judicial officers alike are subject to the same standard of impeachable offenses.

This leaves plenty open to interpretation. As a practical matter, constitutional interpretation of these provisions has been done not by the courts but by the House and the Senate. It has generally been accepted that the Constitution's specification that the House and Senate have the "sole" power over impeachments means that any interpretative questions raised by how they exercise that power are best thought of as non-justiciable political questions.⁵⁰ If a majority of the members of the House and Senate were satisfied with how an impeachment was handled, then that might well be the end of the matter. But the federal courts have become increasingly aggressive in insisting on their own role in resolving any and all constitutional disputes, and it is at least plausible that a majority of the Justices might eventually find themselves willing to weigh in on whether Congress has properly exercised its impeachment power.⁵¹

The House and especially the Senate have formed their own set of precedents over time clarifying how uncertainties about the process ought to be resolved. But there is nothing that prevents either chamber from reconsidering its earlier precedents and charting a new path. The Senate precedents have had particular significance for the details of how the impeachment proceedings should be conducted but have had less relevance for basic, substantive questions about the scope of impeachable offenses. It seems particularly hard to imagine that the Court would ever want to set itself against a supermajority of the Senate in assessing the question of whether someone convicted

45. U.S. CONST. art. I, § 3, cl. 7.

46. *Id.*

47. U.S. CONST. art. II, § 2, cl. 1.

48. U.S. CONST. art. II, § 4.

49. U.S. CONST. art. III, § 1.

50. *Nixon v. United States*, 506 U.S. 224, 228–38 (1993).

51. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 118–46 (2d ed. 2000).

in an impeachment trial had been properly charged with an impeachable offense.⁵² The Court proved willing to accept the Senate's late twentieth-century innovation of using committees to conduct the actual impeachment trial,⁵³ and would perhaps be equally disinclined to question the rules of evidence that the Senate used in an impeachment trial, or whether a senator should have recused himself or herself from voting in an impeachment trial. It is perhaps more credible that the Court might be tempted to intervene if the House and Senate were to impeach and convict someone who claimed not to be a civil officer of the United States, or the Senate purported to convict someone without any process at all other than a roll-call vote, or a sitting president refused to relinquish his office on the grounds that there was some constitutional imperfection in his impeachment and conviction. But failing a truly extreme case and one in which the Congress was not likely to take umbrage at judicial meddling, the senators will have the last word on the validity of an impeachment and will be accountable only to their consciences and to their voters for how they have exercised their judgment in such cases.⁵⁴

III. THE HISTORY OF IMPEACHMENTS

Across its history, the House of Representatives has impeached nineteen federal officers,⁵⁵ though it has initiated impeachment proceedings against dozens of individuals. The Senate has assembled the two-thirds majority to convict on impeachment charges only eight

52. See Keith E. Whittington, *Alan Dershowitz Is Wrong About Impeachments*, LAWFARE (June 3, 2019), <https://www.lawfareblog.com/alan-dershowitz-wrong-about-impeachments>.

53. *Nixon*, 506 U.S. at 227, 238.

54. The stakes can be particularly high in impeachment cases, and it would not be a safe bet to imagine that the courts would be willing to intervene even in the case of an egregious abuse of the impeachment power. There were certainly irregularities in how the Reconstruction Congress handled the impeachment of President Andrew Johnson in 1868. If the Senate would have summarily convicted and removed the president without even the pretense of a trial and on the declared grounds that the president had rendered himself obnoxious to all faithful Republicans, the members of the Supreme Court could not have assumed the safety of their own offices had they attempted to intercede on Johnson's behalf. The senators might be willing to take instruction from the Court on the question of whether a committee trial could satisfy the constitutional requirement in the case of an impeachment of a felonious district judge. They are less likely to be open to judicial advice when they have determined that a sitting president can no longer be allowed to occupy the White House. The courts sometimes find it in their interest to duck. See Mark A. Graber, *Legal, Strategic or Legal Strategy: Deciding to Decide During the Civil War and Reconstruction*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 33 (Ronald Kahn & Ken I. Kersch eds., 2006); David Glick, *Conditional Strategic Retreat: The Court's Concession in the 1935 Gold Clause Cases*, 71 J. POL. 800, 814 (2009).

55. Philip C. Bobbitt, *Impeachment: A Handbook*, 128 YALE L.J. F. 515, 554 (2018).

times,⁵⁶ though the accused likely saved themselves from conviction by resigning in some additional cases. The bulk of those cases involved lower court judges and did not generate much partisan rancor. In only a handful of cases did Congress have to struggle with the potential enormity of the power with which it had been entrusted.

There is no general history of how the impeachment power has been used in the United States.⁵⁷ This is perhaps unsurprising. There is a world of difference between impeaching a corrupt trial judge and impeaching a president. As a result, more attention has been given to the exceptional cases than the routine cases. The House and Senate have acted more as a "grand inquest of the nation" when contemplating whether high government officials should be removed from office for gross or subtle constitutional sins than whether low government officials should be removed before or after their imprisonment for criminal offenses.⁵⁸ The prospect of a presidential impeachment is what gets the blood racing for pundits and scholars alike.

There is a temptation to root the history of American impeachments in the earlier history of British impeachments, but there are limits to what can be gained from doing so. Raoul Berger sought the meaning of the constitutional power to impeach in the actions of Parliament. He appreciated that the constitutional drafters made some important adjustments to the power that had been exercised by Parliament, but he assumed that it was "with the historical past in mind that the Founders wrought."⁵⁹ Berger was hardly alone. When serving as Vice President and presiding officer of the Senate, Thomas Jefferson looked to parliamentary practice in order to construct the first manual for Senate procedures. When sketching out the rules that would govern Senate impeachment trials, he turned to the "principles and practices of England on the same subject."⁶⁰ That history has no doubt been informative of how Congress has approached its power, but early American history, including in the colonies and states, highlighted the distinctively American limitations that were imposed on that power as it was imported into a republican system of government.⁶¹ The nearly unconstrained power of Parliament to punish its enemies was

56. *Id.*

57. Bowman's book perhaps comes closest to providing such a history for federal impeachments. See BOWMAN, *supra* note 39.

58. Edwin Brown Firmage & R. Collin Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023, 1032-33 (1974).

59. Berger, *supra* note 31, at 6.

60. 9 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 82 (H.A. Washington ed., 1857).

61. See PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635-1805, 15-26 (1984).

domesticated to serve the more limited purpose of protecting the institutions of popular constitutional government.

A central challenge for this newly republican power of impeachment was whether it would become the plaything of factional politics. Jefferson worried that it would when the Federalists dominated Congress and the Jeffersonians were still a small minority. As partisan tensions were rising, the political enemies of Tennessee Senator William Blount, an ally of the Jeffersonians, revealed that Blount had been conspiring with British officials to attempt to seize by force territory held by Spain on the southern American border.⁶² Though impeached by the House and expelled by the Senate, Blount remained popular in Tennessee, and Federalists looked for ways to tar the Jeffersonians broadly with charges of disloyalty.⁶³ The Senate tarried over the impeachment case for months before finally deciding to let it go rather than force a confrontation on whether ex-senators were subject to impeachment trials.⁶⁴

The political pendulum swung dramatically in 1800. Now the Jeffersonians held a supermajority of seats in Congress and were capable of impeaching and removing officials with a party-line vote.⁶⁵ They were soon testing the limits of the impeachment power over the objections of uncooperative Federalists. Trial judge John Pickering was apparently suffering the effects of dementia and had become prone to delivering drunken political rants from the bench.⁶⁶ In 1803, the Jeffersonians rammed through an impeachment, and in early 1804 removed Pickering from office despite the pleas of his family that the judge was mentally incapable of committing a high crime.⁶⁷ The Jeffersonians moved on to impeach Associate Justice Samuel Chase a few weeks later.⁶⁸ Chase had been a vocal critic of the Jeffersonians, including in a grand jury charge delivered from the bench, and had been involved in a number of controversial sedition and treason trials in the run-up to the 1800 elections.⁶⁹ The House issued eight articles of impeachment, mostly focusing on his conduct

62. Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CON. L.Q. 161, 175–76 (2007).

63. *Id.* at 176–79.

64. *Id.* at 182.

65. *Id.* at 187. The Jeffersonians got a critical boost in the Senate in the election of 1802.

66. *Id.* at 185.

67. As his co-partisans feared, Pickering's seat was filled by a Jeffersonian. Pickering died a year later. His successor on the bench eventually succumbed to dementia himself and was sidelined from hearing cases in the final years of his life. Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 497–98, 505–06 (1949).

68. Neumann, *supra* note 62, at 187.

69. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 77–82 (1971).

in implementing the Sedition Act of 1798.⁷⁰ A handful of Republican senators broke ranks, and the Senate failed to convict Chase at his trial in the spring of 1805.⁷¹ Especially when combined with the repeal of the Judiciary Act of 1801, the Federalists accused the Republicans of orchestrating a partisan attack on the judiciary.⁷² The Republicans, in turn, argued that the Federalists themselves had reduced the judiciary to a partisan weapon that they had deployed aggressively in an attempt to hang on to political power.⁷³ Chase in particular had demeaned himself by conducting his office in a partisan fashion.⁷⁴ The Chase impeachment, they argued, was the proper mechanism for depoliticizing the courts.⁷⁵

After failing to remove Chase, Congress backed away from controversial impeachments until the attempt to remove President Andrew Johnson after the Civil War.⁷⁶ The pressure to impeach the president built over the course of Johnson's tenure but finally came to a head near the end of his term when he tried to remove the holdover secretary of war, Edwin Stanton.⁷⁷ Johnson had done what he could to obstruct congressional policy and undermine the political fortunes of the congressional Republicans, and the near-term fate of Reconstruction potentially turned on control of the War Department. Johnson defied the political and constitutional norms of his era, and Congress and the president found themselves locked in a struggle that tested their creativity in stretching the limits of their respective institutional prerogatives. When Congress finally impeached the president for violating the Tenure of Office Act (which required Senate approval to remove Stanton) and for engaging in intemperate and unpresidential rhetoric designed to subvert the authority of Congress, there were enough Republican senators to convict Johnson without the assistance of the Democrats.⁷⁸ Nonetheless, a handful of Republican senators doubted the propriety of removing Johnson on the basis of those charges and thought the president had been effectively rendered impotent, and so he was allowed to serve out the remainder of his term. Johnson's acquittal was subsequently portrayed as a triumph of principle over partisanship, though the impeachment effort has often been treated more sympathetically in the post-civil rights era.⁷⁹

70. *Id.* at 81–82; WHITTINGTON, *supra* note 17, at 20.

71. WHITTINGTON, *supra* note 70, at 20.

72. Neumann, *supra* note 62, at 193.

73. *See* WHITTINGTON, *supra* note 70, at 48.

74. *See id.* at 45–46.

75. *See* ELLIS, *supra* note 69, at 48–49, 81–82.

76. Neumann, *supra* note 62, at 213.

77. *Id.* at 223–24.

78. *See id.* at 225.

79. *See* WHITTINGTON, *supra* note 70, at 152; Keith E. Whittington, *Bill Clinton was no Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CON. L. 422, 423 (2000). It is worth noting that Sunstein echoes the traditional view

The use of the impeachment power became more routine after the Johnson episode. In the decade after the president's acquittal, the House unanimously voted at the end of a session to impeach district Judge Mark Delahay, leaving the details of the charges to be worked out later.⁸⁰ Delahay quickly resigned rather than await the results of the corruption investigation.⁸¹ William Belknap, secretary of war in Ulysses Grant's scandal-ridden administration, tried to do the same, but Congress was not satisfied with letting him off that easily and pushed ahead with an impeachment and trial.⁸² Two-thirds of the senators could not come to agreement on the merits of convicting an ex-Cabinet member, however. The focus on misbehaving trial judges continued into the twentieth century, as bipartisan majorities in Congress refrained from pushing the boundaries of the impeachment power but resolved themselves to cleaning out the judiciary of recalcitrant and unethical trial judges.⁸³

Taking on misbehaving judges is one thing; taking on misbehaving presidents is quite another. Even dysfunctional presidents are unlikely to commit the kind of mundane offenses that have earned judges impeachment scrutiny. Their offenses are more idiosyncratic and disputable. The political investment in their continued occupancy of high office is much greater, and even embattled presidents have more resources to fight their congressional foes. President Richard Nixon was able to hold on to the support of Republican legislators until Watergate began to damage the party itself. Like Belknap decades before, Nixon resigned when it became apparent that his base of support in Congress had collapsed and his fate was sealed in an impeachment and trial.⁸⁴ Nixon's resignation spared the Democratic House from having to make any final decisions on how sweeping the articles of impeachment against the president should be. President Bill Clinton, on the other hand, saw his partisan allies continue to rally to his side even as scandals accumulated and so chose to fight through an impeachment and trial, though possibly to the detriment of his political party.⁸⁵ Clinton's impeachment, like Johnson's, looked like partisan overreach, and as with Johnson, there

that Johnson may have been a "terrible president" but his impeachment "violated the constitutional plan." SUNSTEIN, *supra* note 37, at 106. Tribe and Matz take a more awkward approach, asserting that Johnson had to go by any means necessary since "these were not ordinary policy disagreements" but that the House failed to identify "an ironclad offense that would justify his removal." TRIBE & MATZ, *supra* note 11, at 55.

80. ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 1009 (1907).

81. ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES 2 (1992).

82. *See* Neumann, *supra* note 62, at 227.

83. *See id.*

84. *See* STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 533 (1990).

85. *See* Whittington, *supra* note 79, at 424, 450–51.

remained unresolved doubts about whether the unsheathing of the sword of impeachment had been justified.

The history of federal impeachments has built up some precedent that can help cabin disagreements over how the impeachment should be used, but it has not—and probably cannot—eliminate the prospect of future disputes over the impeachment power. House and Senate precedent from previous impeachment efforts provides effective guidance of matters of procedure and form, but they are less helpful in considering substantive questions of who can be impeached and for what offenses. There have been plenty of easy cases that fall squarely within the constitutional authority of Congress, but the hard cases have been more idiosyncratic and less clearly resolved. Congress currently takes the view that congressional members are not federal civil officers for the purposes of impeachment, given the outcome of the Blount impeachment, but there is nothing that prevents Congress from revisiting that conclusion.

IV. THE IMPEACHMENT PROCESS

The House of Representatives can impeach a federal civil officer with a simple majority vote.⁸⁶ The Constitution does not actually specify the threshold for an impeachment vote, but Congress routinely interprets silence on such questions as meaning a simple majority. The Constitution is likewise silent on how Congress might reach that point. Congress could, and it has done so before, pass a resolution of impeachment without engaging in any serious investigation to establish that the target had actually committed any impeachable offenses. Credible allegations might be sufficient to persuade a majority of House members to pass the necessary resolution. As a practical matter, the House has largely been content to outsource the investigatory preliminaries, as it did with President Trump by awaiting the report of special counsel Robert Mueller before seriously contemplating impeachment.⁸⁷

Any member of the House may initiate the impeachment process by introducing a resolution of impeachment.⁸⁸ Such a resolution is referred to the Judiciary Committee.⁸⁹ The committee may choose to conduct a full investigation, including hearing a defense from the accused.⁹⁰ Impeachment resolutions often die in the committee, though it is possible for a floor majority to decide to proceed with an

86. CHARLES W. JOHNSON ET AL., *HOUSE PRACTICE* 616–17 (2017).

87. Tucker Higgins, *Democrats Are Waiting for a Mueller Report Before Talking About Impeaching Trump, but that Report May Never Come*, CNBC (Nov. 14, 2018, 10:13 PM), <https://www.cnbc.com/2018/11/12/mueller-report-may-never-come-as-democrats-wait-to-talk-impeachment.html>.

88. JOHNSON ET AL., *supra* note 86, at 614.

89. *Id.* at 615.

90. *Id.* at 615–16.

impeachment even if the committee is unpersuaded.⁹¹ The House has conventionally voted on a single resolution of impeachment, whether the target is alleged to have committed just one impeachable offense or many.⁹² In order to move to trial in the Senate, however, the House needs to specify particular charges in distinct articles of impeachment, which are often analogized to a bill of indictment from a grand jury.⁹³ Having determined that an officer should be impeached, the House appoints managers to argue the case at trial in the Senate.⁹⁴ The accused retains his or her office after an impeachment until duly convicted by the Senate.⁹⁵

The Constitution's textual reference to an oath and a trial has served to elevate the Senate's process compared to that of the House. The House might rush to judgment with little opportunity for the accused officer to mount a defense, but the Senate is expected to give the impeached officer a hearing. The members of the House become prosecutors in the impeachment process, but senators serve as judges, with a responsibility to judiciously assess the legal validity of the charges levied by the House and evaluate the quality of the evidence presented. In the terms of the current version of the oath, the senators pledge to "do impartial justice according to the Constitution and laws . . ." ⁹⁶ The House is allowed to make its case for conviction and removal, and the accused is afforded an opportunity to mount a vigorous defense. Evidence is entered into the record; testimony is taken; witnesses are questioned and cross-examined. In recent years, the Senate has tasked a committee with the responsibility of conducting the trial, but in the case of a high officer such as a president, the Senate would no doubt feel obliged to meet as a whole to receive evidence and take testimony.⁹⁷

The Senate proceeding ultimately concludes with a vote, where two-thirds of those present are necessary for conviction and removal.⁹⁸ Unlike the House, the Senate votes on each article of impeachment separately.⁹⁹ But the senators are constrained to voting on the articles as drafted by the House, neither adding new

91. *Id.* at 617.

92. *See* GERHARDT, *supra* note 35, at 24–25.

93. *Id.* at 75.

94. *Id.*

95. *See id.* at 21–22, 81, 108.

96. MATTHEW MCGOWAN, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. DOC. NO. 113–1, at 230 (2014).

97. Arguably, the Senate is mandated to conduct a trial only if it wishes to convict and remove an officer. If the votes for conviction do not exist in the Senate, it might pursue a more truncated process or even forego a trial altogether. *See* Keith E. Whittington, *Is a Senate Impeachment Trial Optional?*, NISKANEN CTR. BLOG (Sept. 25, 2019), <https://www.niskanencenter.org/is-a-senate-impeachment-trial-optional/>.

98. MCGOWAN, *supra* note 96, at 228.

99. *Id.*

charges of their own nor subdividing the articles presented.¹⁰⁰ Since the early twentieth century, the Senate has taken the view that a successful vote to convict on even a single article of impeachment results in the immediate removal of the convicted from office.¹⁰¹ No separate vote for removal is necessary. Neither the Constitution nor the Senate rules adopts a burden of proof that the House must meet to sustain an impeachment. Each senator must determine for himself or herself how to evaluate the House's case for conviction on an impeachment.

In addition to removal, the Senate may impose on the convicted the further punishment of disqualification from future federal office. In order to consider such a step, the Senate requires that the House present a request for removal along with the initial articles of impeachment.¹⁰² Upon conviction, the Senate may take an additional vote on the question of disqualification (which has the further implication of disqualifying the individual from collecting a federal pension).¹⁰³ Because the House rarely asks it to do so, the Senate has only disqualified three of the eight individuals it has convicted.¹⁰⁴ The Senate has adopted the position that it can impose disqualification after conviction by a simple majority vote.¹⁰⁵

V. WHY IMPEACH?

The hardest and most persistent questions surrounding the impeachment power concern the scope of impeachable offenses. Treason and bribery are straightforward enough, but there is a great deal of ambiguity in the term "high crimes and misdemeanors." Attempting to pin down the meaning of that term has occupied most discussions of the impeachment power, including those of Sunstein, Tribe and Matz, and Berger and Black before them. The debate is likely to be endless not merely because the constitutional language is protean but because the offenses committed by federal officers are myriad and unpredictable. The constitutional framers rightfully refrained from providing a finite list of impeachable offenses that might prove inadequate to the contingencies of a future day. As Justice Joseph Story observed, "political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."¹⁰⁶

100. GERHARDT, *supra* note 35, at 74, 111.

101. *Id.* at 108.

102. *Id.* at 109.

103. *Id.*

104. *Id.* at 110–11.

105. *Id.* at 111–12.

106. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 287 (5th ed. 1891).

We might gain some insight into what falls within the scope of high crimes and misdemeanors by asking why Congress should impeach an officer. What is the purpose of the impeachment power, and what are the circumstances under which Congress should use it? The impeachment power is far-ranging and flexible, and its use is unavoidably political. The members of the two chambers who will exercise the impeachment power are inescapably political creatures with partisan sympathies, professional aspirations, and constituent pressures. Both their political discernment and their political accountability are relevant to the decision to entrust them with the power to impeach federal officers. There is no shortcut that could make the decision of whether to impeach or convict a particular officer, let alone a president, a mechanical decision or technical legal one. Determining whether an individual must be prematurely separated from his or her office requires pragmatic judgment in factually specific circumstances. Getting that decision wrong can and should have political costs. House members and especially senators should feel the weight of needing to make a public case for taking the extraordinary step of impeachment and removal, and they should take seriously the need to build political support for what they think must be done. They ultimately need to persuade not only their colleagues in the two chambers of Congress but also the American people out of doors of the necessity of impeachment and removal.

Analogies to the criminal justice process might be misleading in this regard. There is necessarily a retrospective component to the impeachment process. It is a necessary condition for an impeachment that an identifiable offense has been committed. Some specific action must have been taken that the House can investigate and potentially frame as a high crime or misdemeanor. But impeachments are not primarily punitive. They have a prospective element as well, not only looking back at what misdeeds have already been committed but also looking ahead to what dangers would be risked if an individual were left in place to continue to exercise public power for the remainder of his or her term of office. The decision of whether to impeach and remove requires an assessment of whether the national interest is as equally well served by waiting for a term to expire, for a resignation, or for a new election. If a judge or Cabinet secretary or president has already left office, then there may not be much to gain by holding a trial for impeachable offenses. If we stood on the eve of a presidential election, Congress would have a further burden to bear to explain why the incumbent should be impeached immediately by the legislature rather than wait for the judgment of the electorate. The rationale for proceeding immediately turns less on whether an officer has misbehaved in the past than on whether the officer might do irredeemable damage if allowed to continue to exercise power in the weeks and months ahead.

The prospective character of impeachments naturally raises the issue of what alternative remedies might be available to address the

problem at hand and what the comparative advantage of impeachment and removal might be. Resignation, for example, might be wholly adequate, and the mere threat of impeachment proved sufficient to secure resignations from Belknap and Nixon. It is easy to imagine that impeachments of executive branch officials would have been more common in American history if it were not relatively easy to remove them by other means. In other cases, resignation might not even be necessary to address apparent problems. Judicial and executive officers violate the Constitution all the time. Impeachment is rarely the natural or most appropriate response. Remedies to abusive official conduct ranging from judicial review to statutory reform to public pressure to electoral challenge are often sufficiently effective and less disruptive. It is only when such remedies fail or seem inadequate to the task that the stronger medicine of impeachment starts to seem necessary. For example, President Andrew Johnson could be resisted in various ways, some more constitutionally dubious than others. His vetoes could be overridden; his efforts to staff the executive branch with his own loyalists could be rejected; the Supreme Court could be shrunk in size to avoid having to face a nomination from him; and the military officers in the South could be instructed to take their orders only through the intermediary of General Ulysses S. Grant. It was only when all such measures seemed ineffective and the president's obstruction of Reconstruction and Republican dominance became too difficult to check that Republican moderates finally threw in with Republican Radicals to pursue impeachment. When President Johnson waved the white flag and promised to end his obstructionism for the last few months until his successor was inaugurated, his actual removal began to seem more vindictive than useful.¹⁰⁷

We might distinguish among three uses of the impeachment power. The first might be called political in a narrow sense. The second might be called personal, and the third might be called constitutional, or political in a broad sense. There is widespread agreement that the first is inappropriate. The second should be approached with caution. The third is often underestimated.¹⁰⁸

We might imagine the impeachment power being used as a simple political weapon, yet another front on which we can fight an ordinary political war. Doing so may be specifically partisan, but it need not necessarily be primarily partisan in character. The key issue is that impeachment in this mode is used in pursuit of ordinary political ends. It is the ordinary stuff of politics that we disagree over policy and personnel. We have established tools for working out those disagreements. Sometimes those disagreements are deep, and

107. See WHITTINGTON, *supra* note 70, at 115, 139.

108. I have also elaborated on these three purposes in Keith Whittington, *What Is the Impeachment Power For?*, LAW & LIBERTY (May 22, 2017), <https://www.lawliberty.org/2017/05/22/what-is-the-impeachment-power-for/>.

sometimes they are superficial or even petty. Regardless of how significantly we disagree with one another about the direction of public policy, we have sought to resolve those disagreements through such familiar means as electoral campaigns, legislative negotiations, and public mobilization efforts. We have generally refrained from using the impeachment power as a tool for advancing those ordinary political goals. If we lose an election or a confirmation battle, we do not seek to overturn those results through congressional action. Politically motivated impeachments have been regarded not simply as a form of political “hardball,” to borrow Mark Tushnet’s phrase;¹⁰⁹ they have also been regarded as out-of-bounds. The impeachments of Justice Samuel Chase, President Andrew Johnson, and President Bill Clinton have generally been seen as misguided failures not merely because their targets were not convicted but because the argument in favor of impeachment in those cases never successfully reached beyond its partisan base. The fact that such impeachments had to rely on party-line votes to move forward has generally been seen as a damning indictment of the effort.¹¹⁰

Whatever norms or constitutional constructions we have adhered to that would hold politically motivated impeachments to be an abuse of the constitutional powers of Congress have been reinforced by a basic procedural feature of the impeachment power: the supermajority requirement for a Senate conviction. When Jefferson and his critics worried about the impeachment power becoming a formidable weapon of faction, their experience suggested that a single party could hold the entire impeachment power in its hands. Both the Federalists and the Jeffersonians enjoyed extremely large majorities in both chambers of Congress, making it easy to imagine an impeachment and conviction of political opponents on a party-line vote and use of the impeachment power to sweep aside lingering pockets of resistance to one-party rule. With the stabilization of two-party competition in American politics, however, that threat has receded. A single party has been able to boast control of two-thirds of the seats in the Senate only in the most extraordinary of occasions, as when the Democratic stronghold withdrew from the Union during

109. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523, 527 (2004).

110. I believe that, at least in the cases of Chase and Johnson, this has been a misreading of those impeachments. Although they were largely partisan projects that did not succeed in winning much support from the other side of the partisan divide, they were not politically motivated in the narrow sense and had broader constitutional ambitions that helped justify the effort (and that were more fully realized than a simple focus on the fate of the accused would suggest). The Clinton impeachment is more problematic from that perspective, not because the Democrats decided to remain loyal to their embattled president, but because the public rationale offered by Republicans for pursuing the impeachment was too small. WHITTINGTON, *supra* note 70, at 20–21, 23, 140–41; Whittington, *supra* note 79, at 422–23.

the Civil War or when the Republicans were routed by the Great Depression. As a practical matter, it might be possible to put together a partisan majority to impeach a federal officer, but it is necessary to reach across the party aisle in order to actually convict and remove that officer. Partisans in Congress have generally not thought it worth their while to pursue purely symbolic impeachments, and so the prospect of a Senate trial has served as a deterrent to normalizing the impeachment process. In ordinary times, if one wants to get serious about impeachment, it is not enough to mobilize the base. One needs to mount an argument that might persuade the other side.¹¹¹

Few have been so bold as to openly advocate for the idea that impeachments should be used for narrow political purposes. A frequent touchstone has been the exchange between George Mason and James Madison at the Philadelphia convention that led to the inclusion of the language of high crimes and misdemeanors in the constitutional text. Mason argued that impeachable offenses could not be limited to treason and bribery and suggested the additional offense of “maladministration” to create more flexibility.¹¹² Madison objected that “maladministration” was too “vague” and would “be equivalent to a tenure during pleasure of the Senate.”¹¹³ Since the framers were all committed to the importance of creating an independent executive that would not be beholden to the legislature, Mason withdrew his proposal. In its place he suggested “high crimes and misdemeanors,” which apparently satisfied both him and Madison and was adopted by the convention.¹¹⁴ Writing before the advent of the originalism wars, Black was perfectly comfortable taking the exchange as “an important piece of evidence on the original intention” of the phrase and therefore “tells us a great deal about its meaning.”¹¹⁵ Sunstein and Tribe and Matz proceed more cautiously, but here at least they are willing to let the founders have their due, for they “threaded a needle” and “accomplished a miracle.”¹¹⁶ Respecting the drafters’ choice of language and overall constitutional design means recognizing that “impeachment is not an extension of

111. Whether the other side is actually persuaded is another question. Partisans have many reasons to rally around their leaders when they are under fire. If advocates of impeachment cannot peel away that support, then that has real implications for a strategic calculation about what the impeachment can accomplish and whether it should be pursued but in itself it does not undercut the normative rationale for thinking that an impeachment would be justified.

112. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 605 (1996).

113. *Id.*

114. *Id.*

115. BLACK, *supra* note 32, at 28–29.

116. SUNSTEIN, *supra* note 37, at 78.

ordinary political debates” and an opportunity for “partisan warfare by other means.”¹¹⁷

A second use of the impeachment power might be thought of as primarily personal. Here, what is primarily at stake is the continuation of a given individual in office. Such impeachments are particularly consequential for the individual, but they may not be particularly consequential for the political system as a whole. Such impeachments may be necessary, but their resonance is limited.

Most of the impeachments pursued by the House have been of this character. Judges who are unwilling to resign from their office despite being incapacitated or incarcerated force the hand of Congress. Judges who can no longer be trusted to act appropriately in conducting trials or who face imminent jail sentences for their own criminal behavior must be removed from the bench. An official who cannot be effectively checked by other means might have to be removed in order to put a stop to a string of abuses. Arguably, an individual officeholder who has egregiously violated well established political, legal, or constitutional norms might need to be removed because their mere presence is no longer consistent with the nature and terms of their office. When West Humphreys abandoned his judicial post in Tennessee in order to join the secessionist cause, the House was compelled to act to declare his seat officially vacant.¹¹⁸ When Harry Claiborne refused to give up his seat on the district court after his conviction for tax evasion, the House could not easily ignore the situation.¹¹⁹

A third, especially important use of the impeachment power is often overlooked. This use is primarily constitutional in the sense that such impeachments are aimed at articulating, establishing, preserving, and protecting constitutional norms—or as I have sometimes characterized it, “constructing” constitutional meaning and practices.¹²⁰

Impeachments are particularly personal when the relevant constitutional norms are already clear and generally supported, and the individual in question has simply violated them. Impeachments serve a larger constitutional function when the norms at issue are not particularly clear or well accepted. The impeachment itself becomes a vehicle for trying to establish the new normative commitments. The fate of the individual being impeached is less important than the message being sent. The officer in the dock is held up as an object lesson. Such impeachments are primarily educative and forward-

117. TRIBE & MATZ, *supra* note 11, at 19.

118. Richard L. Aynes, *The Impeachment and Removal of Tennessee Judge West Humphreys: John Bingham’s Prologue to the Johnson Impeachment Trial*, 2 GA. J. SOUTHERN LEGAL HIST. 71, 71, 75–76 (1993).

119. *The Impeachment Trial of Harry E. Claiborne (1986) U.S. District Judge, Nevada*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Claiborne.htm (last visited Apr. 29, 2020).

120. WHITTINGTON, *supra* note 70, at 1.

looking, not punitive and backward-looking. The critical audience for the impeachment is the other current and future federal officers who are being instructed on the proper bounds of acceptable political behavior. The actual removal of the impeached official is almost beside the point. The impeachment is the message. Once the message has been sent and received, the mission has been accomplished. The impeachments of both Chase and Johnson served this purpose, attempting to install a set of norms in a period in which established constitutional practices had been unsettled and the future was uncertain.

Sometimes Congress just needs to use the impeachment power to emphasize the stability of the norms that were already in place. An impeachment in that context can be norm-reinforcing, rather than norm-creating. Allowing a judge to keep his seat after egregiously bad behavior has been exposed and sanctioned in other venues might send the wrong message to the larger judiciary that such behavior is not so bad. An impeachment puts an exclamation mark on the political and legal system's judgment that some actions will not be tolerated. The question to be asked in such circumstances is whether the established norms really require reinforcement by these means.

Advocates of an impeachment need to think about what they are hoping to accomplish. Other political actors who are being asked to lend their support to such efforts must similarly consider what is to be gained by making use of such a powerful constitutional weapon. Proponents of an impeachment need to be able to explain why it is now time to make use of a last resort option and why there are no better tools available for accomplishing their ultimate political objectives. There are times when an impeachment is necessary, but we should not want impeachments to become part of our normal political experience. It is an extraordinary remedy for extraordinary situations, and if we reach for that remedy, we should know why we are doing so and be prepared for the consequences.

VI. HIGH CRIMES

The Constitution uses the language of "high crimes and misdemeanors" to characterize impeachable offenses. In the case of treason, the constitutional text itself spells out a definition of the crime, but it does not do the same for high crimes. In the case of bribery, the constitutional text directs us to applicable statutes for a definition, but the statute books do not generally identify a category of high crimes.¹²¹ When the constitutional drafters empowered

121. Congress tried to bootstrap itself out of this problem by adding statutory language to the 1867 Tenure of Office Act that "every person who shall violate any provisions of this section shall be deemed guilty of a high misdemeanor," but that did not carry much weight in the 1868 impeachment trial of President Andrew Johnson for violating the Act. Tenure of Office Act, ch. 154, 14 Stat. 432 (1867).

Congress to define and punish “piracies” on the high seas, the U.S. Supreme Court declared that piracy was “defined by the law of nations with reasonable certainty.”¹²² Berger hoped to show that the phrase “high crimes and misdemeanors” was a legal term of art with a sufficiently precise definition that the judiciary could appropriately review whether or not Congress had exceeded its authority in impeaching someone, but the “parliamentary law” on this point did not pin down the scope of impeachable offenses with reasonable certainty.¹²³

There is general agreement that a very broad reading and a very narrow reading of the constitutional language of “high crimes and misdemeanors” should be ruled out. After that, things tend to get rather murky.

A very broad reading of impeachable offenses would leave the matter up “to the arbitrary discretion of the senate.”¹²⁴ Gerald Ford has become the perennial punching bag for this view. As the Republican leader in the House of Representatives in 1970, he briefly tried to drum up support for the impeachment of Associate Justice William O. Douglas. Ford urged his colleagues not to get too bogged down in legal niceties, for the “only honest answer” as to what counted as an impeachable offense is “whatever a majority of the House of Representatives considers [it] to be at a given moment in history”¹²⁵ Ford’s cynicism would empty the constitutional text of any effective meaning and reduce impeachments to pure politics. Joseph Story thought this was plainly an invitation to “despotism” and so “incompatible with the genius of our institutions” that “no lawyer or statesman would be inclined to countenance” it.¹²⁶ Story might have been a bit optimistic, but many others have certainly echoed his sentiments. The impeachment power was not intended to be a tool for collapsing the American separation of powers into a system of congressional sovereignty, and even those who tire of the gridlock of the American constitutional system would find it an awkward vehicle for moving toward a more parliamentary model.

A very narrow reading of impeachable offenses would reduce them to what can be found among the criminal statutes. It is the familiar strategy of the defense attorney that when the facts are against you, argue the law, and when the law is against you, argue the facts. In the context of defending federal officers against articles of impeachment, this has often meant arguing to the Senate that the proper scope of high crimes and misdemeanors should be understood very narrowly. If the House has sought to impeach on the basis of primarily political offenses, the defense has urged the Senate to adopt

122. *United States v. Smith*, 18 U.S. 153, 160 (1820).

123. BERGER, *supra* note 31, at 65.

124. STORY, *supra* note 106, at 288.

125. KYVIG, *supra* note 11, at 96.

126. STORY, *supra* note 106, at 288.

the view that only indictable crimes can serve as the basis for an impeachment. Alan Dershowitz offered this argument in his defense of Donald Trump.¹²⁷ Senators have heard this argument often, but they have not generally accepted it. Again, Story pointed out the problem early. On the one hand, “not every offense” in the criminal law could or should be impeachable as a “*high* crime and misdemeanor.” On the other hand, legislatures in both Britain and America have impeached and convicted officers for many offenses that are not “in the slightest manner alluded to in our statute-book.”¹²⁸ Limiting the reach of the impeachment power to indictable crimes would strip the tool of much of its utility. Neutering the impeachment power in that way might serve the immediate interest of an impeached officer, but it would be unlikely to serve the public interest over time.¹²⁹

Most of the historic and scholarly debate over the meaning of high crimes has taken place in the space between those narrow and broad readings. High crimes are not just a subset of indictable crimes, but they are also not anything that Congress might desire. So, what are they? The House of Representatives’ own practice guide draws a set of reasonable inferences from the congressional precedents. It notes that impeachment “is a constitutional remedy to address serious offenses against the system of government,” which has “commonly involved charges of misconduct incompatible with the official position of the office holder” in that the office holder has been “abusing or exceeding the lawful powers of the office,” “behaving officially or personally in a manner grossly incompatible with the office,” or “using the power of the office for an improper purpose or for personal gain.”¹³⁰

We might take our cue from the named impeachable offenses, treason and bribery. Charles Black took this as his starting point and thought it would help direct us to both the subset of ordinary crimes that ought to be impeachable and the “serious misdeeds” that were not “criminal in the ordinary sense” but nonetheless impeachable.¹³¹ Black thought the relevant offenses should be “(1) extremely serious, (2) . . . in some way corrupt or subvert the political and governmental process, and (3) . . . plainly wrong in themselves to a person of honor, or to a good citizen.”¹³² A focus on treason and bribery might lead us to focus on the political process in a fairly narrow sense and acts that hinder the ability of the people to effectively express their democratic will. Although this might be most closely analogous to treason and

127. DERSHOWITZ, *supra* note 29, at 1.

128. STORY, *supra* note 106, at 287.

129. See Keith E. Whittington, *Must Impeachable Offenses Be Violations of the Criminal Code?*, LAWFARE (Nov. 19, 2019), <https://www.lawfareblog.com/must-impeachable-offenses-be-violations-criminal-code>.

130. JOHNSON ET AL., *supra* note 86, at 603, 608.

131. BLACK, *supra* note 32, at 37.

132. *Id.*

bribery, it would seem to overlook many more substantive abuses of political power and it is not evident why we would want to place such abuses outside the power of Congress to remedy through impeachment.

The founders themselves did not seem to think in narrow procedural terms or view treason and bribery as the paradigm cases of impeachable offenses from which we should analogize to encompass other similar misdeeds. Their concern was a more basic one. They thought it essential to create offices that enjoyed some independence from the momentary whims of the people and could stand up to a reckless and self-aggrandizing legislature, but they feared the possibility of a tyrant. Although they tried to take care to create mechanisms that would elevate virtuous citizens into public office and encourage them to behave responsibly, they knew that no such mechanism could ever be foolproof. One type of fear was the possibility that an unscrupulous chief executive, in particular, would corrupt the political process to keep himself in power and beyond the reach of justice. George Mason was among those who worried about conspiracies and corruption allowing someone to procure “his appointment in the first instance” and then “repeating his guilt” to remain ensconced in power.¹³³ But another type of fear was of a tyrannical ruler, whether he had come to power by fair means or foul. Benjamin Franklin must have had this in mind when he pointed out that the traditional remedy “where the chief Magistrate rendered himself obnoxious” was “assassination,” and Edmund Randolph was more explicit in warning against the likelihood of “tumults & insurrections” if there was no alternative mode of dealing with a president who took advantage of his “great opportunitys [*sic*] of abusing his power.”¹³⁴ Although not wanting to make impeachments too easy, Elbridge Gerry thought it important that a “bad” magistrate “ought to be kept in fear of them.”¹³⁵ When Mason introduced the language of “maladministration” to the list of impeachable offenses, his goal was to “reach many great and dangerous offences” that fell outside the scope of treason and bribery.¹³⁶ If the framers were unhappy with his proposed language, they were in agreement with his goal.¹³⁷

Broadly speaking, the need for a constitutional mechanism to reach the “great and dangerous offences” that might be committed by public officers continues to animate discussions of the impeachment power. Tribe and Matz characterize the impeachment power as “an

133. JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION 232 (Steve Straub ed.), <https://www.thefederalistpapers.org/wp-content/uploads/2012/12/Debates-in-the-Federal-Convention-of-1787.pdf>.

134. *Id.* at 232–33.

135. *Id.* at 233.

136. *Id.* at 445.

137. *Id.*

emergency measure meant to save the democratic foundation on which all other politics unfold,” a failsafe when “[w]aiting until the next election might not be an option.”¹³⁸ Healy views it as an “indispensable remedy” for coming to the “defense of the political community.”¹³⁹ It is one of the “safeguards in the event that things went badly wrong”;¹⁴⁰ a “last resort for holding high-ranking officials accountable for serious misconduct when other mechanisms fail or are not available.”¹⁴¹

But when is it appropriate for Congress to break the glass in case of emergency and pull out the impeachment power? When is waiting until the next election no longer an option? The answers can differ wildly. Sunstein, in particular, urges us to try to set aside our partisan convictions and not be too hasty in declaring our ordinary political squabbling to be a national crisis.¹⁴² As with all constitutional controversies, Sunstein asks us to try to step behind a “veil of ignorance” and consider whether you would reach the same answers on a constitutional question if you did not know the partisan and personal identities of the parties involved in the dispute.¹⁴³ Sunstein reminds us that the impeachment power is not in the Constitution so that the “political losers” can throw out an elected leader because, in their view, he is “doing a rotten job.”¹⁴⁴ It is generally useful advice to encourage constitutional interpreters to try to step out of the current dispute and think about generally applicable standards, but that advice might not take us very far in this context. We should avoid gerrymandering our understanding of the impeachment power in order to stab at our disfavored presidents or shelter our favored ones, but the application of those standards in the context of impeachment will generally require pragmatic judgment about idiosyncratic fact situations. Even if we can agree about the neutral principles regarding the impeachment power, we are not likely to agree about what we should do with the complex individual sitting in front of us.

Sunstein reminds us of the rogue’s gallery of our “worst presidents,” according to a recent poll of historians, and points out that even such failed Presidents as Warren Harding and Franklin Pierce never faced a credible impeachment threat.¹⁴⁵ Healy looks at the same list and wonders why Americans have been so reluctant to get rid of their failed leaders. How much better off would we have been had we been willing to impeach—or at least seriously threaten to impeach—our worst presidents? And perhaps the issue is even

138. TRIBE & MATZ, *supra* note 11, at xii, 8.

139. See HEALY, *supra* note 23, at 36.

140. SUNSTEIN, *supra* note 37, at 12.

141. GERHARDT, *supra* note 35, at 2.

142. SUNSTEIN, *supra* note 37, at 14–15.

143. *Id.*

144. *Id.*

145. *Id.* at 81–82.

more pressing as the power associated with the presidency has grown. Healy concludes his study of the impeachment power by noting that “we’ve somehow managed to convince ourselves that the *one job* in America where you have to commit a felony to get fired is the one where you actually get nuclear weapons.”¹⁴⁶ We should be less tolerant of failure and more demanding of our political leaders.

To facilitate our ability to throw the rascals out, Healy would have us focus on the dangers that Madison identified in responding to a proposal at the federal convention to eliminate the impeachment power entirely. Madison “thought it indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate,” lest he “pervert his administration into a scheme of percolation [*sic*] or oppression” or “lose his capacity after his appointment.”¹⁴⁷ If we understood high crimes to include incapacity, negligence, and perfidy, then relatively few presidents might be confident that they are out of reach of the impeachment power. Healy would say so much the better, and he has little patience with Sunstein as well as Tribe and Matz when they wring their hands over the impeachment power as if it were some sort of “doomsday device.”¹⁴⁸ If presidents found themselves in the dock more often having to plead with the senators to keep their job, maybe they would be a little less arrogant and a little more cautious.

It is not easy to dismiss Healy’s argument because at the extremes he and Madison are right. If the president really did become incapacitated after his inauguration, then the impeachable offenses would rack up and allow for congressional intervention even without the further availability of the Twenty-Fifth Amendment. If the president “were to move to Saudi Arabia so he could have four wives, and were to propose to conduct the office of the presidency by mail and wire from there,” or if the president “were to announce that he would under no circumstances appoint any Roman Catholic to office and were rigorously to stick to that plan,” as Black hypothesized, there would be a case for impeachment and removal.¹⁴⁹ It would be a high crime if the president were to choose to fiddle while Rome burned. We would not want to settle on an understanding of impeachable offenses that ruled out the possibility of congressional action in such extreme cases. Moreover, it is difficult to construct a purely legal rule that would distinguish the case of a president absconding to Saudi Arabia for a permanent vacation and the case of a president absconding to Palm Beach for a busy life of golfing, television watching, and tweeting.

146. HEALY, *supra* note 23, at 85.

147. MADISON, *supra* note 133, at 232.

148. HEALY, *supra* note 23, at 82.

149. BLACK, *supra* note 32, at 33–34.

Sunstein as well as Tribe and Matz try to put up some additional barriers against the wanton use of the impeachment power, but one suspects those are mere parchment barriers. One such barrier is the possibility of a good-faith exception to high crimes. Suppose a president has done things that the opposing party thinks are flagrantly unconstitutional. The president's critics start to argue that the president has violated his oath of office by failing to take care that the laws—the real and true laws—are faithfully executed. If those critics were to succeed in capturing enough seats in Congress, would they be justified in moving ahead with an impeachment? If we view “high crimes” as analogous to ordinary crimes, or even as analogous to the specifically mentioned crimes of treason and bribery, then “we must assess a president's state of mind” to determine whether he intentionally committed the offense. The question is not just whether he intended to do whatever he did, but did he intend to do something “evil” that he knew, or should have known, was wrong?¹⁵⁰

The good-faith exception is one way to try to get out of the problem of criminalizing ordinary political disputes, or in this case converting substantive constitutional disagreements into impeachable offenses. If the president has a “good-faith argument that his orders are lawful,” then he may be wrong, but he is not a criminal. Samuel Chase and Andrew Johnson made much the same argument when they found themselves in the congressional crosshairs for exercising power in ways that their critics thought was beyond the pale. If enough legislators had listened to the critics of George W. Bush and Barack Obama, those presidents would have leaned on the same legal reasoning. If there is an Office of Legal Counsel opinion that says you can do it, then it must not be an impeachable offense. A majority of congressional Republicans did not buy that argument when Chase and Johnson made it (though just enough senators did to win an acquittal), and a future impeachment target would likely find it to be a tough sell as well. Sunstein backpedals from the argument as soon as he makes it, admitting that if the “measures are very extreme” then “We the People . . . can do as we think best.”¹⁵¹

150. TRIBE & MATZ, *supra* note 11, at 39, 42.

151. SUNSTEIN, *supra* note 37, at 126. Donald Trump might pose yet another problem for an exception built around the accused's state of mind. Judge John Pickering's family argued that the mentally diminished judge could not form the state of mind needed to commit an impeachable offense, but Congress (reasonably) concluded that it mattered less whether Pickering understood that he was behaving in inappropriate ways than whether a judge should continue hearing cases who could not be trusted to act in a manner consistent with the dignity of his office. Trump's understanding of the expectations of his office and the requirements of the Constitution is notoriously weak, and thus his defenders have frequently had recourse to some version of the argument that the president should not be taken too seriously when he says or does things that violate accepted understandings of how the president or the government should operate. Even if such a defense accurately describes the situation at hand, it does not

A better appreciation of impeachment as a political remedy might have helped here. The critical question is less whether there is a good-faith exception for constitutional abuses than whether impeachment is the best remedy when we are confronted with acts that we think violate the Constitution but that the relevant government official does not. The existence of good-faith disagreements might be helpful because, for example, it makes it more likely that the dispute can be successfully resolved through judicial review and the willingness of all sides to abide by the judgment of an independent judiciary. A president acting out of bad faith might be less inclined to care whether a gaggle of judges adds their legal opinion to the pile of opinions telling the president he is wrong. A president acting in bad faith might be less willing to care if his legal advisors tell him that he lacks the power to do the thing that he wants to do, and such a president might be inclined to go searching throughout the far reaches of the executive branch or streets of Washington, D.C., for an attorney willing to sign off on his dubious plans. Such impetuous chief executives may force us to take more drastic measures to neuter the president in order to avoid more abusive behavior in the future.

There might be circumstances in which even good-faith disagreements are intolerable. Judge West Humphreys might have believed in good faith that Tennessee had the constitutional right to secede from the Union and that as a loyal citizen of Tennessee he had the duty to follow. That kind of argument might well have significance at a treason trial or in assessing whether to extend a pardon, but it was unlikely to make much difference for his impeachment. We should be cautious about ignoring good-faith disagreements about constitutional meaning because, as Jeremy Waldron might put it, these are the “circumstances of politics.”¹⁵² We need to find ways to peacefully make collective decisions despite such disagreements, rather than invent new ways to ostracize and sanction those who are on the other side of the divide. Impeachments in such circumstances would be a way of trying to shut down political disagreement rather than work through it. But, in the view of the staunch Jeffersonians or the Radical Republicans, sometimes the necessary political act is to mark out the boundaries of acceptable political disagreement.

Another kind of barrier that Sunstein as well as Tribe and Matz half-heartedly erect is that impeachable offenses can only involve

provide a strong reason for allowing someone to continue to occupy an office when he has demonstrated an inability or unwillingness to live up to the expectations of the office. Similarly, we have historically not wanted to make “gross incompetence” in itself an impeachable offense, but a defense that an officer grossly misbehaved due to incompetence rather than malice does not seem very compelling.

152. JEREMY WALDRON, *LAW AND DISAGREEMENT* 102 (1999).

abuses of public power. It is evident that the possibility of otherwise unchecked abuse of government power is the primary rationale for having the impeachment power. It is precisely in those sorts of cases that we will be most easily persuaded that the emergency has arrived and that we must turn to the constitutional failsafe. If the president were to declare himself *dictator perpetuo* and cancel the upcoming elections, then one would hope that Congress would at least rouse itself to charge the president with committing a high crime.¹⁵³ However, we have never understood the impeachment power to be limited to such abuses of public power, and it seems implausible that we would want to take private misdeeds completely off the table. The case of Bill Clinton hovers over these arguments. The easiest way to get Clinton off the hook is to argue that high crimes do not extend to private misdeeds, even private criminal offenses. No one really wants their president to be guilty of perjury or obstruction of justice, but if the things being covered up are purely private failings then perhaps Congress could see its way clear to letting this go. Sunstein suggests, for example, that obstruction of justice is only impeachable if the activities being covered up are themselves impeachable.¹⁵⁴ Obstruction of justice can be the second article of an impeachment resolution, but it could never be the sole article of impeachment. If the president obstructs a criminal investigation into the use of marijuana by the White House staff, Sunstein believes impeachment would be “absurd.”¹⁵⁵

There are likely two issues here that need to be separated in order to assess private misdeeds. One issue is the gravity of the misdeed. In the marijuana example, we presumably might think that impeachment would be absurd because we think the investigation itself would be absurd, and so anything that happens regarding the investigation is trivial. Of course, law enforcement officials are likely to take a rather different view of when it is acceptable for witnesses and suspects to decide that their investigations are absurd and can be obstructed at will—but let us lay aside the obstruction question. Sunstein’s intuition here seems to be similar to Black’s when he posed the hypothetical of the president violating the Mann Act by transporting a woman across state lines for immoral purposes.¹⁵⁶ The president in such a case might have committed a crime, but it is not a sufficiently serious crime to warrant an impeachment. That does

153. Political disagreement raises its head again even in imagining the hypotheticals, however. If the Court had not ducked in the *Gold Clause Cases* and President Franklin Roosevelt had delivered the message he had prepared declaring that the national interest as he understood it took priority over obeying the constitutional edicts of the U.S. Supreme Court, it is not obvious that a majority of the House of Representatives in the summer of 1935 would have been more inclined to impeach Roosevelt than Justice James McReynolds.

154. SUNSTEIN, *supra* note 37, at 133.

155. *Id.*

156. BLACK, *supra* note 32, at 36.

not imply that the president is “above the law,” but simply implies that a president should be held accountable to the law in a manner consistent with his serving out his term of office. But as the private misdeeds become more serious, they are harder to overlook. If it were discovered that the president had committed a murder before entering the White House, or had committed a murder in a private dispute during his tenure as president, even Sunstein admits that impeachment would be warranted.¹⁵⁷ “The Constitution would not make a lot of sense if it did not permit the nation to remove murderers from the highest office in the land.”¹⁵⁸ Unfortunately, Sunstein does not explain how a carve-out for that particular result fits within his broader framework that impeachments are to address the egregious abuse of public power, and we seem to be on our own to determine when a president has committed such an offense that it “would not make a lot of sense” to let him continue to sully the White House with his presence.¹⁵⁹

The other issue tangled up with the example of obstruction of justice of an investigation of private misdeeds are the expectations of the public office. Recall that the House practice manual indicates that one basis for impeachment is that an official is “behaving officially or personally in a manner grossly incompatible with the office.”¹⁶⁰ The House precedent supports the inclusion of that language, and the manual references seven impeachments, including Bill Clinton’s, as involving charges of this sort, and it could have added more. If the impeachment power is in part a tool for constructing and enforcing norms of expected behavior by public officers and preserving the stature and dignity of public offices, and by extension of the government itself, then a wide array of private misdeeds might fall within the ambit of high crimes. There are

157. This hypothetical highlights another potential barrier to the use of the impeachment power, whether the acts were committed before the individual assumed their current office. The House has been reluctant to impeach officers on the basis of prior bad acts, and this seems generally reasonable if the goal of an impeachment is to address a danger that the officer is currently posing to the nation. But, again, there are likely to be exceptions. If the voters were reasonably aware of a candidate’s failings and nonetheless elected that person to be president, it would be very difficult for Congress to justify second-guessing that decision and removing the president for acts grossly incompatible with the office. If the voters are willing to overlook a candidate’s history of murder, then they are the final judge. But if the president’s murder spree during his misspent youth did not come to light until after he had already ascended to the White House, then it would not be so easy for Congress to ignore those revelations and treat it as water under the bridge. If those prior bad acts contributed to how the president won the White House (e.g., it was discovered that he had bribed all the members of the Electoral College to go rogue and vote for him), then that would take us very close to the kinds of concerns that motivated the founders to include an impeachment power in the Constitution in the first place.

158. SUNSTEIN, *supra* note 37, at 134.

159. *Id.*

160. JOHNSON ET AL., *supra* note 86, at 608.

improprieties that might be tolerable if committed by a private citizen—and that might even be tolerable if kept hidden from public view—but that would be intolerable if they became publicly associated with certain federal officials. What is taken to be “grossly incompatible with the office” might well vary depending on the historical context or the office. Presidents and judges might be held to a different standard of behavior than a minor functionary within an executive department. Behavior that might have been condoned, or even rewarded, in the nineteenth century might properly be viewed as appalling if repeated in the twenty-first century. Legislators might reasonably regard it as particularly perverse and norm-eroding for the chief executive to engage in perjury and obstruction of justice, even if the crimes being investigated are trivial ones. Rather differently, if a president were to decide that the job would be more interesting if he converted the White House into a reality television show set with cameras broadcasting the sexual escapades of visiting celebrities, Congress might reasonably take the view that such actions—though non-criminal and not especially abusive of government power—were nonetheless grossly incompatible with the dignity of the Office of President of the United States.

Ultimately, there is no escaping the need for political judgment in assessing high crimes. If a president in 2021 were publicly revealed to have engaged in Harvey Weinstein-like behavior in his previous high-powered job in the private sector, Congress would be confronted with a serious question of whether personal character matters to the dignity of the presidential office and what sort of behavior is “grossly incompatible with the office” in the aftermath of the #MeToo movement. If such a sitting president were discovered to have lied under oath in a deposition for a civil suit regarding his alleged sexual harassment of female underlings in that previous job, the importance of the distinction between private misdeeds and abuses of public power would probably not be universally regarded as compelling.

In our current debates over President Donald Trump, there are important questions of fact, but there will also be unavoidable questions of law. The more fundamental disagreements are not over the basic contours of the possible charges against the president but whether any of those charges rise to the level of high crimes. Although the president’s most ardent defenders might like to make out the case that nothing the president has done can rightfully fall within the category of impeachable offenses, as Dershowitz does in arguing that only indictable crimes can be impeachable offenses, only partisans are likely to be persuaded.¹⁶¹ And, indeed, Trump’s impeachment ended in much the same way as Clinton’s, with

161. DERSHOWITZ, *supra* note 29, at 1.

members of his own party largely rallying to his side and members of the opposite party largely uniting against the incumbent president.

Many of us have the yearning for clear answers to the question of when to impeach. Constitutional lawyers are inclined to want to provide a legal answer to the question of what constitutes a high crime and impeachable offense. We imagine that there are landmines marked “high crimes,” and if only the president were to step on one then we could be rid of him. Such landmines might even be trivial and of marginal interest, but they finally got Al Capone on a tax charge after all. Our constitutional politics is poorer for this kind of thinking. We tolerate more bad behavior than we should, and we enrage partisans by the transparent effort to puff up a category of misdeeds as somehow sufficient to topple a president.

The hard questions surrounding Trump are political questions in the broadest sense. How grave are his offenses? What remedies are available to address them? How risky is it to leave the president to serve out his term in light of what he has already done? How risky is it to forcibly remove a populist president from power on a largely partisan basis? The constitutional impeachment power forces Congress to confront such questions. Partisans will reach different answers on such questions, but even reasonable people not blinded by partisan passions are likely to differ in assessing them. Foes of the president and advocates of impeachment bear a burden to make a genuine effort to construct arguments that can find broad appeal and help persuade the skeptical and the uncommitted. Allies of the president and opponents of impeachment have a duty to listen to such arguments and take them seriously. Foes of the president have the obligation to demonstrate that impeachment is the last resort and that all other remedies have been tried and have proven insufficient to the task. Allies of the president have the obligation to take steps to walk the president out of impeachment territory by designing remedies that mitigate the genuine damage their fellow citizens see being done and not simply sweep offenses under the rug.

The impeachment process stirs passions, but the constitutional system only works if we are willing to deliberate in good faith with those with whom we disagree and look beyond our most immediate interests and inclinations. If impeachments come to be perceived as nothing but a formidable weapon of faction, then we will have taken a large step toward destabilizing our constitutional order and we will have tarnished a potentially necessary constitutional tool.