

A PERJURER IN THE WHITE HOUSE?: THE CONSTITUTIONAL CASE FOR PERJURY AND OBSTRUCTION OF JUSTICE AS HIGH CRIMES AND MISDEMEANORS

CHARLES J. COOPER*

Following an investigation by the Office of the Independent Counsel, President William Jefferson Clinton was credibly charged with lying under oath, both in his testimony in the Paula Jones sexual harassment suit¹ and in his testimony before the grand jury investigating his alleged criminal wrongdoing.² The President was also credibly charged with obstruction of justice in connection with both the *Jones* suit and the grand jury's investigation.³

In considering the referral of the Office of the Independent Counsel, the Subcommittee on the Constitution of the Judiciary Committee of the House of Representatives convened hearings on whether perjury or obstruction of justice would constitute high crimes or misdemeanors for which a president could be impeached. The Committee invited twenty constitutional scholars to address this question. The following is adapted from my testimony presented to the Subcommittee on the

* Founding partner of Cooper, Carvin & Rosenthal in Washington, D.C., and specialist in constitutional and commercial litigation. Assistant Attorney General for the Office of Legal Counsel of the United States Department of Justice from 1985-88 and member of the National Commission on Judicial Discipline and Removal from 1990-92. The author is grateful for the excellent assistance provided by R. Ted Cruz, Noel J. Francisco, and Michael W. Kirk in the preparation of this testimony.

1. See REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, § 595(C) SUBMITTED BY THE OFFICE OF THE INDEPENDENT COUNSEL, H.R. DOC. NO. 105-310, at 131-44, 151-64, 186-89 (1998) [hereinafter REFERRAL]. See also *Clinton v. Jones*, 117 S. Ct. 1636, 1639-40 (1997) (reciting facts underlying the Jones suit).

2. See REFERRAL, *supra* note 1, at 145-50.

3. See *id.* at 173-80, 190-203.

Constitution on November 9, 1998.⁴ Major portions of this testimony were ultimately incorporated, *in haec verba*, into the Brief of the House of Representatives filed in the United States Senate in the impeachment trial of President Clinton.

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The President's lawyers, with the support of some of the witnesses before the Committee,⁵ argued that the President could not constitutionally be impeached for the crimes that were charged against him. The argument was not that presidential perjury and obstruction of justice can *never* qualify as impeachable offenses, but rather that those crimes, to be impeachable, must "involve the derelict exercise of executive powers."⁶ Under this view, because the President's alleged perjury and obstruction of justice grew out of his admitted efforts to conceal his private sexual misconduct rather than to conceal a "criminal exercise of presidential powers,"⁷ the alleged crimes did not rise to the constitutionally required level of "Treason, Bribery, and other high Crimes and Misdemeanors."⁸

I believe that this view of the impeachment power is profoundly wrong. To be sure, serious crimes committed in the actual performance of official government functions are likely to constitute impeachable offenses in all cases. But the scope of the House's impeachment authority is not confined to such crimes, or even to crimes at all. To the contrary, "[i]mpeachment is a constitutional remedy addressed to serious offenses against the system of government."⁹ As Alexander Hamilton put it, impeachable offenses "relate chiefly to injuries done immediately to the society itself."¹⁰ And the

4. This testimony is reprinted in *Background and History of Impeachment: Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 105th Cong. 180-94 (1998).

5. See, e.g., *id.* at 81 (statement of Cass R. Sunstein); *id.* at 98 (statement of Arthur Schlesinger, Jr.); *id.* at 230 (statement of Susan Low Bloch).

6. *Id.* at 384 (letter from Jed Rubenfeld et al., to Newt Gingrich (Oct. 2, 1998)) [hereinafter Rubenfeld Letter].

7. *Id.*

8. U.S. CONST. art. II, § 4.

9. STAFF OF THE IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 26 (Comm. Print 1974) [hereinafter STAFF REPORT].

10. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

crimes of perjury and obstruction of justice, like the crimes of treason and bribery, are quintessentially offenses against our system of government, visiting injury immediately on society itself, whether or not committed in connection with the exercise of official government powers. Indeed, in a society governed by the rule of law, perjury and obstruction of justice cannot be tolerated precisely because these crimes subvert the very judicial processes on which the rule of law so vitally depends.¹¹

But there is an additional and unique dimension to the gravity of the crimes of perjury and obstruction of justice when charged against a president. In a 1974 report, the Judiciary Committee's impeachment inquiry staff noted that "[b]ecause impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with . . . the proper performance of constitutional duties of the presidential office."¹² At the core of the President's constitutional responsibilities is his duty to "take Care that the laws be faithfully executed."¹³

Because perjury and obstruction of justice strike at the rule of law itself, it is difficult to imagine crimes that more clearly or directly violate this core presidential constitutional duty. Far from taking care that the laws be faithfully executed, a president guilty of perjury and obstruction of justice has himself faithlessly subverted them. Thus, while the crimes alleged against the President do not involve the "derelict exercise of executive powers,"¹⁴ they plainly do involve the derelict violation of executive duties. Those crimes are plainly impeachable offenses.

I. HISTORICAL BACKGROUND

The Impeachment Clause provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."¹⁵

11. *See infra* note 42.

12. STAFF REPORT, *supra* note 9, at 27.

13. U.S. CONST. art. II, § 3.

14. *See supra* note 6 and accompanying text.

15. U.S. CONST. art. II, § 4.

While the meanings of "Treason" and "Bribery" are relatively clear (the former is defined in the Constitution itself¹⁶ and the latter by both statutory and common law¹⁷), the term "high Crimes and Misdemeanors" is nowhere specifically defined. To understand the meaning of the this term, one must examine how that term was understood by the founders who framed and ratified the Constitution, and how that term has applied in relevant American precedent. An examination of these sources compels the conclusion that perjury and obstruction of justice constitute "high Crimes and Misdemeanors" under any plausible and logically consistent construction of that term.

Perhaps the most extended examination of the impeachment power during the founding period was undertaken by Alexander Hamilton. In *The Federalist No. 65*, he identified as impeachable

those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.¹⁸

Hamilton was quick to note, however, that no single recipe could embrace the full scope of impeachable offenses. Instead, he recognized the need to confer substantial discretion upon the impeaching body, both in its authority to define the scope of impeachable offenses, and in the procedures by which such offenses would be tried:

The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the

16. See U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").

17. See, e.g., 18 U.S.C. § 201 (1994) (federal bribery statute).

18. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

trust to a small number of persons.¹⁹

In these two passages, Hamilton captures the dominant themes that run throughout the various sources of the meaning "high Crimes and Misdemeanors." First, such offenses are "political" in the sense that "they relate chiefly to injuries done immediately to the society itself" by the "misconduct of public men."²⁰ And second, within this broad definition, the impeaching bodies must be given broad, but not unlimited, discretion to define the precise scope of impeachable offenses.

These broad themes were captured in the Constitutional Convention in Philadelphia in 1787. The initial draft of the Impeachment Clause made the President removable for "malpractice or neglect of duty."²¹ This formulation, however, was altered by the Committee of Detail to "treason, bribery or corruption," and altered again, by the Committee of Eleven, to just "treason or bribery."²² Not until this point, it appears, did the Framers take up the issue of the scope of the impeachment power, with George Mason objecting that it was too narrow:

Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. Hastings is not guilty of

19. *Id.* at 382.

20. In the late eighteenth century (and, to a certain extent, still today), all violations of the criminal law were viewed as injuries inflicted upon the body politic (hence, criminal cases were, and are, denominated "*United States v. Smith*"). Indeed, this distinction, between public and private harm, was not used to differentiate among crimes, but between criminal and civil wrongs:

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's [sic] social aggregate capacity . . . [T]reason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *5. Viewed in this light, Hamilton's standard for impeachable offenses clearly appears to embrace serious private crimes. In any event, the "public" crimes of perjury and obstruction of justice, like treason and bribery, are at the very core of the concept of high crimes and misdemeanors.

21. 2 THE FOUNDERS' CONSTITUTION 153 (Philip B. Kurland & Ralph Lerner eds., 1987).

22. RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 74 (1973).

Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.²³

To broaden it, Mason proposed adding the term “maladministration” to treason and bribery. James Madison, however, objected that the term would extend the impeachment power too far, for “[s]o vague a term [would] be equivalent to a tenure during pleasure of the Senate.”²⁴ Accordingly, Mason withdrew “maladministration” and replaced it with the current phrase, “high crimes & misdemeanors,” which was adopted by the Convention.²⁵ Madison then argued that the power to impeach the President “for any act which might be called a misdemeanor” would render the President “improperly dependent” on the legislative branch.²⁶ He recommended that the power to try impeachments be located in the Supreme Court rather than the Senate, but his motion failed.²⁷

This brief exchange reflects that “high Crimes and Misdemeanors” was intended to extend the impeachment power to “great and dangerous offences” in addition to treason and bribery, but not to the amorphous concept of “maladministration,” which would permit impeachment for mere incompetence or for policy disagreements with Congress.

While this was the only occasion on which the Framers discussed the scope of “high Crimes and Misdemeanors,” it is not the only place that they addressed the nature of impeachable offenses. Earlier on in the Convention, they addressed the question of whether the President should be impeachable *at all*; and in the course of the debate, those arguing in favor of an impeachment power set forth some grounds that, in their view, would justify removing the President. Like Hamilton's test in *The Federalist No. 65* and the

23. 2 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 154. “Hastings” refers to Governor-General of India Warren Hastings, whose impeachment trial was pending in London during the Convention. See STAFF REPORT, *supra* note 9, at 26.

24. 2 THE FOUNDERS' CONSTITUTION, *supra* note 21, at 154.

25. *Id.* at 155.

26. *Id.*

27. *See id.*

broad contours set out in the debate over the text of the Impeachment Clause, this debate outlined the nature of impeachable offenses in broad strokes, apparently focusing, like Hamilton, on offenses inflicting injury on the body politic. James Madison, for example, spoke of the need to remove a president for "incapacity, negligence or perfidy."²⁸ Others described as impeachable offenses "mal—and corrupt conduct," "malpractice or neglect of duty," and "corruption."²⁹ But in this portion of the debate, the Framers also highlighted specific forms of foreseeable misconduct that, in their view, made the case for impeachment compelling. Madison, for example, warned that the President

might lose his capacity after his appointment. He might pervert his administration into a scheme of speculation or oppression. He might betray his trust to foreign powers In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption . . . might be fatal to the Republic.³⁰

A broad view of the term "high Crimes and Misdemeanors," like that enunciated by Hamilton, also appears to have prevailed in the state ratification conventions. Of particular note is the North Carolina convention, where James Iredell, later to become a Supreme Court Justice, spoke at some length on the scope of impeachable offenses. One noted historian succinctly summarized Iredell's position, as well as that of Iredell's fellow North Carolinian, Governor Johnston, as follows:

[Iredell] understood impeachment as having been "calculated to bring [great offenders] to punishment for crime which it is not easy to describe, but which every one must be convinced is a high crime and misdemeanor against government. [T]he occasion for its exercise will arise from acts of great injury to the community[.]" . . . As examples of impeachable offenses, he suggested that "[the] president must certainly be punishable for giving false information to the Senate" and that "the president would be liable to impeachments [if] he had received a bribe or acted from some corrupt motive or other." . . . Governor Johnston, who

28. *Id.* at 153.

29. *Id.* at 152-53.

30. *Id.* at 153.

would subsequently become the state's first U.S. senator, agreed that "[i]mpeachment . . . is a mode of trial pointed out for great misdemeanors against the public."³¹

These historical sources—the framing debates at the Constitutional Convention, *The Federalist Papers*, and the ratification debates in the states—draw the broad confines within which the Framers believed impeachable offenses to fall. In short, within these confines fall “great offenses” that constitute violations of the “public trust” in the sense that they inflict injury upon the body politic. As Joseph Story put it, “[s]trictly speaking . . . the [impeachment] power partakes of a political character, as it respects injuries to the society in its political character.”³² Beyond this, with the exception of the few illustrative examples provided in the course of the debates, the scope of impeachable offenses largely were left to be determined by the bodies charged with executing the impeachment power—the House of Representatives and the Senate.

These same conclusions were reached in 1974 by the impeachment inquiry staff of the House Judiciary Committee. After surveying the relevant English and American authorities, the impeachment inquiry staff concluded that “[i]mpeachment is a constitutional remedy addressed to serious offenses against the system of government.”³³ Such offenses inflict “injury to the commonwealth—that is, to the state itself and to its constitution.”³⁴ The impeachment power, the staff further noted, “is intended to reach a broad variety of conduct by officers that is both serious and incompatible with the duties of

31. MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 19 (1996).

32. 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 385 (4th ed., 1891). Justice Story captured the essence of the matter as follows:

Not but that crimes of a strictly legal character fall within the scope of the power . . . but that it has a more enlarged operation, and reaches what are aptly termed political offenses, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law.

Id. at § 764.

33. STAFF REPORT, *supra* note 9, at 26.

34. *Id.* at 12 n.51.

the office.”³⁵ And because “the scope of impeachment was not viewed narrowly” by the founders,³⁶ “they adopted from English history a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee.”³⁷

II. PERJURY AND OBSTRUCTION OF JUSTICE ARE IMPEACHABLE OFFENSES

Given that offenses against the system of government, inflicting injury immediately on the society itself, are at the core of the concept of “high Crimes and Misdemeanors,” it follows that perjury and obstruction of justice are quintessential impeachable offenses. Before the framing of our Constitution and since, our law has consistently recognized that perjury subverts the judicial process and thus strikes at our nation’s most fundamental value—the rule of law itself.

Indeed, in his *Commentaries on the Laws of England*, Blackstone differentiated between crimes that “more directly infringe the rights of the public or commonwealth, taken in it’s [sic] collective capacity,” and “those which in a more peculiar manner affect and injure *individuals* or private subjects.”³⁸ The latter category contained such crimes as murder, burglary and arson. The former, however, catalogued crimes that could only be understood as assaults upon the state. Within a subcategory denominated “offenses against public justice,”³⁹ Blackstone included the crimes of perjury and bribery.⁴⁰ In fact, in his category of “public justice” offenses, Blackstone places perjury and bribery side-by-side.⁴¹

Likewise, the Supreme Court has repeatedly noted the extent to which perjury subverts the judicial process, and thus the rule of law. For example, in a 1976 case the Court emphasized that

[p]erjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against

35. *Id.* at 21.

36. *Id.* at 16.

37. *Id.* at 2.

38. 4 BLACKSTONE, *supra* note 20, at *176 (emphasis in original).

39. *Id.* at *127.

40. *See id.* at *136-40.

41. *See id.*

this type of egregious offense are therefore imperative Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it.⁴²

All the more serious is perjury if committed in the context of a grand jury proceeding, and especially in an investigation of alleged perjury in a prior proceeding. For in such a case, the only victim of perjury is the rule of law.

The seriousness of the crime of perjury is confirmed by the fact that it was among the few offenses that the First Congress outlawed by statute. In 1790, in a statute entitled "An Act for the punishment of certain crimes against the United States," Congress made the crime of perjury, including perjury committed "in any deposition taken" in an action pending in federal court, punishable by imprisonment of up to three years, a fine of up to \$800, disqualification from giving future testimony, and "stand[ing] in the pillory for one hour."⁴³ Today, perjury is punishable by up to five years imprisonment in a federal penitentiary.⁴⁴

Moreover, in the context of an impeachment inquiry, there is an additional and unique dimension to the gravity of the crimes of perjury and obstruction of justice when charged against a president. The 1974 report of the House Judiciary Committee's impeachment inquiry staff emphasized that "in determining whether grounds for impeachment exist," one must understand "the nature, functions, and duties of the office."⁴⁵ Because impeachment of a president "is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with . . . the proper performance of

42. *United States v. Madujano*, 425 U.S. 564, 576 (1976) (plurality opinion) (emphasis added). See also *Brogan v. United States*, 118 S. Ct. 805, 808-09 (1998) ("We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function."); *ABF Freight Sys. v. N.L.R.B.*, 510 U.S. 317, 323 (1994) ("False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a 'flagrant affront' to the truth-seeking function of adversary proceedings."); *United States v. Norris*, 300 U.S. 564, 574 (1937) ("Perjury is an obstruction of justice.").

43. 2 ANNALS OF CONG. 2219 (1790).

44. See 18 U.S.C. §§ 1621-23 (1994).

45. STAFF REPORT, *supra* note 9, at 21.

constitutional duties of the presidential office."⁴⁶

At the core of the President's responsibilities under Article II of the Constitution is his duty to "take care that the Laws be faithfully executed."⁴⁷ Indeed, the Supreme Court has called this responsibility "the Chief Executive's most important constitutional duty."⁴⁸ It is no exaggeration to say that our Constitution, and the American people, entrust to the President singular responsibility for enforcing the rule of law. Perjury and obstruction of justice strike at the heart of the rule of law, and a president who has committed these crimes has plainly and directly violated his most important executive duty.

III. THE "OFFICIAL CRIMES" DEFENSE

During the House hearings on the subject, some of President Clinton's supporters advanced the extraordinary argument that he could not constitutionally be impeached for the crimes that had been credibly alleged against him. In a letter to the Speaker of the House, a group of thirteen law professors contended that these crimes did not rise to the constitutionally-required level of "high Crimes and Misdemeanors."⁴⁹ The law professors acknowledge that "lying under oath is a serious offense," and they concede that "[p]erjury and obstruction of justice can without doubt be impeachable offenses."⁵⁰ As charged against President Clinton, however, these crimes were not impeachable offenses because they did not "involve the derelict exercise of executive powers."⁵¹ As the law professors put it: "If the President committed perjury regarding his sexual conduct, this perjury involved no exercise of presidential power as such. If he concealed evidence, this misdeed too involved no exercise of executive authority."⁵²

Similarly, a group of some 400 historians, which called itself "Historians in Defense of the Constitution," issued a statement during the House deliberations asserting that the Constitution

46. *Id.* at 27.

47. U.S. CONST. art. II, § 3.

48. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

49. See Rubinfeld Letter, *supra* note 6, at 383-85.

50. *Id.* at 384.

51. *Id.*

52. *Id.* (emphasis in original).

authorizes presidential impeachment only "for high crimes and misdemeanors in the exercise of executive power."⁵³ These historians contend that "[i]mpeachment for anything else would, according to James Madison, leave the president to serve 'during the pleasure of the Senate.'"⁵⁴

I believe that this "official crimes" theory is demonstrably wrong, for it runs contrary to the text of the Impeachment Clause, to the understanding of the clause at the time of its framing, and to the actions by Congress in actual cases of impeachment. Turning first to the constitutional text, the Impeachment Clause speaks of "Treason, Bribery, and *other* high Crimes and Misdemeanors."⁵⁵ This wording necessarily implies that treason and bribery are themselves "high Crimes and Misdemeanors," else the word "other" would not only be wholly superfluous, but affirmatively misleading. And the Impeachment Clause, by its express terms, prohibits treason and bribery without reference to whether the commission of those crimes is connected in any way to the offender's performance of his official functions. Thus, for example, if the President pays an illegal bribe to a judge in a private civil action in order to obtain a favorable ruling, then the President has committed the impeachable offense of bribery, even though the crime did not involve the "derelict exercise of executive powers."

In addition to being textually incoherent, the "official crimes" theory rests on a patent misreading of history. As noted, the historians assert that "[i]mpeachment for anything [other than official misconduct] would, according to James Madison, leave the President to serve 'during the pleasure of the Senate.'"⁵⁶ Madison, however, said no such thing. Instead, as previously discussed, he objected that the term "maladministration" was so vague that the Senate would be empowered effectively to remove the President at its

53. *Background and History of Impeachment: Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 105th Cong. 334 (1998) (statement against inquiry by Historians in Defense of the Constitution) [hereinafter *Historians' Statement*].

54. *Id.*

55. U.S. CONST. art. II, § 4 (emphasis added).

56. *Historians' Statement*, *supra* note 53, at 334.

pleasure.⁵⁷ Madison's opposition was to impeachments based on mere policy disagreements—which would arguably be included in “maladministration”—not to impeachments based on non-official, criminal conduct. He made no statement that could reasonably be construed as supporting an understanding of the impeachment power that would preclude its exercise for criminal conduct unrelated to the offender's office. Indeed, the term that Madison rejected—“maladministration”—is itself readily amenable to a construction that limits its scope to wrongdoing in connection with the administration of official functions.

Moreover, the framers had available to them, and rejected, the language of several state constitutions that arguably would have limited impeachable offenses to official misconduct. For example, the constitution of North Carolina allowed impeachment for “violating any part of this Constitution, maladministration, or corruption.”⁵⁸ Likewise, the framers explicitly considered, and rejected, the formulations “mal—and corrupt conduct,” and “malpractice or neglect of duty.”⁵⁹

Therefore, the Framers were aware of language that on its face implied a requirement of official misconduct but chose instead to adopt language that did not. Indeed, after carefully reviewing the text and history of the term “high Crimes and Misdemeanors,” Justice Joseph Story⁶⁰ forcefully outlined the argument against the claim that the impeachment power is limited to wrongdoing connected to the powers of office:

[T]here is not a syllable in the Constitution which confines impeachments to official acts, and it is against the plainest dictates of common-sense that such restraint should be imposed upon it. Suppose a judge should countenance or aid insurgents in a meditated conspiracy or insurrection

57. See *supra* text accompanying note 24.

58. 2 THE FOUNDER'S CONSTITUTION, *supra* note 21, at 150.

59. *Id.* at 152-53.

60. Professor Berger has observed that “Story's summary of the arguments betrays partiality to impeachment for unofficial misconduct. But conscious of the proprieties, for after all he was a Justice of the Supreme Court, he went on to say that he ‘[e]xpressed no opinion’ because these are ‘matters still *sub judice*,’ that is, questions to be decided by the Senate.” BERGER, *supra* note 22, at 198 n.31. Professor Berger likewise concluded that “[t]he necessity of dealing with offenses such as perjury and forgery in private transactions precludes a wholesale bar to inclusion of nonofficial conduct in ‘high crimes and misdemeanors.’” *Id.* at 209 (emphasis added).

against the government. This is not a judicial act, and yet it ought certainly to be impeachable. He may be called upon to try the very persons whom he has aided. Suppose a judge or other officer to receive a bribe not connected with his judicial office, could he be entitled to any public confidence? Would not these reasons for removal be just as strong as if it were a case of an official bribe?⁶¹

To be sure, the severity of wrongdoing is aggravated if facilitated by an official's governmental powers. A drug dealer on the street corner is bad enough, but a drug dealer on the police force is much worse. Still, while the official nature of wrongdoing might aggravate the crime, it cannot, for the reasons shown, serve as a dividing line between impeachable and unimpeachable offenses.

In sum, the crimes of perjury and obstruction of justice, whether or not committed in the exercise of official powers, are quintessential "high Crimes and Misdemeanors" under the Impeachment Clause. Indeed, the Congress has, in the recent past, unanimously and near-unanimously so concluded. That is, in recent years, the Congress has several times impeached and removed from office federal judges on the basis of conduct that, in all relevant respects, was indistinguishable from that alleged against the President.

IV. THE JUDICIAL IMPEACHMENTS OF THE 1980s

In the 1980s, three federal judges were impeached, convicted, and removed from office for making perjurious statements. It speaks volumes that, although each judge was represented by able counsel, none of them argued that perjury or making false statements were not impeachable offenses. Nor did a single Congressman or Senator, in any of the three impeachment proceedings, suggest that perjury or false statements do not qualify as "high Crimes and Misdemeanors." Finally, in two of the cases, it was undisputed that the perjury was not committed in connection with the exercise of the offenders' judicial powers, yet *no one* suggested that the offenses, though private, might not constitute "high Crimes and Misdemeanors."

61. 1 STORY, *supra* note 32, at § 804.

A. The Impeachment of Judge Nixon

In 1989, Judge Walter L. Nixon, Jr., was impeached, convicted, and removed from office solely for perjury and lying to federal officers. Judge Nixon's offense stemmed from his grand jury testimony and statements to federal officers concerning his intervention in the state drug prosecution of Drew Fairchild, the son of Wiley Fairchild, a business partner of Judge Nixon's.⁶² Although Judge Nixon had no official role or function in Drew Fairchild's case (which was assigned to a state court judge), Wiley Fairchild had asked Judge Nixon to help out by speaking to the prosecutor.⁶³ Judge Nixon did so, and the prosecutor, a long-time friend of the judge's, dropped the case.⁶⁴

When Judge Nixon was interviewed by the FBI and the Department of Justice, he denied any involvement whatsoever.⁶⁵ Subsequently, a federal grand jury was empanelled and Judge Nixon again denied his involvement.⁶⁶

After a lengthy criminal prosecution, Judge Nixon was convicted on two counts of perjury before the grand jury and sentenced to five years in prison on each count.⁶⁷ Not long thereafter, the House impeached Judge Nixon by a vote of 417 to 0.⁶⁸ The first article of impeachment against him charged him with making the false or misleading statement to the grand jury that he could not "recall" discussing the Fairchild case with the prosecutor.⁶⁹ The second article charged Nixon with making affirmative false or misleading statements to the grand jury that he had "nothing whatsoever officially or unofficially to do with the Drew Fairchild case."⁷⁰ The third article alleged that Judge Nixon made numerous false statements (not under oath) to federal investigators prior to his grand jury testimony.⁷¹

62. See 135 CONG. REC. 8816 (1989) (statement of Rep. Edwards).

63. See *id.* (statement of Rep. Edwards).

64. See *id.* at 8817 (statement of Rep. Edwards).

65. See *id.* at 8816 (statement of Rep. Edwards).

66. See *id.* at 8816 (statement of Rep. Edwards).

67. See *id.* (statement of Rep. Edwards).

68. See *id.* at 8823.

69. See *id.* at 8814-15.

70. *Id.* at 8815.

71. See *id.*

Neither Judge Nixon nor his "very able counsel,"⁷² even suggested that perjury was not a "high Crime or Misdemeanor." Indeed, Judge Nixon affirmatively acknowledged to the Senate, "If you find that the prosecution has clearly met its heavy burden of truth . . . then you may vote to convict."⁷³ His sole defense was that he was innocent, "unjustly and wrongfully convicted."⁷⁴

As the House Judiciary Committee Report on his impeachment concluded, "Judge Nixon's conduct was wholly unacceptable for a federal judge and [has] tainted the integrity of the federal judiciary. The Committee therefore recommends that Judge Walter L. Nixon, Jr., be impeached by the House of Representatives and tried by the United States Senate."⁷⁵ The House unanimously impeached Judge Nixon, and the House Managers' Report expressed no doubt that perjury is an impeachable offense:

It is difficult to imagine an act more subversive to the legal process than lying from the witness stand. A judge who violates his testimonial oath and misleads a grand jury is clearly unfit to remain on the bench. If a judge's truthfulness cannot be guaranteed, if he sets less than the highest standard for candor, how can ordinary citizens who appear in court be expected to abide by their testimonial oath?⁷⁶

As House Manager Don Edwards further argued to the full Senate,

We deal here with a Federal judge who committed perjury. A man who lied to law enforcement officials in an interview, and then lied again in sworn testimony before a grand jury. . . . After carefully investigating the facts and hearing all the evidence, the House voted 417 to 0 in favor of three articles of impeachment. Accordingly, you must grapple with the same question we faced in the House. Is a man who repeatedly lied fit to hold the high office of Federal judge? I hope you agree the answer is obvious. To preserve the integrity of the judiciary, to maintain public respect for law

72. *Id.* at 8816 (statement of Rep. Edwards).

73. 135 CONG. REC. 26,753 (1989).

74. *Id.*

75. H.R. REP. NO. 101-36, at 3 (1989).

76. S. DOC. NO. 101-22, at 89 (1989) (brief of House Managers).

and order, Judge Nixon must be removed from the bench.⁷⁷

House Manager James Sensenbrenner addressed the question even more directly:

There are basically two questions before you in connection with this impeachment. First, does the conduct alleged in the three articles of impeachment state an impeachable offense? *There is really no debate on this point.* The articles allege misconduct that is criminal and wholly inconsistent with judicial integrity and the judicial oath. *Everyone agrees that a judge who lies under oath, or who deceives Federal investigators by lying in an interview, is not fit to remain on the bench.*⁷⁸

The Senate agreed, overwhelmingly voting to convict Judge Nixon of perjury on the first two articles (89-8 and 78-19, respectively).⁷⁹ As Senator Carl Levin explained:

The record amply supports the finding in the criminal trial that Judge Nixon's statements to the grand jury were false and misleading and constituted perjury. Those are the statements cited in articles I and II, and it is on those articles that I vote to convict Judge Nixon and remove him from office.⁸⁰

B. The Impeachment of Judge Hastings

In 1988, the House impeached Judge Alcee L. Hastings for, *inter alia*, making numerous false statements under oath.⁸¹ The Senate convicted him, and he was removed from office.⁸² Initially, Judge Hastings had been indicted by a federal grand jury for conspiracy stemming from an alleged bribery scheme with his friend William Borders to "fix" cases before Judge Hastings in exchange for cash payments from defendants.⁸³ William Borders was convicted,⁸⁴ but, at his own trial, Judge

77. 135 CONG. REC. 26,746 (1989) (statement of Manager Edwards).

78. *Id.* at 26,748 (statement of Manager Sensenbrenner) (emphasis added).

79. *See id.* at 27,104.

80. *Id.* at 27,105 (statement of Sen. Levin).

81. *See* 134 CONG. REC. 20,221 (1988).

82. *See* 135 CONG. REC. 25,330-35 (1989).

83. *See* 134 CONG. REC. H6182 (daily ed. Aug. 3, 1988) (statement of Rep. Rodino). *See generally* Alan I. Baron, *The Curious Case of Alcee Hastings*, 19 NOVA L. REV. 873 (1995) (detailing the background of the charges against Judge Hastings).

84. *See* 134 CONG. REC. H6182 (daily ed. Aug. 3, 1988) (statement of Rep. Rodino); *United States v. Borders*, 693 F.2d 1318 (11th Cir. 1982) (upholding Borders's conviction).

Hastings took the stand and unequivocally denied any participation in a conspiracy with Borders.⁸⁵ The jury acquitted Judge Hastings on all counts.⁸⁶ Nevertheless, the House impeached Judge Hastings, approving seventeen articles of impeachment, fourteen of which were for lying under oath at his trial.

The House voted 413 to 3 to impeach.⁸⁷ In the trial before the Senate, the House Managers' Report left no doubt whatsoever as to whether perjury alone is impeachable:

It is important to realize that each instance of false testimony charged in the false statement articles is more than enough reason to convict Judge Hastings and remove him from office. Even if the evidence were insufficient to prove that Judge Hastings was part of the conspiracy with William Borders, which the House in no way concedes, the fact that he lied under oath to assure his acquittal is conduct that cannot be tolerated of a United States District Judge. To bolster one's defense by lying to a jury is separate, independent corrupt conduct. For this reason alone, Judge Hastings should be removed from public office.⁸⁸

Representative John Conyers, Democrat from Michigan, also argued for the impeachment of Judge Hastings:

[W]e can no more close our eyes to acts that constitute high crimes and misdemeanors when practiced by judges whose views we approve than we could against judges whose views we detested. It would be disloyal . . . to my oath of office at this late state of my career to set up a double standard for those who share my philosophy and for those who may oppose it. In order to be true to our principles, we must demand that all persons live up to the same high standards that we demand of everyone else.⁸⁹

C. *The Impeachment of Judge Claiborne*

In 1986, Judge Harry E. Claiborne was likewise impeached, convicted, and removed from office for making false

85. See 134 CONG. REC. H6182 (daily ed. Aug. 3, 1988) (statement of Rep. Rodino).

86. See *id.* (statement of Rep. Rodino); *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 95 (D.C. Cir. 1987).

87. See 134 CONG. REC. 20,221 (1988).

88. S. DOC. NO. 101-18, at 243-44 (1989) (brief of House Managers) (emphasis added).

89. 134 CONG. REC. H6186 (daily ed. Aug. 3, 1988) (statement of Rep. Conyers).

statements. In particular, Judge Claiborne had filed false income tax returns in 1979 and 1980, grossly understating his income.⁹⁰ As a result, he was convicted by a jury of two counts of willfully making a false statement on federal tax returns in violation of 26 U.S.C. § 7206(1).⁹¹ Subsequently, the House unanimously (406-0) approved four articles of impeachment.⁹² The proposition that Claiborne's perjurious personal income tax filings were not impeachable was never even seriously considered. As the House Managers explained:

[T]he constitutional issues raised by the first two Articles of Impeachment [concerning the filing of false tax returns] are readily resolved. The Constitution provides that Judge Claiborne may be impeached and convicted for "High Crimes and Misdemeanors." Article II, Section 4. *The willful making of or subscribing of a false statement on a tax return is a felony offense under the laws of the United States. The commission of such a felony is a proper basis for Judge Claiborne's impeachment and conviction in the Senate.*⁹³

House Manager Peter Rodino, Democrat from New Jersey, in his oral argument to the Senate, emphatically made the same point:

Honor in the eyes of the American people lies in public officials who respect the law, not in those who violate the trust that has been given to them when they are trusted with public office.

Judge Harry E. Claiborne has, sad to say, undermined the integrity of the judicial branch of Government. To restore that integrity and to maintain public confidence in the administration of justice, Judge Claiborne must be convicted on the fourth Article of Impeachment [that of reducing confidence in the integrity of the judiciary].⁹⁴

The Senate agreed.⁹⁵ Telling are the words of then-Senator Albert Gore, Jr., Democrat from Tennessee, in voting to convict Judge Claiborne and remove him from office:

90. See 132 CONG. REC. S15,760-61 (daily ed. Oct. 8, 1986) (detailing articles of impeachment against Judge Claiborne).

91. See *id.*

92. See 132 CONG. REC. H4721 (daily ed. July 22, 1986).

93. S. DOC. NO. 99-48, at 23 (1986) (brief of House Managers) (emphasis added).

94. 132 CONG. REC. 29,141 (1986) (statement of Manager Rodino).

95. See *id.* at S15,760-61 (daily ed. Oct. 8, 1986).

The conclusion is inescapable that Claiborne filed false income tax returns and that he did so willfully rather than negligently Given the circumstances, it is incumbent upon the Senate to fulfill its constitutional responsibility and strip this man of his title. An individual who knowingly falsified tax returns has no business receiving a salary derived from the tax dollars of honest citizens. More importantly, an individual guilty of such reprehensible conduct ought not be permitted to exercise the awesome powers which the Constitution entrusts to the Federal Judiciary.⁹⁶

Notably, Judge Claiborne defended himself, *inter alia*, by claiming that he was the victim of a "vast" conspiracy, and that, but for over-zealous and unscrupulous prosecutors, his crimes would never have been investigated in the first place.⁹⁷ Although the prosecutorial misconduct alleged was serious, neither the House nor the Senate found it even remotely a barrier to impeachment. As then-Senator Gore explained:

[Judge Claiborne's] contention seems to be that but for a vast conspiratorial vendetta, his innocence would have been proven or the charges would never have been brought. Claiborne contends that full consideration of his claims on this score leads to several conclusions which will exonerate him. Specifically, he suggests that Federal prosecutors pursued him so relentlessly and unscrupulously that they bargained for perjured testimony from a known criminal and spearheaded an illegal burglary of his home in search of inculpatory evidence. He claims that exculpatory evidence was withheld and that witnesses were either intimidated or unfairly coached. If accurate, these claims warrant serious scrutiny and I have cosponsored legislation to establish a special subcommittee to investigate the issue further. If the claims have merit, steps should be taken to rectify the wrong. *Remedial measures, however, will in no way abrogate the finding that Claiborne has engaged in impeachable conduct.*⁹⁸

96. S. DOC. NO. 99-48, at 372 (1986) (statement of Sen. Gore).

97. Cf. David Maraniss, *First Lady Launches Counterattack; Prosecutor Called 'Politically Motivated' Ally of 'Right-Wing Conspiracy'*, WASH. POST, Jan. 28, 1998, at A1 (reporting statement by Hillary Clinton blaming the scandal surrounding President Clinton on a "vast right-wing conspiracy" allied with a "politically motivated" prosecutor).

98. 132 CONG. REC. 32,634 (1986) (statement of Sen. Gore) (emphasis added).

D. Official Versus Private Misconduct

Two of these impeachments were predicated on crimes that were unrelated to the exercise of the judge's official powers. Judge Nixon's impeachment did not relate to any official action. Drew Fairchild's case was not before Judge Nixon; indeed, it was not even in the federal courts, so Judge Nixon could not have exercised his judicial powers in connection with it. Rather, he privately and informally asked a friend (who happened to be the prosecutor) to drop the charges. And his impeachment was even once-removed from that: he was not impeached for privately interfering with the prosecution, but instead for perjuring himself about his involvement (improper or not) before the grand jury.

Likewise, Judge Claiborne's impeachment involved no official conduct whatsoever. His false tax returns, filed under penalty of perjury, were criminal, but they were not at all incident or connected with his exercise of official powers. His income tax returns were purely personal, and his private life resulted in his being a repeat felon. Nevertheless, in both proceedings, the House concluded (and the Senate agreed) that the judges' private criminal conduct was fully impeachable. As Representative Hamilton Fish, Republican from New York, observed during the Claiborne proceedings:

[I]t is . . . self-evident that criminal conduct is a justifiable basis for a decision to impeach [But] [m]y overriding concern, given these facts, is public confidence in the integrity of the judicial branch and the individual Federal judges that exercise the most important responsibilities of that branch under our constitutional system Judge Claiborne is more than a mere embarrassment. He is a disgrace—an affront—to the judicial office and the judicial branch he was appointed to serve [I]n article II, section 4, of the Constitution, [the founders] also recognized that judges and other high officers of the United States were not to be above the law *Impeachable conduct does not have to occur in the course of the performance of an officer's official duties. Evidence of misconduct, misbehavior, high crimes, and misdemeanors can be justified upon one's private dealings as well as one's exercise of public office. That, of course, is the situation in this case* There can be no doubt that conviction of a Federal crime falls within the definition of a "high crime" in article II, section 4 of the Constitution [Judge Claiborne's] refusal to resign, in the face of these facts and

events, further demonstrates a disregard of his judicial responsibilities.⁹⁹

V. APPLICATION OF JUDICIAL PRECEDENTS TO THE IMPEACHMENT OF THE PRESIDENT

To avoid the conclusive force of these recent precedents—and in particular the exact precedent supporting impeachment for perjury—the only recourse is to argue that a “high Crime or Misdemeanor” for a judge is not necessarily a “high Crime or Misdemeanor” when committed by the President. The arguments in support of this dubious proposition do not withstand serious scrutiny.

A. Good Behavior

Some have argued that because judges serve during “good behavior,”¹⁰⁰ a different impeachment standard applies to them than to the President. This argument, though popular on the television talk shows,¹⁰¹ has been widely rejected by Congress and by legal scholars.¹⁰²

For example, the 1974 impeachment inquiry staff report explained as follows:

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

99. *Id.* at 17,297 (statement of Rep. Fish) (emphasis added).

100. U.S. CONST. art. III, § 1.

101. See, e.g., *Today* (NBC television broadcast, Jan. 19, 1998), available in 1999 WL 6010267 (Tim Russert: “[J]udges . . . can be removed for, quote, ‘lack of good behavior.’ That’s the phrase in the Constitution. There’s no such phrase for the President.”).

102. See, e.g., BERGER, *supra* note 22, at 132 (“[I]mpeachment for ‘high crimes and misdemeanors’ did not embrace removal for ‘misbehavior’ which fell short of ‘high crimes and misdemeanors.’”).

Bribery, and other high Crimes and Misdemeanors.”¹⁰³

Similarly, the House Managers observed in the Judge Claiborne proceeding that “[t]he *sole impeachment standard* for the President, Vice President and all civil officers of the United States, including federal judges, is found in Article II, Section 4 of the Constitution, which provides for removal from office for ‘treason, bribery, or other high crimes and misdemeanors.’”¹⁰⁴

While there is some distant precedent for the inclusion of “misbehavior” as an *additional* ground for the impeachment of federal judges,¹⁰⁵ “no judge has been removed for misbehavior alone.”¹⁰⁶ And, more to the point, the 1980s judicial impeachments did not consider or purport to determine whether perjury and false statements constituted “bad behavior,” rather, they expressly and unequivocally decided that perjury and false statements were “high Crimes and Misdemeanors” under Article II, Section 4—the exact provision applicable to the President.

B. The President is Different

Another argument made in support of establishing a unique constitutional test for impeaching Presidents is that, because the President is the head of an entire branch of government, impeaching him requires far worse conduct than does impeaching a simple federal judge, who is but one of many.¹⁰⁷ There is no doubt that impeaching a president is a graver matter than impeaching a single judge, and this fact is certainly relevant to the question of *whether* to impeach. But it is difficult to understand how the relative gravity of impeachment could render perjury and obstruction of justice—unquestionably “high Crimes or Misdemeanors” for federal judges—something less than “high Crimes or Misdemeanors” for the President.

103. STAFF REPORT, *supra* note 9, at 17 (emphasis added).

104. S. DOC. NO. 99-48, at 43 (1986) (emphasis added).

105. *See, e.g.*, 48 CONG. REC. 8906 (1912) (impeachment of Judge Robert W. Archbald); 80 CONG. REC. 3486-88 (1936) (impeachment of Judge Halstead L. Ritter).

106. OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, LEGAL ASPECTS OF IMPEACHMENT: AN OVERVIEW, app. 1, 34 (1974).

107. *See, e.g.*, Laurence H. Tribe, Address to Democratic Forum on Impeachment (Harvard Law School, Oct. 15, 1998) (“Removing a federal district judge, serious though it is, does not involve decapitating a branch of the Government.”) (on file with *Journal*).

Either a particular crime is a "high Crime or Misdemeanor" or it is not.

Moreover, even assuming that presidential "high Crimes and Misdemeanors" could be different from judicial ones, surely the President ought not be held to a *lower* standard of impeachability than judges. In the course of the 1980s judicial impeachments, Congress emphasized unequivocally that the removal from office of federal judges guilty of crimes indistinguishable from those charged against President Clinton was essential to the preservation of the rule of law. If the perjury of just one judge so undermines the rule of law as to make it intolerable that he remain in office, then how much more so does perjury committed by the President of the United States, who *alone* is charged with the duty "to take Care that the Laws be faithfully executed."¹⁰⁸

Finally, the corollary to this argument, often offered in the same breath, is that impeachment of a president is a "constitutional crisis." This is not so. It is an event fully contemplated and provided for by the Constitution. The fact that it may result in a new president does not make it a constitutional crisis, any more than does that same fact make each presidential election a crisis. And, while it is a political crisis for the particular President facing impeachment, presumably the Vice President stands by fit and able to step in and fulfill the role of president if necessary.¹⁰⁹

In sum, if perjury and false statements are "High Crimes or Misdemeanors" for a judge, then they are for a president as well.

VI. EPILOGUE

Following the hearing on the meaning of "high Crimes and Misdemeanors" before the Subcommittee on the Constitution, the House Judiciary Committee recommended four articles of impeachment against President Clinton to the full House of Representatives. Two articles, one alleging perjury in the grand jury investigation and the other alleging obstruction of justice,

108. U.S. CONST. art. II, § 3.

109. See U.S. CONST., art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office . . . the Same shall devolve on the Vice President.").

were passed by the House and sent on to the Senate.¹¹⁰ The Senate concluded its four-week trial of the President by defeating both articles and allowing President Clinton to stay in office to serve out the remainder of his term.¹¹¹

Despite the Senate acquittal, those who argued that the range of impeachable offenses for a president is not limited to dereliction of his official duties enjoyed a significant measure of vindication. The truth of that proposition, hotly contested at the outset of the proceedings, appeared to gather a growing consensus by trial's end. Most participants in the debate agreed that "high Crimes or Misdemeanors" include any offense that undermines the President's sworn duty to faithfully execute his duties—including perjury and obstruction of justice unrelated to the official duties of office.

This view was clearly shared by a majority of the House of Representatives, and by the House Managers who prosecuted the case against President Clinton in the Senate. Consider this excerpt from the House Managers' trial brief to the Senate:

Nothing in the text, structure, or history of the Constitution suggests that officials are subject to impeachment only for official misconduct. Perjury and obstruction of justice—even regarding a private matter—are offenses that substantially affect the President's official duties because they are grossly incompatible with his preeminent duty to "take care that the laws be faithfully executed."¹¹²

While answering questions from the Senate, even the President's lawyers grudgingly conceded—contrary to their original position in their brief¹¹³—that there may be some criminal acts unrelated to presidential duties that would merit his removal:

Now we agree that there might be extreme cases where

110. See H.R. RES. 611, 105th Cong. (1998). Article I (grand jury perjury) passed 228-206; Article III (obstruction of justice) passed 221-212. Articles II and IV, alleging perjury in a civil deposition and making misleading statements to Congress, were defeated. See 144 CONG. REC. H12,040-42 (daily ed. Dec. 19, 1998).

111. See 145 CONG. REC. S1458 (daily ed. Feb. 12, 1999) (Article I: 45 guilty, 55 not guilty); *id.* at S1459 (Article II: 50 guilty, 50 not guilty).

112. See *id.* at S76 (daily ed. Jan. 14, 1999) (brief of House Managers).

113. "Impeachment is reserved for the most serious public misconduct, those aggravated abuses of executive power that, given the President's four-year term, might otherwise go unchecked." *Id.* at S195 (brief of President Clinton).

private conduct would so paralyze the President's ability to govern that the impeachment power must be exercised, where the certainty of guilt and the gravity of the charge would leave no choice. But charges arising out of the President's efforts to keep an admittedly wrongful relationship secret are by no analysis of that caliber.¹¹⁴

As the trial went on, the argument against conviction moved away from the position that impeachment and removal required misconduct in the exercise of official powers, and toward the position that although crimes committed in the course of a president's private conduct may be grounds for conviction and removal, *these* particular crimes allegedly committed by *this* President did not merit that punishment.

This argument carried the day. Senator Robert Byrd, elder statesman of the Senate and Democrat from West Virginia, was convinced that the President had committed impeachable offenses as the framers understood the term:

When the President of the United States, who was sworn to protect and defend the Constitution of the United States, and to see to it that the laws be faithfully executed, breaks the law himself by lying under oath, he undermines the system of justice and law on which this Republic—not this “democracy”—this Republic has its foundation.

In so doing, has the President not committed an offense in violation of the public trust? Does not this misconduct constitute an injury to the society and its political character? Does not such injury to the institutions of Government constitute an impeachable offense, a political high crime or misdemeanor against the state? How would Washington vote? How would Hamilton vote? How would Madison or Mason or Gerry vote? My head and my heart tell me that their answer to these questions would be, “Yes.”¹¹⁵

Despite these convictions, Senator Byrd ultimately voted against removal of the President, citing prudential concerns over the lack of public support for such a move and the possible effect impeachment might have on national security.¹¹⁶

Senator Joseph Lieberman, Democrat from Connecticut,

114. *Id.* at S967 (daily ed. Jan. 25, 1999) (statement of Nicole K. Seligman).

115. *Id.* at S1636 (daily ed. Feb. 12, 1999) (statement of Sen. Byrd).

116. *See id.* at S1636-37 (statement of Sen. Byrd).

came to a similar conclusion:

The President's counsel and others . . . argu[e] that Congress has no authority to remove a President for any offense not committed through the use of official power. *I cannot agree.* Instead, Madison's argument that we must have an escape valve that allows the legislature to remove a President when the need arises to defend "the Community against the incapacity, negligence, or perfidy of the chief Magistrate," coupled with Hamilton's definition of "high Crimes and Misdemeanors" as an "abuse or violation of some public trust," convince me that it is more than just misuse of official power that can require the Senate to remove an office holder. Acts that, although in their immediate nature and effect differ from treason or bribery because they do not stem from a misuse of official power, may nevertheless undermine the offender's ability to discharge his duties in the interests of the American people. . . .

It is for this reason that I reject the contention that a President's giving false or misleading statements under oath or his impeding the discovery of evidence in a lawsuit arising out of his personal conduct may never constitute a high crime or misdemeanor. I have no doubt that under certain circumstances such offenses could demonstrate such a level of depravity, deceit and disregard for the administration of justice that we would have no choice but to conclude that the President could no longer be trusted to use the authority of his office and make the decisions entrusted to him as Chief Executive in the best interest of the nation.¹¹⁷

Despite agreeing that the alleged conduct could be impeachable, Senator Lieberman voted against removing the President because, although he believed that the House Managers may well have proven both perjury and obstruction of justice sufficiently for a finding of guilt in a criminal proceeding, in his opinion they failed to demonstrate that those crimes warranted removing this President from office in this case.¹¹⁸

These concessions from the President's lawyers and from prominent Democrats who voted in his favor strongly suggest that if the congressional proponents of impeachment won nothing else during the Clinton controversy, they won this

117. *Id.* at S1602 (statement of Sen. Lieberman) (emphasis added).

118. *See id.* at S1603-04 (statement of Sen. Lieberman).

point: impeachable "high Crimes and Misdemeanors" are not limited to official misconduct.