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Mark R. Slusar

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THE CONFUSION DEFINED: QUESTIONS AND PROBLEMS OF PROCESS IN THE AFTERMATH OF THE CLINTON IMPEACHMENT

INTRODUCTION

Following a bitterly divisive thirteen-month debate, President William Jefferson Clinton was acquitted of two articles of impeachment on February 12, 1999. Senators rejoiced in self-congratulation as this year-long national embarrassment finally reached its inevitable conclusion. Yet, it was particularly unnerving that while nearly every senator and representative called these the most important votes of their careers, in debate they were often talking past each other, applying very different standards, and speaking of the basic purpose and functioning of the impeachment process in markedly different terms.¹ Often it seemed that they could have been speaking of different nations with different constitutions and different histories of interpretation. In the aftermath of this debacle, one is left to ponder the impeachment process and whether this antiquated piece of constitutional machinery needs to be reworked.

The Founders intended for the impeachment language in the Constitution to have some open texture, for reasons that are described in this Comment. But, because its legitimacy derives from just process, there are several aspects of the impeachment mechanism that are fundamentally weakened by allowing this unsettling variance in interpretation.² Some of these questions that remain could not have been

¹ See *infra* note 158. Similarly, Professor Michael Gerhardt, in his thorough treatise on impeachment, declares without the slightest concern that the "Constitution does not dictate what each senator must have in his mind when voting on removal; it mandates only that at least two-thirds of the members present must vote . . . to convict in order for a removal to occur." MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 44 (1996) [hereinafter GERHARDT, *FEDERAL IMPEACHMENT PROCESS*].

² Another complicating factor in the interpretation of the federal impeachment power derives from the Supreme Court's ruling in *Nixon v. United States*, 506 U.S. 224 (1993), that any

intentionally left open by the Founders. For instance, are impeachable offenses defined in the Constitution? Is there language that defines a different standard for judges? Is the president held to a higher or lower standard than other impeachable officials? Does conviction mandate removal? What range of punishments is available? Does guilt of "high crimes and misdemeanors" mandate removal? What due process and standard of proof are constitutionally required in order to convict?

These questions need to be clarified by Congress before this matter reappears. There is great danger in allowing disagreement on these aspects that comprise the fundament of the impeachment process. Further, it is bad policy to allow the process to be shaped and defined during the great passion and division of a trial. What was apparent in the Clinton impeachment, by the strict partisanship of the votes and arguments given by each side, is that politics guides constitutional interpretation in these matters. Congress needs to reexamine and redefine our impeachment process outside of the trial context, where the nature of the process can be coolly deliberated. The words of the debate can replace the vagaries of the Constitutional Convention and past English and American precedent.

If Congress does not take such action, we will be leaving ourselves exposed to the possibility of a true constitutional crisis. A situation could easily arise when a substantial disagreement in process or standard results in the constitutionality and, therefore, the legitimacy of an impeachment, being disputed by senators, pundits, and perhaps even a president who refuses to leave office. This Comment attempts to outline the current areas of disputed interpretation and explain which areas need to be redefined in order to allow discretion where prudent but to eliminate it where it is not.

Part I of this Comment analyzes the dispute over the scope of impeachment, focusing on the meaning of the phrase "high crimes and misdemeanors" and whether it in fact defines the full range of impeachable offenses. Part II discusses whether the same standard of required behavior applies to all impeachable offenses. Part III analyzes the question of whether guilt of "high crimes and misdemeanors" mandates removal. Part IV discusses the range of permissible punishments for the impeached. Part V examines whether there is a constitutionally required standard of proof and due process for impeachment trials. Part VI concludes with a discussion of the danger inherent in leaving certain aspects of the process open to widely varying interpretation, and describes some areas that are better left with open texture and subject to each senator's individual discretion.

claims regarding the procedural propriety of impeachment trials were nonjusticiable. *See id.* at 235-39.

I. THE SCOPE OF IMPEACHMENT

Much of the substance of the Clinton impeachment debate revolved around the proper scope of impeachment and, specifically, what constitutes impeachable offenses. There are two very different readings of the Constitution in this regard. The first maintains that a president can only be impeached upon conviction for "high crimes and misdemeanors." There is a significant split within this camp about what constitutes a "high crime and misdemeanor," which will be discussed *infra*. The second reading, which was put forth by Professor Isenbergh of the University of Chicago,³ maintains that the Constitution requires removal for high crimes and misdemeanors but allows impeachment for a wide variety of offenses.

A. A President Can Only Be Impeached for High Crimes and Misdemeanors

Even if one accepts the conventional reading of the Constitution, that a president can only be impeached upon conviction of "high crimes and misdemeanors," there is still considerable dispute regarding exactly what sort of offense constitutes a high crime or misdemeanor.⁴ The Framers' debates were quite brief and less than precise in this regard, and commentators and senators appear to be able to string together enough fragmentary quotes from the debates and subsequent analysis to give credibility to almost any position.⁵ Two mainstream views have surfaced, however, which are referred to as the "narrow" reading and the "broad" reading of high crimes and misdemeanors.

³ See Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process* (last modified Dec. 31, 1998) <<http://www.law.uchicago.edu/Publications>>.

⁴ See generally, Philip Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 668 (1969) (commenting that "when it comes to defining 'high crimes and misdemeanors' no one should claim certainty"); see also RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 5 (1973) [hereinafter BERGER, *CONSTITUTIONAL PROBLEMS*]; Raoul Berger, *Impeachment for "High Crimes and Misdemeanors,"* 44 S. CAL. L. REV. 395 (1971) [hereinafter Berger, *High Crimes*]; Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1 (1989) [hereinafter Gerhardt, *Constitutional Limits*]; Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 716 (1987).

⁵ See Gerhardt, *Constitutional Limits*, *supra* note 4, at 4-6. Gerhardt notes that the scholarship on impeachment tends to be "unenlightening and unimpressive," owing in part to the fact that the impeachment clauses defy systematic analysis because the process is so political by nature. *Id.* at 5. Commentators, he argues, appear to let their political biases lead them to whatever interpretation of convenience they choose, and there is enough ambiguity in the Framers' debates to justify their wide range of conclusions. See *id.* at 7; see also BERGER, *CONSTITUTIONAL PROBLEMS*, *supra* note 4, at 5 (defending the narrow reading of high crimes and misdemeanors through historical analysis); Rotunda, *supra* note 4, at 721-28 (arguing that impeachable offenses have no legal limits but should be limited to "serious" offenses).

1. *The Narrow Reading of High Crimes and Misdemeanors*

The narrow reading of “high crimes and misdemeanors” appears to be the most common among legal scholars and senators.⁶ Their view is essentially that the phrase “high crimes and misdemeanors” was incorporated in order to set a very high bar for the Senate to have to hurdle in order to impeach a president.⁷ Their position is based more in advocacy of protecting the raw structural power of the executive branch rather than preserving the integrity, dignity, or moral authority of the Office of the Presidency. In his remarks before the Senate, White House Counsel Charles Ruff described the “narrow” reading and the high standard it requires as

a standard that the framers intentionally set at this extraordinarily high level to ensure that only the most serious offenses and in particular those that subverted our system of government would justify overturning a popular election. Impeachment is not a remedy for private wrongs. It is a method of removing someone whose continued presence in office would cause grave danger to the Nation.⁸

Similarly, following his vote to acquit Mr. Clinton, Senator Kent Conrad of North Dakota explained that impeachment requires “great and public offenses” that directly serve to “bring our commonwealth into danger.”⁹

There is ample support for such a reading in the debates of the Framers and the structure of the Constitution. A number of delegates to the Constitutional Convention opposed the notion of vesting an impeachment power in the legislature in any form.¹⁰ Others supported the notion of impeachment only for situations in which “great crimes were committed” against the state, or to guard against “tyranny and oppression.”¹¹

⁶ This is based on the author’s own observations of opinion in the popular media as well as the scholarship that continues to develop in this hot area of late. Also, over 400 historians and legal scholars signed a letter that supported the narrow reading with respect to the Clinton impeachment. Among those to sign the letter included Arthur M. Schlesinger, Stephen Ambrose and C. Vann Woodward. See 145 Cong. Rec. S486 (daily ed. Jan. 19, 1999) (statement of White House Counsel Charles Ruff).

⁷ See BERGER, *CONSTITUTIONAL PROBLEMS*, *supra* note 4, at 61.

⁸ 145 CONG. REC. S486 (daily ed. Jan. 19, 1999) (statement of White House Counsel Charles Ruff).

⁹ *Senators Offer Some Reasons for Their Decisions in Clinton’s Trial*, THE N.Y. TIMES ON THE WEB, at 4 (Feb. 13, 1999) <<http://www.nytimes.com/library/politics/021399impeach-text.html>>.

¹⁰ See Daniel H. Pollitt, *Sex in the Oval Office and Cover-Up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259, 263 (1998) (explaining that a number of delegates believed that such a power would interfere with the independence of the executive branch and that the electors could remove an unfit magistrate upon the expiration of his term of office).

¹¹ *Id.* at 264, 265.

Further, support for the narrow reading can arguably be found in the structure of the Constitution as well.¹² The numerous references to crime and punishment in the Constitution are argued to represent an attempt to limit the bases for impeachment to criminal conduct and, thus, prevent the misuse of power.¹³

Proponents of the narrow reading tend to restrict their examination to the objective elements of a crime. Their focus is on whether a crime was directed against the state, or an attempt to subvert the Constitution, or a "great" or "serious" offense. For instance, Raoul Berger explains that the critical element in distinguishing an offense as a "high crime" is the presence of an injury to the state.¹⁴ His understanding of impeachable offenses does not include any private misconduct outside of office, and draws a distinction between a lower standard for impeachment of lesser officials and a higher bar for impeaching a president.¹⁵ The narrow reading appears to place little or no weight on the subjective elements of an offense, including how the offense reflects upon the qualities of the executive, or tends to prove a degree of recklessness, negligence, or disrespect for the law as to make him unfit to continue in office.¹⁶ A fair assessment of the Clinton impeachment and subsequent acquittal is that the narrow reading of high crimes and misdemeanors was endorsed, but given the totality of its uniquely bizarre circumstances one should expect that this reading will not be given a tremendous amount of deference in any subsequent impeachment process.

2. *The Broad Reading of High Crimes and Misdemeanors*

Those subscribing to the broad reading of "high crimes and misdemeanors" tend to focus less on the need for strict separation of powers and more on the necessity of preserving the integrity of the Office of the Presidency, the government itself and the sanctity of the rule of law.¹⁷ Their focus is on their belief that impeachment is a decidedly political process, entrusted to the legislative branch without

¹² See, e.g., IRVING BRANT, *IMPEACHMENT: TRIAL AND ERRORS* 3-23 (1972) (defending the narrow reading of high crimes and misdemeanors by examining the structure of the Constitution and its numerous references to crime and punishment).

¹³ See *id.* at 18-23.

¹⁴ See BERGER, *CONSTITUTIONAL PROBLEMS*, *supra* note 4, at 61.

¹⁵ See *id.* at 88-93, 196-97.

¹⁶ This was essentially the position taken by those driving the impeachment proceedings against Mr. Clinton. Their argument was that lying under oath, obstruction of justice, and witness tampering by Mr. Clinton were charges that, despite being committed in his personal capacity, rather than as the President qua President, showed contempt for the rule of law and were incompatible with his continuation as President. See 145 CONG. REC. S285 (daily ed. Jan. 16, 1999) (statement of House Manager Buyer); 145 Cong. Rec. S292 (daily ed. Jan. 16, 1999) (statement of House Manager Canady).

¹⁷ See, e.g., GERHARDT, *FEDERAL IMPEACHMENT PROCESS*, *supra* note 1, at 106-07.

any external check or balance, and not subject to judicial review.¹⁸ Its purpose, they maintain, is to function more as a cleansing process in order to maintain civic hygiene, rather than provide a power of last resort, available only when the nation faces "grave danger" from a corrupt magistrate.¹⁹

Prior to the drafting and ratification of the Constitution, impeachment was considered to be a political proceeding, and impeachable offenses were political crimes.²⁰ For an offense to be considered a "high crime," it had to cause an injury to the state.²¹ The inclusion of this phrase by the Framers was one of careful and considered deliberation, and it was intended to expand the scope of impeachable conduct to political offenses that cause injury to the state "in its political character" and tarnish the integrity of the office by "breaching the public's trust."²²

The scope of offenses that can be properly considered "political crimes" or "breaches of the public trust" is not easily determined. While involved in the impeachment proceedings against Supreme Court Justice William O. Douglas, then House Majority Leader Gerald R. Ford argued that an impeachable offense "is whatever a majority of the House [considers it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office."²³ Many commentators have criticized Ford's statement on the grounds that it completely ignores the role of history, precedent, and the text of the Constitution and instead relies solely on political motivations and resolutions.²⁴ However, Professor Michael Gerhardt has explained that Ford's statement may actually capture the practical reality of the impeachment process more accurately than his critics' allegedly impartial analyses suggest.²⁵ Despite the fact that it maintains the trappings of a legal proceeding, the im-

¹⁸ See *id.*

¹⁹ See 145 CONG. REC. S295 (daily ed. Jan. 16, 1999) (statement of House Manager Canady).

²⁰ See GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 103.

²¹ For instance, Raoul Berger determined that the English defined "high crimes and misdemeanors" as a category of political crimes against the state. Berger included quotations from relevant periods where the terms "political" and "against the state" were used interchangeably in identifying the relevant characteristics of an impeachable offense. See BERGER, CONSTITUTIONAL PROBLEMS, *supra* note 4, at 263-64.

²² HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 26 (Comm. Print 1974). The focus of the Committee Report was to establish that impeachment could be based on nonindictable conduct.

²³ 116 CONG. REC. 11,913 (daily ed. Apr. 15, 1973) (statement of Rep. Ford).

²⁴ See GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 103 n.2 (citing articles that criticize Ford's statement by analyzing failed attempts at impeachment that were politically motivated).

²⁵ See GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1 at 103; Gerhardt, *Constitutional Limits*, *supra* note 4, at 82.

peachment process is designed to deal with political offenses through political mechanisms. Ford's statement resulted in a number of attempts to circumscribe the ambit of impeachable offenses in order to limit the influence of politics in beginning or carrying on an impeachment.²⁶ Yet, the process remains as designed by the founders, because the role of political factors is so central to the essence of the mechanism that it can not and should not be reduced without changing the utility and purpose behind the process.

The understanding that impeachment was a political proceeding warranted by offenses that were political in nature was argued and adopted by both the ratifiers of and the delegates to the Constitutional Convention.²⁷ The delegates drew on centuries of practice in England where, as in colonial America, the impeachment process was primarily a political one.²⁸ For instance, Professor Michael Gerhardt explains that in the state ratification conventions, the delegates frequently explained that impeachment should be used as a remedy where an official "deviates from his duty" or if he "dare[s] to abuse the power vested in him by the people."²⁹

Gerhardt continues that a similar understanding was included in *The Federalist* by Alexander Hamilton, who wrote that impeachable offenses were those "which proceed from the misconduct of public men, or, in other words, from the abuse of some public trust. They are of a nature which may with particular propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."³⁰ James Madison concurred in this understanding, stating that impeachment was "indispensable" to protect the state from the "incapacity, negligence or perfidy of the chief Magistrate."³¹ Madison's choice of the word "negligence" especially does not seem to comport with the narrow understanding of high crimes and misdemeanors.

Further, Justices James Wilson and Joseph Story appear to express similar views to Hamilton and Madison in their writings.³² Story wrote:

[t]he jurisdiction is to be exercised over offences, which are committed by public men in violation of their public trust and duties. Those duties are, in many cases, political

²⁶ See Gerhardt, *Constitutional Limits*, *supra* note 4, at 82.

²⁷ See *id.* at 84 (citing Arthur Bestor, *Impeachment*, Book Review, 49 WASH. L. REV. 255, 266 (1973) (reviewing RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973)).

²⁸ See GERHARDT, *FEDERAL IMPEACHMENT PROCESS*, *supra* note 1, at 104.

²⁹ *Id.* at 105 (quoting 2 THE DEBATES OF THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 47 (J. Elliot ed., 1836)).

³⁰ THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³¹ THE RECORDS OF THE FEDERAL CONVENTION 66 (Max Farrand ed., 1911).

³² See GERHARDT, *FEDERAL IMPEACHMENT PROCESS*, *supra* note 1, at 105.

Strictly speaking, then, the power partakes of a political character, as it respects injuries to society in its political character.³³

Story also viewed the penalties of removal and disqualification as more of a cleansing process, or civic hygiene.³⁴ Impeachment is not a criminal trial; imprisonment or fines can not result from conviction by the Senate, as sanctions may not extend beyond removal and disqualification. Story stated that this limiting of the range of "punishment to such modes of redress, as are peculiarly fit for a political tribunal to administer," would serve to "secure the public against political injuries."³⁵

This analysis imputes a very different purpose behind impeachment. It describes a mechanism whereby the Congress, for good cause, can remove a president who has proven himself dangerous, reckless, unfit or incapacitated to hold the most powerful office in the federal government. Impeachment, according to the broad reading proponents, is a mechanism of civic hygiene, whereby an unfit executive whose actions damage the integrity and worth of our highest office shall be removed.

The House Judiciary Committee examined the history of American federal impeachment proceedings in 1974.³⁶ A report defining three broad categories of impeachable offenses emerged. The first involved exceeding or abusing the constitutional limits on the powers of the office in derogation of the powers of another branch of government.³⁷ The second focused on behavior that is grossly incompatible with the proper function and purpose of the office.³⁸ The third included using the power of the office for an improper purpose or for personal gain.³⁹ The breadth of these categories is telling in terms of the difficulty in defining a range of impeachable offenses. As discussed above, "high crimes and misdemeanors" are not limited to indictable crimes, but it is in defining the nonindictable or purely political offenses that one encounters serious difficulty.

Justice Story believed, similarly to Hamilton, that "political offenses are of so various and complex a character, so utterly incapable of being defined or classified, that the task of positive legislation

³³ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 385, at 272-73 (Ronald Rotunda & John Nowak eds., 1987).

³⁴ See GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 87 (arguing that a president "may be impeached and removed for lacking the minimal level of integrity and judgment sufficient to discharge the responsibilities of the office").

³⁵ STORY, *supra* note 33, at § 385 at 272-73.

³⁶ HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 26 (Comm. Print 1974).

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

would be impracticable, if it were not almost absurd to attempt it.”⁴⁰ Thus, Story believed that impeachable offenses would have to be defined on an ad hoc basis.⁴¹ The conventional wisdom that has developed from a meager and often confusing body of precedent, questionable legal scholarship, and conclusions drawn from the apocryphal debates of the Framers is that not all impeachable offenses are crimes, and not all crimes are political offenses.⁴²

In determining which offenses are impeachable, and why they are so, the broad reading proponents examine the true purpose behind the impeachment clause. Professor Gerhardt argues that violations of some criminal statutes might be considered abuses against the state sufficient to trigger the impeachment process if the “offenses involved demonstrate serious lack of judgment or disdain for the law and their commission lowers respect for the office.”⁴³ That is, if Congress considers an alleged crime to reflect an egregious lack of judgment, breach of the public trust, and disregard for the integrity of the office, that offense would be impeachable.⁴⁴ It is clear that not all crimes would warrant impeachment; jaywalking or speeding are examples of technical violations of statutes that contain neither the gravity of a high crime against the state nor would they show such a lack of judgement as to warrant removal from office.⁴⁵ The full range of political crimes defies specification because both their gravity and their reflection on the fitness of the perpetrator are determined by the totality of the circumstances of the act, the political reality of the moment and the political judgement of the Congress.⁴⁶

The well respected report on the “Law of Presidential Impeachment,” prepared by the Association of the Bar of the City of New York in 1974, summarized the proper range of offenses that warrant impeachment and removal.⁴⁷ It explained that the grounds for removal were not limited to crimes, but extended to

acts which undermine the integrity of the office In our view, the essential nexus to damaging the integrity of government may be found in acts which constitute corruption in, or flagrant abuse of the powers of, official position. It may

⁴⁰ STORY, *supra* note 33, § 405, at 288.

⁴¹ *See id.*

⁴² *See* GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 104 (explaining that “the debates at the constitutional convention show at least that impeachable offenses were not limited to indictable offenses On the other hand, not all statutory crimes demonstrate unfitness for office”).

⁴³ GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 106.

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, LAW OF PRESIDENTIAL IMPEACHMENT 18-19 (1974).

also be found in acts which, without directly affecting governmental processes, undermine the degree of public confidence in the probity of executive and judicial officers that is essential to the effectiveness of government in a free society.⁴⁸

For both the narrow and broad reading, a problem exists regarding how to include serious private misdeeds into the category of high crimes and misdemeanors. Consider, for instance, this reasonable but strained logic from Professor Gerhardt:

Yet, it is easy to imagine that a president who murdered someone in a jealous rage committed an impeachable offense [and hence, a high crime according to Gerhardt]. Even if such a crime were unrelated to the president's constitutional duties, his criminal act cheapens the presidency, destroys his credibility with the other branches (and other nations, for that matter), and shows such a lack of respect for human life and disdain for the law (which he is sworn to enforce faithfully) that Congress could conclude that he had seriously abused his trust and no longer deserved to hold office.⁴⁹

There is very little doubt that Professor Gerhardt's ultimate conclusion is correct; murder is an impeachable offense. Yet, when analyzing his argument in light of the traditional definition of "high crimes," the metaphor of a square peg and a round hole comes to mind. His rationale that murder by a president is an act deserving impeachment because it indirectly "cheapens the presidency" and "destroys his credibility with other nations," is sound, but does that then mean it is a high crime or misdemeanor? This, in turn, raises the question of whether it is possible that a crime may be impeachable without being a high crime or misdemeanor.

B. *The Isenbergh Thesis*

In an effort to explain how such divergent understandings of impeachable offenses and appropriate punishments have developed from our history and constitutional interpretation, Professor Joseph Isenbergh has posited that nearly everyone, including those in the broad reading and narrow reading camps, has made a fundamental error in concluding that impeachable offenses are defined in the Constitution as "Treason, Bribery, or other high Crimes and Misdemeanors."⁵⁰

⁴⁸ *Id.*

⁴⁹ GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 108.

⁵⁰ See Isenbergh, *supra* note 3, at 15 (claiming that "[o]ne has to work quite hard against the text to find in Article II, section 4, a definition of all impeachable offenses rather than a specification of those offenses for which removal is mandatory upon conviction").

According to Professor Isenbergh, this provision has long been understood by proponents of both the narrow and broad reading as meaning something that it does not say: the listed offenses are the only ones for which a president can be impeached and removed.⁵¹ In a well-reasoned exposition of the language and history of the Constitution and the Framers' intent, Professor Isenbergh reinterprets the impeachment clauses in a manner that resolves much of the dispute regarding the scope of impeachable offenses.⁵²

It is possible, he explains, that the two camps are both right and wrong regarding the scope of impeachment. As the proponents of the narrow reading argue, "high Crimes and Misdemeanors" are a narrowly defined set of crimes against the state.⁵³ By examining the relevant history and the Founders' debates, Isenbergh demonstrates that the word "high," when attached to "crime" or "misdemeanor," was well known to lawyers in 1787, including the Founders, as "aiming at the state or the sovereign rather than a private person."⁵⁴ He persuasively cites Blackstone, Coke and cases dating back to the Middle Ages to support this understanding.⁵⁵ There is evidence that the Framers intended the phrase to be read narrowly. In fact, as Isenbergh explains, the Convention originally adopted the phrase "high crimes and misdemeanors against the State."⁵⁶ The phrase "against the State" was then replaced by "against the United States" to remove "ambiguity," before being removed altogether and without explanation by the Committee on Style.⁵⁷ Isenbergh posits that the Committee on Style, which was not authorized to make any substantive changes in meaning, eliminated the phrase because it was redundant when included in the same clause with "high."⁵⁸

Isenbergh's reading, and thus the narrow reading, is buttressed by traditional canons of statutory interpretation. The words "or other high Crimes and Misdemeanors" are *noscitur a sociis* ("known by their associates"). Light may be shed on the meaning of ambiguous words by reference to the words associated with them.⁵⁹ The words "high Crimes and Misdemeanors" are *ejusdem generis* ("of the same kind") as treason and bribery. Therefore, in interpreting this phrase, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only crimes similar

⁵¹ See *id.*

⁵² See *id.* at 25-29.

⁵³ See *supra* note 14 and accompanying text.

⁵⁴ *Id.* at 20.

⁵⁵ See *id.* at 20-22.

⁵⁶ *Id.* at 22 (citing THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1937)).

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See WILLIAM FARBER & PHILIP FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND CREATIVE PUBLIC POLICY 637 (1995).

in nature to those crimes enumerated by the preceding specific words. The narrow reading of "high Crimes and Misdemeanors," which only includes offenses against the state, comports with these traditional canons of interpretation.

While Isenbergh endorses the narrow reading of high crimes and misdemeanors, he persuasively argues that the narrow reading proponents are incorrect in their understanding that impeachable offenses are limited to those described in Article IV, Section 2.⁶⁰ By examining the plain meaning of the constitution and the relevant English and colonial precedent, he concludes that impeachable offenses included a wide range of offenses both criminal and non-criminal that did not have to be directed against the state.⁶¹ Instead, those offenses directed against the state require removal from office, while impeachable offenses arising from personal conduct, which do not harm the state or impair its functioning in any meaningful way, may be punished at the discretion of the Senate.⁶²

Isenbergh traces the history of impeachments back to the mid-seventeenth century to conclude that it was understood by the Founders that impeachment was not limited to high crimes and misdemeanors.⁶³ In English and colonial American precedent, impeachment extended to a number of indictable and nonindictable offenses.⁶⁴ Isenbergh cites a 1681 House of Commons resolution that Parliament had the right to impeach "for treason or any other crime or misdemeanor."⁶⁵ And following a thorough historical investigation, Isenbergh was left to conclude that "[i]n the entire body of impeachment cases and commentary in England impeachable offenses are not once held out as congruent with 'high crimes and misdemeanors.'"⁶⁶ The words "high crimes and misdemeanors," Isenbergh claims, lost their meaning over time as they began to be used as jurisdictional formalities in any article of impeachment irrespective of whether high crimes and misdemeanors were alleged.⁶⁷ Thus, the words became mere incantations without independent meaning.

So, if one accepts the Isenbergh thesis, that a president may be impeached for a wide range of offenses but that there are some offenses for which removal is mandated, the dispute between the narrow and broad reading camps can be abated. Article II, Section 4 refers only

⁶⁰ See Isenbergh, *supra* note 3, at 22.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.* at 27 n.68 (referring to a number of English impeachments involving convictions for such offenses as "frequent and notorious excesses and debaucheries," and losing a ship to carelessness).

⁶⁵ *Id.* at 27.

⁶⁶ *Id.* at 28.

⁶⁷ See *id.* at 29.

to crimes against the state, but it does not define or in any respect limit impeachable offenses.⁶⁸ Isenbergh explains that when the Founders granted the power to impeach and set the vote standard in Article I, Section 3, they felt no need to circumscribe an impeachable set of offenses because impeachment had a clear meaning to them.⁶⁹ But the narrow and the broad reading of high crimes and misdemeanors both have support in the text and the Framers' debates, and this question will not be resolved by historians, commentators or professors. It is a question fundamental to the impeachment process, however, and allowing these varying interpretations to continue could eventually lead to a true constitutional crisis.

While it is impossible and inadvisable to attempt to circumscribe the full ambit of impeachable offenses or "high crimes and misdemeanors," it would be folly for Congress not to adopt a definitive answer to the question of whether only offenses committed by the president qua president or also in his private capacity could be impeachable.⁷⁰ Amazingly, it would be debatable under the current understandings whether a president could be impeached for committing rape or murder. Further, language needs to be adopted to clearly determine whether impeachment is limited to high crimes and misdemeanors or other offenses traditionally considered impeachable in the eighteenth century. Likewise, the question of whether impeachment is a process reserved as a method of last resort to protect the state from abuse by its chief executive or whether civic hygiene and preserving the integrity of the office are *permissible constitutional objectives* of impeachment needs to be resolved. These are questions that go to the fundament of how we define our most crucial governmental office, what level of accountability we require, and how much power and latitude we grant the legislature to remove our head of state. Common sense demands that these interpretations be reworked and brought into consensus.

II. IS THE STANDARD THE SAME FOR ALL IMPEACHABLE OFFICIALS?

A. *The Text—It Depends on What Your Definition of "Good Behaviour" Is*

Article II, Section 4 states that "The President, Vice President and all Civil Officers shall be removed from office on impeachment for, and conviction of Treason, Bribery, and other high Crimes and Mis-

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See, e.g., 145 CONG. REC. S486 (statement of White House Counsel Charles Ruff) (maintaining that "[i]mpeachment is not a remedy for private wrongs" before the Senate during the Clinton impeachment trial).

demeanors.”⁷¹ While it is clear that these provisions apply to judges as well, there is much controversy about whether the Constitution provides another higher standard of behavior for judges.⁷² For instance, many of President Clinton’s defenders attempted to minimize the relevance of the Senate precedent regarding the removal of federal judges by claiming that the Constitution mandates a lower standard for judges.⁷³ Charles Ruff, in his defense of the President before the Senate, argued that the “good behaviour” phrase in the Constitution mandates that judges be held to a higher standard than the President.⁷⁴

There are two possible readings of the statement that federal judges “shall hold their Offices during good Behavior” in Article III, Section One.⁷⁵ The first is that “good behavior” is an eighteenth century term of art incorporated into the Constitution merely to explain the fact that federal judges hold tenure for life and to contrast this with the fixed terms of the president, vice president and members of Congress.⁷⁶ The second and less historically probable reading of the “good behavior” clause is that it establishes a higher standard by which federal judges should be held and, consequently, a looser standard by which they might be impeached.⁷⁷ This reading suggests that “good behavior” provides a second removal standard, as well as a second process in addition to the impeachment proceeding.⁷⁸

The first reading is more widely accepted, and comports with the Founders’ notion of the independence of the judiciary, and their belief that impeachment should be the only means by which the political branches could remove judges. For instance, Alexander Hamilton stated that the “article representing impeachments” in the Constitution was the “only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our Constitution in respect to our own judges.”⁷⁹

Professor Gerhardt persuasively argues that the Founders designed the federal impeachment process to be a cumbersome, deliberate process. Further, the notion that the Founders would devise so awkward and politically dangerous a device for removing some federal officials, including judges, but then also include an undefined additional

⁷¹ U.S. CONST. art. II, § 4.

⁷² See generally, Raoul Berger, *Impeachment of Judges and “Good Behavior” Tenure*, 79 YALE L.J. 1475 (1970) [hereinafter Berger, *Impeachment of Judges*]; John Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1 (1970).

⁷³ See 145 CONG. REC. S487 (daily ed. Jan. 19, 1999) (statement of White House Counsel Charles Ruff).

⁷⁴ See *id.*

⁷⁵ U.S. CONST. art. III, § 1.

⁷⁶ See GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 83.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ *Id.* (citing THE FEDERALIST NO. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

process without the procedural protections of impeachment for removing judges simply defies common sense.⁸⁰ Moreover, why then, if this clearly more efficient process with its higher “good behavior” standard exists, would the Founders have included judges in the Impeachment Clause?

*B. Good Behavior as a Higher Standard
of Comportment for Judges*

There is considerable dispute regarding the good behavior clause and whether it establishes a higher standard of comportment for judges. Throughout the Clinton trial, White House counsel argued that the precedent the Senate had set in convicting and removing three judges for offenses of a similar nature to allegations against Mr. Clinton should not apply.⁸¹ Their argument was based on a reading of the “during good Behaviour” clause in the Constitution as expressly setting a higher standard of comportment for judges or a lower standard required of the president.⁸² The President’s Counsel argued that even if the Senate has repeatedly determined that perjury and obstruction of justice are impeachable offenses warranting removal for judges, these offenses only violate the “good behavior standard” applied to judges rather than “the impeachment standard” applied to other federal officers.⁸³

Their argument, it seems, was not based in solid constitutional theory or history, but in their own conception of the practical implications of the conviction and removal of a sitting president. White House counsel argued that the “standard to which judges must adhere is stricter than the impeachment standard,” and claimed that their rationale was “wholly consistent with the framers’ intent in drafting the impeachment clause” without offering any support from the Framers’ debates.⁸⁴ Yet, one would expect that if the Framers had intended to establish a lower standard of removal for judges, and possibly even a

⁸⁰ See *id.* (explaining that along with Hamilton, the Anti-federalist essayist Brutus argued that the “only causes” for which federal judges could be removed would be impeachable offenses).

⁸¹ See 145 CONG. REC. S487 (daily ed. Jan. 19, 1999) (statement of White House Counsel Charles Ruff) (arguing that judges are held to a different standard than the President).

What, then, of the managers’ argument that the Senate’s recent conviction of three judges requires a conviction on the articles before you today? Again, they simply have it wrong, both as a matter of Senate precedent and as a matter of constitutional analysis . . . [because] judges are different. Indeed, every civil officer other than the President of the United States is different. They are different because before deciding whether to impose the ultimate sanction of removal the Senate must weigh in the balance dramatically different considerations.

Id.

⁸² See *id.*

⁸³ *Id.* at 12.

⁸⁴ *Id.*

process of removal other than impeachment, as this argument implies, there would be some mention of it in their debates. Again, to accept this argument we are left with the conspicuous absence of debate by the Framers, or another “dog that did not bark.” This time it relates to an understanding of the Constitution that would significantly alter the balance of power between the legislature and a judiciary that the Framers by all accounts wanted to keep independent.

Much of the argument put forth by the White House counsel was based on the notion that the Senate was able to hold judges to a stricter standard than the President because the institutional trauma concomitant in removing a president is so much greater than removing only “one of 900 or 1,000 judges with lifetime tenure.”⁸⁵ Further, they argued, a president can be removed by the electorate while judges have life tenure and can only be removed by the Senate.⁸⁶ Certainly, removal of a sitting president is more traumatic to the nation than a single federal judge, but this argument ignores the fact that malfeasance by a sitting president does exponentially more damage to the nation, the rule of law, and our constitutional system than the same offense committed by a single federal judge.⁸⁷

C. *Good Behavior as a Term for Life Tenure and a Standard for Removal*

Professor Isenbergh offers another interpretation of the “during good behavior” phrase in Article III. Isenbergh believes that the “words serve both to give judges life tenure and indicate a standard of removal,” because good behavior is a term of art meaning “to commit no crime.”⁸⁸ The difficulty of reconciling this definition of good behavior with the removal standard of “high crimes” in Article II is nonexistent for Isenbergh; his reading of Article II mandates removal for high crimes but does not preclude impeachment for bad behavior.⁸⁹ Thus, a judge or any other official could be impeached for bad behavior under the traditional conception of impeachable offenses.

The real distinction to be drawn between the executive standard versus that by which federal judges must constitutionally abide has instead to do with the special duties and nature of the particular of-

⁸⁵ *Id.* at 11.

⁸⁶ *See id.*

⁸⁷ What is perhaps most disconcerting about the manner in which Mr. Clinton handled this scandal is the fact that his behavior was so careless and even reckless in the face of intense public scrutiny. If he were a federal judge, the public would never have taken the time or energy required to sift through tawdriness and fecklessness repeatedly displayed in the lies under oath, and the damage to the integrity of the office or the sanctity of the rule of law would have been miniscule by comparison.

⁸⁸ Isenbergh, *supra* note 3, at 31.

⁸⁹ *See id.* at 33.

office.⁹⁰ For instance, a federal judge is in a peculiar position of having to retain at least the appearance of neutrality. As a result, a particularly controversial law review article or comment on the nightly news might completely undo the public's trust in the judge's neutrality and impugn the integrity of the office. For example, if a judge were to state publicly that he believes "that Representative David Bonior is the Antichrist, and that if he ever made it into his courtroom he would make it absolutely certain that he did not walk out a winner," this conduct would probably be impeachable. There is nothing illegal about the statement, but it would probably be considered a "high crime" or misdemeanor regardless, even if there was no evidence of such behavior. In contrast, if a president stated that he considers Representative Bonior to be worse than the Antichrist and would make every effort to make sure that the current bills sponsored by him are never signed into law, he could not be impeached, because neutrality is not central to his office.⁹¹

D. Should a President Be Judged by a Different Standard?

Senator Daniel Patrick Moynihan argued in September of 1998 that we resist ever removing a sitting president in the absence of the highest form of misconduct because it might "destabilize" the Presidency.⁹² Such risk to the Presidency is intolerable, he argues, because the United States has become an "indispensable nation" in geopolitics.⁹³ However, a stronger argument can be made that the continuation in office of a compromised and weakened president whose motives will be questioned in any action by the rest of the world, like Mr. Clinton appears to be, does greater damage to the Presidency than some uncertainty over who will be in office following an impeachment trial.

The "indispensability" of the United States, currently sitting as the world's lone superpower, is undoubted and has been demonstrated by the collapse of Clinton statecraft from North Korea to Iraq during his scandal-induced period of paralysis, which has surpassed one full year as of this writing. The obvious weakness of the United States during this period moved Senator Moynihan to claim that a lower standard of behavior should be required of the president. His position is derived from his belief that there "has to be a commander in chief. You could very readily destabilize the presidency, move to a randomness. That's an institution that has to be stable, not in dispute."⁹⁴

⁹⁰ See GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 107.

⁹¹ *See id.*

⁹² George F. Will, *Shaky "Stability" Theory*, WASHINGTON POST, Dec. 31, 1998, at A17.

⁹³ *Id.*

⁹⁴ *Id.*

Columnist George F. Will explained in response to this statement that while instability is to be feared, we can not allow the notion to take root that for the duration of America's instability, "the Constitution's impeachment clause is a dead letter, too dangerous to act on."⁹⁵

The instability of the Office of the President needs to be guarded against, but it might not come in the form Senator Moynihan warns. Rather, it might result from a compromised, politically impotent president whose guilt and damage is apparent but who nevertheless clings to his office by shrouding himself in the protections it affords. It is precisely the instability of this type of office holder that should be guarded against. The nation is and must be able with uncertainty regarding who will be holding the office in the near future; this sort of uncertainty, or instability as Moynihan calls it, is familiar and hardly unnerving for this republic in its maturity. As George Will points out, "presidents are rarely—very rarely—indispensable. De Gaulle was right. Graveyards (including, since 1970, one at Colombey-les-deux Eglises) are full of indispensable men."⁹⁶ In fact, six of the seven presidencies prior to Clinton's were truncated by either assassination, scandal-induced resignation, failure to seek office or failure to win reelection. In each case, a new president took office, and actually received the benefit of what the pundits call a "honeymoon" with Congress.

As our republic has matured, our federal government has developed such a level of stability that we tend to embrace change.⁹⁷ In the Clinton impeachment, Republicans feared the possibility of this transition politically, and roundly agreed that were Clinton to be removed, Vice President Gore would put the Democrats in a much stronger position politically for the final two years of the current administration. Likewise, it could also have been persuasively argued that as the charges against Mr. Clinton (and his response to them) have caused him to be seen as ridiculous in the world's eyes, his replacement by a new chief executive whose integrity is undamaged

⁹⁵ *Id.* Will went on to explain that the United States was in a much more delicate position during the Nixon impeachment debate. Then, during the height of the Cold War, while American troops were engaged in Southeast Asia, Congress performed its Constitutional duties by beginning impeachment proceedings for Mr. Nixon. Sen. Moynihan's argument certainly would have had more force during this uncertain time in our history, but the result of the impeachment proceedings was not "randomness," but the Ford Administration. *See id.*

⁹⁶ *Id.*

⁹⁷ Our political system is nothing if not stable. For instance, the advantages of federal Congressional incumbency are disturbing; consequently, a major push for term limits for our Congressman has developed over the last decade in an effort to counter some of the entrenchment in national office. In the last 12 elections, the lowest rates of reelection for federal House members running as incumbents were 89% in 1974 and 91% in 1994. *See Don Feder, GOP Term Limits Just a Charade* (visited March 29, 1999) <<http://www.ustermimits.org/research/105th/charade.htm>>. Interestingly, members of the House in the 1980s and 1990s were less likely to lose their seats than members of the old Soviet Communist Party Central Committee. *See id.*

would serve to greatly improve the position of the United States in geopolitical reality.

Despite the above arguments, Moynihan's warning should be heeded, so that the nation can avoid a situation where "a congressional majority began routinely removing presidents, speakers become president, no one knows who is the commander in chief, who is the chief executive officer, and the whole stability of this nation, on which the stability of the world rests, could be seriously and grievously undermined"⁹⁸ This sort of situation is possible, but remains regardless of which standard of impeachment we adopt. The discretion left to Congress will always allow for the possibility of this result. The Framers allowed this discretion but left structural constraints to prevent this sort of madness from overcoming the process. First, an oath is required of the Senators who decide the president's political fate.⁹⁹ Second, a two-thirds majority is required to convict and remove.¹⁰⁰ Third, the Chief Justice must preside over the trial.¹⁰¹ Finally, the political danger of attempting to impeach a sitting president is enormous. During the Clinton impeachment, the Republicans, after sitting as strongly as any point in the past fifty years, lost two Speakers to resignation, several seats in the 1998 elections, and saw its approval rating plummet to its lowest point since the Watergate period of the 1970s. Consequently, the political consequences of an impeachment proceeding are now clearer than they have ever been.

E. The Necessity of Preserving the Office

The Presidency is our most important office.¹⁰² The power of the executive branch is singularly vested in it. If the impeachment process is abused so that an executive who is obviously corrupt is left in office, or if a meritorious president is cast out of office for partisan reasons, the legitimacy of the entire system of government goes with him. The question that needs to be asked before defining the impeachment process is whether the Office of the President needs to be protected more from the Senate's abuse of the impeachment power or the President's own corrupt actions. The necessity of preserving the Office and its unique strength is unquestioned, but how the Office can be protected by the impeachment process needs to be defined in a context removed from the heat of an impeachment trial.

⁹⁸ George F. Will, *supra* note 92, at A17.

⁹⁹ See U.S. CONST. art I, § 3, cl. 6.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See Arthur Selwyn Miller, *Cutting the Presidency Down to Size—But Not Too Much*, 43 GEO. WASH. L. REV. 403, 405 (1973) (explaining that "the president wears many hats—Head of State, Chief Executive, Minister of Foreign Affairs, Chief Legislator, Head of the Party, Tribune of the People, Ultimate Arbiter of Social Justice, Guardian of Economic Prosperity, and World Leader of Western Civilization").

The lesson to be learned from the Clinton and Nixon impeachments is the damage to the country a protracted period of uncertainty can cause. During the thirteen-month investigation of Mr. Clinton by the Office of the Independent Counsel ("OIC") and trial by the Senate, there was an unsettling amount of artillery exchanged between the OIC and the executive branch.¹⁰³ More importantly, the motivation behind major foreign policy actions was seriously called into question.

One day before the Clinton impeachment proceedings were to begin in the full House, Mr. Clinton ordered the bombing of Iraq.¹⁰⁴ Following the first day of bombing, A.M. Rosenthal of the *New York Times* wrote:

The loss in credibility [to the President] earned with his quick decision to attack Iraq, although his impeachment was likely the next day, will dilute the chances of lasting victory over Saddam Hussein. He created two obstacles to eliminating Saddam—a mountain of cynicism, and another of disbelief But Mr. Clinton took the risk that his timing would create disbelief in America and help Saddam become even more popular in the Mideast. Palestinians in pro-Saddam ecstasy are already burning U.S. flags they waved for the President a few days ago. Mr. Clinton is given to strange risks—as when he gambled the Presidency for office sex. . . . Until Mr. Clinton ordered the attack on Iraq the day before the scheduled impeachment vote, his departure was a dispute about morality, the Constitution, and politics. Now something dangerous has been added: how much damage his continuation as President does to American military and security interests, jargon for life and death.¹⁰⁵

During the two years of the Nixon impeachment fiasco, similar problems and questions arose. In the aftermath, Hans Linde wrote that the extended investigation and political battles had left the country at a standstill:

It is no way to conduct a government. During our recent wallow in Watergate the nation also faced, or failed to face, the consequences of the 1973 Middle East war, the oil crisis, steep inflation, agricultural and other economic dislocation, deteriorating prospects for strategic arms limitation, and armed conflict between two NATO allies in Cyprus

¹⁰³ See WILLIAM BENNETT, *THE DEATH OF OUTRAGE: THE CLINTON PRESIDENCY AND THE ASSAULT ON AMERICAN IDEALS* 75 (1998) (quoting some of the harsh language and epithets directed at Independent Counsel Starr during the investigation of President Clinton).

¹⁰⁴ See A.M. Rosenthal, *What Clinton Can Do*, N.Y. TIMES, Dec. 18, 1998, at A35.

¹⁰⁵ *Id.*

Worse, the time span of impeachment proceedings may present tempting opportunities to make the duty to rally the beleaguered executive seem greater, as some expected the armed forces alert called on October 25, 1973 was designed to do. The inevitable political skepticism during such a period, in turn, may make a genuine emergency doubly dangerous. Even without military undertones, it is hardly unexpected to find claims of presidential foreign policy indispensability shamelessly thrust into the forefront of the political crisis¹⁰⁶

Again, regardless of which position is ultimately adopted by the Congress, there is no good reason for allowing different readings of such a simple clause of the Constitution to exist. The Presidency is simply too crucial of an Office to allow protracted periods of uncertainty to develop. When, due to unclear standards and intragovernmental battling the nation is left at a *de facto interregnum*, the entire world could stand imperiled. As it stands, we are unsure what standard is required of our president. Were a crisis involving some level of executive wrongdoing to develop, the nation would need to endure a period of uncertainty as first the facts of the allegations were developed and then the standard of required behavior was also reexamined. Uncertainty would exist regarding whether any of our precedent involving impeachment of judges or other lesser officials applies and also whether exigent circumstances in geopolitics would militate against removal. To remove at least some of this uncertainty, Congress should adopt a uniform interpretation of these clauses and establish, at a minimum, what language describes the standard of behavior for our federal officials. Until this action is taken, most of the common-law precedent developed in two hundred years of impeachments is suspect.

III. DOES CONVICTION MANDATE REMOVAL?

Among the most troubling aspects of the variance in interpretations is the confusion over whether the Constitution mandates removal for the commission of treason, bribery, or other high crimes and misdemeanors. The conventional wisdom is that removal is not mandatory.¹⁰⁷ Rather, the deliberation a senator must go through ties together conviction and removal, so that a president, though guilty of

¹⁰⁶ Hans Linde, *Replacing a President: Prescription for a 21st Century Watergate*, 43 GEO. WASH. L. REV. 384, 388-89 (1975) (arguing for replacing the impeachment process with a vote of confidence).

¹⁰⁷ The commission of a crime against the state is not currently considered to mandate removal. Instead, some secondary considerations are weighed in determining whether to convict and remove. *See, e.g., infra* note 109 and accompanying text (citing Sen. Byrd); *see also infra* note 149 (quoting Sen. Collins).

high crimes and misdemeanors, will not be convicted if one-third of the Senate does not think it would be good for the country to remove him.¹⁰⁸ Following the debate in and out of the Senate during the Clinton impeachment, it appeared that a majority of the Clinton defenders held this view, or at least seemed to support it out of political exegesis. Senator Robert Byrd, who has achieved emeritus status for his knowledge of Senate history and constitutional process, was the lone senator to admit that he in fact believed that President Clinton was guilty of high crimes and misdemeanors but that he decided to acquit because it would be in the best interest of the country to avoid removal and because of the rift it would cause.¹⁰⁹

It is difficult to determine exactly how many senators subscribed to this view. The line the Clinton defenders put out collectively is that their votes were either based on their belief that the crimes alleged against Mr. Clinton were not proven or because the crimes alleged did not rise to the level of high crimes and misdemeanors.¹¹⁰ While these views arguably are reasonable, it is unreasonable to assume that nearly every Democrat in the House and Senate believed either that Mr. Clinton was innocent or that criminal obstruction of justice and serial perjury in federal court were not high crimes and misdemeanors. Instead, the inescapable conclusion is that a large percentage of Clinton's defenders in Congress agreed with Senator Byrd. This conclusion is buttressed by the fact that many of the same Senators who voted to convict and remove Judge Walter Nixon for the high crime of lying under oath on his taxes did not vote the same way in the Clinton impeachment.¹¹¹

The Byrd analysis runs directly counter to the Isenbergh reading of Article II, Section 4 as mandating removal for high crimes and misdemeanors.¹¹² The Isenbergh reading is supported by a number of factors, both textual and prudential. As Isenbergh points out, the word "shall" in the phrase "shall be removed" in Article II, Section 4 should be read to mean that a president's removal is mandatory if he is guilty of high crimes and misdemeanors.¹¹³ The word "shall," he writes, "has imperative force everywhere in the Constitution when it occurs in an independent clause."¹¹⁴ Isenbergh's reading is supported

¹⁰⁸ See Gerhardt, *Constitutional Limits*, *supra* note 4, at 92 (arguing that the real question in an impeachment inquiry is not simply whether a high crime was committed, but rather "the critical question is often whether the President has the capacity, integrity, or competency to continue to occupy the office").

¹⁰⁹ See Robert Novak, *Why Dems Blindly Backed Clinton*, CHICAGO SUN-TIMES, Feb. 15, 1999, at A27.

¹¹⁰ See *id.*; see also *Senators Offer Some Reasons for Their Decisions in Clinton's Trial*, N.Y. TIMES, *supra* note 9, at 3-8.

¹¹¹ See Pollitt, *supra* note 10, at 276.

¹¹² See Isenbergh, *supra* note 3, at 15 n.28.

¹¹³ See *id.*

¹¹⁴ *Id.*

by the fact that when the Framers meant to provide discretion in the Constitution, they did so with a number of phrases absent in Article II, Section 4. For instance, the word “may” is used repeatedly to vest a power that Congress or the executive may or may not choose to use. Likewise, the word “shall” is modified to grant discretion by either the phrase “whenever two thirds of both Houses deem it necessary,”¹¹⁵ or the words “have the power to” when the Framers meant to allow for discretion rather than creating an absolute imperative of action as the word “shall” does when it stands alone in an independent clause.

The language in Article I, Section 3 contains no such imperative and creates no duty. Rather, it is a general grant of discretionary power, with a description of the process and mandatory safeguards to keep the power of impeachment from being used capriciously. It provides a minimum vote standard and some limiting language regarding the punishments that can be meted out to the impeached. This section clearly does not mandate that the Senate impeach those who have committed impeachable offenses, and consequently, Senators have never felt a constitutional duty to do so.¹¹⁶ This does not affect the meaning of the impeachment language in Article II, Section 4, however, because the mandatory language there refers only to high crimes and misdemeanors.

Beyond the text, there are prudential reasons why the impeachment language in Article I, Section 2 should be read as discretionary while Article II, section 4 should be read as mandatory. First, impeachment is available as a remedy for impeachable offenses, which as a class are nearly limitless and impossible to define. Second, if removal were required for any impeachable offense, Congress, and especially the Senate, would be able to avoid much of the intended political accountability that was designed to constrain the power of the legislature’s impeachment power over the executive and legislative branches. If they could identify any infraction that fell within the broad ambit of impeachable offenses, they could then claim that

¹¹⁵ U.S. CONST. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . .”). The Constitution grants Congress the discretion to propose amendments or to not propose amendments; there is no imperative and hence no duty to propose amendments or to convene for such purposes. Absent the modifying “whenever two thirds of both Houses shall deem it necessary” clause, Congress would be under an affirmative duty to propose amendments at designed intervals. Thus, in Article II, Section 3, where “shall” is not followed by the modifying “whenever two thirds shall deem it necessary” phrase, an imperative is given to the executive requiring him to give a State of the Union report. Likewise, in Article II, Section 2, the language grants the president discretion in that “he shall have Power to grant Reprieves and Pardons for Offenses against the United States, Except in Cases of Impeachment.” Again, the president is not required to grant any pardons, but he is given the discretion to do so.

¹¹⁶ See Isenbergh, *supra* note 3, at 14.

the Constitution required the President's removal and no blame could fall on them.

This is perhaps one of the most dangerous and bizarre ambiguities in the impeachment process. The situation could arise, under our current system, where a separate vote for conviction and removal takes place, and some senators who voted to convict would refuse to take part in the removal vote on the grounds that it is unconstitutional because the president has already been removed. If the removal vote then failed, what would be the result? Would the conviction vote then be rescinded? Common sense dictates that Congress clear up these questions by adopting a uniform interpretation.

IV. WHAT IS THE RANGE OF PUNISHMENTS FOR THE IMPEACHED?

A. *The Text*

Here again, there is great dispute about a relatively simple clause of the Constitution, and there is simply no good reason for allowing it to persist. The language of the Constitution in Article I, Section 3 states that judgement in cases of impeachment "shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."¹¹⁷ The view of the majority of the Senate as well as the majority of commentators is that removal and disqualification are the *only* punishments available to the Senate.¹¹⁸ This view has become generally accepted, and articles of impeachment that begin in the House end with a call that the president be convicted and removed. In the Clinton impeachment, much of the debate about censure focused on its use as a substitute for, rather than a punishment after, an impeachment and trial. Censure resolutions are viewed as extra-constitutional, neither provided for nor prohibited by the text of the Constitution.¹¹⁹ As such, it would not necessarily have the same procedural safeguards as the impeachment process, and its potential for abusing our separation of powers causes wariness in many commentators and senators.¹²⁰

¹¹⁷ U.S. CONST. art. I, § 3.

¹¹⁸ See, e.g., GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 78; David Broder, *Don't Hide Behind Censure*, WASHINGTON POST, Feb. 9, 1999, at A17 (arguing that a post-trial censure resolution is unconstitutional because "[o]nce the votes have been cast, the constitutional process is over. The House and the Senate have discharged their responsibilities . . . [T]here is no sanction for [censure] in the Constitution, and the precedents have been terrible").

¹¹⁹ See Broder, *supra* note 118, at A17 (quoting Sen. Collins and Sen. Rockefeller, both of whom advocated a bipartisan censure resolution following the Senate trial).

¹²⁰ See *id.* (explaining that "[Sen.] Gramm also argued, as I have, that once censure enters the armory of congressional punishments, the separation of powers is eviscerated . . .").

No one in the Clinton trial proposed the idea that the President could be impeached, convicted and then censured, rather than removed from office. Toward the end of the trial, however, the Isenbergh thesis began to garner some consideration in this regard.¹²¹ Professor Isenbergh cites the fact that the English and American colonial history and precedent of impeachment up to and shortly after 1787 allowed a great range of punishments following impeachment and conviction. These penalties ranged from "temporary suspension from preaching" to "hanging, drawing and quartering."¹²²

While the debates of the Founders do not offer much to support this reading, they certainly offer little to foreclose its viability either. Much of the debate is equivocal, and it is often unclear whether the terms "high crimes" and "impeachable offenses" are being used synonymously or not.¹²³ What is clear from the debates is that this issue was not explicitly discussed one way or the other. The absence of meaningful debate then creates a presumption that no understanding other than the common one was developed or intended. As this issue appears to be a "dog that did not bark" in the Founders' debates, the natural assumption is that there was no intent to break from relevant history and practice to limit the range of punishments for impeachment to only removal and disqualification.

Moreover, this understanding is reflected in the text; Isenbergh argues that if the Founders had intended to limit punishments *only* to removal and disqualification they would have used the word "only," as they did elsewhere.¹²⁴ He cites Article III, Section 3 where the Founders wrote that treason against the United States "shall consist only in levying War against them, or in adhering to their Enemies, giving Them Aid and Comfort."¹²⁵

To further support his argument, Prof. Isenbergh examines the impeachment and trial of Justice John Pickering in 1804.¹²⁶ Pickering was impeached for drunkenness.¹²⁷ When the trial came down to a vote on Pickering's guilt, the Senate decided to have separate votes.

¹²¹ On January 29, 1999, Douglas W. Kmiec, a professor of constitutional law at Pepperdine University, published an article in the *Wall Street Journal* where he endorsed the Isenbergh view that Article I, Section 3 of the Constitution allows for a lesser penalty upon conviction of impeachable offenses other than high crimes and misdemeanors. See Douglas W. Kmiec, *Convict, but Don't Remove Clinton*, WALL ST. J., Jan. 29, 1999, at A21. This view was similarly endorsed by Stuart Taylor, Jr. See *Conviction Need Not Mean Removal*, N.Y.L.J., Jan. 25, 1999, at 15. Mr. Taylor endorsed and defended the Isenbergh view of the range of punishments for impeachment and conviction. See *id.* at 15.

¹²² Isenbergh, *supra* note 3, at 17 n.35.

¹²³ See generally THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 50-65 (Max Farrand ed., 1937).

¹²⁴ Isenbergh, *supra* note 3, at 17 n.35.

¹²⁵ U.S. CONST. art. III, § 3, cl. 1.

¹²⁶ See Isenbergh, *supra* note 3, at 41-43.

¹²⁷ See *id.*

The first involved Pickering's guilt, where he was convicted by a vote of nineteen to seven.¹²⁸ In the second vote, the senate voted to remove Pickering by a twenty to six vote.¹²⁹ If no lesser sanction than removal were available to the senators, Isenbergh argues, this second vote would have been unnecessary.¹³⁰

Isenbergh cites the Pickering impeachment and removal as confirming his theory that lesser penalties are available to the Senators.¹³¹ Likewise, his reading of the mandatory nature of Article, Section 4 and its restriction to high crimes and misdemeanors is also supported.¹³² Because Pickering had been charged with drunkenness, which is not a high crime, his removal upon conviction was not mandatory but had to be decided by a separate vote.

The impeachment proceedings involving Senator William Blount in 1797 are enlightening regarding the purpose of impeachment and the intended range of punishments.¹³³ Senator Blount was expelled by the Senate for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator."¹³⁴

The Senate expelled Blount on these charges, but the House subsequently decided to impeach nonetheless.¹³⁵ This action by the House, especially considering its proximity to the framing debates and ratification of the Constitution, is revealing regarding the purpose of impeachment. If it were simply a method of "last resort" to protect those officials who might cause "grave danger to the Nation" as the narrow reading proponents suggest, this action by the House would seem to be mere surplusage and possibly unconstitutional.¹³⁶ If impeachment was only to function as a removal proceeding for dangerous officials, what would have been the point of impeaching Senator Blount after he had been removed from office? Similarly, in 1876, the House unanimously impeached Secretary of War Belknap after he had resigned from office.¹³⁷ These early actions by the House also support the notion that impeachment could have been designed as a method of civic hygiene. The Blount and Belknap impeachments were probably intended to provide a formal action to express the House's disapproval of these federal officials' actions. Consequently,

¹²⁸ See *id.* at 42.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *id.* at 43.

¹³² See *id.*

¹³³ See Rotunda, *supra* note 4, at 717 (explaining that President Washington appointed Senator Blount of Tennessee to be Superintendent of Indian Affairs. Blount schemed to organize the Cherokee and Creek Indians to help Great Britain oust the Spanish from Florida and Louisiana).

¹³⁴ *Id.*

¹³⁵ See *id.*

¹³⁶ See *supra* text accompanying note 8.

¹³⁷ See Pollitt, *supra* note 10, at 272.

the notion that the Framers may have allowed for a more expansive range of lesser penalties, rather than only removal and disqualification, is supported.

Further, Alexander Hamilton's argument regarding where the impeachment power should be vested supports this broader notion of impeachment as a means to formalize disapproval and social opprobrium of a federal official's actions.¹³⁸ In *Federalist 65*, Hamilton made reference to the "awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and most distinguished characters of the community . . ."¹³⁹ Hamilton's references here to "honor" and "infamy" as the consequences of impeachments of "distinguished characters" further reinforces the notion that the Founders may have intended for the range of punishments for impeachment to include sanctions of a lesser variety, rather than only removal.

Support for this argument can also be found in the words of Benjamin Franklin on the purpose and virtue of the impeachment process:

What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in [which] he was not only deprived of his life but of the opportunity of vindicating his character. It [would] be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his conduct should deserve it, and for his honorable acquittal when he should be unjustly accused.¹⁴⁰

Again, if the Founders understood impeachment to involve only removal from office, one would expect that the language would be confined to balance of power issues and the potential for a crisis of legitimacy. Instead, Franklin appears concerned about impeachment on a much smaller scale, and particularly whether it affords an executive a fair opportunity of "vindicating his character."¹⁴¹ Further, it is described as a method to provide "the regular punishment of the Executive when his conduct should deserve it."¹⁴² It is difficult to square this language with the notion that impeachment is a mechanism "of last resort" to be used only where the continuance of an executive in office would cause "grave danger to the Nation."¹⁴³

¹³⁸ See THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (C. Rossiter ed., 1961).

¹³⁹ *Id.*

¹⁴⁰ THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 65 (Max Farrand ed., 1937).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 145 CONG. REC. S486 (daily ed. Jan. 19, 1999) (statement of White House Counsel Charles Ruff).

Strangely, Isenbergh's argument, which seems solidly based in history and a reasonable reading of the plain meaning of the text, has been dismissed out of hand by commentators and Senators alike. Much of the criticism it has received appears to be based more in the notion that it is novel rather than wrongheaded. For instance, Robert H. Bork stated that "[o]ne is entitled to be suspicious of a constitutional interpretation that nobody thought of for over 200 years."¹⁴⁴ Bork's main objection to the Isenbergh thesis is that he believes it "necessarily produces a conflict" between the impeachment language in Article I, Section 3 and Article II, Section 4, and thus "gratuitously charges the Founders with sloppy draftsmanship."¹⁴⁵ On the contrary, Isenbergh's reading does no such thing. Rather, it alleges that the impeachment articles are relating to different things. Article I is a general grant of power that provides some structural safeguards and a limit on punishments.¹⁴⁶ Article II mandates removal for high crimes.¹⁴⁷

Bork further turns the "dog that did not bark" argument on its head by alleging that "if there were anything to [the Isenbergh thesis] it should have been mentioned in the history of the founding."¹⁴⁸ To the contrary, Isenbergh's thesis is consistent with the history and precedent that surrounded and defined the impeachment process contemporaneous to the drafting of the Constitution. Therefore, if the Founders had meant to *depart from*, rather than incorporate, the contemporaneous colonial and English understanding of impeachment, one would expect there to be express language in the debates reflecting such a shift in understanding. Consequently, this "dog that did not bark" leads to the reasonable understanding that impeachable offenses are not defined in the Constitution.

A finding of fact was proposed with a separate vote apart from the decision of whether to remove by Senator Collins of Maine.¹⁴⁹ While this was consistent with the Isenbergh thesis and had occurred before in the trial of Justice Pickering,¹⁵⁰ it was criticized by many as an unconstitutional punishment of the President. Robert Bork argues that the one of the most troubling effects of the Isenbergh thesis "would be to say that a president of the United States is convicted as a felon by the Senate but is nevertheless worthy to be president."¹⁵¹ This is a strange criticism in a number of respects. First, every reading of the

¹⁴⁴ Robert Bork, *Read the Constitution: It's Removal or Nothing*, WALL ST. J., Feb. 1, 1999, at A21.

¹⁴⁵ *Id.*

¹⁴⁶ See Isenbergh, *supra* note 3, at 15.

¹⁴⁷ See *id.*

¹⁴⁸ *Id.*

¹⁴⁹ See Broder, *supra* note 118, at A17.

¹⁵⁰ See Isenbergh, *supra* note 3, at 41-43.

¹⁵¹ Bork, *supra* note 144, at A21.

impeachment process allows for such a belief to be held; no one, including Bork, believes that all impeachable offenses are indictable or felonious,¹⁵² nor that all felonies are impeachable. Second, a finding of fact does not necessarily fall within the description of a punishment, and it is a tenuous argument to claim that it would be proscribed as such by the Constitution.

Consistent with the other interpretations, including Bork's, the Isenbergh thesis would allow the result Bork declares anomalous above, but only where the felony is of a private nature that falls short of high crimes and misdemeanors.¹⁵³ In contrast, it is the conventional view that allows a president who all know to be a felon and even guilty of a high crime such as treason to remain in office if the Senate believes that it is in the best interest of the country. Thus, under the conventional view, it is not only possible that an executive guilty of treason remains in office, but even more dangerously, his actions would receive the Senate's formal imprimatur and exoneration in an acquittal vote.¹⁵⁴ The idea that the Founders would allow for a traitorous president to remain in office is difficult to accept.

B. Censure

The proponents of censure argue that it provides a needed alternative to removal. Its critics argue that under our system of separation of powers, the role of the Senate is not to punish the president, but to remove him if necessary to protect the republic.¹⁵⁵ In considering these arguments, one must remember that the fundamental object of impeachment is to maintain the supremacy of the law against the misconduct of public officials. It came into existence in order to investigate and prosecute the highest ranking members of the federal government, who are otherwise beyond the reach of judicial process. The Senate, without less drastic alternatives like censure, is left only with alternatives of removal, which means overturning an election, or acquittal, which amounts to a Senate imprimatur of the president's behavior. This will often amount to the Senate sending the wrong message to the public. If the Clinton situation were to have occurred just

¹⁵² See *id.*

¹⁵³ See Isenbergh, *supra* note 3, at 16.

¹⁵⁴ See White House Associate Counsel Dmitri Nionakis, Address at the Case Western School of Law (Mar. 16, 1999) (explaining that "even if, hypothetically, the President were to be guilty of selling secrets to the Chinese," the Senate would not need to convict and remove automatically, but would have to consider the effects of his removal on the common weal and how much damage this single act of treason caused the country before voting to convict or acquit).

¹⁵⁵ See, e.g., text accompanying note 8 (quoting White House Counsel Charles Ruff's statement that impeachment "is not a punishment for private wrongs"); see also Bork, *supra* note 144, at A21 (explaining that the "Senate may not attach additional penalties; removal and disqualification are all the Senate may decree").

prior to an election, the President would be able to hold up his acquittal, claim complete innocence, and chastise his accusers, even if he were guilty of reprehensible and illegal behavior.

The argument that allowing censure would create a situation where the Senate is constantly criticizing the president and abusing the separation of powers envisioned by the Founders is a suspect one.¹⁵⁶ The notion that the Founders, following a colonial experience where they were without real representation and forced to accept the dictates of a king, would not allow their elected representatives to express formal disapproval of their executive's actions is difficult to accept. Further, the idea that an "acquittal" decision may be rendered when the Senate believes the president guilty of an impeachable offense or perhaps even a high crime does great damage to the principle that the law applies to all equally. In a similar vein, the argument that providing censure as an alternative punishment will create a situation where presidents or Supreme Court justices will be censured on a weekly basis is laughable. First, censure would only follow an impeachment, with all of its structural and political protections. Second, two-thirds of the Senate is required to impeach and censure, and an ill-intentioned faction within the Senate of such numbers essentially will be able to enact its legislative agenda without regard to the president's wishes. Therefore, if this faction wished to waste its time drafting and debating censure resolutions, that should be the least of our republic's worries.

V. WHAT STANDARD OF PROOF AND DUE PROCESS DOES THE CONSTITUTION REQUIRE?

The Framers, in their wisdom, left open the questions of what due process was required in an impeachment trial as well as what standard of proof is required to convict. The Senate has repeatedly refused to apply a uniform standard of proof to impeachment trials.¹⁵⁷ Senators choose, as they did in the Clinton impeachment, from standards of proof as low as "a common sense" standard to a "beyond a reasonable doubt" standard.¹⁵⁸ Those senators requiring a "beyond a reasonable

¹⁵⁶ See Broder, *supra* note 118, at A17.

¹⁵⁷ See GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 41 (describing the Judge Claiborne trial where the Senate refused to adopt the "beyond a reasonable doubt" standard by a 75 to 15 vote). Subsequently, the Trial Committees for Judges Hastings and Nixon both construed that vote as precedent confirming that the standard of proof was left to each senator's discretion. *See id.* at 42.

¹⁵⁸ Following the Clinton impeachment trial, a number of senators went on record explaining the standard they employed in reaching their decisions. *See Senators Offer Some Reasons for Their Decisions in Clinton's Trial*, *supra* note 9. The standards adopted by the senators individually varied widely. The "beyond a reasonable doubt" standard was adopted by a majority of Democrats, but many Republicans also. Other standards were defended as well. For instance, Senator Evan Bayh of Indiana explained his acquittal vote by the standard that the "case must be overwhelming. Here, it is not." *Id.* Another further confusing standard was

doubt” standard do so because they believe it makes conviction more difficult, thereby providing more protection to the other branches of government.¹⁵⁹ Other senators favor the same standard because they believe that “fairness dictates” that a defendant accused of a crime deserves the same high standard as an accused felon in a criminal court.¹⁶⁰

Some maintain that the proper standard of proof should be something lower, such as clear and convincing evidence.¹⁶¹ They criticize the “beyond the reasonable doubt” standard as failing to recognize the true purpose of impeachment, which is to protect the public from the recklessness or malice of an unfit officer.¹⁶² A standard below “clear and convincing” such as a “preponderance of the evidence” has also been criticized because it “fails to respect society’s interest in retain-

adopted by Senator John Edwards, Democrat of North Carolina, who described what he considered the “one quintessential moment of the trial”:

The question was, Is [sic] this a matter about which reasonable people can differ? I will never forget Manager Lindsey Graham coming to the microphone and his answer was “Absolutely.” Now if the prosecution concedes that reasonable people can differ about this, how can we not have reasonable doubt.[sic]

Id. Manager Graham was not expressing the opinion that reasonable people can disagree about whether Mr. Clinton had committed the crimes alleged; in fact, he considered Mr. Clinton’s guilt indisputable. The question to which Sen. Edwards refers was about whether the offenses, if proven as Rep. Graham believed they were, rose to the level of high crimes as envisioned by the Founders. Rep. Graham acknowledged that reasonable people could differ in that respect, but he was not stating that the facts of the case did not establish Mr. Clinton’s guilt beyond a reasonable doubt. *See id.* Senator Judd Gregg, Republican of New Hampshire, stated that the President’s crimes had “been fairly proven,” and voted to convict. *Id.* Senator Barbara Mikulski, Democrat of Maryland, stated that she voted to acquit because “the House managers’ case was thin and circumstantial” and “did not present sufficient direct evidence to prove beyond a reasonable doubt” that the President had committed crimes. *Id.* Senator Pat Roberts, Republican of Kansas, voted to convict Mr. Clinton on a “Kansas common sense” standard. He stated that “an open-minded individual applying Kansas common sense would reach the conclusion that I reached.” *Id.* Senator Richard Shelby, Republican of Alabama, stated that he voted to convict because the “House managers proved beyond a reasonable doubt” that the President had obstructed justice but not that he had perjured himself. *Id.* Minority Leader Daschle voted to acquit on the basis that the allegations had not been proven “beyond a reasonable doubt.” *Id.* Senator Susan Collins, Republican of Maine, stated that

If I were a juror in an ordinary criminal case, I might very well vote to convict faced with these facts. Nevertheless, I do not think that the President’s actions constitute a high crime or misdemeanor. . . . I will cast my vote not for the current president, but for the presidency. I believe that in order to convict, we must conclude from the evidence presented to us with no room for doubt that our Constitution will be injured and our democracy suffer should the president remain in office one moment more. In this instance, the claims failed to reach this very high standard.

Id.

¹⁵⁹ *See GERHARDT, FEDERAL IMPEACHMENT PROCESS, supra* note 1, at 42.

¹⁶⁰ *Id.* (quoting Sen. Orrin Hatch: “fairness dictates the Senate use the same standard” as a criminal court).

¹⁶¹ *See Rotunda, supra* note 4, at 719 (arguing that the “seriousness and uniqueness of impeachment caution that it should not be used too readily or too easily accomplished. The standard of proof should be a high one, such as ‘clear and convincing evidence’—the standard used in important, noncriminal cases”).

¹⁶² *See id.*

ing skilled and honest government officials and the damage to the innocent jurist's reputation wrought by an erroneous conviction."¹⁶³ Yet, in light of the fact that the Senate's range of penalties extend only to removal and disqualification rather than deprivation of life, liberty or property as in a criminal trial, a lower standard like a "preponderance of the evidence" might be appropriate.

Many have called for the Senate to establish a uniform standard of proof.¹⁶⁴ However, leaving the standard of proof to each senator's discretion allows for the standard to be chosen that is appropriate to the allegation. No uniform standard of proof or complete notion of due process has or should be adopted because, in certain circumstances, time may be of the essence in an impeachment inquiry. For instance, a president may be faced with credible allegations of a serious high crime like treason. Naturally, he might refuse to provide any exculpatory information and begin to use Nixonian or Clintonian tactics of stonewalling, raising spurious claims of executive privilege, and sending his aides out to lie for him. In order to protect the republic, it may be necessary to remove him immediately. In such a situation, senators' views that the same due process and standard of proof of a criminal trial should be used in the impeachment process would clearly be unwise. Applying a "beyond a reasonable doubt" standard in this situation would present the following problems. First, it would require an independent counsel or special prosecutor to amass a mountain of evidence over a protracted period of time. Second, it would require a lengthy trial with opportunity to rebut this evidence, as well as witnesses and all the other time-consuming aspects attendant to a trial. In a situation where a president appears to be a danger to the republic, many of the procedural and structural protections of a formal trial, by necessity, may be ignored.

But when the nature of charges are markedly different, due process similar to a criminal court and a higher standard of proof, such as "beyond a reasonable doubt," would be appropriate. For instance, where a president is charged with illegal activity related to his private life, the reason behind the impeachment is based more in holding the president responsible to the same laws as the rest of us. As such, most, if not all, of the procedural protections and a heightened standard of proof should be applied. This would give the president and the country some protection from baseless charges related to his personal life, as too low a standard would invite spurious allegations and put senators in a very difficult position. To accommodate these very

¹⁶³ *Id.*

¹⁶⁴ See GERHARDT, FEDERAL IMPEACHMENT PROCESS, *supra* note 1, at 40-41 (explaining that the "major argument in favor of a uniform burden of proof is that it would put both sides in an impeachment trial on notice as to how best to present their respective cases and would allow for greater consistency in impeachment trials").

different situations, the standard of proof and precise outlines of due process need to be left to the discretion of each senator.

The danger in all this is not in senators abusing a process without bright line rules, but in some senators or perhaps a president believing that an executive must be given the same standard of proof and due process as is required under the Constitution for criminal trials. If one believes that most or all of these criminal standards are mandatory, then the situation could arise when an official is investigated in an extremely expeditious manner after a "smoking gun," for instance, appears. In such a situation, the Senate may feel it absolutely necessary to remove the official immediately without much of a formal process. If some senators, or perhaps the president, believe that the Senate's conviction and removal actions were in violation of constitutional due process requirements, a real constitutional crisis, where a president refuses to acknowledge the validity of a Senate removal vote, could occur. This possibility can not be avoided entirely, of course, but adopting clear standards, or where appropriate, expressly validating the *absence* of a clear standard, could remove some uncertainty surrounding this most important process.

VI. THE CONFUSION AND THE POSSIBILITY OF A REAL CONSTITUTIONAL CRISIS

The American impeachment process is a delicate balancing act between attempting to rein in the grant to Congress of the "awful discretion"¹⁶⁵ to which Hamilton referred, with the real politik concerns of the government's ability to protect itself from the corrupt abuses of an executive in power.¹⁶⁶ The impeachment language in the Constitution and the Framers' debates are open to a number of valid interpretations. It is not the intent of this Comment to establish how these issues are resolved; rather, it is only a recommendation that Congress adopt some uniformity of interpretation regarding several key issues.

Among the list of impeachable offenses described by James Madison included "the wanton removal of meritorious officers," which would subject a President "to impeachment and removal."¹⁶⁷ President Andrew Johnson was impeached and came within one vote in the Senate of conviction for removing a "meritorious" member of his Cabinet.¹⁶⁸ It is equally clear that refusing to remove an officer who is guilty of a serious and continuing offense against the state, like treason for instance, would warrant impeachment. In light of these competing duties, it is easy to see how one group within Congress

¹⁶⁵ THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁶⁶ See *id.*

¹⁶⁷ 1 ANNALS OF CONGRESS 517 (Joseph Gales ed., 1789).

¹⁶⁸ See Pollitt, *supra* note 10, at 277-78 (1998).

could feel duty bound by their oath and fealty to the Constitution to impeach and remove a president, while another group could view the removal attempts as an unconstitutional and therefore illegitimate *coup d'état*—an action itself warranting impeachment.

Democratic government depends on the legitimacy of its process. The impeachment process in particular needs to be well defined, because it is inherently political and belongs to the legislature alone. The power of impeachment is without any check or balance, and is not subject to judicial review. Congress must not allow this power to appear to be arbitrary. The fact that the Constitution does vest a great deal of discretion in Congress and that final authority does lie in the Senate, does not mean that Congress's power is arbitrary or has no limits to its legitimacy. As the Texas Supreme Court has described its own state impeachment procedures:

There is a vast difference between arbitrary power and final authority. This court, in most cases has final authority; but it has, and can exercise, no arbitrary power. So the Senate, sitting as a court of impeachment, has, and in the nature of things should have final authority but it, too, is wholly lacking in arbitrary power.¹⁶⁹

If the widely varying interpretations of the purpose, scope and mechanisms of the impeachment process discussed in this Comment are allowed to continue, it is only a matter of time before the removal actions of the Senate will be seen as the illegitimate exercise of arbitrary power. With the stakes so high, it is deeply troubling that we allow these major differences in interpretation to persist. This process is among the most important that our constitutional system both provides and depends upon, and it is imperative that Congress act to establish some uniformity of interpretation. The purpose of this Comment is not to suggest that these clarifications will, ipso facto, eliminate the potential for a crisis over the legitimacy of an impeachment. What is suggested here is not a panacea, but merely a logical necessity.

MARK R. SLUSAR[†]

¹⁶⁹ Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924), *quoted in* Rotunda, *supra* note 4, at 727.

[†] The author would like to thank his father, Robert J. Slusar, for supporting his prodigal son.