Conviction, Nullification, and the Limits of Impeachment as Politics

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The election of Donald Trump to the American presidency has brought with it controversies that have prompted serious talk about presidential impeachment. Even if an impeachment of President Trump never comes to fruition, the national conversation about it has revived the need for serious study of presidential impeachment—the kind of serious study that took place twenty years ago during and after President Clinton’s impeachment. This Article contributes to the revival of academic literature on this subject by exploring the institutional role of the Senate as a court of impeachment. It gives attention to the Constitution’s mandate that the Senate decide whether the impeached Party should be “convicted”—a term that is used elsewhere in the Constitution and always in the criminal law context. Combined with other attributes of impeachment found in the constitutional text and historical understandings, the requirement of a “conviction” before removal helps give impeachment a criminal justice character that mitigates, though does not destroy, its political character. Accordingly, this Article argues that the political character of impeachment is often overstated. The Senate is transformed into something different than a conventional political or legislative body. This Article therefore considers various approaches to deciding whether to convict, including one that views the Senator simply as finder of factual guilt, one that combines a finding of factual guilt with a legal finding that the offense is constitutionally impeachable, and another approach that separates the normative value of removal from the factual and legal conclusions. The Article further argues that considerations of raw partisanship or electoral politics as a basis for acquittal are akin to a form of nullification similar to that found in the criminal
law. In light of the quasi-criminal–quasi-judicial role that the Senate plays as a court of impeachment, the importance of presidential responsibility, and the need to protect the legitimacy of the Senate and impeachment as a constitutional defense mechanism, the Senate should be just as wary of partisan or politically-motivated acquittals, whether overt or covert, as it should be of partisan or politically-motivated convictions.

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**Introduction**

Impeachment talk is in the air. Again. To varying degrees of seriousness, it has reared its head at various points over the past twenty years. But Donald Trump’s election to the presidency has revived serious impeachment conversation in the country, even if a Trump impeachment seems, for the moment at least, relatively unlikely. His ascendancy to the Oval Office brought with it concerns

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about his private business dealings and his ability to comply with the Constitution’s Foreign Emoluments Clause;\(^2\) about his campaign’s alleged connections to efforts by the Russian government to influence the 2016 presidential election in Trump’s favor;\(^3\) his decision to fire the Director of the Federal Bureau of Investigation, and subsequent statements that led some to wonder whether that action was an effort to obstruct justice;\(^4\) and speculation that he may be planning a way to fire, or thwart the work of, Special Counsel Robert Mueller.\(^5\) All of this has provided fodder for an increasingly robust rhetoric of presidential impeachment.\(^6\) Indeed, the phrase “constitutional crisis” has been uttered by many a commentator of late.\(^7\)


The subject of impeachment more broadly is a subject that, of course, overwhelmed the literature two decades ago. Perhaps we learned some important lessons. Perhaps we thought that the experience of the Clinton impeachment made it less likely that impeachments would form a significant part of the business of future Congresses. Perhaps we believed that public officials would be more careful about their official behavior. Perhaps we hoped that Congress learned a harsh lesson about public perceptions of partisan impeachments.8

But the Trump presidency seems to have reignited interest in impeachment. Perhaps, then, the Trump presidency has reminded lawyers and legal scholars that we must not give up on impeachment as a serious area of scholarly inquiry. Congress, after all, has not forgotten about impeachment. Impeachment talk has not been all bark and no bite. Within the past decade, the Senate has convicted a federal judge—Thomas Porteus of Louisiana—on articles of impeachment,9 and had planned a trial on the articles of impeachment that

( arguing that the House “should immediately impeach the president” if he fires Mueller).


the House approved against District Judge Samuel Kent of Texas, before Judge Kent resigned instead. Of course, perhaps judicial impeachments raise somewhat different concerns than presidential ones. But the point is that these judicial impeachments show that Congress still knows how to employ impeachment under the right circumstances, and not merely as a weapon for partisan advantage or embarrassment of political opponents. Still, we know that the extreme partisanship that prevails in the modern Congress can influence impeachment work. For example, where the president and congressional majorities represent different parties, extremes in partisanship could make impeachment of a president, or a presidential appointee, a real possibility. By the same token, such extreme partisanship could make it unlikely, if not virtually impossible, to impeach a president when he is of the same party as the House majority, or to convict him when he shares a political affiliation with the Senate majority.

Perhaps, then, though there are surely lessons to be learned from judicial impeachments and though the legal standards may be the


11. See Akhil Reed Amar, On Impeaching Presidents, 28 Hofstra L. Rev. 291, 303-04 (1999) (arguing that presidential impeachments differ from those of other impeachable officers); see also RAOUl BERGER, Impeachment: The Constitutional Problems 3-4 (1973) (noting that for the founding generation, impeachment of judges was “decidedly peripheral”).


same, one can think about judicial and presidential impeachments differently. This possibility is enhanced when you add the likelihood of politically divided government in the political branches. Since the Clinton impeachment, articles of impeachment were formally filed against numerous public officials—in the George W. Bush Administration alone, articles of impeachment were filed against President Bush, Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, and Attorney General Alberto Gonzales. During the Obama years, articles of impeachment were filed against Attorney General Eric Holder and IRS Commissioner John Koskinen. And, now, at least one formal article of impeachment has been filed against President Trump. Even beyond concerns about naked partisanship and the reality of modern congressional politics, one cannot ignore the possibility that Congress as an institution may at some point feel legitimately compelled to protect itself and other institutions from a President whose public conduct poses a threat to the rule of law, constitutional government, or the separation of powers. Partisan impeachment concerns aside, then, impeachment remains an essential feature of our government of limited and enumerated powers, a

14. See Michael J. Gerhardt, Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals, 60 Md. L. Rev. 59, 73-76 (2001) (evaluating with skepticism the arguments for different standards); Gerhardt, supra note 12, at 370-73 (same); Senator Jeff Sessions, Judicial Independence: Did the Clinton Impeachment Erode the Principle?, 29 CUMB. L. Rev. 489, 490 (1999) (arguing that only a single standard for impeachment exists).

15. See Elizabeth B. Bazan, Cong. Research Serv., 7-5700, Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice 19-20 (2010). For specific actions, see Impeaching George W. Bush, President of the United States, of High Crimes and Misdemeanors, H.R. Res. 1258, 110th Cong. (2008); Articles of Impeachment Against George Walker Bush, President of the United States of America, and Other Officials, for High Crimes and Misdemeanors, H.R. Res. 1106, 109th Cong. (2006); Directing the Committee on the Judiciary to Investigate Whether Alberto R. Gonzales, Attorney General of the United States, Should Be Impeached for High Crimes and Misdemeanors, H.R. Res. 589, 110th Cong. (2007). All of these were referred to a House committee, but no action was taken.


legitimate and meaningful legislative weapon for assuring public accountability to the Constitution and rule of law—its somewhat troubled history notwithstanding. Legal scholarship therefore should continue to urge understanding in this area, and not feel content to leave impeachment permanently in the late-1990s.

Of course, the ultimate question is whether President Trump has committed or will commit impeachable offenses—“treason, bribery, or other high crimes and misdemeanors.” Again, much of the early Trump presidency has been consumed by scandal and controversy. With various scandals during the Trump presidency, talk of criminality has inevitably ensued. But impeachment is not concerned with mere criminality. Its focus is abuse of the public trust, though this may often intersect with criminality. Impeachment requires—indeed, is the ultimate exercise of—careful and thorough congressional oversight and investigation of the executive, beyond what prosecutors and other law enforcement officials may pursue. During the Trump presidency, then, congressional investigation and oversight of the executive


may be more significant than it has been in at least a generation. Impeachment talk must therefore consist of more than simply whether a particular presidential act constitutes an impeachable offense. Once the House determines that an offense is at least impeachable, it must determine whether to impeach. And even if it does so, the Senate is presented with yet another complicated problem: assuming that an impeachable offense is submitted, what must—or should—happen next?

Consider the following hypothetical example. It is the final day of the President’s—any President’s—impeachment trial in the United States Senate. The House Managers have introduced massive amounts of evidence over the course of two weeks. That evidence tends to show that the President engaged in the very conduct that was the subject of the articles of impeachment that the House approved. The President’s lawyers, in his defense, have been frustrated, unable to seriously counter the House’s proof of the alleged acts. In their closing statements, the President’s lawyers feel that they are left with the following strategy: argue to the Senators that, despite proof that the President engaged in conduct that amounts to an impeachable offense, he should not be removed from office. The argument is a politically powerful one in light of several facts about the President’s popularity and job performance. The President’s public approval ratings stand at about 55 percent, despite the impeachment. The national economy is growing, the military remains strong, and the President has worked with Congress to achieve meaningful reform of tax and international trade policy, and has even worked with the opposing political party to secure passage of a major infrastructure bill. By all objective measurements, his presidency has been successful. Must a voting Senator convict the President if the Senator is persuaded that the President committed the offense, and that it is an impeachable one, even if the Senator personally believes that the President ought to be permitted to remain in office because of his popularity and accomplishments?

The answer to that normative question requires special focus on the nature of impeachment, which, in turn, requires some focus on the use of the words “convicted” and “conviction” in the various impeachment provisions of the Constitution. The impeachment clauses provide the necessary text, but their scope and meaning raise questions. Article I, section 3 of the Constitution states that, upon impeachment in the House and trial in the Senate, “no Person shall be convicted without the Concurrence of two-thirds of the Members present.” The next clause states that “the Party convicted” shall be

21. See U.S. Const. art I, § 2, cl. 5.
“liable and subject to indictment, trial, judgment, and punishment, according to law.” Article II, section 4 says that the President, Vice-President, and all civil officers shall “removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.” The process thus far seems clear: the House impeaches the Party, the Senate tries and decides whether to convict the Party. But when deciding whether to convict, must removal from office form a distinct consideration? Should Senators consider the political consequences of conviction? What, then, does it mean to “convict” someone in this context?

In the ordinary criminal law use of the term, of course, it means to find a party guilty; to impose a legally binding determination that he has done as a matter of fact what is alleged. But find them guilty of what, exactly? After all, the Constitution’s use of the term is not limited to the impeachment context. Article III, section 3 provides that “no person shall be convicted of treason except where there are two witnesses to the same overt act or upon confession in open court.” It seems clear that with respect to treason, to convict a person of treason means to determine that she committed all of the elements of treason—levying war against the United States or adhering to the enemy, giving them aid and comfort—but only where the evidence consists of the requisite witness testimony or confession in

23. Id. at cl. 7.
25. There exists some disagreement among scholars as to whether removal from office is actually required on impeachment. Joseph Isenbergh, for example, argued that impeachment was not limited to “treason, bribery, or other high crimes and misdemeanors,” and that the Senate could convict an executive official for other misconduct but that removal from office would be permitted but not be required. See Joseph Isenbergh, Impeachment and Presidential Immunity from Judicial Process, 18 Yale L. & Pol’y Rev. 53, 63–64 (1999); see also Douglas W. Kmiec, Editorial, Convict, But Don’t Remove, Clinton, WALL ST. J. (Jan. 29, 1999, 12:01 AM) https://www.wsj.com/articles/SB917560066964106500 [https://perma.cc/QEC6-S6C8] (endorsing Isenbergh’s view). Substantial authority concludes that impeachable offenses are limited to those enumerated in the Constitution—treason, bribery, or other high crimes and misdemeanors—and that removal is required. See, e.g., Susan Low Bloch, A Report Card on the Impeachment: Judging the Institutions That Judged President Clinton, 63 LAW & CONTEMP. PROBS. 143, 157 (2000) (arguing that the linkage of conviction and removal is constitutionally mandated and any procedure for separating them is unconstitutional).
27. U.S. Const. art III, § 3, cl. 1 (emphasis added).
open court.  

In the impeachment context, though, it is less textually clear what the Senate is being asked to do when it is asked to vote to convict or acquit an impeached Party. Can a Senator legitimately vote to acquit an impeached party despite a belief—or even an affirmative finding—that the Party is guilty of doing what the House has alleged in the articles of impeachment? The concern is that a Senator will vote to acquit the impeached Party because—regardless of the Party’s guilt as a factual matter—the Senator does not, as a political matter, wish the Party to be removed from office, which conviction would arguably require. This problem is especially acute with presidential impeachments because of concerns about “undoing” the national election of the unitary head of the executive branch. Following the Clinton impeachment, Akhil Amar observed that a Senator could not convict and remove President Clinton because the Senator’s constituents wanted Al Gore to be the president. But a different question arises in this context: could the Senate decline to convict President Clinton simply because it did not want Al Gore to be president, even if Senators believed President Clinton actually committed impeachable offenses? What if today’s Senate preferred President Trump to Vice President Mike Pence? Or what if the Senator believed that his prospects for re-election, or his popularity in his home state, would benefit from acquitting the President, notwithstanding a personal belief that the President in fact committed an impeachable offense? We have heard about the dangers of partisan or politically-motivated prosecutions and convictions, but should we also be concerned about partisan or politically-motivated acquittals?

Consider the previous hypothetical, but now suppose that the President has only middling popularity nationwide, or even that he is deeply unpopular nationally and remains highly popular with most voters there. Moreover, suppose that voters in town hall meetings and through constituent correspondence have informed Senator X that they expect her to work closely with the President and to be loyal to both the President and their shared political party. To make matters more complicated, the President begins holding rallies in Senator X’s state in an effort to solidify his voter base and presumably increase pressure on Senator X to defend him during the trial. Does—should—any of this alter the Senator’s calculation on impeachment, if the Senator is nonetheless persuaded that the President committed an impeachable offense?

28. See id.

29. Amar, supra note 11, at 311.

30. Id. at 307.
Assume that the Senator is moved by the political calculations and votes not to convict. This practice may have an analogue in the ordinary criminal law, albeit an imperfect one—jury nullification. Jury nullification is the practice of jurors in a criminal trial refusing to convict a criminal defendant despite proof beyond a reasonable doubt of the defendant’s guilt.\textsuperscript{31} Jury nullification has both a distinguished and controversial history in the criminal law.\textsuperscript{32} As a matter of raw power, jurors nullify, and this prevents re-prosecution pursuant to principles of double jeopardy.\textsuperscript{33} Defenders argue that such a power is “a vital component of democracy and its lawmaking function,”\textsuperscript{34} giving citizens an important voice in the enforcement of a morally just criminal law and serving as a safeguard against government oppression.\textsuperscript{35} Scholars have also demonstrated that common law juries, as would have been known to the Framers, had the power to judge the scope of the law in addition to the facts and therefore could acquit a criminal defendant based on the jury’s own interpretation of the applicable law.\textsuperscript{36}

Critics, though, claim that jury nullification breeds disrespect and disregard for the law and for a court’s instructions, undermines the role of the judiciary in the constitutional system, and that moral concerns about a particular criminal law or its enforcement should be addressed through other public institutions, such as the legislative branch.\textsuperscript{37} Critics further note that even if jurors can nullify as an exercise of raw power, there is no such right to do so and courts should not be complicit in encouraging it.\textsuperscript{38} So despite its pedigree and the

\begin{itemize}
  \item \textsuperscript{31} See Joshua Dressler, Understanding Criminal Law 5–6 (4th ed. 2006).
  \item \textsuperscript{32} Id. at 6–7; see also Kaimipono David Wenger & David Hoffman, Nullificatory Juries, 2003 Wis. L. Rev. 1115, 1129 (2003) (describing the history of criminal jury nullification and stating that it was “extremely popular in the colonies”).
  \item \textsuperscript{33} Dressler, supra note 31, at 5–7.
  \item \textsuperscript{34} Jenny E. Carroll, Nullification as Law, 102 Geo. L.J. 579, 586 (2014).
  \item \textsuperscript{36} See Carroll, supra note 34, at 588.
  \item \textsuperscript{38} See United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997); Crease v. McKune, 189 F.3d 1188, 1194 (10th Cir. 1999); Luisi, 568 F. Supp. 2d at 120.
\end{itemize}
claims of its defenders, modern criminal law and jurisprudence—and some modern legal scholarship—often view jury nullification with significant skepticism and derision. Consequently, if Senators sitting as a court of impeachment are engaged in a process analogous to that of criminal jurors or even judges, then it is fair to question whether a practice of Senatorial nullification is any more legitimate.

The major object of this Article, then, is to urge greater attention to the institutional role of, and impeachment decision-making in, the Senate. Accordingly, this Article focuses on the use of the words “convicted” and “conviction” in the impeachment clauses, highlighting the overlap between impeachments and the criminal law. This Article then places Senate decisions whether to convict into three categories: the Anti-Nullification Approach, which bases the decision to convict solely on a finding of factual guilt and accepts the House’s constitutional judgment as conclusive; the Independent Interpretation Approach, which permits the Senator to consider both the factual basis for guilt as well as to independently determine whether the conduct constitutes “treason, bribery, or other high crimes and misdemeanors;” and the Political Nullification Approach, where the Senator possesses a factual belief in guilt for what she deems to be legitimately impeachable conduct, but declines conviction based solely upon the political inexpediency of removal upon conviction. This Article acknowledges that impeachment is “political,” rather than strictly legal, but concludes that its political nature is often overstated. Rather, the Senate undergoes a transformation as a court of impeachment. This transformation—which reflects the overlap of impeachment with traditional criminal law, protects the institutional prerogatives of the Senate, and promotes presidential responsibility—demands that a Senator, when deciding whether to convict, eschew the kind of partisan or electoral considerations that form a part of the Senate’s ordinary legislative business.

I. “Conviction,” Criminal Law Terminology, and the Nullification Analogue

The ample scholarship on impeachment has not devoted considerable attention to the use of the terms “convicted” and “conviction” in the impeachment clauses. Perhaps the use of these words is not
terribly significant. However, the use of these terms may tell us something more about the character of Senate impeachment proceedings. Placing this “conviction” terminology in context, this Part explores the textual and structural significance of understanding the Senate as a quasi-judicial—rather than strictly political—body when sitting as a court of impeachment, and what this could mean for the institutional role of the Senate when it decides upon conviction in impeachment trials.

A. Impeachment Trials as (Quasi) Criminal Justice

Impeachment, it is often noted, is not a strictly criminal proceeding.40 This is in contrast to English impeachments, which were more closely tied to criminality, as impeachment carried the possibility of death, prison, or significant fine.41 It is, as Joseph Story observed, a political one designed to protect the institutions of government by divesting the impeached party of his office, but not imposing punishment.42 Alexander Hamilton, too, devoted considerable attention to the nature of impeachment in Federalist 65. There, discussing the Senate’s role, Hamilton explained that impeachment’s jurisdiction concerns “the misconduct of public men, or, in other words, the abuse or violation of some public trust.”43 Hamilton further stated that impeachments are “with peculiar propriety . . . POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”44 The constitutional text plainly leaves criminal prosecution and punishment as a distinct option once conviction and removal on impeachment are finalized.45 And as Raoul Berger has noted, reading impeachment as a criminal proceeding would potentially implicate a number of constitutional limits unique to the criminally accused, such


41. BERGER, supra note 11, at 78.

42. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 573 § 803 (1987).


44. Id. at 394–95.

45. See U.S. CONST. art. I, § 3.
as the double jeopardy bar and the Sixth Amendment right to trial by jury.\textsuperscript{46}

And yet, while not formally “criminal” in the legal or constitutional sense, the overlap of impeachment with the criminal law remains striking. The text on impeachable offenses uses the language of criminality—“treason,” “bribery,” “high crimes and misdemeanors”\textsuperscript{47}—even though there is compelling scholarly evidence to support the proposition that the underlying act need not be a common law or statutory crime to be impeachable.\textsuperscript{48} The President’s pardon power applies to “offenses” against the United States, “except in cases of impeachment.”\textsuperscript{49} Article III explains that the trial of all “crimes, except in Cases of Impeachment, shall be by jury.”\textsuperscript{50} This provision, of course, is subject to any change that the Sixth Amendment’s jury trial guarantee works,\textsuperscript{51} but it nonetheless tells us something important about the thinking of the Framers with respect to the subjects of impeachment. In addition, the Impeachment Clauses speak in terms of a “conviction,” a term otherwise unique to a criminal setting.\textsuperscript{52} So even if these provisions do not make the impeachment trial an ordinary criminal trial with all of its trappings and procedural safeguards, they indicate that impeachment draws its core from the criminal law.

Hamilton’s description in \textit{Federalist 65} should not be taken to mean that impeachments have a conventional political nature, unmoored from traditional criminal process. Recall that Hamilton says impeachments may be denominated “with peculiar propriety” as political, in the sense that they involve offenses against society.\textsuperscript{53} He does not appear to use “political” to mean concern with raw politics or electoral consequences; rather, his use of that term occurs in the

\textsuperscript{46} See Berger, \textit{supra} note 11, at 78–85.

\textsuperscript{47} See U.S. Const. art. II, § 4.


\textsuperscript{49} U.S. Const. art. II, § 2.

\textsuperscript{50} U.S. Const. art. III, § 2.

\textsuperscript{51} See Schick v. United States, 195 U.S. 65, 68–69 (1904) (stating that in any conflict between Article III, section 2 and the Sixth Amendment, the Sixth Amendment must prevail).

\textsuperscript{52} U.S. Const. art I, § 3. This is different, incidentally, than the problem identified by other scholars related to the standard of proof. See, e.g., Black, \textit{supra} note 48, at 16–17. Even if we identify the relevant standard of proof for a conviction—say, proof beyond a reasonable doubt, or clear and convincing evidence—that still does not tell us to what question the Senate must apply the relevant standard.

\textsuperscript{53} The \textit{Federalist} No. 65, \textit{supra} note 43, at 394.
context of misconduct or abuse of office that constitutes an offense against the state—political crimes; for example, treason and bribery. He also uses the term “conviction” as well as the term “prosecution” to describe the process for trying impeachments.

In light of these realities in the text and its intellectual history, perhaps, as Charles Black has explained, the question is not whether impeachment ought to be characterized as “criminal” or something else, but whether there are certain aspects of impeachment that ought to be treated the same as we treat them in criminal adjudication. This is not to say that impeachment commands no significance in political, rather than legal, terms. As Jeffrey Tulis has thoughtfully explained, the danger of over-legalizing impeachment is that such a view ignores—or at least undervalues—the political understanding of impeachment. According to Tulis, even though the Constitution “does offer a kind of template for an analogy between the processes for impeachment and conviction and those of indictment and trial,” it also separates impeachment from other legal processes. And despite creating a pretense of legality, the Constitution does this so as to “structure an extraordinary political process—a process more elevated and less partisan than ordinary politics.” For Tulis, then, impeachment should be understood as a particular kind of political process, rather than a brazenly partisan one at one extreme or a strictly legal one at the other. About this, Tulis is persuasive. But even if it is desirable to avoid a hyper-legalization of impeachment, one should not diminish the significance of impeachment’s legal aspects, particularly as they relate to the formalities of the criminal justice process. It is a hybrid of the political and the legal, a political process moderated by legal formalities that give impeachment legiti-

54. See Gerhardt, supra note 20, at 612 (explaining Hamilton’s use of the term in connection with other historical sources that also referred to impeachment as involving political crimes); see also Jonathan Turley, Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, 49 Duke L.J. 1, 5 n.7 (1999) (explaining that the Senate’s use of the word political is due to a misconception of Hamilton’s view).

55. See The Federalist No. 65, supra note 43, at 397.

56. Black, supra note 48, at 15.


58. Id. at 236.

59. Id. at 236–37.

60. Id. at 237.
macy, sobriety, even gravitas. As Akhil Amar has observed, impeachment is “sensibly political as well as legal.”

Regardless of how we characterize impeachment more broadly—as criminal trial-like, or otherwise—the text’s multiple uses of the term “conviction” strengthen the relationship of impeachment and criminal law. This is especially true when we consider that it is the one term used with respect to Senate impeachment trials that is exclusively understood in the criminal context in other provisions of the Constitution: In Article III, when referring to a person being “convicted” of treason, and in the Thirteenth Amendment, when referring to a person “duly convicted” for a crime who may be punished by slavery or involuntary servitude. For purposes of understanding what it is that Senators do when they deliberate on articles of impeachment—that is, when they decide whether to “convict”—it is sensible to draw our understanding from criminal adjudication. Understanding the process of conviction and acquittal in the criminal arena demands some reflection on nullification.

B. Nullification in the Criminal Law

It has been said that nullification is appropriate because the jury represents the “conscience of the community” in a criminal case. The jury is representative of the community’s interest in justice, fairness, and equality—values that nullification allows the community to express through the mechanism of the jury. This is true, advocates argue, even when the formalities of the criminal law would demand a different result. Yet the arguments for nullification tend to arise most forcefully in circumstances where the jury legitimately occupies


62. See U.S. Const. art. III, § 3. Of course, a person may also be “convicted” of treason in impeachment, rather than criminal proceedings, but Article III appears to be describing treason in the context of criminal trial and punishment in a federal court.


64. See generally Sherman J. Clark, The Courage of Our Convictions, 97 Mich. L. Rev. 2381, 2420 (1999) (stating that “the jury is frequently referred to as the ‘conscience of the community,’ or variations on that theme.”).

65. See Jenny E. Carroll, Nullification as Law, 102 Geo. L.J. 579, 622–26 (2014) (describing nullification as a reminder that laws obtain their values from the people).

66. See id. at 57.
some reasonable and high moral ground, such as preventing government oppression or misconduct, exposing the injustice of a particular law or its application against a particular defendant,\textsuperscript{67} or where a jury engages in a form of legal interpretation that leads it to conclude that the law does not apply in the particular case.\textsuperscript{68}

Still, even those claims can find expression in other ways consistent with the forms of a constitutional democracy, such as by lobbying for legislative change in the law, by forming strong public opposition to a particular prosecution, or by taking one’s case to the ballot box.\textsuperscript{69} In addition, creating an atmosphere of permissiveness or even of affirmative endorsement with respect to nullification also creates the possibility that jurors will nullify based on less worthy grounds, or that such decisions will be based on arbitrary factors such as race, or gender, or religion, or even on raw political grounds.\textsuperscript{70}

Even the Supreme Court has referenced jury nullification disapprovingly. In \textit{Sparf v. United States},\textsuperscript{71} the Court held that defendants lacked a right to a jury instruction on nullification power.\textsuperscript{72} In \textit{Woodson v. North Carolina},\textsuperscript{73} the Court held that the Eighth Amendment requires individualized consideration of a capital defendant’s crime and background, and thus forbids the government from imposing a mandatory death penalty upon conviction of capital murder.\textsuperscript{74} One of the Court’s arguments against mandatory death penalties was the possibility that jurors who wanted to convict but did not want the death penalty imposed might simply nullify, preferring ac-

\textsuperscript{67} See, e.g., Brown, supra note 35, at 1172–96 (discussing the relevance of jury nullification in correcting government officials’ rule violations); Adrien Leavitt, \textit{Queering Jury Nullification: Using Jury Nullification As a Tool to Fight Against the Criminalization of Queer and Transgender People}, Seattle U. J. for Soc. Just. 709 (2012) (explaining why it is morally justifiable for queer and trans jurors to use jury nullification to subvert the criminal legal system); Butler, supra note 35, at 709–14 (encouraging African American jurors to take advantage of jury nullification if, in their estimation, the operation of criminal law in the United States does not advance the interests of black people).

\textsuperscript{68} See Brown, supra note 35, at 1183.

\textsuperscript{69} Cf. Warshawsky, supra note 39, at 216 (arguing that jury nullification “proposes the unprincipled extension of interest group politics beyond the state house and into the jury room”).

\textsuperscript{70} See United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997).

\textsuperscript{71} 156 U.S. 51 (1895).

\textsuperscript{72} Id. at 74.

\textsuperscript{73} 428 U.S. 280 (1976).

\textsuperscript{74} Id. at 303–05.
quittal of a guilty defendant to the imposition of capital punishment. The context in which the Court made this argument was one that strongly suggested disapproval of the practice. Finally, in *Strickland v. Washington*, the Court held that defendants claiming ineffective assistance of counsel must prove both deficient performance by counsel and prejudice to the defendant, describing nullification as an example of “lawlessness” in determining how to apply the prejudice prong of its holding. Consequently, even though jury nullification may have an attractive pedigree and appeal in some academic circles—and even exist with grudging acceptance—many influential courts have not viewed it as broadly praiseworthy or desirable.

Moreover, if the Senate is more like a court rather than a jury, and impeachment trials are akin to a bench trial rather than a jury trial, then the analogy to nullification is really to judicial nullification rather than jury nullification. Recall that during the Clinton impeachment trial, the Senate not only voted on the articles of impeachment but also voted on motions—as a judge, but not a jury, would do. This included rejecting a motion to dismiss by a simple majority vote. And whatever pedigree jury nullification enjoys, a similar one does not appear to exist for judicial nullification. Joshua Dressler notes that the literature on judicial nullification is scant. The existing literature does not place judicial nullification on par with jury nullification in terms of historical tradition or political value, though it concedes that judicial nullification likely happens, perhaps with

75. *Id.* at 293, 303.

76. For example, when describing the history of jury attitudes toward mandatory death penalties, the Court stated that jurors have “with some regularity, disregarded their oaths” in refusing to convict defendants of crimes that carried a mandatory death sentence. *Id.* at 293. The Court also said that mandatory death penalties could exacerbate the problem of arbitrary and capricious determinations of who lives and who dies “by resting the penalty determination on the particular jury’s willingness to act lawlessly.” *Id.* at 303.


78. *Id.* at 695.

79. *See*, e.g., *Sparf v. United States*, 156 U.S. 51, 106 (1895); *Strickland*, 466 U.S. at 695; *United States v. Perez*, 86 F.3d 735, 736 (7th Cir. 1996); *United States v. Kryzske*, 836 F.2d 1013, 1021 (6th Cir. 1988) (approving of the trial court’s refusal to instruct on nullification and statement that there is no such thing as “valid jury nullification”).

80. *See* 145 CONG. REC. S1,017–18 (daily ed. Jan. 27, 1999). This procedure was approved in the resolution that established the procedures for the trial. *See* S. Res. 16, 106th Cong. (1999).

81. *See* DRESSLER, supra note 31, at 6 n.37.
some frequency. Indeed, the treatment that jury nullification has received in modern criminal law from many judges indicates why judicial nullification would be both rare and difficult to defend. As one commentator wrote, “judges are repeat players in the justice system, making judicial nullification more dangerous for the judicial system in the long run.” The argument continues: “[a] judge’s routine refusal to follow the law is more pernicious than a single verdict rendered by twelve jurors, randomly selected from the community, who are then released from service, unlikely to serve again in the near future.” Of course, the rarity of impeachment raises the question of whether Senators really are repeat-players in the same way that judges are.

C. Nullification in Impeachments

The notion of nullification in the impeachment conviction context was advanced most directly by Jonathan Turley in his substantial scholarship on the Clinton impeachment. But Turley’s nullification idea was chiefly directed at the House acting in its capacity as both quasi-grand juror and quasi-prosecutor. There is some reason to

83. Hannaford-Agor, supra note 82, at 423.
84. Id.
85. See Turley, supra note 40, at 788. It is notable that the issue arose, albeit in a different context, during the impeachment of Justice Samuel Chase in 1805. See William H. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson 60–70 (1992). One of the grounds for Chase’s impeachment was that he refused to allow lawyers during the trial of John Fries to make arguments about the law of treason to the jury that tried Fries. Id. at 63. It is difficult, though, to read much into this historical footnote. On the one hand, this suggests—indeed, it arguably confirms—that the founding generation would have understood jury nullification in the form of independent legal interpretation to be an acceptable and even desirable practice. And yet, Chase was acquitted. We do not know the reasons the Senators had for their votes. Id. at 108. But Chase’s acquittal on this ground could suggest that his refusal to allow this kind of nullification argument was either not improper or not a sufficiently serious breach of the judicial role as to warrant conviction on impeachment.
86. Turley, supra note 40, at 787.
question whether the nullification analogy works well in that context, or whether the House’s refusal to bring articles of impeachment is simply more akin to an exercise of ordinary prosecutorial discretion. Turley briefly discussed the concept of nullification in the Senate and conceded that if such nullification is to occur, then the Senate is where it should occur. In fact, Turley argued that the Framers “anticipated” a kind of jury nullification in the Senate because they wanted the Senate to consider a variety of factors relevant to the national interest in deciding whether to convict. Similarly—though he did not use the terminology of nullification—Akhil Amar also alluded to what functions as the nullification power of the Senate. “Like trial jurors, Senators have the inherent power to acquit against the evidence—to decide, as the conscience of the community, that even if the charges are true, they do not warrant a conviction.”

Again likening the Senators to an “ordinary criminal juror,” Amar argued that “each Senator is free to be merciful for a wide variety of reasons—because she thinks the defendant has suffered enough, or because the punishment does not fit the crime, or because punishing the defendant would impose unacceptable costs on third parties.”

Still, the nullification analogue is not perfect. One manifestation of jury nullification occurs when jurors interpret the law differently than it is given to them in the judge’s instructions; there is an objective law that the jurors are instructed to, but do not wish to, apply. This analogue makes sense in the impeachment context only if we treat the House’s view of impeachability as carrying dispositive weight. Otherwise, one might argue, Senators who disagree with the impeachability of an official’s conduct are not really nullifying anything; they are exercising discretionary judgment about the meaning of the law, which, arguably, the Constitution independently affords

87. Susan Low Bloch’s testimony before the House Judiciary Committee’s Constitution Subcommittee in 1998 also alluded to the concept of refusing to impeach, even if the House had evidence that an impeachable offense had been committed. See Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 232 (1998) (statement of Susan Low Bloch). Again, though, Bloch appears to be discussing what amounts to the exercise of discretion, rather than jury nullification.

88. Turley, supra note 40, at 788.

89. Id. at 788 n.277.

90. Amar, supra note 11, at 311.

91. Id. at 307.

92. See Crease v. McKune, 189 F.3d 1188, 1194 (10th Cir. 1999).
them. And yet, if a Senator agrees with the House, accepts the impeachability of the conduct, and believes that the official has committed the conduct alleged, then the decision not to convict more closely approaches a form of nullification—such as where a juror refuses to convict because she does not approve of the punishment that the defendant would face upon conviction. The analogy seems even more appropriate where the Senator refuses to convict on grounds that have nothing to do with the facts or the law.

Moreover, the comparison with ordinary jury nullification is arguably limited by the structural attributes of the Senate. After all, once you concede that impeachment trial is emphatically not a criminal trial and that impeachment is political as well as legal, then a rationale exists for defending Senatorial nullification that perhaps does not exist for defending criminal jury nullification. Consider, for example, the incident during the Clinton impeachment in which one of the House Managers, Representative Bob Barr of Georgia, referred to the Senators as “jurors.” Senator Tom Harkin of Iowa raised an immediate objection, arguing that the Senators were not “jurors,” but rather, Senators, meaning that they had a role that ordinary criminal jurors do not. Chief Justice Rehnquist sustained the objection, admonishing the House Managers that the Senate was sitting as a “court” and the Senators were not mere jurors. To some extent, the Harkin objection was a sensible one and highlights what is the conventional wisdom on the Senate’s role: impeachment is ultimately different than a criminal trial and Senators must exercise judgments that we do not expect an ordinary lay jury in a criminal case to exercise. But does that include judgments that amount to a kind of Senatorial nullification?

Finally, why does it matter? After all, impeachments are largely immune from judicial review, and there always remains the somewhat cynical view that a Senator, believing his or her decision to be

93. See U.S. Const. art I, § 3, cl. 6 (“The Senate shall have the sole power to try all impeachments.”).
95. Id. (statement of Sen. Harkin).
96. Id. (statement of Rehnquist, C.J., presiding).
97. See generally Turley, supra note 40 at 788. This was also the view of many other Senators during the Clinton impeachment. See infra Part III.A.
98. See Nixon v. United States, 506 U.S. 224, 244 (1993) (“[T]he Framers’ conferred upon Congress a potential tool of legislative dominance yet at the same time rendered Congress’ exercise of that power one of the very few areas of legislative authority immune from any judicial review.”).
essentially unreviewable, will simply do as she pleases based on her personal political calculations. There is arguably no downside to engaging in ad hoc judgments, even nakedly political ones. A Senator who does not want an official, such as the President, removed will simply vote to acquit regardless of the evidence and the objective merit of the House’s allegations. Perhaps. But a few reasons exist to pursue this matter further.

First, at a somewhat more abstract level of formal constitution- alism, the constitutional processes of impeachment are legitimate—and worthy of respect—only if Senators abide by an understanding of those processes that conforms to constitutional text, structure, and history, beyond their partisan predilections. Impeachment is a serious and sobering constitutional moment for the Senate and the Nation. The constitutional legitimacy of impeachment and the institutional legitimacy of the Senate are subject to doubt if a Senator is engaged in merely ad hoc decision-making or a judgment based solely on partisan or electoral calculations without regard to the underlying facts and applicable constitutional law. As explained later in this Article, there are reasons to think that the text and structure of the Constitution contemplate that the Senator’s discretion will be guided by, and his or her thought processes channeled through, institutional formalities not unlike those that guide the decision-making of a fact- finder or judge in a criminal trial.99 Moreover, at a less abstract level, if the analogy to nullification is correct, then the issue is an important one because nullification is an extremely controversial—and for many, even deeply troubling100—phenomenon. If there are reasons to object to jury nullification at the conviction stage of an ordinary criminal case, then there are reasons to at least hesitate about applying similar types of nullification at the conviction stage of an impeachment trial, even if we concede the differences between criminal trials and impeachments.

II. Senate Practice and the Competing Approaches to “Convicting” on Impeachment

The Senate’s role as a court of impeachment is unique in the constitutional scheme. Consistent with the notion that impeachment is not strictly criminal or even strictly legal, and without clarity as to how one precedent binds future voting, it is important to evaluate historical practices in Senate impeachments with respect to the approach of various Senators in deciding whether to convict. In so doing, one

100. See supra note 79 and accompanying text (citing judicial and scholarly sources opposing nullification).
can find which patterns emerge and ask whether they are consistent with our constitutional architecture.

A. Views from Presidential Impeachment Trials

The disconnect among Senators as to what it means to “convict” an impeached party is apparent in the history of impeachments. The Clinton impeachment provides the most obvious, and compelling, examples. Recall that President Clinton was tried on two distinct articles of impeachment in the Senate. The first article of impeachment alleged that President Clinton gave “perjurious, false, and misleading testimony” to a grand jury arising out of his relationship with former Arkansas employee Paula Jones. The second article of impeachment alleged that President Clinton obstructed justice by concealing information that related to Jones’ sexual harassment lawsuit against him. Of course, he was acquitted on each of these articles: forty-five Senators voted to convict on the first article, and fifty voted to convict on the second article. This Article surveys a few examples of the Senators’ approaches.

In an opinion piece for the Washington Post arguing against the adoption of “findings of fact” in place of a single vote on conviction and removal, Senator Robert Byrd of West Virginia stated his view that “senators must answer not one but two questions: is the president guilty or not guilty of committing high crimes and misdemeanors, and if he is guilty, do his actions warrant removal from office?” Senator Byron Dorgan of North Dakota later endorsed Senator Byrd’s view. Arriving at much the same conclusion but through a different formulation, Senator Slade Gorton of Washington saw the Senate’s job as answering four questions: Did the House prove the facts alleged in the articles?; Do those facts establish the elements of the alleged crimes?; Are the alleged offenses high crimes or misdemeanors?; And


102. Id.


finally, even if the facts establish that the president committed a high crime or misdemeanor, is the offense of sufficient gravity to warrant conviction and removal? Under Senator Gorton’s formula, even if the Senate answers the first three questions in the affirmative, it has not yet “convicted” the president. Rather, “conviction” only occurs once it is determined that the offense was severe enough to justify removal.

Senator Susan Collins of Maine stated her view of the problem: “the Framers wanted the Senate to make not only a determination of guilt, but also a judgment about what is best for our nation and its institutions.” Applying this standard, Collins voted not guilty on article one because she found the evidence insufficient, but not guilty on article two because she believed that obstruction of justice did not amount to a high crime or misdemeanor under the circumstances. Notably, Collins said if she were a juror in a criminal case, she might “very well vote to convict faced with these facts.” She decided against conviction on impeachment because for impeachment the Senate was required to conclude from the evidence “with no room for doubt” that injury would be done to the Constitution and to the Republic if the President remained in office. Senator Collins also suggested a bifurcation, in which conviction and removal would be subjected to distinct votes, leading Professor Susan Low Bloch to suggest that Senator Collins had been influenced by Joseph Isenbergh’s article that made this argument. Bloch and other prominent legal scholars objected to this suggestion in light of the Constitution’s command that the Senate “shall” remove the President upon “conviction,” and the Senate did not permit it. Bloch articulated the ultimate “multifaceted” question this way: “[d]id the alleged behavior occur and does it constitute a ‘high crime and misdemeanor’ warranting removal?”

Consider also Maine Senator Olympia Snowe’s nuanced interpretation of the questions that the Senate must ask and answer. As

107. Id. at S1,568 (statement of Sen. Collins).
108. Id.
109. Id.
110. Id.
111. See Bloch, supra note 25, at 157 (2000). For Isenbergh’s argument, see Isenberg, supra note 25, at 90.
113. Id. at 159.
Senator Snowe articulated it, the Senate must decide “whether there is evidence that persuades us, in my view beyond a reasonable doubt, that the President’s offenses constitute high crimes and misdemeanors that require his removal.” She ultimately voted against conviction on both of the articles of impeachment, although she concluded beyond a reasonable doubt that President Clinton had committed the underlying conduct alleged in one of the articles—presumably article II on obstruction of justice. She did not separately decide whether a high crime or misdemeanor had been committed, and if so, whether it warranted removal. Rather, her view appeared to accept the reality that if the offense is a high crime or misdemeanor, then the President must be convicted and removed once factual guilt is determined.

She determined, however, that his conduct did not constitute a high crime or misdemeanor. She asked whether “the President’s misconduct, even if deplorable, represent[s] such an egregious and immediate threat to the very structure of our Government that the Constitution requires his removal.” She answered that question in the negative. Similarly, Senator James Jeffords of Vermont stated his view that, although he was persuaded by clear and convincing evidence that President Clinton gave false testimony during his deposition, “the President lied to avoid embarrassment. However, the Framers did not envision such behavior as being encompassed within the phrase ‘other high crimes and misdemeanors.’”

Contrast these approaches with those of the Senate during the impeachment trial of President Andrew Johnson, who was acquitted on multiple articles of impeachment, almost all of which arose out of President Johnson’s alleged violations of the Tenure of Office Act. Johnson fired Secretary of War Edwin Stanton and replaced him with an interim secretary, Lorenzo Thomas, without the advice and consent of the Senate which was required by the Act. Some senators,

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115. See id. at S1,671.
116. See id. at S1,670 (“If I conclude that this President’s conduct is of that nature, I would vote to remove him.”).
117. See id. at S1,671.
118. Id. at S1,670.
119. See id. at S1,671.
120. Id. at S1,597 (statement of Sen. Jeffords).
121. See generally Rehnquist, supra note 85, at 143-248; Michael Les Benedict, The Impeachment and Trial of Andrew Johnson (1973).
122. See generally Rehnquist, supra note 85, at 212-16.
like Lyman Trumbull of Illinois and James Grimes of Iowa, were political adversaries of Johnson but concluded simply that the House had failed to prove any impeachable conduct by the President. In contrast, Senator Charles Sumner of Massachusetts voted to convict on all articles, explaining his view that an “impeachment” is “political,” and “belongs to the Senate, which is a political body,” whereas a proceeding “according to law” is “judicial, and belongs to the courts, which are judicial bodies.”

Interestingly, and contrary to the view that impeachment trials are essentially political in nature, both Trumbull and Grimes viewed the impeachment trial as essentially judicial in its character. So, too, did others. Republican Senator George Edmunds of Vermont, known for his rigorous legal thinking and who ultimately voted to convict Johnson, also explained his view that his duties were “clearly judicial,” and that he would not concern himself with any of the political consequences of his decision whether to convict. He further explained that it was the members of the House, acting as a kind of grand jury, that were to be the “sole judges” of whether a violation of law amounted to a prosecutable—meaning, in this context, impeachable—offense. The House having done so, Edmunds explained, “we have only to apply the law as it is to the facts proved. We have no discretion to say guilty or not guilty according to our views of expediency or our personal wishes.” Senator William Fessenden of Maine made a similar point with respect to the judicial nature of the impeachment trial, but unlike Edmunds, ultimately found that the House had failed to prove any impeachable conduct. Rather, like Grimes, Fessenden concluded that Johnson’s removal of Stanton based on his construction of the Tenure of Office Act was at least debatable and thus should not subject him to conviction.

123. See Cong. Globe, 40th Cong., 2d Sess., Supp. 419–24 (1868) (statements of Sens. Trumbull and Grimes). For his part, Senator Trumbull also stated that one of the articles—the tenth—did not “afford just grounds for impeachment.” Id. at 420.
124. Id. at 463 (statement of Sen. Sumner).
125. See id. at 420 (statement of Sen. Trumbull) (expressing that the decision to impeach should not be partisan); id. at 424 (statement of Sen. Grimes).
126. Id. at 424 (statement of Sen. Edmunds).
127. Id.
128. Id.
129. See id. at 452–57 (statement of Sen. Fessenden).
Senate as a “court” and stated explicitly that the Senate “is now acting in a judicial character. The judgment which it may pronounce as regards the respondent will be final.”\textsuperscript{130} Johnson, a Democrat, also vowed to dismiss partisan considerations, as well as the contention that an acquittal would result in “civil commotion and bloodshed.”\textsuperscript{131}

Many of the statements from the Johnson impeachment create the image of a Senate impeachment trial as distinctly judicial, and still more urged that it be removed from partisan or other political considerations.\textsuperscript{132} Yet—and recall the question posed earlier, as to whether acquittal of President Clinton would have been appropriate, even if he were guilty, simply because the Senate did not want Al Gore to be President—it is also significant to note the consequences had the Senate convicted Johnson. Pursuant to then-existing rules of presidential succession, and because there was no vice-president, Johnson’s conviction and removal would have meant the elevation of Senate president pro tempore Benjamin Wade of Ohio to the presidency.\textsuperscript{133} This would have been an unpopular result across the political spectrum,\textsuperscript{134} and even Senator Edmunds later speculated that several of his colleagues would likely have voted to convict Johnson had Wade not been the next in line to succeed Johnson.\textsuperscript{135} So even if the respective statements by those who voted to acquit President Johnson do not reveal the kind of overt nullification theories addressed here, there remains evidence that a kind of nullification may have been at work in the Johnson acquittal, and perhaps in the Clinton acquittal, as well.

\textsuperscript{130} Id. at 431 (statement of Sen. Johnson).

\textsuperscript{131} Id.

\textsuperscript{132} See, e.g., id. at 420 (statement of Sen. Trumbull) (detailing political disagreements with Johnson but voting nonetheless to acquit).

\textsuperscript{133} See Act of March 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886). See also Akhil Reed Amar & Vikram David Amar, \textit{Is the Presidential Succession Law Unconstitutional?}, 48 Stan. L. Rev. 113, 123 (1995) (discussing Wade’s role in the Johnson impeachment).

\textsuperscript{134} See \textit{Rehnquist, supra} note 85, at 246–47 (stating that both Republicans and Democrats were uncomfortable allowing Wade to become President because he supported progressive causes). Chief Justice Rehnquist’s account of the trial also states that there were “rumors” regarding efforts by Chief Justice Salmon P. Chase, who presided, to secure votes against Johnson’s conviction, presumably because Wade had failed to support Chase’s run for the presidency in 1860. \textit{Id.} at 247. It was never proven that Chase tried to secure these votes, but, as Rehnquist states, “Chase’s overweening ambition for the presidency lent credibility to” the rumors. \textit{Id.}

\textsuperscript{135} See \textit{Benedict, supra} note 121, at 141.
B. Categorizing the Approaches to “Convicting” on Impeachment

Based on this admittedly incomplete history of senatorial practices in voting on presidential impeachments, there is a hodgepodge of approaches as to whether the Senator should “convict.” What is relevant is not just the question that each Senator must ask herself when voting on the articles of impeachment. Rather, it is whether a purely political consideration—one that does not relate to the purely factual question of whether the President did what is alleged nor to the legal definitional question of whether the act constitutes treason, bribery, or a high crime and misdemeanor—can be a dispositive factor in how the Senator votes. Although judicial impeachments may shed some light on senatorial voting patterns, removing the unitary head of the executive branch, in whom all executive power is vested, and particularly one who has been elected in a free and fair—but also partisan—election, creates opportunities for the contemplation of partisan politics in ways that judicial impeachments might not.136 As a practical matter, then, the issue is the extent to which the normative removal question is, or ought to be, considered when answering the other, primary questions.

Because of the hodgepodge of approaches taken by Senators in presidential impeachments, some of which bleed into one another, it is difficult to create a perfect taxonomy. This Article does not purport to do so. Nonetheless, three distinct approaches emerge that are relevant to the thesis considered here. One approach may be referred to as the Anti-Nullification Approach, which considers only whether factual allegations have been proven. A second approach may be called the Independent Interpretation Approach, in which the Senator may engage in a legal determination that differs from that of the House with respect to the impeachability of the alleged offense. A third may be called the Political Nullification Approach, which is the approach that explicitly or implicitly considers the normative value of removal, and appears to be the approach that can mimic the more objectionable aspects of nullification.

The Anti-Nullification Approach—perhaps it should be called the Edmunds Approach—would posit that “convict” has its conventional criminal law meaning: It means to find the Party guilty by determining that the Party committed the acts alleged by the House;

136. Cf. Turley, supra note 54, at 70. Turley examines the history of factional disputes in judicial impeachments, and states that such factional disputes also exist “in modern cases.” Id. He gives the example of judges subjected to calls for impeachment based on their judicial activism. See id. See also Tuan Samahon, Impeachment as Judicial Selection?, 18 WM. & MARY. BILL RTS. J. 595, 598 (2010) (considering whether judicial impeachment might be used as a way to “deselect” judges so as to make room for new appointments).
removal is then incidental to that finding but forms no necessary part of it. The only job of the Senate at the verdict-conviction phase is, like a criminal jury, to determine the facts: Did the impeached Party do what the House alleges in the articles of impeachment? If not, then acquittal is required, but if so, conviction is required. This approach, then, would not permit the Senate to engage in any conclusions of law—deferring to the “sole” power of the House to impeach, and thus, on this view, to determine what is impeachable—nor any normative judgments about the wisdom of removal, but rather would place the Senate in the position of a typical modern criminal jury that does not exercise any nullification power.

A second approach—the Independent Approach—holds that to “convict” means to find the Party guilty by determining that the Party committed the acts alleged and that those acts constitute treason, bribery, or a high crime and misdemeanor; removal from office is then incidental to this finding, and the Senator does not make a distinct express determination about it. Bloch appears to advocate this approach, as did Laurence Tribe, and Charles Black briefly mentions this approach in his impeachment handbook. Black says that each Senator must answer two questions: “‘Did the president do what he is charged in this Article with having done?’ ‘If he did, did that action constitute an impeachable offense within the meaning of the constitutional phrase?’” Black acknowledges that these questions combine law and fact, such that the Senator is acting as both a judge and a fact-finder.

In the impeachment context, the Senator using this approach is substituting his own interpretation for that of the House, which, by submitting the article of impeachment to the Senate, has already determined conclusively, for purposes of fulfilling the House’s role, that the alleged conduct is impeachable under Article II, section 4. Again, the analogue to nullification here seems awkward. If the Senate pos-

137. Of course, a number of Senators concluded during the Clinton impeachment that the House failed to establish the President’s factual guilt on one or both articles. See, e.g., 145 Cong. Rec. S1,539 (daily ed. Feb. 12, 1999) (statement of Sen. Specter); id. at S1,595 (statement of Sen. Jeffords); id. at S1,479 (statement of Sen. Biden).


139. See Bloch, supra note 25, at 159.

140. See id. at 157 n.71 (noting Tribe’s view as expressed in a New York Times piece by David Rosenbaum).

141. BLACK, supra note 48, at 13.

142. Id.

143. See id.
sesses independent power to interpret the meaning of “treason, bribery, or other high crimes and misdemeanors,” then its mere disagreement with the House would not seem to be nullification of anything; that is, if the House does not have the power to instruct the Senate on what constitutional law is binding, then there is nothing to “nullify.” Indeed, Hamilton’s defense of the Senate’s role in *Federalist 65* explicitly states that the Senate should not be “tied down by such strict rules . . . in the construction of [the alleged offense] by the judges, that is, the Senate.” 144 Rather, this approach would only constitute nullification if one assumes that in exercising the “sole” power of impeachment145 the House necessarily has the sole power of giving binding law to the Senate. Even if that is true, then this approach at least has the virtue of consistency with a view of jury nullification from the time of the Framing that would have allowed jurors to engage in legal interpretation that is at odds with the given law.146 This would then be objectionable only if the Senator is persuaded that the legal judgment is one to be made by the House only, and that the Senate may not properly decide what is and is not a high crime or misdemeanor.

A third approach—the Political Nullification Approach—holds that “convict” means to determine that the Party has committed an act; that the act is treason, bribery or a high crime or misdemeanor; *and* that the impeached party, having committed such an act, *should* be removed from office. This approach differs significantly from the other two because it includes a normative judgment, rather than a strictly factual or strictly legal determination. This is the approach that Senator Byrd and some others urged during the Clinton impeachment proceedings.147 Others seemed to engage in distinct deliberation upon the question of removal, but it was unclear whether they were tying this to the question of impeachability or considering...
it separately. The key difficulty with Political Nullification, and the one on which this Article focuses, occurs when it is used for raw partisanship or political expediency. But this may be precisely when it is most difficult to detect, where partisan or political motivations are hidden but nonetheless made effective through other approaches or forms of argument.

C. Evaluating the Approaches to “Convicting” on Impeachment

There is a meaningful difference in these various approaches. When the House impeaches, it is imposing its constitutional judgment that the conduct is worthy of impeachment, conviction, and, necessarily, removal upon conviction. The Anti-Nullification Approach is strictly factual and gives absolute deference to the House’s constitutional judgment. If the Senate ought to determine whether to “convict” based on the Political Nullification Approach, then the comparison to modern variants of jury nullification is appropriate where a Senator decides that the Party is guilty of underlying impeachable conduct but should not be removed from office. In both the Independent and Political Nullification Approaches, the Senator is reserving power to dispute the legal judgment of the House. The Independent Approach, though, stops at this level of discretion. Political Nullification goes further by taking issue with the connection between conviction for an impeachable offense and removal. For if the party is convicted of treason, bribery, or a high crime and misdemeanor, then arguably the text already assumes that removal is appropriate. The Senate need not make this judgment independently because the Constitution has already fixed that consequence. This aspect of Senatorial nullification practice is akin to a criminal juror deciding not to convict someone of first-degree murder, which the relevant jurisdiction punishes by a mandatory term of life in prison, because the juror knows

148. See, e.g., 145 Cong. Rec. S1,555 (daily ed. Feb. 12, 1999) (statement of Sen. Thompson). Senator Fred Thompson of Tennessee voted to convict on Article II, but as to Article I, he found that grand jury perjury had been proven but then said, “[t]he question then is whether these examples of perjury warrant removal of the President for the commission of high crimes and misdemeanors.” Id. “In my opinion,” he said, “these statements, while wrong and perhaps indictable after the President leaves office, do not justify removal of the President from office.” Id.

149. See Neal Kumar Katyal, Impeachment as Congressional Constitutional Interpretation, 63 L. & Contemp. Probs. 169, 176 (2000) (discussing why it is undesirable for Senators to mask political motivations in impeachments).

150. See 145 Cong. Rec. S1,475 (daily ed. Feb. 12, 1999) (statement of Sen. Lugar) (“With few exceptions, Senators recognize that the Constitution gives only one outcome to a verdict of ‘guilty,’ namely, removal from office.”).
the sentence and does not want the person to serve life in prison—not because the defendant did not commit the facts underlying the crime and not because the government was unable to prove that a first-degree murder occurred. Indeed, in the taxonomy articulated here, Political Nullification takes this problem even a step further, if the Senator is using her own calculations about her or the President’s political fortunes when rendering her decision. A judgment about the consequences of a conviction is quite different from a judgment about whether to convict in the first instance.

Political Nullification, then, appears to be less desirable than the other approaches when viewed in light of the constitutional text’s requirement that Senators make a decision to “convict,” and in light of the institutional role that the Senate plays when it acts as a court of impeachment. Of course, there are grounds on which to defend something like this: first, on a constitutional interpretation that understands the removability question as distinct from the conviction question; and second, on the ground that both conviction and removability should be determined based on higher-level national interests rather than any parochial political or electoral concerns. After all, not all political considerations are created equal.

In other words, on one view, political nullification becomes legitimate—indeed, it ceases to look like nullification at all—if the Senate has the independent constitutional authority to decline to remove the president even where there is a finding of guilt for an impeachable offense. In the Senate impeachment trial context, though, substantial authority suggests that “conviction” and “removal” are not distinct concepts, just as the Senate and other legal scholars recognized when rejecting the bifurcation approach in the Clinton impeachment trial. A Senator bent on judging the political wisdom

151. For more on this phenomenon, see generally Jeffrey Bellin, Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction, 90 B.U. L. Rev. 2223 (2010) (discussing the phenomenon of nullification where juries know the sentencing options available upon conviction). Of course, unlike many jurors, Senators already know the consequences of conviction at the time of voting.

152. See Turley, supra note 40, at 788 (defending “jury nullification” in the Senate and separating conviction from removal); Amar, supra note 11, at 307 (explaining the role of mercy in Senate impeachment judgments).

153. Cf. Whittington, supra note 61 (distinguishing low, high, and constitutional politics during impeachment).

154. See Bloch, supra note 25, at 157; see also Gerhardt, supra note 12, at 381–82 (describing the history of Senate voting with respect to separate votes on removal and conviction, and finding that the Senate, with the impeachment of Judge Halsted Ritter, “concluded then (and has taken the position consistently since) that a single vote to convict is all that it is required to do constitutionally.”).
of removal separately from conviction would have to grapple with that authority. Moreover, on another view, “conviction” is so intertwined with “removal” that the value of conviction must be determined in light of the value of removal in the scheme of national interests. Still, this seems to preclude the exercise of raw, lower-order political judgments, those that account for a President’s popularity, a lack of desire to see the current Vice-President elevated, or—perhaps most often—a calculation about how the Senator’s own electoral fortunes would be affected by his vote on articles of impeachment.\(^{155}\) And even where “higher” politics inform Political Nullification, it is a concession that the decision whether to convict involves something beyond a finding of fact of guilt and a legal judgment about impeachability. The Senator must be prepared to explain why the Constitution permits an acquittal for a president who—in the Senator’s own view—has in fact committed an impeachable offense.

A model based on the Anti-Nullification Approach that requires the Senate to simply judge the facts, and that does not permit a judgment as to whether the conduct constitutes a high crime or misdemeanor, is structurally problematic. This model would make the House the exclusive judge of the scope and meaning of the phrase “high crimes or misdemeanors,” and would make the Senate bound by that constitutional interpretation. There is, of course, a textual argument for this. If the “sole” power of impeachment lies in the House,\(^{156}\) and the power of impeachment assumes the exclusive power to determine what an impeachable offense is, then perhaps it makes some sense to say that this is an interpretive job for the House and no other body, not even the Senate. One is reminded of then-Representative Gerald Ford’s observation that an impeachable offense “is whatever a majority of the House of Representatives considers [it] to be at a given moment in history.”\(^{157}\) If Ford was correct—and there is every reason to think he was not—then once the House has rendered its “sole” judgment as to whether conduct constitutes an impeachable offense, then, on this view, the Senate has no role in second-guessing. This appears to have been the position of Senator Edmunds during the Johnson impeachment.\(^{158}\)

But if this is so, then it binds the Senate in a way that the Senate is not otherwise bound by the judgments of the House in any other

\(^{155}\) Cf. Whittington, supra note 61 (examining various forms of political considerations on impeachment, but conceding that “low politics” will be a factor is an “otherwise justifiable” impeachment).

\(^{156}\) See U.S. Const. art. I, § 2.


constitutional context. It would also remove an essential legal decision-making problem from the Senate’s domain. Aside from ruling on legal process questions, the Senate’s only judgment would be factual. It also puts the Senate in an untenable position if the facts of the underlying conduct are proven by the House managers. This is because the Senate would then be bound to affirm the House’s interpretive decision about the nature of the conduct—i.e., whether it is impeachable at all—and to remove the official from office, even if the conduct was minor and, in the Senate’s judgment, not an impeachable offense. The only other recourse under this model would be to vote not guilty, even if it were clear that the impeached official had committed the underlying conduct. The Anti-Nullification Approach therefore could have the pernicious effect of actually inducing nullification.

Moreover, if a court of impeachment really is more a hybrid criminal law process, rather than a conventional political one, then the Anti-Nullification Approach treats the House as both accuser and law-giver. While this may track a conventional grand jury model, it does not track a conventional criminal trial model, where the prosecutor is not the conclusive law-giver. This is yet another reason why this approach may tend to accumulate power in the House in ways that could frustrate the Senate’s role.

The Independent Approach—articulated by Black and Bloch, and applied by, among others, Senators Snowe and Jeffords—thus emerges as a sensible one when grounded in the notion of what it means to “convict” and when combined with the structure of the Senate in the constitutional design. This approach preserves the quasi-criminal–quasi-judicial nature of impeachment trials in the Senate, by treating the Senate as a court that both finds facts and makes legal judgments, as it is entitled to do on motions, for example, in a criminal law context. And yet this approach also stays true to the act of deciding whether to convict—it permits a decision as to the factual


160. Bloch, supra note 25, at 159.


162. Id. at S1,596-98 (statement of Sen. Jeffords). For another example of this approach, as applied in judicial impeachment, see 156 Cong. Rec. S1,022 (daily ed. Mar. 3, 2010) (statement of Sen. Levin); Senator Carl Levin of Michigan voted to convict Judge Porteous, on multiple articles, but not on article IV. In the process, Senator Levin stated that “it is up to each of us to determine what actions reach the level of impeachable offenses egregious enough to remove a federal officer such as a district court judge.” Id.
basis for the House’s allegations without permitting a separate normative judgment about whether removal is appropriate, a decision that this approach treats as having already been made, both constitutionally and by the related conclusion that the Party committed an impeachable offense. It also gives the Senate the flexibility to make judgments about the nature of the conduct at issue to ensure that, even if a factual basis for the allegation is established, the Senate still makes its own independent judgment as to impeachability. This serves to check the ability of the House to engage in vindictive or overzealous impeachments.

Of course, one might question this framework by saying, quite rightly, that no Senator would explicitly invoke raw partisanship or personal political considerations to justify a vote to acquit, just as no Senator would invoke those factors in voting to convict. Political Nullification, the argument goes, will always be covert, cloaked in some higher-order justification or rationale. Consequently, one might argue that one of the other approaches could serve as a convenient subterfuge that simply amounts functionally to another form of Political Nullification. Senators, pursuant to this argument, could publicly answer the question of impeachability or factual guilt in the negative, simply because they ultimately believe that the official should not be removed from office, even if, in truth, they are privately persuaded of both guilt and impeachability. There is merit to these contentions, and one imagines that such decision-making likely infected the voting in President Clinton’s impeachment trial—perhaps even Senator Snowe’s ultimate conclusion is an example of such an approach—or President Johnson’s.163 To the extent that true Political Nullification will always be covert, we may never know for sure. But to the extent that Senators wish to give effect to higher order political concerns, doing so through the Independent Approach—judging removability through the lens of the “political” crimes model of “high crimes and misdemeanors”—seems preferable to doing so through Political Nullification.

Still, some cases are possible in which both factual guilt and impeachability will be clear. This would be particularly true where the underlying impeachable offense that is alleged is bribery, proof of which is far easier to discern because—like treason,164 but unlike the


164. See U.S. Const. art. III, § 3 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”); 18 U.S.C. § 2381 (2012).
ill-defined “other high crimes and misdemeanors”—it is previously defined in our criminal law.165

For example, let us assume that the President is accused of accepting a bribe in exchange for public support of legislation and a vow to sign the legislation when it is approved by Congress. Let us assume further that the proof that the President engaged in the conduct is legally sufficient. Let us even further assume that the bribe was in a relatively small amount and that it occurred only once, that the President has no prior history of accepting or offering bribes, and that the President is both popular and performing his other duties capably. A Senator might believe that the conduct is sufficiently minor and mitigated that it should not result in removal from office. And yet, following the Independent Interpretation Approach, the Senator would also be compelled to conclude that the conduct amounted to bribery, which is plainly impeachable, and thus removable. In such a situation, the Senator’s decision to acquit would have to be based on nothing more than nullification in its purest form; it could not reasonably be based on a failure of proof or a failure to state an impeachable offense.

There are, of course, other ways procedurally to maintain both the legal and factual decision-making roles for the Senate without compromising on the meaning of “conviction,” if we can say that “conviction” means, at a minimum, a factual finding of guilt as it is used in the Treason Clause and Thirteenth Amendment. To ensure that the Senate has a legal, as well as factual, determination to make and is not bound to the House’s determination, the Senate could adopt a new procedure. The Senate could adopt a rule which allows it to vote, as a threshold matter, on whether the alleged conduct, if proven, constitutes treason, bribery, or a high crime and misdemeanor.166 Then, if a supermajority votes in the affirmative, the trial can proceed. If not, the time and energy of an impeachment trial are not spent; the Senate could dismiss the articles of impeachment, just like a court could dismiss charges against a criminal defendant.

165. See 18 U.S.C. § 201 (defining the crime of bribery and relevant terms).

166. Akhil Amar suggests something akin to this. See Amar, supra note 11, at 311. This is not the same as the “Findings of Fact” debate that the Senate had during the Clinton impeachment, where the object was to approve factual findings that the President engaged in the conduct of which he was accused but to do so outside of the context of a vote on conviction and removal, thus avoiding the unpopular notion of removing him from office while still preserving a record of affirmative findings that he had committed the alleged conduct. See, e.g., 145 Cong. Rec. S1,118 (daily ed. Feb. 3, 1999) (statement of Sen. Dorgan) (objecting to a vote on factual findings).
This is hardly a perfect solution, however. Such a procedure would require the Senate to make its legal judgment in the abstract, rather than on the particulars of the case. Still, one resolution would be to permit the issue to arise again in the form of a subsequent or renewed motion by any Senator or by motion of the impeached party. So whether the Senate uses a motion-like procedure to exercise its legal judgment, or whether it does so by employing something akin to the Independent Interpretation Approach articulated here, the Senate still is capable of exercising judgment that fits a hybrid political-legal understanding of impeachment, without resort to an extra-legal process of Political Nullification.

III. The Limits of Impeachment as Politics

To defend politically-motivated acquittals on the ground that impeachment is inherently “political” is to overstate, if not misstate, the political nature of impeachment. Recall that Hamilton describes impeachment as political in the sense that it involves offenses against the community and governing instruments of civil society. In *Federalist 65* and *66*, he also responded to objections involving giving the Senate the power to try impeachments—that, for example, courts would be better repositories of such power and that Senate trials would intolerably aggrandize senatorial power in the constitutional design. To fend off such claims, he assured readers that—even knowing that impeachments could begin as partisan exercises against a president—Senators can be trusted to exercise sound judgment on impeachment, and they will avoid corruption. Hamilton also referred to the fact that making the Senate a court of impeachment was one way in which the Constitution mixes powers, giving one branch powers that might ordinarily belong to another branch. While Hamilton never argued that Senators are exercising the full panoply of judicial power, his argument nevertheless implies that when sitting as a court of impeachment, the

167. See *The Federalist No. 65*, supra note 43, at 394–95; see also Turley, supra note 54, at 127–28 (explaining Hamilton’s particular use of the word “political”).


169. See *The Federalist No. 66*, supra note 168, at 404–05; see also Gerhardt, supra note 40, at 15–16 (discussing the Convention’s approach to the vote required for conviction, and explaining that “[t]he delegates saw the Senate as composed of well-educated, wealthy, virtuous citizens who would be sure to have the Nation’s welfare at heart.”).

170. See *The Federalist No. 66*, supra note 168, at 399–400.
Senate is transformed—it is assigned “the right of judging,” whereas the House has the “right of accusing.” Consequently, if the Senate were to act, and cast votes, using the same kinds of political calculations that it uses in performing its ordinary legislative business, there would have been no need for Hamilton to refer to the mixture of legislative and judicial power in impeachments; indeed, there would have been no reason for opponents of this arrangement to object on these grounds. The very fact that Senators are acting as judges was the basis for the objection to which Hamilton responded, and offers ample reason to think that Senators must decide impeachments without reference to ordinary political or electoral considerations.

Another reason to think this, drawn again from Hamilton and The Federalist, has to do with the importance of holding presidents responsible. In Federalist 70, Hamilton offered his now famous explanation of the need for energy in the executive, a component of which is unity. Unity is inconsistent with plurality, and a plural executive is undesirable in part because it makes responsibility more difficult to assess. “Responsibility,” Hamilton said, “is of two kinds—to censure and to punishment.” Hamilton told his readers that there must be a mechanism for presidential accountability—holding presidents responsible for their misdeeds—but doing so is more challenging when there are multiple individuals on whom to shift blame. A plural executive, then, deprives the people of “the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.” Hamilton then returned to responsibility as he closed his discussion of the executive, in Federalist 77: having discussed the “requisites for energy,” does the proposed executive have “the requisites to safety, in the republican sense—a due dependence on the people, a due responsibility?” Hamilton answered in the affirmative, and cited impeachment as evi-

171. See id. at 400.
173. Id. at 427.
174. Id. at 426.
175. Id. at 427–28.
176. Id. at 427.
dence of the Constitution’s safeguards for presidential responsibility.\textsuperscript{178} If a Senator believes that the President has committed an act that is legitimately impeachable, then acquittal based on raw politics or electoral calculations undermines the Senate’s role in assuring responsibility in the unitary executive. This, in turn, enables presidents in their misconduct\textsuperscript{179} and threatens the ability of the legislature to resist accumulations of presidential power. This is especially problematic if presidents attempt to use their position to influence Senate voting, such as by staging rallies in the Senator’s home state or otherwise developing a base of popular support that could sway individual Senators based on raw politics.

Senator Harkin’s view, then, may go too far in the other direction. For when sitting as a court of impeachment, the Senate is transformed. It is still a political body, but it is not the same kind of political body as it normally is when its sits as a deliberative legislative body. The normal incidents of politics, and political judgments, would seem not to obtain when sitting for impeachment purposes.\textsuperscript{180} This is particularly true once one considers the mandates of the constitutional text with respect to impeachments, including that the party must be “convicted” with a supermajority of the Senate. Remember also that when the impeachment clauses were initially discussed at the Constitutional Convention, leading Framers like George Mason and Elbridge Gerry wanted to add “maladministration” to the text as a basis for impeachment.\textsuperscript{181} But that suggestion was defeated upon the urging of James Madison, who thought that such a term would simply permit “tenure during pleasure of the Senate.”\textsuperscript{182} This rejection in the language of impeachment—well-covered in the impeachment literature—was designed to prevent impeachment from being a device for removal upon mere political disagreement or petty conduct by the impeached Party.\textsuperscript{183} The Framers desired a standard less subject to political or partisan manipulation. Recall also that the Framers took care to make the Senate different than the House—more deliberative,

\textsuperscript{178} Id.; see also Gerhardt, supra note 40, at 93 (“By its very nature, the impeachment process is reserved for Congress to demand an accounting from the President regarding alleged abuses of his powers.”).

\textsuperscript{179} See Whittington, supra note 61 (stating that if the “big stick” of impeachment is unused, “Congress might find that some who hold an office of trust under the United States are emboldened to behave badly”).

\textsuperscript{180} See Tulis, supra note 57, at 237.


\textsuperscript{182} Id. For more on the history of the debates over language in the impeachment clauses, see Gerhardt, supra note 20, at 606–609.

\textsuperscript{183} See Berger, supra note 11, at 89–90; Black, supra note 48, at 30.
more distant from popular passion and sentiment—though some of this was compromised by the Seventeenth Amendment. Structurally, then, the Senate is positioned to deliberate soberly and objectively as to the facts of an impeachment and the constitutional standard for impeachment. The formalities—quasi-legal, and even quasi-criminal—that the Framers devised for grappling with the subject of impeachment would have been unnecessary if impeachment were to be treated the same as any other legislative or political moment for the Senate. And if raw partisanship ought not to be a reason for impeachment, conviction, and removal, then, arguably, neither should raw partisanship be a basis for acquittal.

This is not to say that we can cleanse impeachment trials of all partisan political considerations. Neal Katyal recognized this reality and wrote that, “[p]olitics is inevitable in these high-stakes impeachment debates. And this is how it should be.” Katyal does not demand partisanship in impeachment decision-making, but rather is contending that it is dangerous for moral, legal, and historical appeals to mask ordinary political motivations. He is rightly concerned about senatorial responsibility, and grounds his argument in the distinction between the judiciary and the Senate as a representative body. Senators should, as Katyal notes, be transparent about political motivations. But, as Turley argues, the structural and procedural mechanisms of impeachment offer a forum in which Senators can be open about politics, but where the deliberative process can induce Senators to use factual and legal judgments that override strictly partisan or politically expedient ones. Senators, then, may—and likely will—bring their partisan or electoral concerns to the table at the trial’s inception. But they should ultimately seek to subordinate those motivations to higher-order concerns about guilt, constitutionalism, and presidential responsibility.

Of course, one hopes that Senators could conduct all legislative business in a manner that will “refine and enlarge the public view.”

185. See U.S. Const. amend. XVII (making Senators popularly elected).
186. See Katyal, supra note 149, at 176.
187. Id.
188. Id. at 176–77.
189. See Turley, supra note 54, at 128. Cf. Whittington, supra note 61 (distinguishing low, high, and constitutional politics, and stating that even low politics will be factors in judging an otherwise justifiable impeachment).
as Madison described it, and that Senators will “best discern the true interest of their country” and not sacrifice it to “temporary or partial considerations.”

But the special nature of impeachment renders this notion even more critical when Senators sit for that great purpose.

Conclusion

Although impeachment is political, it is important not to overstate its political nature. While Senator Harkin correctly said that those who sit in judgment during an impeachment trial are “Senators” and not strictly “jurors,” their senatorial attributes are now different from those that attend ordinary legislative business. Of course, let us not be naïve: perhaps Senators will do what they wish on impeachment, particularly when they have little or no disincentive to make it up as they go. But Senators ought to adhere to a standard that is most consistent with the constitutional text and the structure of the Senate, which is transformed into a quasi-judicial body that determines facts and applies principles of constitutional and criminal law. Such a process demands more uniformity and consistency, not less. While the ultimate judgment may well rest within each Senator’s conscience, the Senator’s task on impeachment trials need not be wholly subjectivized nor politicized. Within a constitutional design that transforms the Senate into a quasi-judicial body, political nullification by a court of impeachment—whether overt or covert—can do violence to the rule of law, presidential responsibility, the institutional integrity of the Senate, and the separation of powers.

191. Id.