



NACDL Testimony

For More Information:

Leslie Hagin, Legislative Affairs Director
202-872-8600 x226, NACDLegis@aol.com

**"The Background and History of Impeachment"
Defining the Constitutional Limits on Presidential Impeachment**

**Statement of
Professor Frank O. Bowman, III
and
Professor Stephen L. Sepinuck,
Gonzaga University School of Law**

**on behalf of
National Association of Criminal Defense Lawyers (NACDL)**

**before the
Subcommittee on the Constitution, Committee on the Judiciary**

**Monday, November 9, 1998
2141 Rayburn House Office Building**

Frank O. Bowman, III is Visiting Professor of Law at Gonzaga University School of Law in Spokane, Washington. He is a graduate of Colorado College and Harvard Law School. He has served as a Trial Attorney for the Criminal Division of the U.S. Department of Justice, an Assistant U.S. Attorney in the Southern District of Florida, and a Deputy District Attorney in Denver Colorado. In 1994-95, he was Special Counsel to the United States Sentencing Commission. He has also practiced as a criminal defense attorney in Colorado and Washington. Professor Bowman is the author of a treatise, a monthly newsletter, and numerous articles on various aspects of federal criminal law.

Stephen L. Sepinuck is Associate Professor of Law and Associate Dean of the Gonzaga University School of Law in Spokane Washington. He is a graduate of Brown University and the Boston University School of Law, and holds an LL.M. in taxation from New York University School of Law. Professor Sepinuck is an expert in the history of the American impeachment process.

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 10,000 direct members -- and 80 state and local affiliate organizations with another 28,000 members -- include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. NACDL is a non-partisan, non-profit organization, with no Political Action Committee (PAC).

Neither Professor Bowman, Professor Sepinuck, nor the National Association of Criminal Defense Lawyers has received any federal grant, contract or subcontract in the current and preceding two fiscal years.

I. Introduction

When then-Congressman Gerald Ford famously remarked that an impeachable offense "is whatever a majority of the House of Representatives considers it to be at a given moment in history,"⁽¹⁾ as a political realist he spoke no more than the plain truth. The Constitution confers on the House of Representatives the sole power of impeaching a president (and other "civil Officers of the United States"), and grants the Senate the sole power to remove a President upon a finding by two-thirds of its members that the president has committed "treason, bribery, or other high crimes and misdemeanors."⁽²⁾ The decisions to impeach and to convict and remove from office are almost certainly not reviewable by any court.⁽³⁾ Therefore, a Congress disposed to do so can indeed displace a president for any reason that will garner sufficient votes, and can act without fear that its decision will be overridden by any other governmental body.

Nonetheless, to acknowledge that Congress has the final word on what constitutes a proper ground for impeaching a president is not to concede that Congress is unconstrained by the Constitution when it makes its choice for or against impeachment. The language of the Constitution limits the instrument of impeachment to a very particular class of cases - "treason, bribery, or other high crimes and misdemeanors" - and that language is no more rendered meaningless by the congressional monopoly on its interpretation than is the remainder of the Constitution by the fact that the Supreme Court customarily has the last word on its meaning. Both the Court and the Congress have an obligation of fidelity to the fundamental design of the Republic embodied in the written Constitution. We think history supports our assumption that Members of Congress take their obligation of faithful interpretation of the constitutional text no less seriously than do judges.

The occasion for submitting this paper to the Judiciary Committee is the Committee's consideration of allegations of impeachable behavior by President William Jefferson Clinton, in particular the allegations contained in the report to Congress of the Office of Independent Counsel. This paper does not advance a definitive answer to the question of whether any or all of the proposed grounds for impeachment listed in the report of the Independent Counsel are impeachable offenses. Rather, it seeks to assist Members of Congress by discussing the meaning of the constitutional phrase "treason, bribery, or other high crimes and misdemeanors," with particular emphasis on five interpretive questions implicit in the nature of the specifications by the Independent Counsel:

- *Must an Impeachable Offense be a Crime?*
- *If Non-criminal Conduct is Impeachable, What Distinguishes Impeachable From Non-impeachable Non-criminal Conduct?*
- *Is All Criminal Conduct a Proper Ground for Impeachment?*
- *If Not All Crimes Are Impeachable Offenses, What Distinguishes Impeachable Crimes From Non-impeachable Crimes?*
- *Finally, Is There a Category of Impeachable Offenses for Which the Congress Should Nonetheless Not Impeach?*

II. Sources of Authority

To what sources should one look in pricking out the limits of the rather inscrutable constitutional phrase "treason, bribery, or other high crimes and misdemeanors"? This paper conforms to the historical practice of relying on the same sources one would consult in construing other constitutional provisions: (1) the language of the constitution itself; (2) the intentions of the founding generation as revealed in the debates of the convention and thereafter in the debates on ratification; (3) the body of precedent created by prior American impeachment proceedings; (4) the views of scholars and other commentators; and (5) considerations of reason, common sense, and sound public policy. The third of these categories - precedent - may merit some brief additional comment because the concept of "precedent" in impeachments differs in important respects from its usage in the more familiar judicial setting.

In the first place, there are few impeachment precedents because there have been very few impeachments. In over two hundred years, only fifteen federal officials have actually been impeached. Of these fifteen cases, twelve have been judges, one was a Senator, one a Secretary of War, and one was President Andrew Johnson. Several other federal officers, including President Richard Nixon, have resigned or retired under threat of imminent impeachment. Thus, there are very few cases involving impeachment of executive branch officials, and as we will discuss below, the standard for impeaching judges is arguably quite different than the standard that should be applied when removing a President. **(Attached to this Statement is an [Appendix](#) prepared by Professor Sepinuck describing the articles of impeachment in and disposition of all fifteen actual impeachments, as well as four near-impeachments.)**

Second, the "decisions" in impeachment cases are merely statements of result. The officeholder was impeached or not impeached on this ground, convicted or acquitted on that ground. Although individual representatives or senators, and on occasion the prevailing or dissenting

faction of a committee, may have given statements of their reasons for voting as they did, such statements represent only the views of the Members who subscribe to them, not the collective opinion of the legislature as a whole. Most importantly, no explanation of result from a congressional source is the equivalent of a judicial opinion because there is no legislative equivalent of the doctrine of *stare decisis* binding future congresses to abide by either the choices or the rationales of their predecessors.

It is true that some impeachments have been treated as "deciding" certain questions. For example, in 1789, Senator William Blount was expelled by the Senate and then impeached by the House. The Senate then dismissed the impeachment proceedings for lack of jurisdiction.⁽⁴⁾ The dismissal has been said to stand for the proposition that impeachment may not be used against legislators. Similarly, in 1876, Secretary of War William W. Belknap was impeached for bribery. He resigned and was then acquitted in the Senate.⁽⁵⁾ The acquittal is said to establish that impeachment may not be used against persons no longer in office. In truth, neither of these propositions is beyond question and either could probably be ignored with impunity by a Congress determined to do so.⁽⁶⁾

The biggest problem may be knowing what use to make of even those impeachment precedents where both the result and the contemporary reasons for reaching it are fairly clear. The best example of this difficulty is the impeachment of President Andrew Johnson. Although President Johnson was acquitted in the Senate, the fact remains that the House approved eleven articles of impeachment. Does the House vote, standing alone, constitute precedent upon which succeeding Congresses may rely, to the effect that offenses of the type charged against President Johnson are properly impeachable? Does the Senate's vote represent a judgment that none of the eleven articles charged were impeachable offenses, or a judgment that the offenses charged were not proven? Or is it fair to conclude that the Senate vote meant either of those things in light of the fact that Johnson was acquitted by only one vote and thus a clear majority of the senators cast votes *for* impeachment on Articles 2, 3, and 11, thus rendering an opinion that those charges were both impeachable and proven? The Johnson case raises in particularly acute form the question of whether we should give greater weight to the judgment of Congress or the judgment of history. How should one think about what Congress actually did in 1868 in light of the nearly universal conclusion of later commentators that the Johnson impeachment effort was a misuse of the impeachment power?

In the end, we believe that prior impeachment actions by Congress are best viewed as a form of "persuasive authority." That is, the members of this Committee are not bound by the actions of their congressional predecessors, but should view prior impeachment proceedings as a valuable source of information about the proper and improper exercise of the impeachment power.

III. Five Interpretive Questions Presented

A. Must an Impeachable Offense be a Crime?

It has from time to time been argued that impeachment may be based only on conduct that is technically and legally a crime. Notably, congressional opponents of impeachment in the cases of Andrew Johnson and Richard Nixon hewed to this line.⁽⁷⁾ However, the weight of authority is to the contrary. In the first place, the Framers almost certainly intended that presidents be

impeachable for conduct not technically criminal. During the debates of the Constitutional Convention in July of 1787, the delegates twice voted in favor of the general proposition that the president should be removable for "malpractice or neglect of duty."⁽⁸⁾ Many delegates spoke of a body of offenses outside the common law crimes for which presidents and other federal officials could be impeached, using terms such as "maladministration," "corrupt administration," "neglect of duty," and "misconduct in office."⁽⁹⁾ On August 20, 1787, the Committee on Detail reported to the convention that federal officers "shall be liable to impeachment and removal from office for neglect of duty, malversation,⁽¹⁰⁾ or corruption."⁽¹¹⁾

Despite the tenor of these earlier discussions in the convention, in its report of September 4, 1787, the Committee of Eleven proposed that the President be removable only on conviction of "treason or bribery."⁽¹²⁾ On September 8, George Mason made a motion the effect of which was to restore the thrust of the general proposals previously assented to by adding "maladministration" as a third ground for impeachment.⁽¹³⁾ Madison objected to removal of a President "for any act which might be called a misdemeanour [sic],"⁽¹⁴⁾ observing that, "So vague a term will be equivalent to a tenure during pleasure of the Senate."⁽¹⁵⁾ Mason withdrew "maladministration," substituting "other high crimes and misdemeanors against the State."⁽¹⁶⁾ The phrase "against the State" was later amended to "against the United States,"⁽¹⁷⁾ and then deleted altogether in the final draft of the Constitution.

It is plain that Mason's substitution of "high crimes and misdemeanors" in the face of objections by Madison and others to "maladministration" represented an effort to limit the reach of the original proposal.⁽¹⁸⁾ Regrettably, however, neither Mason nor anyone else at the Convention offered any particular views on what "high crimes and misdemeanors" meant. Raoul Berger has argued that the phrase was a "technical term" derived from English practice, with which the Framers would have been familiar, and therefore that its technical meaning "furnishes the boundary of the [impeachment] power."⁽¹⁹⁾ Among the various kinds of official misconduct that fell within the English usage of "high misdemeanors" were such non-criminal behavior as abuse of power, neglect of duty, encroachment on the prerogatives of Parliament, and betrayal of trust.⁽²⁰⁾ Both Berger's factual premise that all, or even very many, of the Framers were intimately familiar with the details of English impeachment precedents, and his conclusion that the Framers were thus conscious of having adopted those precedents by reference through Mason's amendment seem to us somewhat doubtful. Both premise and conclusion become still more doubtful when applied to the several thousand ratifiers who debated and approved the Constitution in the state conventions. Berger is certainly correct, however, that most delegates to the Philadelphia and ratification conventions would have been sufficiently familiar with English constitutional history to recognize "high crimes and misdemeanors" as a phrase that embraced territory broader than indictable crime, but more restricted than mere poor performance in office.

The conclusion that criminality is not a prerequisite for impeachment is supported by the historical record of a consistent pattern of impeachment for non-criminal conduct.⁽²¹⁾ For example, Justice Samuel Chase was impeached (though not convicted) for exhibitions of judicial bias and making improper rulings.⁽²²⁾ Judge Halstead Ritter was impeached by the House on six charges of taking kickbacks and tax evasion, as well as a seventh of bringing his court "into scandal and disrepute." The Senate acquitted him of all six of the articles charging criminal offenses, but nonetheless convicted and removed him on the seventh article.⁽²³⁾ President Andrew

Johnson was impeached by the House for, among other things, giving speeches casting aspersions on Congress.⁽²⁴⁾ The second and third articles of impeachment approved by the House Judiciary Committee against President Richard Nixon charged misuse of government agencies for improper purposes and refusal to comply with lawful subpoenas of the Committee.⁽²⁵⁾

In sum, a showing of criminality is not necessary to establish an impeachable offense.⁽²⁶⁾ It may nonetheless be important to remember that the historical evidence of the Founders' intentions must be viewed in the context of their time when there were by modern reckoning very few criminal laws. The sprawling federal and state criminal codes of the late twentieth century would have seemed quite foreign to our eighteenth century forbearers. Much of the official misconduct, particularly "corruption" and misapplication of public funds, with which the Framers were concerned when they debated the impeachment clauses, may have violated no criminal law in their day, but would fall squarely within a battery of modern federal statutes.⁽²⁷⁾ One may well wonder whether Mason, Madison, or Franklin, if aware of the reach of modern criminal law, would conclude that there was much, if any, non-criminal conduct that would now merit impeachment.

B. If Non-criminal Conduct is Impeachable, What Distinguishes Impeachable From Non-impeachable Non-criminal Conduct?

1. General Observations

To define the scope of impeachable non-criminal offenses, one must begin by examining both the text of the impeachment clauses and the place of the impeachment mechanism within the structure of the Constitution. The text says that a President may be impeached only for the commission of "treason, bribery, or *other* high crimes and misdemeanors." It is a cardinal error to abbreviate this passage and speak of "high crimes and misdemeanors" in isolation, and so to ignore the fact that the Constitution gives two concrete examples of the type of offense the Framers intended to be proper grounds for impeachment. When the Constitution authorizes impeachment for "treason, bribery, or other high crimes and misdemeanors," it is saying that a President may be removed if he commits treason, takes or gives bribes, or commits other acts similar both in type and seriousness to bribery and treason.⁽²⁸⁾

Thus, we can fairly infer two things from the constitutional text. First, a "high crime or misdemeanor" is an offense of the most serious kind. Treason is and always has been punishable by death. And bribery is everywhere thought of as among the gravest of non-violent crimes.⁽²⁹⁾ Second, impeachable offenses are public offenses, offenses that strike at the heart of the democratic order. As Alexander Hamilton said in Number 65 of "The Federalist," they are "of a nature which may with peculiar propriety be denominated POLITICAL [capitalization in the original], as they relate chiefly to the injuries done to the society itself."

Over the centuries, observers have used a variety of formulations in an effort to capture the essence of transgressions meriting removal of a head of state (or in England, of his chief ministers). The common law called them "great offenses."⁽³⁰⁾ An English Solicitor General stated in Parliament in 1691 that "the power of impeachment ought to be, like Goliath's sword, kept in the temple, and not used but on great occasions."⁽³¹⁾ In America, James Iredell told the North Carolina ratification convention that the "occasion for its exercise [impeachment] will arise from acts of great injury to the community."⁽³²⁾ Shortly after ratification, in 1790-91, Supreme Court

Justice James Wilson described impeachments in the United States as "confined to political characters, to political crimes and misdemeanors, and to political punishment."⁽³³⁾ Justice Story wrote that impeachment is "intended for occasional and extraordinary cases, where a superior power, acting for the whole people, is put into operation to protect their rights, and to rescue their liberties from violation."⁽³⁴⁾

More recently, Raoul Berger concluded that the Founders intended to "preclude resort to impeachment of the President for petty misconduct,"⁽³⁵⁾ and that they "conceived that the President would be impeachable for 'great offenses' such as corruption [or] perfidy."⁽³⁶⁾ And in the most recent comprehensive treatment of impeachment, Professor Michael Gerhardt observed that the ratification debates support the conclusion that high crimes and misdemeanors "were not limited to indictable offenses, but rather included great offenses against the federal government."⁽³⁷⁾

The proposition that impeachment of a President should result only from "great" offenses seems born out by the actual conduct of the impeachment proceedings against Presidents Johnson and Nixon. Whatever may be said of the merits of the particular charges against Andrew Johnson, the true occasion for the effort to remove him was an irreconcilable conflict between the President and the dominant forces of the party that had elected him over the issue that would define America for the next century and more - how to treat the states of the defeated rebellion and how to regulate the way those states treated their large populations of recently emancipated African-American slaves. Through the lenses of hindsight, the Johnson impeachment effort has come to be viewed as an exercise in congressional overreaching by a vengeful group of radicals against a President acting within his rights. Whether or not this a correct view of history, the key point for our purposes is that, *at the time*, the majority of both houses of Congress perceived Johnson's policy of liberality towards rebels and seeming indifference to the political and economic status of freed slaves as a treasonous betrayal of the cause in which several million northern men fought and hundreds of thousands became casualties. The particular charges on which Johnson was impeached, almost all of which involved the President's removal of Secretary of War Stanton in defiance of the Tenure of Office Act, seem to modern eyes both specious and rather trivial. But for his contemporaries, Johnson's true offenses were quintessential "great crimes."

The impeachment of Richard Nixon likewise turned on "great" questions of constitutional governance. As with the case of Andrew Johnson, not far removed from the impeachment effort was a deeply divisive quarrel about the conduct of a war and its aftermath. One of the five articles of impeachment proposed, but not adopted by the Judiciary Committee, charged the President with concealing the bombing of Cambodia from Congress through the creation of false military records and the repeated submission to Congress of overtly false official reports.⁽³⁸⁾ Unlike the case of Andrew Johnson, the specific charges approved by the House Judiciary Committee in the Articles of Impeachment against Richard Nixon themselves concerned grave abuses of executive power. Article 1 charged criminal obstruction of the investigation of a burglary carried out by paid agents of the President's re-election committee to gather political intelligence on the President's opponents.⁽³⁹⁾ Article 2 alleged pervasive misuse of federal law enforcement and intelligence agencies for political purposes, notably to collect information on or to discredit persons opposed to the President's general political aims or his conduct of the

Vietnam War.⁽⁴⁰⁾ Article 3 sought impeachment based on the President's refusal to comply with the Judiciary Committee's own subpoenas.⁽⁴¹⁾

The near-universal theme of the Judiciary Committee report and of formal supplemental statements by Committee Members from both parties was that a President should be impeached only for offenses that go to the heart of his constitutional responsibilities, and not for any transient or venal personal failings. The Judiciary Committee staff prepared a report entitled, "Constitutional Grounds for Presidential Impeachment," portions of which were incorporated into the Committee's final report. In one such portion, the staff concluded:

Impeachment is a constitutional remedy addressed to serious offenses against the system of government. *** It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are "high" offenses in the sense the word was used in English impeachments.

Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement -- substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.⁽⁴²⁾

Among those who voted for impeachment, Congressman Conyers wrote that the impeachment remedy "was framed with the intention that it be used only as a last constitutional resort against the danger of executive tyranny."⁽⁴³⁾ Another group of Members declared that, "In these proceedings we have sought to return to the fundamental limitations on Presidential power contained in the Constitution and to reassert the right of the people to self-government through their elected representatives within that Constitutional framework."⁽⁴⁴⁾ Congressman Waldie said, "Impeachment of a President should not be undertaken to punish a President, but to constitutionally redefine and to constitutionally limit the powers of the Presidency when those powers have been dangerously extended and abused."⁽⁴⁵⁾ Several Members who voted for impeachment did so because the President's conduct, in their view, "violated our guarantees of liberty,"⁽⁴⁶⁾ or was a "grave threat to the liberties of the American people."⁽⁴⁷⁾ Referring in particular to Article 3 concerning President's defiance of congressional subpoenas, Congressman McClory observed that, "The power of impeachment is the Constitution's paramount power of self-preservation."⁽⁴⁸⁾

The minority report endorsed by those who voted against all of the Nixon articles of impeachment concluded that impeachment was constitutionally permissible only for the commission of crimes, and then only for "extremely grave crimes."⁽⁴⁹⁾ Congressman Hutchinson wrote separately to emphasize that, "Impeachment of a President is a drastic remedy and should

be resorted to only in cases where the offenses committed by him are so grave as to make his continuance in office intolerable."

In the Nixon impeachment, the rhetoric of the Judiciary Committee was matched by its actions. Confronted with evidence that President Nixon may have committed the essentially private crime of criminal income tax fraud and may have illegally received government money to pay for improvements on his private estates at San Clemente, California, and Key Biscayne, Florida, the Committee voted 26-12 against impeaching the President on these grounds.

Thus, both the phrase "treason, bribery, or other high crimes and misdemeanors" and the precedent of the two previous presidential impeachment proceedings strongly suggest that presidents are to be impeached only for "great" transgressions characterized by some conflation of moral gravity and danger to the constitutional order. This conclusion is also implicit in the role of the Executive in our Constitution. The President is co-equal with the Congress and the courts. The office is attained by direct grant of the people, and does not rest on any delegation of power from the legislature. Thus, any dramatic lowering of the impeachment threshold in the direction of converting impeachment into a mechanism for legislative removal of the chief executive on a vote of no confidence is antithetical to the design of this Constitution.⁽⁵⁰⁾

2. Judicial Impeachment Precedents

It might be argued that the history of the most numerous class of impeachments, those of federal judges, supports the removal of federal officers for non-criminal conduct far different and less grave than the "great" offenses. As the attached [Appendix](#) details, judges have been impeached for drunkenness, blasphemy, and entering improper judicial orders,⁽⁵¹⁾ bias in charging a grand jury,⁽⁵²⁾ improperly holding in contempt a lawyer who had criticized the court's rulings,⁽⁵³⁾ habitual malperformance,⁽⁵⁴⁾ using favoritism in appointing receivers,⁽⁵⁵⁾ and bringing the court into scandal and disrepute.⁽⁵⁶⁾ On balance, however, we join with those commentators who have concluded that the constitutional text and sound considerations of policy dictate a different impeachment standard for judges than for the President.⁽⁵⁷⁾

First, the constitutional text creates some ambiguity about the proper impeachment standard for judges. Article II authorizes impeachment of the "President, Vice President and *all civil Officers*" for "Treason, Bribery, or other high Crimes and Misdemeanors." In contrast, Article III provides that federal judges "shall hold their Offices during good Behavior." While the impeachment standard in Article II apparently does apply to judges, the additional language in Article III suggests an additional basis for their impeachment and removal.

Second, the rather limited debates in the Constitutional Convention regarding impeachment were focused on the President and the most senior officers of his government. Little thought was devoted to removal of judges.

Third, in marked contrast to the profound political questions and great occasions that precipitated the impeachment efforts against Presidents Johnson and Nixon, impeachments of judges seem rather tawdry affairs generally revolving around charges of personal incapacity,⁽⁵⁸⁾ political or personal bias,⁽⁵⁹⁾ or, most commonly, financial dishonesty.⁽⁶⁰⁾ This sense that presidential impeachments necessarily involve grander issues arises in part, of course, because any effort to

depose a President precipitates a constitutional crisis even if the charges against the President are not themselves of constitutional magnitude. A change in Presidents requires, or at least permits, a reordering of the executive branch and unforeseeable changes in national policy. The removal of a lower federal court judge has no necessary consequence outside his or her own district or circuit, and only modest effects even there. Even the removal of a Supreme Court Justice may have no noticeable impact on the court's decisions. It bears emphasis, however, that the Nixon and Johnson impeachment efforts differ from the body of judicial impeachments not merely because of the profound *effect* of presidential removal. With the repeated caution that it is dangerous to over-interpret sparse impeachment precedents, comparative analysis suggests that Congress has applied a discernibly different standard to the removal of judges.

No president has been impeached for general failure or incapacity to perform his duties. Several judges have been. No president has been impeached for being politically biased or for favoring his friends in the exercise of his official duties. Several judges have been. Two judges have been impeached and one convicted of tax evasion, yet the House Judiciary Committee declined to impeach Richard Nixon for income tax violations. At least three apparent distinctions arise from these and other comparisons:

First, Congress properly seems more disposed to impeach judges than presidents for incapacity or fundamental unsuitability for office, perhaps because judges continue in office until death unless removed, while presidential tenure is limited to four years without a re-endorsement by the people. Second, as the differential treatment of presidential and judicial tax evasion suggests, Congress has, in general, set the bar for presidential impeachment higher than for judicial impeachment. Third, and we think most importantly, the nature of an impeachable offense under the constitution depends largely on the nature of the office from which the subject is to be removed.⁽⁶¹⁾ For example, judges are expected to be apolitical and impartial. Exercising the powers of one's office to favor one's friends and allies or to advance partisan political goals is conduct fundamentally incompatible with the judicial role, and is thus impeachable conduct for a judge. However, the same sort of behavior is often the essence of being a President, and absent violation of some statute a President will not be impeached for exercising his powers of patronage or using his office to advance his party's agenda.

3. Impeachable Non-criminal Offenses -- Distinguishing Features and Special Cases

What then are the distinguishing features of non-criminal impeachable offenses for Presidents? Such offenses surely include most of the "great" political infractions recognized at English common law including misapplication of funds, abuse of official power, neglect of duty, or encroachment on the prerogatives of another co-equal branch of government.⁽⁶²⁾ Virtually all of the charges against Presidents Johnson and Nixon were either criminal or fell into one of the common law 'great offense' categories or both. Articles 1-9 in the Johnson case were essentially claims of abuse of power, and were also technically criminal because they charged violation of the Tenure of Office Act which carried criminal penalties. Article 11, which alleged that Johnson had declared the 39th Congress "was not a Congress authorized by the Constitution to exercise legislative power" and that he was therefore not bound to enforce its statutes, charged an encroachment on the prerogatives of the legislative branch. All three articles approved by the Nixon Judiciary Committee arguably fall under the rubric of abuse of power, and Article 1 charging obstruction of justice clearly alleged criminal conduct. Of the two articles proposed but

not adopted in 1974, the article concerning concealment of the bombing of Cambodia implicated both abuse of presidential power and a serious intrusion into the constitutional war-making power of Congress, while the article charging tax evasion was plainly criminal.

Two charges from the prior presidential impeachments raise issues that do not fit comfortably within the traditional "great offense" categories: Article 3 in the case of Richard Nixon alleging resistance to congressional subpoenas as an impeachable offense, and Article 10 against Andrew Johnson asserting that his public speeches casting aspersions on Congress were grounds for removal. Although Article X of the Johnson case can be readily dismissed as an artifact of the particular virulence of that dispute, Article III in the Nixon impeachment raises more difficult questions to which we now turn.

a. Presidential Resistance to Congressional Investigative Efforts

In response to a series of subpoenas issued by the House Judiciary Committee, President Nixon refused to produce certain tape recordings and documents, asserting the novel theory that the doctrine of separation of powers gave him an "executive privilege" to refuse the Committee's investigative requests.⁽⁶³⁾ At the same time, the President was resisting criminal subpoenas from the Watergate Special Prosecutor's Office seeking some of the same material. It was only after the Supreme Court ruled unanimously that the President must comply with the criminal subpoenas that the Judiciary Committee also received materials it had demanded.⁽⁶⁴⁾ The Committee felt that the refusal to comply with congressional subpoenas was a transgression sufficiently grave and sufficiently distinct from the criminal obstruction of justice charged in Article I that it merited a separate article of impeachment. As the Committee said, "Whatever the limits of legislative power in other contexts -- and whatever need may otherwise exist for preserving the confidentiality of Presidential conversations -- in the context of an impeachment proceeding the balance was struck in favor of the power of inquiry when the impeachment provision was written into the Constitution."⁽⁶⁵⁾

To the extent that resolution of certain aspects of the inquiry presently before this Committee may turn on the limits of a President's power to contest investigative requests made to the White House or other executive branch officials, several points may be worth noting. First, the Nixon Judiciary Committee differentiated sharply between President Nixon's legal contest with the Watergate Special Prosecutor over criminal subpoenas and his refusal to respond to congressional subpoenas issued in the course of an impeachment inquiry. At no point did the Judiciary Committee assert that President Nixon's battle with the Special Prosecutor over criminal discovery was a constitutional misdeed. Rather, in its third impeachment article, the Committee alleged that by defying its own subpoenas, the President "assum[ed] to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives."⁽⁶⁶⁾

Second, clearly implicit in the Judiciary Committee report and its vote to approve Article III against President Nixon was the judgment that *this* President's assertion of "executive privilege" was a flimsy and legally unjustifiable excuse for selectively withholding evidence that was both central to the resolution of charges of obviously constitutional magnitude and known by the President to be so. Indeed, once President Nixon produced additional tapes in compliance with the Supreme Court's order, the Committee's conclusion about the nature of the withheld material

was fully born out by its contents. Neither Article III of the Nixon impeachment nor the Committee reports can fairly be read to support the view that assertion of a legally substantial claim of privilege in either a criminal investigation or an impeachment inquiry is in itself an impeachable offense.

Third, the effect of the Nixon precedent becomes more difficult to divine where a President resists investigative requests from an Independent Counsel by asserting legal privileges in courts of law. If an Independent Counsel is considered the current analog of the Watergate Special Prosecutor, then the Nixon precedent suggests that a President's resistance to subpoenas from that source encroaches on no legislative prerogative and is thus no ground for impeachment. However, if one were to view the Independent Counsel Statute as a *de jure* or at least *de facto* delegation of a portion of the Congress' power to investigate impeachable offenses against high executive officials to the Office of Independent Counsel, the picture becomes murkier. In this view, resistance to the investigation of the Independent Counsel becomes tantamount to defiance of Congress itself.

We would find such a construction of either the Independent Counsel Statute or the Nixon impeachment precedent deeply troubling. We do not believe that Congress could delegate any part of its constitutional impeachment authority to an official who is accountable to both the head of an executive department -- the Attorney General -- and to a panel of judges. Nor do we think that conclusions drawn by the Judiciary Committee in 1974 about President Nixon's direct challenge to congressional investigative authority are plausibly transferrable to a contest between a President and an Independent Counsel. Put simply, we find it difficult to conceive that raising legal objections in legal forums to the investigative requests of an Independent Counsel could constitute a high crime or misdemeanor.

b. Other Forms of Non-criminal Misconduct

Two other forms of non-criminal presidential misbehavior -- personal immorality and lying -- are often the subject of discussions concerning impeachment. We will discuss them seriatim:

(i) Re: Personal immorality.

Only one person has ever been impeached, even in part, for conduct that could fairly be characterized as purely personal immorality. In 1804, Judge John Pickering of the New Hampshire District Court was impeached because, among other things, he "in a most profane and indecent manner, [did] invoke the name of the Supreme Being, to the evil example of the good citizens of the United States."⁽⁶⁷⁾ However, Pickering was also charged and convicted for making a series of improper rulings and with being drunk on the bench. Moreover, the true reason for his impeachment appears to have been that he was insane.⁽⁶⁸⁾

As for private sexual immorality, there seems little constitutional basis for concluding that such behavior could ever constitute an impeachable offense. No federal official has ever been impeached for sexual misconduct. Such history as there is on the point is negative and anecdotal, but supports the view that neither the Framers nor anyone since has seriously proposed impeachment as a remedy for private sexual misbehavior. For example, in 1792-93, Alexander Hamilton defused a congressional investigation into his financial relationship with a convicted swindler by telling the congressmen who came to question him that he had committed adultery

with the man's wife and later paid him to hush up the affair.⁽⁶⁹⁾ Similarly, the unsuccessful effort to unseat Justice William O. Douglas began with questions about his character arising from his supposed promiscuity; however, the impeachment inquiry itself never dignified these scurrilous allegations with serious attention, focusing instead on the sources of Justice Douglas' extra-judicial income.⁽⁷⁰⁾

We hasten to add that merely because the alleged misconduct of a President has a sexual component such conduct is not exempt from consideration by this Committee under the impeachment clauses. Criminal sexual misbehavior such as rape, child sexual assault, and the like would surely be an impeachable offense. And we can imagine consensual sexual conduct such as adulterous relations with a spouse or child of a foreign head of state or dignitary that would directly impact quintessentially political functions of the presidency and so subject a President to impeachment. For the present, however, it is sufficient to say that no actual impeachment case presenting such an unusual confluence of the sexual and the political has come to our notice.

(ii) Re: Lying.

Even leaving to one side the special problem of perjury, to which we will return presently, presidential lies present a particularly knotty problem. Everyone lies sometimes, and it would be absurd to hold Presidents to an inhuman standard of unfailing truthfulness. Moreover, a President is head of state, diplomat, and practicing politician rolled into one. A certain amount of dissimulation is necessary to the successful practice of statecraft. Nonetheless, certain kinds of presidential falsehoods are probably high crimes and misdemeanors, even when they are not delivered under oath.

The best example of an impeachable, but nonperjurious, lie would be a false statement made in the President's official capacity to the legislature or the judiciary for the purpose of deceiving the other branch in its execution of a core constitutional function. As James Iredell, one of the first Supreme Court Justices said in debate over the impeachment clauses, "The President must certainly be punishable for giving false information to the Senate."⁽⁷¹⁾ Only one article of impeachment relying on this principle has ever been advanced, Article IV of the Nixon impeachment charging concealment of the bombing of Cambodia through the creation of false military documents and submission to Congress of false official reports on the war in Southeast Asia. Although the Judiciary Committee did not approve Article IV, we are disposed to think that the vote resulted from a disinclination to inject the explosive politics of the Viet Nam War into a case where ample ground for impeachment already existed, rather than a rejection of the principle that the Chief Executive may not intentionally deceive Congress in matters that relate to the legislature's own constitutional duties.

The more difficult case to analyze is one involving allegations that a President lied to The People in public statements on important national issues. Although a few observers have intimated a general presidential obligation of public candor on pain of impeachment,⁽⁷²⁾ no impeachment has ever gone forward on this basis and it seems a very malleable and dangerous doctrine. The more desirable constitutional remedy for falsehoods of this sort probably rests in the hands of the public itself when it uses the ballot box.

4. Non-criminal Impeachable Offenses -- Summary

The hallmarks of impeachable offenses not technically criminal are their magnitude and their public, political character. Congressman Danielson of the Nixon Judiciary Committee put it well when he wrote: "It is enough to support impeachment that the conduct complained of be conduct which is grossly incompatible with the office held and which is subversive of that office and of our Constitutional system of government. With respect to a President of the United States ... conduct which constitutes a substantial breach of his oath of office, is impeachable conduct."⁽⁷³⁾

C. Is All Criminal Conduct a Proper Ground for Impeachment?

What then of Presidential conduct that is a statutory crime? Not all violations of criminal statutes are "high crimes and misdemeanors." If the Framers had wanted *any* crime or misdemeanor to be a valid basis for impeachment, they knew how to say so. Their debates, the original restriction of impeachment by the Committee of Eleven to the crimes of treason and bribery, and the Convention's final choice of moderately expanded language all demonstrate a sensible intention to exclude some crimes from the category of impeachable offenses. Their judgment was sound. Jaywalking, public drunkenness, and reckless driving are all crimes, and offenses such as hunting without a license in a wildlife refuge are crimes punishable by six months imprisonment,⁽⁷⁴⁾ but a President self-evidently should not be displaced if he commits them.

Not even all felonies are necessarily impeachable offenses. For example, punching a "foreign official" in the nose,⁽⁷⁵⁾ destroying a document belonging to the estate of a debtor,⁽⁷⁶⁾ operating a bus or train while intoxicated,⁽⁷⁷⁾ counterfeiting a postage stamp,⁽⁷⁸⁾ and obliterating the vehicle identification number of someone else's car⁽⁷⁹⁾ are all federal felonies. One doubts that any of these are "high crimes and misdemeanors." Thus, not only are some, perhaps many, indictable crimes not impeachable, but there is no pre-existing division in the criminal law itself, such as that between felonies and misdemeanors, which will reliably distinguish the impeachable from non-impeachable crimes. We must therefore determine whether the Constitution or other sources provide any guidance in making this distinction.

D. If Not All Crimes Are Impeachable Offenses, What Distinguishes Impeachable Crimes From Non-impeachable Crimes?

1. The President's Obligation to "Take Care That the Laws be Faithfully Executed"

Article II of the Constitution vests the executive power of the United States government in the President. Section 3 of the same Article commands that the President "shall take Care that the Laws be faithfully executed," and Section 1 of that Article prescribes an oath of office in which the President must swear that he will "preserve, protect and defend the Constitution of the United States." It can be argued that the President's role as Chief Executive imposes a special obligation of scrupulous adherence to the law,⁽⁸⁰⁾ and thus that the failure to remove a presidential law breaker from office so endangers the rule of law that the remedy of impeachment ought to be liberally invoked whenever a President commits any significant legal infraction. We think, however, that such an argument is subject to the following criticisms:

First, impeachment is not the only remedy the law provides against a President who breaks it. As Alexander Hamilton said of those who actually are impeached, "After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country,

he will still be liable to prosecution and punishment in the ordinary course of law."⁽⁸¹⁾ The same is true of those who commit crimes, but are *not* removed from office on that account. In other words, a refusal to impeach does not mean a refusal to punish. If a President commits crimes for which he is not impeached, nothing bars his prosecution for those offenses once he leaves office.

Second, the contention that the President's special Article II obligation to uphold the law authorizes his impeachment for virtually all serious criminal infractions collides squarely with the designedly restrictive scope of the impeachment clauses. In effect, the proponents of this view are arguing that the President's constitutional role should render him liable to impeachment for more kinds and degrees of crimes than any other federal officer. But as our previous discussion demonstrates, the Framers adopted the "treason, bribery, or other high crimes and misdemeanors" formula precisely in order to limit the occasions on which a *President* might be removed.

We find no inconsistency in the fact that the Constitution imposes on Presidents an obligation of scrupulous adherence to law and at the same time permits their impeachment and removal from office only for great infractions which constitute a limited subset of the crimes for which Presidents and paupers alike may be prosecuted and imprisoned. The Framers were sophisticated political architects who counted on more than the single and supremely disruptive mechanism of impeachment to regulate presidential behavior. They assumed that the primary check on presidential excesses would be the limited tenure of the post and the power of the electorate to turn Presidents out of office for misbehavior. And for criminal transgressions both great and small, they expressly contemplated the possibility of ordinary criminal prosecution of Presidents.

The view that only a restricted class of grave crimes warrant removal of a President was manifest in several aspects of the impeachment proceedings against President Nixon. The most obvious of these was the refusal of the Judiciary Committee to impeach the President on the basis of substantial allegations of income tax evasion, a refusal which contrasts sharply with congressional readiness both before and after 1974 to impeach federal judges on precisely the same ground.⁽⁸²⁾ The rejection of the Nixon impeachment article regarding personal tax evasion may, of course, be explainable as a tactical choice by those favoring the President's removal to focus on the more serious and more "political" first three articles, rather than as a judgment that presidential tax evasion is *per se* not an impeachable offense. But the minority report by ten dissenting members of the Committee unequivocally endorsed the view that even proof of multiple crimes by a President acting in concert with his subordinates would not necessarily compel impeachment. The minority wrote of the second article of impeachment that "isolated instances of unlawful conduct by presidential aides and subordinates," even with "varying degrees of direct personal knowledge or involvement of the President in these respective illegal episodes" were insufficient to warrant impeachment and removal of "President Nixon, or any President."⁽⁸³⁾

None of the foregoing should be construed to imply that a President's obligation faithfully to execute the laws is irrelevant to the question of defining impeachable offenses. We can say, however, that this presidential obligation provides no panacea to the definitional problem.

2. Towards a Working Definition of an Impeachable Crime

In the end, neither the Constitution, nor the Framers, nor the precedents, nor the commentators can tell us exactly what differentiates statutory crimes for which a President should be impeached from those for which he should not. However, careful study of all these sources viewed in the light of reason and common sense suggests certain tentative conclusions:

a. *The Relationship Between Moral Gravity and Political Seriousness*

We think that what makes a crime a "high crime or misdemeanor" and therefore a proper basis for impeachment is a hard to define, but intuitively identifiable, combination of moral gravity and political seriousness. Some kinds of particularly morally reprehensible crimes, for example murder or rape, would certainly require impeachment even if committed by the President for entirely private motives in circumstances wholly unconnected with the office of President. Such crimes are political only insofar as their heinousness strips the President of his legitimacy and renders him unfit in the eyes of the country to hold office. On the other hand, the more political the crime, the more it involves abuse of the president's official position or subversion of the proper functions of the other branches of government, the less likely we are to be concerned with its moral depravity. A President who used illegal wiretaps to obtain information with which to blackmail a Congressman into voting for flood and famine relief would be no less impeachable because his motives were good. Such conduct imperils honest constitutional government.

Crimes which are both morally reprehensible and intimately related to the presidential office are the most obviously impeachable (e.g., murder of a political rival; selling military secrets to known terrorists). Beyond such extreme examples, however, there will usually be an inverse relationship between moral gravity and political character. The more reprehensible the crime, the more relaxed will be the required nexus to the President's official duties. The more direct the connection between the crime and the President's constitutional functions, the lower the required level of heinousness.

b. *The Severity of the Crime in the Eyes of the Criminal Law*

Although it is true that not all crimes and not even all felonies are impeachable "high crimes and misdemeanors," the severity of the crime in the eyes of the criminal law is certainly relevant. Felonies *are* more serious than misdemeanors. Within the broad class of felonies, Congress has expressed some rough view of the relative seriousness of different felony offenses through the assignment of different levels of punishment.⁽⁸⁴⁾ On balance, a crime for which the criminal law prescribes a sentence of ten years is probably more serious than an offense where the likely punishment is six months. Such distinctions are certainly relevant to an impeachment inquiry.

c. *The Relative Importance of the Elements of a Crime and the Circumstances Under Which It Was Committed*

Any consideration of whether allegedly criminal presidential conduct is also an impeachable "high crime or misdemeanor" should not be limited to an abstract assessment of the statutory elements of the crime, but must also take account of the particular circumstances of the case. For example, in the State of Washington, wrongfully appropriating a \$1500 watch misdelivered in the mail is the same statutory crime, First Degree Theft, as embezzling \$1.5 million from a trust fund for widows and orphans.⁽⁸⁵⁾ It will often be the circumstances rather than the label of the crime that determines its true seriousness.

d. *Perjury and Obstruction of Justice*

Perjury and obstruction of justice are serious felonies that strike at the heart of the judicial process. In the impeachment setting, an allegation that a President lied under oath or sought to induce others to do so must be viewed with the utmost seriousness. As with any other crime, however, the label is not necessarily determinative of the true seriousness of the crime or of the weight to be accorded the crime in the impeachment calculus. Put plainly, some perjuries and obstructions are certainly "high crimes and misdemeanors," while other perjuries and obstructions may not rise to that terrible level. Both the general principles concerning the impeachment clauses discussed at length above and several specific impeachment precedents provide some guidance in analyzing particular cases.

First, consistent with the principle that "high crimes and misdemeanors" are political crimes, the founding generation explicitly contemplated that a President who lied directly to Congress about matters relating to his office, whether under oath or not, could be impeached. Recall the declaration of James Iredell, one of the first Supreme Court Justices, that, "The President must certainly be punishable for giving false information to the Senate."⁽⁸⁶⁾

Second, there is ample precedent for removing officials from office for perjury or obstruction. President Richard Nixon was impeached for obstruction of justice, and within the last decade two federal judges, Alcee Hastings and Walter Nixon, have been impeached and removed from office for perjury.⁽⁸⁷⁾ A notable feature of all three of these impeachments was that they involved lies about underlying conduct that was itself either criminal or involved a corrupt misuse of office. President Nixon's case is well known. Judge Hastings was impeached and convicted for lying at his own criminal trial about his participation in a conspiracy to solicit a bribe. Judge Walter Nixon was impeached and convicted for lying to a grand jury about his connection to the father of an accusing drug smuggler and his own attempts to influence the outcome of the son's case.

There is no clear guidance in the constitutional text, the debates of the Founders, or prior impeachment precedents regarding allegations of perjury or obstruction that do not concern lies told in the President's official capacity or in an effort to conceal conduct that would itself be a crime. We suggest, however, that it may be important in assessing the seriousness of any particular allegation of presidential perjury to consider the treatment of similar cases in the ordinary criminal process. For example, perjury before federal grand and trial juries is prosecuted with reasonable frequency, suggesting that lies in these settings are considered particularly egregious. On the other hand, perjury committed in civil cases is very rarely prosecuted in federal courts.

The language of Title 18, U.S.C., Sections 1512, 1621, and 1623 sweeps broadly enough to embrace false swearing in, and obstruction of, federal civil actions to which the federal government is not a party. As the Sixth Circuit said in *In re Morganroth*, "The possibility of a perjury prosecution exists whenever an individual takes an oath, in a civil or criminal matter, where the law of the United States authorizes an oath to be administered"⁽⁸⁸⁾ Cases charging perjury or obstruction in connection with a purely private civil action have been brought in federal court. Nonetheless, as the Eleventh Circuit noted in *United States v. Holland*, the "vast majority of convictions under 18 U.S.C. 1621" involve perjury in a criminal proceeding."⁽⁸⁹⁾

Indeed, a search conducted of all reported federal cases since 1944 revealed sixteen (16) prosecutions for violations of 18 U.S.C. 1512, 1621, or 1623 arising out of a civil action to which the United States, or some agency thereof, was not a party.⁽⁹⁰⁾ If one assumes that the sixteen cases located by search of prior appellate case law represent only one-sixth of the actual total of such cases filed, and therefore that roughly one hundred such cases have been brought since 1944, the result would nonetheless be that a case of perjury or obstruction in a case involving only private parties is brought by any given U.S. Attorney's Office, on average, once every half century.⁽⁹¹⁾ Among the sixteen cases identified above, the majority were plainly brought to vindicate a strong, and easily ascertainable, federal interest.⁽⁹²⁾

E. Is There a Category of Impeachable Offenses for Which the House Should Nonetheless Not Impeach?

One of the conceptual difficulties in debates over impeachment flows from the fact that the constitutional language *seems* imperative. Article II says that the President "*shall* be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Read closely, however, the Constitution does not say that Congress must impeach if a President commits high crimes or misdemeanors; it says only that the President must be removed if impeached and convicted. This aspect of the impeachment process is captured better in the common term "impeachable offense" than in the constitutional language itself. An "impeachable offense" is one for which the legislature could, but need not, impeach and remove an officeholder. We think that there is indeed a class of such offenses. The process the Committee ought to apply in considering offenses that fall into this category is perhaps not dissimilar to the decisional process of a public prosecutor deciding which of many technically prosecutable offenses and offenders merit the imposition of the moral opprobrium and harsh punishments of the criminal law. In such a process, the decisionmaker must consider not only whether facts can be proven, but whether prosecution promotes or disserves the interests of the country.

CONCLUSION

We thank the Committee for the opportunity to contribute the foregoing remarks, and we hope they will prove in some small degree helpful in the exercise of the Members' grave constitutional duty.

NOTES

1. 116 Cong. Rec. H3113-3114 (daily ed. Apr. 15, 1970) (statement of Rep. Gerald Ford). The comment was made in the course of debate over whether to initiate impeachment proceedings against Supreme Court Justice William O. Douglas.

2. There are five constitutional provisions dealing with impeachment, four of which are applicable to impeachment of a president:

"The House of Representatives shall ... have the sole Power of Impeachment." (U.S. Const., art. I, 2, cl. 5.)

"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present." (U.S. Const., art. I, 3, cl. 6.)

"Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nonetheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." (U.S. Const., art. I, 3, cl. 7.)

"The President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." (U.S. Const., art. II, 4.)

3. See *Walter Nixon v. United States*, 113 S.Ct. 732 (1993); *Ritter v. United States*, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937) (rejecting as non-justiciable the claim of Judge Halstead Ritter that the Senate convicted and removed him for non-impeachable offenses). See generally, Michael J. Gerhardt, *The Federal Impeachment Process* 143-46 (1996).

4. See **Appendix**, at A-1.

5. See **Appendix**, at A-11-12.

6. See, e.g., Raoul Berger, *Impeachment* 214-223(1973) (suggesting that legislators are amenable to impeachment despite the contrary precedent).

7. See, e.g., *Minority Views of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti and Latta*, in *Impeachment of Richard M. Nixon, President of the United States*, Report of the Committee on the Judiciary, House of Representatives, H.R. Rep. No. 1035, 93d Cong., 2d Sess., 359 (1974) (hereinafter *Nixon Impeachment Report*) ("The language of the Constitution indicates that impeachment can lie only for serious criminal offenses."); Statement of Senator Johnson, *Trial of Andrew Johnson*, Vol. III, p. 51 (1868) (explaining his vote against impeachment in part on the ground that, "the terms crimes and misdemeanors in the [constitution] mean legal crimes and misdemeanors").

8. The first vote came on July 19, 1787, and the second on July 26, 1787. Max Ferrand, *Records of the Federal Convention of 1787* (hereinafter *Records*), 2:61, 69, 116.

9. *Id.*, at 2:64-69. See also, Gerhardt, *supra* note 3, at 7-9.

10. "Malversation" means "corrupt conduct or fraudulent practices, as in public office." Webster's New World Dictionary (2d Coll. Ed. 1986), at 858.

11. *Records*, at 2:337.

12. *Id.* at 2:495.

13. *Id.* at 2:550

14. *Id.* at 2:551.

15. *Id.* at 2:550.

16. *Id.*

17. *Id.* at 2:551.

18. *See*, Berger, *supra* note 6, at 86.

19. *Id.* at 71, 86-87.

20. *Id.* at 70-71.

21. *See* **Appendix**, at A-22-23.

22. *See* **Appendix**, at A-3-4.

23. *Ritter v. United States*, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937) (rejecting as non-justiciable the claim of Judge Halstead Ritter that the Senate convicted and removed him for non-impeachable offenses).

24. Trial of Andrew Johnson, Vol. I, pp. 8-10 (1868) (Articles X and XI of the Articles of Impeachment against President Johnson).

25. *See* Impeachment of Richard M. Nixon, President of the United States, Report of the Committee on the Judiciary, House of Representatives, H.R. Rep. No. 1035, 93d Cong., 2d Sess., 3-4 (1974).

26. This view is virtually universal among commentators. For example, Justice Story wrote: "Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct. *** In the few cases of impeachment which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanor." Joseph Story, *Commentaries on the Constitution of the United States*, 5th ed., 799 (1905). *See also*, Gerhardt, *supra* note 3, at 103; Berger, *supra* note 6, at 56-57; C. Black, *Impeachment: A Handbook* 33-35 (1974).

27. Such modern innovations include the wire and mail fraud statutes, 18 U.S.C. 1341 and 1343; the RICO statute, 18 U.S.C. 1962, et seq., the federal false statements statute, 18 U.S.C. 1001, and many others.

28. The canon of statutory construction bearing the Latin title *ejusdem generis* which holds that "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." Black's Law Dictionary (5th ed.), at 464. Applied here, *ejusdem generis* suggests that the phrase "high crimes and misdemeanors" should be construed as applying only to offenses of the same general class as treason and bribery. In the present case, ordinary rules of English usage produce the same conclusion. The use of the word "other" is an unequivocal statement that treason and bribery are merely two examples of the general category of high crimes and misdemeanors.

29. Interestingly, however, bribery was not designated by statute as a federal crime until 1790. *See*, Act of April 30, 1790, ch. 9, 21, 1 Stat. 112 (1845).

30. George Mason, the originator of the phrase "high crimes and misdemeanors," said earlier in the Convention that he favored impeachment for "great crimes." *Proceedings*, 2:65.

31. Berger, *supra* note 6, at 88.

32. Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2d ed., Vol. 4, p. 113 (1836).

33. James Wilson, *Lectures in Law*, in 1 *The Works of James Wilson* 426 (R. McCloskey ed. 1967).

34. Story, *supra* note 26, 751.

35. Berger, *supra* note 6, at 90.

36. *Id.* at 298.

37. Gerhardt, *supra* note 3, at 104-05.

38. *Nixon Impeachment Report*, at 217-219, 338.

39. *Id.* at 1-2.

40. *Id.* at 3-4.

41. *Id.* at 4.

42. *Id.* at 7-8.

43. *Id.* at 289.

44. *Id.* at 327 (Statement of Congresswoman Holtzman, joined by Congressmen Kastenmeier, Edwards, Hungate, Conyers, Waldie, Drinan, Rangel, Owens, and Mezvinsky).

45. *Id.* at 297.

46. *Id.* at 341 (Statement of Congressman Wayne Owens).

47. *Id.* at 287 (Supplemental Views of Congressman Don Edwards).

48. *Id.* at 349. McClory was joined by Congressmen Danielson and Fish.

49. *Id.* at 363.

50. This point was made forcefully by the dissenting members of the Judiciary Committee in the Nixon impeachment: "We have never had a British parliamentary system in this country, and we have never adopted the device of a parliamentary vote of no-confidence in the chief executive. If it is thought desirable to adopt such a system of government, the proper way to do so is by amending our written Constitution -- not by removing the President." (Minority Views of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti and Latta, *id.* at 365.)

51. See **Appendix**, at A-2; Gerhardt, *supra* note 3, at 50 (describing impeachment of Judge John Pickering.)

52. See **Appendix**, at A-3-4 (describing impeachment of Supreme Court Justice Samuel Chase).

53. See **Appendix**, at A-5 (describing impeachment of Judge James H. Peck).

54. See **Appendix**, at A-18-19 (describing impeachment of Judge George English).

55. See **Appendix**, at A-20-21 (describing impeachment of Judge Harold Louderback).

56. See **Appendix**, at A-22-23 (describing impeachment of Judge Halstead L. Ritter).

57. See, e.g., Berger, *supra* note 6, at 122-180; Gerhardt, *supra* note 3..

58. See **Appendix** for descriptions of impeachment of Judges Pickering (drunkenness, blasphemy, senility, and improper rulings) and English (habitual malperformance).

59. See **Appendix** for descriptions of impeachment of Judges Chase (bias in charging grand jury and delivering inflammatory political harangue to grand jury), Peck (improperly holding in contempt lawyer who criticized his rulings), and Louderback (using favoritism in appointing receivers).

60. See **Appendix** for descriptions of impeachment of Judges Swayne (falsifying expense accounts and using property held in a receivership); Archbald (bribery and hearing cases in

which he had a financial interest); Ritter (taking kickbacks and tax evasion); Claiborne (tax evasion); Hastings (conspiracy to solicit a bribe). In addition, two judges who resigned to avoid impeachment, Judge Mark W. Delahay and Judge Robert Collins, were charged with questionable financial dealings and bribery respectively. *See also*, Gerhardt, *supra* note 3, at 23, 30 n. 36.

61. The staff of the House Judiciary Committee in the Nixon presidential impeachment took the view that the standard for impeachment of judges is no different than the standard for presidents, but agreed with our reading of the judicial impeachment cases insofar as we take them to involve "an assessment of the conduct of the officer in terms of the constitutional duties of his office." *Constitutional Grounds for Presidential Impeachment*, Report by the Staff of the Impeachment Inquiry, Committee on the Judiciary, House of Representatives, 93rd Cong., 2d Sess., 17 (Feb. 1974).

62. Berger, *supra* note 6, at 70-71.

63. As the Committee Report observed, with one possible exception, none of the subjects of the sixty-nine previous impeachment inquiries had ever asserted a privilege to refuse compliance with a legislative subpoena. *Nixon Impeachment Report*, at 206.

64. *Id.* at 190. The Committee report also contains substantial evidence that the disclosures the President did make contained intentional omissions as well as false and misleading material. *Id.* at 203-05 and elsewhere.

65. *Id.* at 209.

66. *Id.* at 4.

67. *See Appendix*, at A-2.

68. Gerhardt, *supra* note 3, at 50.

69. Robert Pear, *Clinton Lawyers Compare his Travails to Hamilton's*, *The Sacramento Bee*, October 4, 1998 (reprinted from *New York Times*).

70. James F. Simon, *Independent Journey: The Life of William O. Douglas* 391-409 (Harper & Row 1980). *See also*, Gerhardt, *supra* note 3, at 107.

71. Quoted by Congresswoman Holtzman in *Nixon Impeachment Report* at 327.

72. *See, e.g.*, Additional Views of Mr. Conyers, in *Nixon Impeachment Report*, at 295:

By the same policies of secrecy and deception [regarding Cambodia], Richard Nixon also violated a principal tenet of democratic government: that the President, like every other elected official, is accountable to the people. For how can the people hold their President to account if he

deliberately and consistently lies to them? The people cannot judge if they do not know, and President Nixon did everything within his power to keep them in ignorance.

73. Additional Views of Mr. Danielson, *id.* at 303.

74. 18 U.S.C. 41.

75. 18 U.S.C. 112(a).

76. 18 U.S.C. 153(a).

77. 18 U.S.C. 342.

78. 18 U.S.C. 501.

79. 18 U.S.C. 511.

80. *See, e.g.*, Concurring Views of Congressman Hamilton Fish, Jr., *Nixon Impeachment Report*, 356 ("At the very least [the President] is bound not to violate the law; not to order others to violate the law; and not to participate in the concealment of evidence respecting violations of the law of which he is made aware.").

81. Alexander Hamilton, *The Federalist Papers*, No. 65.

82. *See* descriptions of impeachments of Judge Halstead Ritter in 1936, **Appendix** at A-22-23, and Judge Harry Claiborne in 1986, **Appendix** at A-24, both for income tax evasion.

83. *Nixon Impeachment Report* at 360.

84. The real severity ranking of federal offenses may not always be apparent from looking at the statutory maximum sentences. A better gauge will often be found in the Federal Sentencing Guidelines.

85. *See*, Revised Code of Washington, 9A.56.020(1)(a) and (c) and 9A.56.030(1)(a).

86. Quoted by Congresswoman Holtzman in *Nixon Impeachment Report* at 327.

87. *See*, **Appendix**, at A-25-28.

88. 718 F.2d 161, 166 (6th Cir. 1983).

89. 22 F.3d 1040, 1047 (11th Cir. 1994). In fairness, it should be noted that the *Holland* court made this observation in the course of rejecting the district court's grant of a downward departure based on the ground that the perjury at issue in the case occurred in a civil proceeding. The civil case in question was an effort by Morris Dees of the Southern Poverty Law Center to collect a

judgment obtained against the defendant for violating the civil rights of various persons while acting as leader of the Ku Klux Klan.

90. Although the electronic search that produced this result was designed to discover every perjury or obstruction case reported in the past half century arising from a civil action to which the U.S. was not a party; we have no doubt that some such cases slipped through the search net. Nonetheless, we suggest that no search, no matter how exhaustive, will discover a significantly larger group of such cases. The cases identified were: *United States v. Holland*, 22 F.3d 1040 (11th Cir. 1994); *United States v. McAfee*, 8 F.3d 1010 (5th Cir. 1993); *United States v. Markiewicz*, 978 F.2d 786 (2nd Cir. 1992); *United States v. Morales*, 976 F.2d 724, 1992 WL 245718 (1st Cir. 1992) (unpublished); *United States v. Maddox*, 943 F.2d 53, 1991 WL 164318 (6th Cir. 1991) (unpublished); *United States v. Clark*, 918 F.2d 843 (9th Cir. 1990); *United States v. Reed*, 773 F.2d 477 (2nd Cir. 1985); *United States v. Jonnet*, 762 F.2d 16 (3d Cir. 1985); *United States v. Coven*, 662 F.2d 162 (2nd Cir. 1981); *United States v. Comiskey*, 460 F.2d 1293 (7th Cir. 1972); *Brightman v. United States*, 386 F.2d 695 (1st Cir. 1967); *United States v. Lester*, 248 F.2d 329 (2nd Cir. 1957); *Roberts v. United States*, 239 F.2d 467 (9th Cir. 1956); *United States v. Ashley*, 905 F.Supp. 1146 (E.D.N.Y. 1995); *United States v. Dell*, 736 F.Supp. 186 (N.D. Ill. 1990); *United States v. Taylor*, 693 F.Supp. 828 (N.D. Cal. 1988).

91. There are approximately ninety-five United States Attorney's Offices.

92. See, e.g., *Markiewicz, supra* (witness tampering and perjury were part of scheme to steal tribal funds in Indian country); *Reed, supra* (perjury part of securities fraud scheme criminally prosecuted by U.S.); *Ashley, supra* (perjury part of scheme to defraud Federal Home Loan Mortgage Corp.); *Coven, supra*, and *Dell, supra* (obstruction, false statements, and perjury part of fraud scheme criminally prosecuted by U.S.); *Comiskey, supra* (case referred directly to U.S. Attorney by U.S. District Judge who presided over civil case); *Clark, supra* (perjury involved case concerning complaint to EEOC); *Holland, supra* (Southern Poverty Law Center acting as something approximating a government surrogate in long-running federal fight against bigotry and violence of the KKK).

[Introduction](#) | [Table of Contents](#) | [Home](#)
[Criminal Justice News/Issues](#) | [The Champion Magazine](#)
[About NACDL](#) | [Membership](#) | [Upcoming Events/Education](#)
[Legal Research](#) | [Publications & Tapes](#)
[Members Only](#)

National Association of Criminal Defense Lawyers (NACDL)
1025 Connecticut Ave. NW, Ste. 901, Washington DC 20036
www.criminaljustice.org / www.nacdl.org
(202) 872-8600 / FAX(202) 872-8690 / assist@nacdl.com

