Testimony Before the U.S.

From the Halls of Congress

Political Scientists Testify before the House Committee on the Judiciary during the Hearing on Impeachment Inquiry Pursuant to H. Res. 581*

Five APSA members testified before the U.S. House Judiciary Committee's impeachment hearings during the fall session of the 105th Congress–Bruce Ackerman of Yale University, Samuel Beer of Harvard University, Matthew Holden of the University of Virginia, Cass Sunstein of the University of Chicago, and Gary McDowell of the University of London.

All or portions of reformatted versions of their statements are printed here to illustrate political scientists "speaking truth to power." The statements of the five scholars are their own and do not represent the positions of either their institutions or the American Political Science Association.

The editors of *PS* encourage other APSA members participating in federal and state policy processes in all substantive areas to notify *PS* of their activities. This information will be shared with journal readers in future issues.

Robert J-P. Hauck, Editor

* House Resolution 581, officially titled "H. Res. 581: Authorizing and directing the Committee on the Judiciary to investigate whether sufficient grounds exist for the impeachment of William Jefferson Clinton, President of the United States," made official the resolution that: "the Committee on the Judiciary, acting as a whole or by any subcommittee thereof appointed by the chairman for the purposes hereof and in accordance with the rules of the committee, is authorized and directed to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach William Jefferson Clinton, President of the United States of America. The committee shall report to the House of Representatives such resolutions, articles of impeachment, or other recommendations as it deems proper."

Gary L. McDowell

University of London
November 9, 1998

Editor's Note: This excerpt from Professor McDowell's testimony is taken from the concluding section, titled "Oaths and Perjury."

The use of oaths in legal proceedings in which evidence is given is an ancient part of the common law. Sir Edward Coke noted that the "word oath is derived from the Saxon word *eoth*." The oath is nothing less, said Coke, than "an affirmation or denial by any Christian of anything lawfull and honest, before one or more, that have the authority to give the same for advancement of truth and right, calling Almighty God to witness that his testimony is true" (1809, 165).[1] Yet there is evidence that the use of oaths extends back to Roman times, where the law of the Twelve Tables provides that "Whoever gives false evidence must be thrown from the Tarpeian rock" (Stephens 1883, 1: 11). And Cicero in *De Officiis* argues that "in taking an oath it is our duty to consider not what we may have to fear in case of violation but wherein its obligation lies: an oath is an assurance backed by religious sanctity; and a solemn promise given, as before God as one's witness, is to be sacredly kept" (1991, III: 104, 383). As Samuel Pufendorf emphasized, oaths were not simply the preserve of Christians:

> An oath the very Heathens look'd on as a thing of so great force, and of so sacred authority, that they believed the sin of perjury to be punished with the severest vengeance; such as extended itself to the posterity of the offender, and such as might be incurr'd by the bare thought and inclination without the act. (1717, IV. II. 1, 117)

The significance of the oath in

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Bruce Ackerman

Yale University
December 7, 1998

Good morning, Mr. Chairman, and the distinguished members of this Committee. My name is Bruce Ackerman. I am Sterling Professor of Law and Political Science at Yale. I request the Chair's permission to revise and extend these remarks.

Since you have already heard so much on the subject of constitutional standards for impeachment, I would like to concentrate on three big mistakes that have characterized the discussion up to now.

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The first big mistake centers on the power of this Committee and the present House of Representatives to send a case to trial in the Senate. People seem to be assuming that once the present Committee and the full House vote for a bill of impeachment, the stage will be set for a trial in the Senate during the coming year, and that the next House will not have to take any further actions on the matter.

Nothing could be further from the truth. As a constitutional matter, the House of Representatives is not a continuing body. When the 105th House dies on January 3, all its unfinished business dies with it. To begin with the most obvious example, a bill passed by the 105th House that is still pending in the 105th Senate on January 3rd cannot be enacted into law unless it once again meets the approval of the 106th House.

This is as it should be. Otherwise lame-duck Congresses would have a field day in situations like the present, where the old House majority has had a setback in the polls. Recognizing that its political power is on the wane, the dominant party

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House Judiciary Committee

Samuel H. Beer

Harvard University
December 7, 1998

My concern is the political and constitutional consequences of impeachment rather than its legal and judicial aspects. The process is judicial in form, impeachment by the House being like indictment by a grand jury, and trial and conviction by the Senate being like trial and conviction by a court. In fact, however, the consequences of successful impeachment do not resemble the usual consequences of a judicial trial, for instance, punishment by fine and/or imprisonment. As Article I, section 3, paragraph 7 provides, punishment of that kind would be invoked after the president had become a private citizen by resignation, removal, or expiration of his term of office.

Removal from office, the grand and forbidding consequence of successful impeachment, distinguishes this process radically from the judgement of a court. It resembles rather a vote of no confidence in a legislature, such as the British parliament. By such a vote the House of Commons can bring to an end the life of a government. In 1841, Sir Robert Peel summed up this fundamental convention of the British Constitution when he successfully moved that "her Majesty's Ministers do not sufficiently possess the confidence of the House of Commons to enable them to carry through the House measures which they deem of essential importance to the public welfare."

Like a vote of no confidence, impeachment brings to an end a president's administration. Like a vote of no confidence, it relates not merely to some specific failure, but is a judgment on his record and promise as a whole with regard to those "measures which he deems of essen-

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Matthew Holden Jr.

University of Virginia
November 9, 1998

Editor's Note: This excerpt from Professor's Holden's testimony is taken from the concluding section, titled "Impeachment is a Caged Lion: Should it Be Loose in the Streets?"

Someone, at a responsible level, must face up to the fact that impeachment is a caged lion, and ask seriously, and without prejudice, whether letting that lion loose in the streets will leave anyone safe.

The House of Representatives is placed by the constitutional prescription in the role analogous to that of the prosecutor. When is it necessary to go forward? In the narrower domain of ordinary criminal law, the criminal prosecutor considers many factors in deciding whether to bring charges. Among others, the prosecutor considers "the strength of the evidence, the suspect's background and characteristics, the costs and benefits of obtaining a conviction, and the attitude of the community toward the offense the suspect is believed to have committed" (Miller et al. 1991, 695).

The discussion for the past four years, and especially for the past ten months, has not gotten to this, the nexus of the most serious issue. The discussion has focused upon attitudes toward the person who now occupies the office of president, and, secondarily, upon what people believe is the evidence. But the most serious issue is different. There has been a continual avoidance of the costs and benefits of impeachment when considered in relation to the whole political system.

There is some discussion of the attitude of the community, often in puzzlement as to the difference between opinion reflected in mass poll data and opinion expressed by those

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Cass R. Sunstein

University of Chicago
November 9, 1998

Editor's Note: This excerpt from Professor's Sunstein's testimony is taken from the concluding section, titled "How Should We Understand Impeachment Today?"

Thus far I have suggested that both the original understanding and historical practice converge on a simple principle. The basic point of the impeachment provision is to allow the House of Representatives to impeach the president of the United States for egregious misconduct that amounts to the abusive misuse of the authority of his office. This principle does not exclude the possibility that a president would be impeachable for an extremely heinous "private" crime, such as murder or rape. But it suggests that outside of such extraordinary (and unprecedented and most unlikely) cases, impeachment is unacceptable. The clear implication is that the charges made thus far by Judge Kenneth Starr and David Schippers do not, if proved, make out any legitimately impeachable offenses under the Constitution.

In the present context, it would be possible to respond to this suggestion in two different ways. First, it might be urged that actual or possible counts against President Clinton–frequent lies to the American public, false statements under oath, conspiracy to ensure that such false statements are made, perhaps perjury, interactions with his advisers designed to promote further falsehoods under oath, and so forth–are very serious indeed and that if these very serious charges are deemed a legitimate basis for impeachment, little or nothing will be done to alter the traditional conception of impeachment. Perhaps some of these possible counts, involving interactions with his advisers designed to

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courts of law was explained by James Wilson in his law lectures: "The courts of justice, in almost every age, and in almost every country, have had recourse to oaths, or appeals to heaven, as the most universal and the most powerful means to engage men to declare the truth. By the common law, before the testimony of a witness can be received, he is obliged to swear, that it shall be the truth, the whole truth, and nothing but the truth."

The purpose, Wilson concluded, is to secure truthful evidence:

> Belief is the end proposed by evidence of every kind. Belief in testimony is produced by the supposed veracity of him who declares it. The opinion of his veracity . . . is shaken, either when, in former instances, we have known him to deliver testimony which has been false; or when, in the present instance, we discover some strong inducement which may prevail on him to deceive. (McCloskey 1967, 2: 702-03)[2]

Wilson took his moral and historical bearings on the necessity of oaths to getting at the truth from William Paley, whose *Principles of Moral and Political Philosophy* (1788) was an influential work of considerable prominence among the early Americans. Wilson praised Paley as an authority of "high reputation," a "sensible and ingenious writer," who was "no undiscerning judge of the subject" of the administration of justice (McCloskey 1967, 1: 310, 240, 325). Joseph Story was similarly impressed with Paley as a writer of "practical sense" whose analyses of political institutions displayed "great skill and ingenuity of reasoning." Throughout his celebrated *Commentaries on the Constitution of the United States* (1851), Story relies often on the "excellent writings" of Paley.[3]

For Paley, the issue of oaths and perjury was one of morality as well as of law; he expressed views not unlike that of Cicero who warned that "people overturn the fundamental principles established by nature, when they divorce expediency from moral rectitude" (1991, III: 101, 184). In Paley's view, the entire question of perjury rested on the definition of a lie: "A lie is a breach of promise: for whoever seriously addresses his discourse to another, tacitly promises to speak the truth, because he knows that the truth is expected." And the effects of lying are not simply private; they are public in the deepest and most important sense:

> [T]he direct ill consequences of lying . . . consist, either in some specific injury to particular individuals, or the destruction of that confidence, which is essential to the intercourse of human life: for which latter reason, a lie may be pernicious in its general tendency, and therefore criminal, though it produce no particular visible mischief to anyone. (1788, 1: 184)

Given this public aspect to the damages that come from lying, it is necessary that oaths never be made "cheap in the minds of the people." Since "mankind must trust to one another" there is no more efficacious means than through the use of oaths: "Hence legal adjudications, which govern and affect every right and interest on this side of the grave, of necessity proceed and depend upon oaths." As a result, lying under oath is far more serious than merely lying; perjury is, Paley notes, "a sin of greater deliberation," an act that "violates a superior confidence" (1: 193-197).

Because a witness swears that he will "speak the truth, the whole truth, and nothing but the truth, touching the matter in question," there is no place where a person under oath can cleverly lie and not commit perjury. The witness cannot legitimately conceal "any truth, which relates to the matter in adjudication" because to so conceal "is as much a violation of the oath, as to testify a positive falsehood; and this whether the witness be interrogated to that particular point or not." It is not enough, Paley observed, for the witness afterward to say that he was not forthcoming "because it was never asked of me"; an oath obliges to tell all one knows whether asked or not. As Paley notes, "the law intends . . . to require of the witness, that he give a complete and unreserved account of what he knows of the subject of the trial, whether the questions proposed to him reach the extent of his knowledge or not" (1: 200-01).

Nor is it sufficient an excuse that "a point of honor, of delicacy, or of reputation, may make a witness backward to disclose some circumstance with which he is acquainted." Such a sense of shame or embarrassment cannot "justify his concealment of the truth, unless it could be shown, that the law which imposes the oath, intended to allow this indulgence to such motives" (1: 201).

Similarly, linguistic contortions with the words used cannot legitimately conceal a lie or, if under oath, perjury. Paley's argument on this point merits a complete hearing:

> As there may be falsehoods which are not lies, so there may be lies without literal or direct falsehood. An opening is always left for this species of prevarication, when the literal and the grammatical signification of a sentence is different from the popular and customary meanings. It is the willful deceit that makes the lie; and we willfully deceive, where our expressions are not true in the sense in which we believe the hearer apprehends them. Besides, it is absurd to contend for any sense of words, in opposition to usage, for all senses of words are founded upon usage, and upon nothing else. (1: 188-89)[4]

Thus, the most common terms of oaths sworn include a promise not only to tell the truth, but the broader promise to tell the whole truth and nothing but the truth. Willful deceit is the key to whether a witness commits perjury or not, whatever the means chosen.[5] The moral and legal inheritance of the founding generation included the belief that the violation of an oath was nothing less than "treachery" (Sidney [1698] 1990, 225).

None of the major writers with whom the founders were intimately conversant saw perjury as anything but one of the most serious offences against the commonwealth.[6] In his widely cited *Treatise on the Pleas of the Crown*, for example, William Hawkins explained that there were certain kinds of offences that were

"infamous, and grossly scandalous, proceeding from principles of down right dishonesty, malice or faction"; and it was under this rubric that he included "perjury and subornation of perjury." Indeed, he went further arguing that "perjury . . . is of all crimes whatsoever the most infamous and detestable" ([1724-26] 1972, 1: 318-19).[7]

Perjury was, in the first instance, tied to jurors who might give a false verdict and "for several centuries no trace is to be found of the punishment of witnesses for perjury." And, even after it originated in the Star Chamber, it was only by "slow degrees [that] the conclusion that all perjury in a judicial proceeding is a crime was arrived at" (Stephens 1883, 3: 241, 247). In 1562-63 there came the first statute providing penalties for those who committed both perjury and subornation of perjury (Holdsworth 1966, 4: 515-18). Thus were human punishments made to augment the fear of divine vengeance for lying under oath.[8] This was, in Pufendorf's view, absolutely essential, as he noted by quoting Demosthenes: "Those who escape your justice, leave to the vengeance of the gods; but those on whom you can lay hands, never consign over to Providence without punishing them yourselves" (1717, IV. II. 2, 118).

It was by this joint power of the sacred and the secular that men could put their faith in oaths as a means of securing truthful testimony from those sworn to give it. And by such oaths and the punishments to be meted out for perjury, the commonwealth could secure the proper administration of justice within the courts of law. Perjury was no longer just a sin; it was a crime.

Based on the foregoing analysis and review of the historical record, the conclusion seems inescapable, based on the expressed intent of the framers, the wording of the Constitution, the writings of the principal legal authorities known to the framers, and the common law, that perjury would certainly be included as a "high Crime and Misdemeanor" in an impeachment trial under the United States Constitution. Further, the record fails to support the claim that impeachable offences are limited to only those abuses that occur in the official exercise of executive power. As seen in the authorities, impeachable offences, in both English and American history, have been understood to extend to "personal misconduct" (Story 1851, 2: 274), "violation of . . . trust" (Simpson 1916, 144 n. 6), and "immorality or imbecility" (Curtis 1854-60, 2: 260) among other charges.

There is no power granted to the House of Representatives more formidable than "the sole power of impeachment." Knowing as they did the dangers of subjecting those in high office to the mere passion and caprice of the moment, the founders sought to create a power to impeach that would be capable of "displacing an unfit magistrate," but within the confines of a written and ratified Constitution of enumerated and limited powers. Thus did they limit the reasons for which an impeachment could be undertaken to "Treason, Bribery, or other high Crimes and Misdemeanors."

The success of the founders in creating the impeachment power to be both politically effective and safe to the demands of republican government is seen most clearly in how few have been the instances of its use. Lord Bryce described the power of impeachment over a century ago as "the heaviest piece of artillery in the congressional arsenal" and thus "unfit for ordinary use." The process seeking to remove a president, he said, "is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at" (Bryce [1893] 1995, 1: 190). The constitutional provisions for impeachment were intended, in part, to secure the chief executive from being driven from office for mere partisan reasons. To get rid of a president–or to try to – Congress has to have good cause. As Bryce said, one does not use impeachment for light and transient causes, "as one does not use steam hammers to crack nuts" (1: 190).

In the end, the determination of whether presidential misconduct rises to the level of "high Crimes and Misdemeanors," as used by the framers, is left to the discretion and deliberation of the House of Representatives. No small part of that deliberation, guided as it must be by the history and meaning of "high Crimes and Misdemeanors," must address what effect the exercise of this extraordinary constitutional sanction would have on the health of the republic, as weighed against the necessity of making clear that in America no one is above the law. In the end, that is what matters most and must bear most heavily on the members of the House of Representatives as they consider what they must do in the weeks ahead.

Notes

1. This view has been expanded upon by John Wigmore in his treatise on evidence, in which he notes that the idea of an oath came from Germanic law: "The employment of oaths takes our history back to the origins of Germanic law and custom when, as in all early civilizations, the appeal to the supernatural plays an important part in the administration of justice" (1976, V: Sec. 1815, 380). James Bradley Thayer observed that the "Normans . . . found much of what they brought [to England] was there already; for the Anglo-Saxons were their cousins of the Germanic race, and had, in a great degree, the same legal conceptions and methods only less worked out" (1891, 45, 58). This extended to the use of oaths.

2. Wilson was not alone in his view of the importance of oaths. For example, Justice Jacob Rush, the brother of Benjamin Rush, expressed views much like those of Wilson in a pamphlet published in 1796, *The Nature and Importance of an Oath–the Charge to a Jury* (Rutland, Vermont): "An oath is a very serious transaction . . . the nature [of which] . . . is the solemn appeal to God–it is engaging to speak the truth, and calling upon Him to witness our sincerity, that constitute the oath and obligation." Thus is it important that civil society maintain a due attention to "the religious sentiment upon which an oath is founded"; to allow that sentiment to relax will be "injurious to society" (Hyneman and Lutz 1983, 2: 1015-1017, 1018).

3. See Story (1851), especially Sec. 587, II: 69; Sec. 584, II: 65; Sec. 1603, III: 467. See also, for examples, Secs. 522, 547, 558, 572, 575, 579, 581, 584, 587, and 1338.

4. Pufendorf was of a similar mind: Witnesses, he said, should not have "an opportunity by insidious or equivocal expressions to evade the force of their obligations." Should they so break their oath they will discover the truth that God is the "avenger of perjury" (1717, IV. II. III, 121, 119).

5. As Thomas Wood put it, "it cannot be presumed that one would commit perjury without design" (1730, II. 10, xiv, 288-89).

6. For a helpful compilation of many of the common law sources on "oaths" and "perjury" see under those heads in Giles Jacob (1772).

7. Pufendorf put it even more strikingly: "Perjury appears to be a most monstrous sin, in as much as by it the forsworn wretch shews that he at the same time condemns the divine and yet is afraid of human punishment; that he is a daring villain towards God, and a sneaking coward towards men" (1717, IV. II. 2, 118).

8. "The two expedients of the oath and the perjury penalty are similar in their operation; that is, they influence the witness subjectively against conscious falsification, the one by reminding him of ultimate punishment by a supernatural power, the other by reminding him of speedy punishment by a temporal power" (Wigmore 1976, V: Sec. 1831, 432).

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Bruce Ackerman
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will predictably use its lame-duck months to pass lots of controversial legislation on to the Senate in defiance of the judgment made by the voters.

This abuse was very common during the first 150 years of the Republic. Until the Twentieth Amendment was passed in 1933, a newly elected Congress ordinarily waited 13 months before it began its first meeting in Washington. In the meantime, lameducks did the nation's business for a full session, often in ways that ran against the grain of the last election. This might have been an acceptable price to pay in the eighteenth century, when roads were terrible and it took time for farmer-representatives to arrange their business affairs. But as the centuries passed, the operation of lame-duck Congresses proved to be an intolerable violation of democratic principles, and they were basically abolished by the Twentieth Amendment in 1933.

This amendment anticipates that new Congresses will begin meeting as soon as possible after the elections—the text specifies January 3. In enacting it into our fundamental law, Americans believed they were reducing the lame-duck problem to vestigial proportions (Nagle 1997). Perhaps some grave national emergency might require decisive action, but the old Congress would normally fade away as the nation enjoyed a respite from politics between Thanksgiving and New Year's Day.

Generally speaking, lame-duck Congresses have proved faithful to this expectation. For example, during the 65 years since the Twentieth Amendment became part of our higher law, no lame-duck House has ever impeached an errant federal judge, much less a sitting president. Such matters have been left to the judgment of Congresses that were not full of members who had been repudiated at the polls or were retiring from office.

These proceedings, then, are absolutely unprecedented in the post-lame-duck era. Despite this fact, I do not question the raw constitutional power of the current lame-duck House to vote out a bill of impeachment. But I do respectfully submit that the Constitution treats a lame-duck bill of impeachment in precisely the same way it treats any other House bill that remains pending in the Senate on January 3. Like all other bills, a lame-duck bill of impeachment loses its constitutional force with the death of the House that passed it.

This point was rightly ignored before the election, since everybody expected the new Congress to be more Republican than its predecessor. On this assumption, it was perfectly plausible for this distinguished Committee to proceed in earnest–if the 105th House voted to impeach, there was every reason to suppose that the 106th House would quickly reaffirm its judgment, and send the matter on its way to the Senate. But now that the voters have spoken, the constitutional status of lame-duck impeachments deserves far more attention than it has been given.

Worse yet, we cannot rely much on the past for guidance. The closest precedent comes from the 1988 impeachment of federal district judge Alcee Hastings. The 100th House had impeached Hastings, but both sides wanted to delay the Senate trial to the 101st session, and the Senate Rules Committee granted their request (U.S. Senate 1988). The Senate's perfunctory six-page report, however, does not resolve any of the key issues raised by the present case.

Judge Hastings wanted to delay his Senate trial as long as possible, and did not even try to argue that his bill of impeachment expired on January 3 for fear that his Senate trial would be expedited. What is more, Hastings was a judge not a president; and he was impeached during a normal session of Congress, not by a Congress of lameducks. As a consequence, the Senate committee understandably failed to consider any of the crucial constitutional issues raised by the present case. It did not even pause to consider the fact that the people decisively sought to limit the capacity of lame-duck Congresses by solemnly enacting the Twentieth Amendment. If we take this amendment seriously, it means that a lame-duck House should not be allowed to relieve its freshly elected successor of its solemn obligation to determine whether the nation's political life should be disrupted by a lengthy trial of the president in the Senate. In short, whatever decision is reached by this Committee and this House this month, the Constitution requires the newly elected House to reconsider impeachment afresh in January.

Moreover, if the next House of Representatives tries to evade its fundamental constitutional responsibility, the Senate will not be free to dispense with the problem of lame-duck impeachment by a simple reference to its 1988 decision in Judge Hastings' case. Not only does this report fail to confront the basic issues, but the Senate Rules Committee, which authored the report, will not even be the final judge of the matter this time around. Instead, the constitutionality of a lame-duck impeachment will be the first question confronting Chief Justice Rehnquist, the designated presiding officer at the Senate trial. Following the precedent established by Chief Justice Chase before and during the trial of President Andrew Johnson, the chief justice will rightly assert his authority to rule on all procedural issues (Ackerman 1998, 467-68). And the first of these should undoubtedly be a motion by the president's lawyers to quash the lame-duck impeachment as constitutionally invalid unless reaffirmed by the 106th House.

Now, Chief Justice Rehnquist is in fact a scholar of the impeachment process, having written an entire book on the subject. I am sure that he will be fully aware of the historical importance of his conduct of the proceeding, and will quickly grasp the obvious dangers of lame-duck impeachment. Moreover, there are many strands in the chief justice's jurisprudence which will lead him to give great weight to the idea that it is only a truly democratic House, and not a collection of lameducks, that has the constitutional authority to proceed against a man who has been fairly elected to the presidency by the people of the United States.

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Without any hint of partisanship, he would be well within his rights to quash the lame-duck impeachment and remand the matter back to the House.

Since the status of lame-duck impeachments has never before been briefed and argued in the modern era inaugurated by the Twentieth Amendment, it is impossible to make a firm guess as to the way the chief justice will rule on the matter. Only one thing is clear. It would be far better for the country and the constitution if the chief justice is never put to this test. As Alexander Bickel, my great predecessor in the Sterling Chair at Yale, frequently reminded us, the health of our constitutional system is not measured by the number of "hard cases" that have been resolved by clear rulings. It is measured instead by the number of statesmen in our history who, seeing a hard case on the horizon, act in sensible ways so as to avoid ever precipitating a constitutional crisis.[1]

If this Committee and the present House choose to go forward and vote in favor of a bill of impeachment, I respectfully urge the new Speaker of the 106th Congress to do the right thing, and remit the matter once again for consideration by the new House. Suppose, however, he does not do so; suppose further that the chief justice, when pressed, upholds the continuing validity of the lame-duck impeachment despite the expiration of the 105th Congress. Even then, the new House of Representatives will not be able to escape the need for another up or down vote to determine whether a majority of members continue to favor impeachment.

To see why, consider that the House must select a group of its members, called "impeachment managers," to present its case against the president at the Senate trial. Without the energetic prosecution of the case by the managers, the Senate trial cannot go forward. No managers, no trial; but only the new House can appoint the managers. This was done in Judge Hastings' case, and it certainly should be required in the case of a sitting president facing a lame-duck impeachment.

Thus, even if the new House leadership chooses to rely on a lame-duck impeachment, and refuses to allow another vote on a fresh bill before sending the matter to the Senate, there is no way it can avoid the need to test the majority sentiment of the new House. By voting against the slate of managers, a majority of the new House will be in a position to stop the impeachment process dead in its tracks.

It is a big mistake, then, for the distinguished members of this Committee and this House to suppose that they are the final judges of the bill of impeachment. To be sure, the recommendations of this Committee and the vote of the entire House deserve serious consideration by the members taking office next month. But so do the judgments of the voters, as expressed at the elections in November. I respectfully urge you to consider this point as you determine your present course.

To put my point in operational terms: If you don't believe that a bill of impeachment or the election of impeachment managers will gain the majority support of the next House, the wise thing to do is to stop the process now. While it may be embarrassing to reverse gears after so much momentum has been generated in favor of a bill of impeachment, the leadership of the next House will confront a much more embarrassing situation if it becomes evident that its slender proimpeachment majority has vanished over the Christmas recess.

II

So much for the first big mistake. A second mistake involves a persistent confusion about impeachment standards. People keep on talking as if the standards that apply to judges also apply to presidents. But a glance at the constitutional text is enough to establish that this is a mistake. Under Article III of the Constitution, any federal judge may be deprived of his lifetime job if he fails the test of "good Behavior." Thus, the House and Senate may remove a judge even if his "bad" behavior would not otherwise amount to a "high Crime and Misdemeanor."

In contrast, the Constitution does not allow presidents to be removed for want of "good behavior"–for the obvious reason that he does not serve for life, but is under regular electoral scrutiny by the people. Moreover, there should be no doubt that the Framers were serious in restricting themselves to *high* crimes and misdemeanors. In contrast to the impeachment clause, other textual references to crime do not contain similar emphasis on high crime. Thus, the Extradition Clause applies to anyone who commits "Treason, Felony or other Crime," and Article I, Section 6 gives every congressman an immunity from arrest except in cases of "Treason, Felony, and Breach of the Peace." This stands in sharp contrast to the *high* crimes required of presidents, and the mere breaches of good behavior required in the case of judges. It is a bad mistake, then, to assume that the relatively low impeachment standard applied to judges also applies to the president. The mere fact that they are undoubtedly removable for perjury does not imply that the president is also impeachable for the same offense.

Which leads me to the third and last mistake. Perhaps because of the role of the special prosecutor in this case, there has been a constant temptation to imagine that what we are doing here is considering whether you should issue something similar to a criminal indictment. This is a mistake today, even though there was a time long ago when this view was plausible. When impeachment began in the English parliament five hundred years ago, this medieval assembly still thought of itself as a High Court, and often subjected the victims of impeachment to dire criminal punishments.

But the Framers of our Constitution self-consciously rejected these medieval precedents. They carefully limited the sanctions for impeachment to removal from political office, and the like. Once a president departs, he is fully subject to the rigors of criminal prosecution. Rather than standing above the law,

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William Jefferson Clinton probably runs a greater risk of an indictment for perjury in the year 2001 than any other American citizen alive today.

This committee does not sit as a grand jury of the District of Columbia, but as a grand inquest representing the nation. It should not focus on the details of a particular crime, but ask itself a very different question: Does the conduct alleged in this case constitute such a threat to the very foundations of the Republic that it is legitimate to deprive the people of their freely elected choice as president?

For two centuries, the Congress has shown great restraint in dealing with this question. From the era of George Washington to that of Ronald Reagan, presidents have often stretched their constitutional authority to the very limits, making unpopular decisions which have often proved to be in the larger interest of the nation. And yet only one President–Andrew Johnson–has been impeached, and only one–Richard Nixon–has resigned under threat of impeachment. The presidential conduct involved in both cases amounted to an assault on the very foundations of our democracy. Andrew Johnson sought to block the enactment of the Fourteenth Amendment, and its guarantees of equal protection and due process to all American citizens (Ackerman 1988, chap. 8). Richard Nixon sought to undermine the very foundations of the two-party system. Once we lower the impeachment standard to include conduct that does not amount to such clear and danger to our constitutional order, we will do grievous damage to the independence of the presidency.

James Madison saw this. At the [Constitutional] Convention, he opposed the addition of any language which would water down the solemn requirement of a "high Crime and Misdemeanor." A lower standard, he said, would transform the Presidency from an office with a fixed four-year term to one "whose term will be equivalent to a tenure during the pleasure of the Senate" (Farrand 1996, 550). Indeed, when the Founders voted on the impeachment standard, they did not, in fact, vote on the provision that appears in the text today. Instead, they actually approved a standard that required the proof of a "high crime and misdemeanor *against the state*" [emphasis added]. These last three words were later eliminated by the Committee on Style, which had absolutely no authority to change the substance of any provision. Thus, the Committee must have thought that the text's insistence on "*high* crime and misdemeanors" already included the requirement of an assault on the foundations of the American state.

And as we have seen, this is the standard that has, in fact, consistently governed the House's actions over the past two centuries. If the House had been operating under any lower standard, our history books would have been littered with many, many bills of impeachment, and not only two. When judged against this consistent history of restrained congressional interpretation of the impeachment clause, there can be little doubt that the present case falls far short of the standard set by the Framers when they insisted on "high crimes and misdemeanor against the state."

Indeed, if the Committee does find President Clinton's conduct impeachable, it will be setting a precedent that will haunt this country for generations to come. Under the new and low standard, impeachment will become an ordinary part of our political system. Whenever Congress and the presidency are controlled by different political parties, the Congress will regularly use impeachment as a weapon to serve its partisan purposes.

After all, presidents are often called upon to make fateful decisions of the first importance, and, in the short term at least, these decisions can be very unpopular. Once the House's centuries-long tradition of constitutional restraint has been destroyed, its future political leadership will be sorely tempted to respond to unpopular decisions by regularly seeking to force the president from office. The result would be a massive shift toward a British-style system of parliamentary government.

This is in fact what happened in the aftermath of the impeachment of President Andrew Johnson in 1868. Though this impeachment effort barely failed to gain two-thirds support in the Senate, it drained effective power from the presidency–to the point where Woodrow Wilson, writing in 1885, could describe our system as "congressional government." And it could readily happen again. Imagine, for example, that the political wheel turns and that a Democratic Congress confronts a Republican president in the year 2001. Can there be any doubt that enterprising members of the House will be tempted to use the Clinton precedent to unseat the next Republican president at the first politically propitious opportunity?

My study of history and human nature convinces me that once such an abusive cycle of impeachments has begun, it will be very difficult to keep the bitter disagreements generated by our often-divided government under control.

Let me emphasize that, though the lawyers for President Clinton asked me to testify today, I would be equally emphatic in my opposition to any future effort by a Democratic Congress to impeach a Republican president for anything short of an outright assault on the foundations of the Republic. But it is a far, far better thing to cut short a cycle of incivility before it starts. I respectfully urge the distinguished members of this Committee to defer further action on impeachment to the next session of Congress, when our newly elected representatives will be in a much better position to decide on the kind of action–ranging from impeachment to censure to nothing–that is most appropriate in this case.

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Note

1. This is a *leitmotiv* linking Bickel's early works like *The Least Dangerous Branch* (1962) to his posthumous *The Morality of Consent* (1975).

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tial importance to the public welfare." Because of these broad and weighty consequences, impeachment is primarily a political, not a judicial, act.

As a political act, impeachment, like a vote of no confidence, passes judgement on and enforces responsibility on the executive power. In the British system, that responsibility runs directly to the legislature. In the American system, on the contrary, that responsibility runs to the legislature only secondarily and in special circumstances. For us, the responsibility of the president is essentially and directly to the voters. The legislature, as a separate office, separately elected, likewise is held accountable by the voters. This separation of powers is fundamental in our constitutional design and is a main point of distinction from the British system. The direct responsibility of both branches to the voters expresses the sovereignty of the people as the ultimate authority of our constitution and of the government established under it.

As the framers struggled to give expression to this principle, they ran into a problem. How were our liberties to be protected against misuse of power by the executive between quadrennial elections? At the Philadelphia convention during the summer of 1787, they explored various possibilities, such as appeals to the Supreme Court and similar bodies. The states, likewise, we may note, experimented in theory and practice with a variety of methods of bridging this gap. At the last moment, the framers incorporated a structure almost exactly in the form then being used in England in the impeachment of Warren Hastings. This device, although it had ancient roots, had come to special prominence in the seventeenth and eighteenth centuries when Great Britain also for a time displayed a separation of powers, as a still powerful and independent monarch faced off against the rising assertions of the parliament. In those circumstances, impeachment was adopted by the parliamentarians as a means of enforcing responsibility on the monarch through action against his ministers. When, finally, the monarch was eased out of politics the old fusion of executive and legislative power was taken over by a committee of the parliament–the cabinet. Now, the interim method of getting a hold on the executive was dropped in favor of a vote of confidence which performed more effectively the function of enforcing responsibility on parliament. At the same time that impeachment was dying out in Britain, it was taken up by Americans, who found in it a way of supplementing the principal mechanism of democratic responsibility by quadrennial elections. The broad scope of impeachment was embodied in a very different system.

Where the ultimate sovereign is the people, the interference of one power, the legislature in its exercise of such a dire responsibility as removal of a popularly elected president imposes severe duties on the legislature. The Congress itself, not the primary source of authority, but only a creature of the people, must act in lieu of the people between quadrennial elections. At their best, the legislators will do what the people, at their best, would do, weighing the pluses and minuses of the record and the promise as a whole, asking, "Does the national interest require the removal from office of this president?" In the case of President Clinton, the American people have twice answered that question by electing him to the American presidency. If we seek further light on the American mind, surveys of opinion continue to confirm that answer which also in no way is disturbed by the outcome of the recent midterm elections.

The failure to consider the whole record of Clinton's presidency in foreign and domestic affairs could have severe long-run costs. The removal of a president, thanks to such neglect in judgement, could damage our democratic system. Consider the temptations which this precedent would excite in a Congress of a different party against a future president of a different party. As a great historian, Henry Adams, said, on the failed attempt of the Jeffersonians to remove Justice Chase, impeachment is not a suitable activity for party politics.

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commentators whose profession it is to express opinion. I can recall a television commentary, in August 1998, when panelists were asked about the reason that public audiences generally did not have the same intense feelings about the Clinton-Lewinsky information as the television journalists. One panelist said: "We'll just have to educate them." Such commentary fails to consider that the general public may already have made its judgments, however rough, that the "cost" of further action against the president may exceed the "benefit" to the political system. The general public has good reason to believe that, on the basis of past performance, its evaluation of such a cost-benefit ratio may be more clear-minded than that of many reporters and editors from whom they have heard.

To initiate an impeachment ([an] accusation of asserted "high crime" or "high misdemeanor") against the president would impose far too heavy a burden upon the political system since no reasonable person argues that the acts under discussion in any way disable, or potentially disable, the Congress. Neither Congress nor [the] courts [are] disabled, or under any potentiality of being disabled, or the president would not now be on the defensive. Impeachment and conviction of a president would mean replacing an entire administration.

Within the parameters of the Constitution, some significant institutional features have developed, and it is to their interrelationships that the idea of the "system" refers. Our ability to operate under this Constitution, with a strong presidency, has given the United States a remarkably stable government. If, for example, the United States had a parliamentary regime, President Reagan probably would have had to yield in 1982 under the pressure of economic recession. If that were so, he could never have evolved to a *de facto* partnership, as some see it, with Gorbachev toward winding down the arms race.

The president has a unique combination of formal and informal powers that revolve around his centrality to the executive branch, his role as the prime leader in national security policy, his leadership of one of the political parties, and his twentieth-century role in legislative leadership, [are] strongly affected by all his other powers, but grounded in his possession of the veto, which effectively makes him one-third of the legislative process.

The president does not prevail all the time in these domains, or even in any one of them. But the president's role in several of them is almost always critical, and is so even now.[1]

The normal requirement of American government engages all these resources, as presidents work with, against, and around a variety of allies and opponents. If any president were to be removed, no other person could exercise equivalent leadership until the successor had developed his own relationships.

The level of cost to the system goes far beyond this. It is in the intense animosity that almost surely will have developed.

These seventeenth-century cases that I mentioned earlier are not mere decoration, but have direct application. Lawyers, of course, use them to trace the very meaning of the law itself (U.S. House of Representatives 1974). These historical cases help me to state a simple hypothesis: Whatever new weapon is introduced into the political battle tends soon to become domesticated, even banalized, so that its use is more and more common judgment. It will be adapted and adopted by many other groups. James J. Kilpatrick was not talking about impeachments, but about [having] . . . the Supreme Court hold the Paula Jones law suit out until the conclusion of the president's term. But his statement [that] the decision "is likely to encourage trumped-up harassments of future presidents on down the line" (1998, 46) is apposite.

Impeachment investigations, trumped-up and otherwise, will virtually be mandated by going forward on this one. Richard H. Tawney, who wrote an account of the governmental career of Lionel Cranfield, also wrote that "The resurrection of (this) antiquated weapon . . . produced some forty impeachments between 1621 and 1688" (1958, 248). That is sixty-seven years (67) times twelve months (12) for a sum of eight hundred and four months (804). Divided by forty (40), the number of impeachments, the result is, on a straight-line average, one impeachment every twenty months. In fact, of course, these impeachments came in clusters, rather than on a straight-line average basis. But the echoes from seventeenth-century England, with its fifteen to twenty impeachments during a three year period, with numerous impeachments on slender evidence (Holdsworth 1924, 260), are not to [be] taken lightly. In the slow-moving seventeenth century, factions brought each other to the test—whether routinely over long periods or more intensely in periodic bursts. We should not expect an impeachment in 1999 or 2000 to let the United States slip back into political tranquillity.

The better hypothesis is that we should expect more turmoil. The twentieth century has been, since World War II perhaps, somewhat similar to the seventeenth century in one respect: intense ideological antagonisms. Even in the past twenty years, when it might have been thought to decline, there are intense ideological battle groupings, easily activated. The resultant turmoil will be made far worse by an impeachment on the grounds that we now know. Massive distrust will feed it. Ideological antagonism will feed it. Well-financed political entrepreneurs will feed it. Instantaneous communication of information, disinformation, and misinformation will feed it. Impeachment as technique will increasingly be domesticated as legal defense funds, political action committees, and many other techniques have been domesticated. Private groups will urge their congressional friends to initiate calls for independent counsels or other procedures to inquire into whether there might be a basis for determining that someone has violated, or conspired to violate, some law.

Those who urge this resurrection should, if they believe that the political system concern is worthwhile, have a public duty to weigh carefully whether the result they achieve is the result they want to achieve.

It is thus likely that we will see attempts to initiate impeachment actions against other presidents. In each instance, one may assume that such effort will be made by people who genuinely believe their charges, and who believe they have credible cases. Since all successful efforts depend upon coalitions, explicit or *de facto*, such efforts will become successful only as varieties of other groups and persons join the efforts on a variety of grounds. There must be a number of upwardly mobile congressmen, senators, and governors–Republican as well as Democratic–who should expect to find themselves absorbed in such controversies over the next two, three, or four presidential cycles. Congressional leaders know that impeachment does not have to stop with a president. The same provision (Article II, Section 4) also applies to "the Vice President, and all civil Officers of the United States." Cabinet officers and sub-cabinet officers are also civil officers. There is no reason for adversaries not to seek to invoke the process whenever they are deeply angry, or simply calculatedly rational, about some action. Is it beyond the imagination that, as many people genuinely believe that abortion is an ultimate evil, impeachment attempts would not be initiated against some secretary of Health and Human Services on the basis that he or she is conducting policies favorable to this perceived evil? Is there any reason to believe that some attorney general, even the present one, might not be the object of attempted impeachment actions if he (or, in the present case, she) were resolutely to decline to initiate some independent counsel investigation desired by Senate leaders? Is there any reason to suppose that such an attorney general would be even more at peril for limiting, or exercising the legal discretion to terminate, an independent counsel investigation if the independent counsel were to wish to continue? Is the independent counsel, as a civil officer, also within the scope of Article II, Section 4, if there are those who are motivated to make the effort?

Even regulatory commissioners, beyond presidential direction, are also civil officers, are they not? What reason is there for affected interests not to use this newly available weapon? While the impeachment of federal judges does not provide much to go on, as to standards for evaluating presidential impeachments, there is one response in which the reverse situation becomes part of the system threat. The Article III courts [are also] subject to the same threats of punitive impeachment actions–regardless of whether they succeed–if someone becomes dedicated to making their lives miserable.

This is, again, not to be taken lightly. Even under the stricter standards that apply to Article III judges. There are members of Congress who have, within the past three years, been known to argue that judges making "wrong" decisions should be impeached.[2] Will this approach be withheld if federal trial judges depart from what [have] been thought [of as] conventional procedures? For example, a trial judge had appointed a special master to conduct certain proceedings involving the Justice Department's current litigation against Microsoft. In due course, he was obliged to dispense with the special master by virtue of an appeals court decision. The judge has reportedly "told lawyers for both sides that he may ask [this dismissed special master] to write a 'friend of the court' brief summarizing his views on the case." Is it beyond reasonable belief that, under intense conditions, someone would choose to impeach such a judge in such a case?

Clearly, my approach is framed, as stated in the first place, in political system terms. This does not imply that impeachment should never be employed. It does, however, suggest a balancing test: specifically, that the gravity of the presidential offenses should be weighed against the potential of far greater costs to the whole country. The assigning of some behavior to the category of those "other high Crimes and Misdemeanors"–parallel to treason and bribery–should be done only with utmost seriousness, and assessed with maintaining the essentials of the political system (or "the structure of government" or "institutional stability") as the prime purpose.

The maintenance of this kind of seriousness will be increasingly problematic, in somewhat the same way of maintaining a high level of dignity has already proved problematic. House leadership has, presumably with all seriousness, urged dignity. But since the beginning of 1998, every level of the inquiry has become more raucous than anyone in the leadership predicted before. It will continue to go beyond control unless there is some clear decision that produces the contrary. Alexander Hamilton was right to say in *Federalist 65* (423): "The prosecution of [actions deemed impeachable] . . . will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused." That tells us that such matters should be approached with prudence and wisdom.

The impeachment process lends itself to the persistent conflict of factions. Each of which will seek to use the process to advance its own material goods and its own revered symbols, to pursue vengeance and feud as if they were Capulet and Montague. Case in point: On October 8, 1997, during the House debate on the resolution to launch an impeachment inquiry into the conduct of President Clinton, one man from Alabama called the CNN conservative phone line to say that what he enjoyed was frustration and defeat in the eyes of the liberals who had been having it all their way, having been in power for 40 years. Such a statement should be seen as the cloud no bigger than a man's hand. Again, to cite Hamilton: "In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative

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strength of parties, than by the real demonstrations of innocence or guilt."

The importance of prosecution, with impeachment as its leading case, as a weapon of recurrent group conflict becomes more important as each side disputes the morality and the methods of the other. Political leaders have already lost too much of the lessons of how to trade with each other and learned instead to turn each conflict into a dramatic morality play, or to an occasion of political vengeance. The magnification of conflict is something we have seen before. Congress should [do] nothing further to let this lion loose in the streets. Prudence and wisdom argue for terminating this process. Close the cage.

Notes

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1. This is reflected in Republican protests about the farm bill, which they have had to accept much more on President Clinton's terms than they wish, even as he faces the impeachment proceeding.

2. The references in support of this are not immediately at hand, but they will be found in the *ABA Journal* and in the *National Law Journal*.

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promote lies or continued procedural objections to the underlying inquiry, even amount to abuse of power. Second, it might be said that whatever history and past practice show, we should understand the Constitution's text to allow the President to be impeached, via the democratic channels, whenever a serious charge, of one sort or another, is both made and proved. I take up these two responses in sequence.

If the first claim is that certain kinds of falsehoods under oath, perjury, conspiracy to lie, and so forth, could be a legitimate basis for impeachment, there can be no objection. A false statement under oath about a practice of using the IRS to punish political opponents would almost certainly be an impeachable offense; so too about a false statement about the acceptance of a bribe to veto legislation. Thus, false statements under oath might well be a legitimate basis for impeachment. Indeed, lying to the American people may itself be an impeachable offense if, for example, the president says that a treaty should be signed because it is in the best interest of the United States when in fact he supports the treaty because its signatories have agreed to give him a lot of money. But it does not diminish the universal importance of telling the truth under oath to say that whether perjury or a false statement is an impeachable offense depends on what it is a false statement about. The same is true for "obstruction of justice" or interactions with advisers designed to promote the underlying falsehood.

Anyone can be prosecuted for violating the criminal law, and if the president has violated the criminal law, he is properly subject to criminal prosecution after his term ends. But it does not make sense to say, for example, that an American president could be impeached for false statements under oath in connection with a traffic accident in which he was involved, or that a false statement under oath, designed to protect a friend in a negligence action, is a legitimate basis for impeachment. Probably the best general statement is that a false statement under oath is an appropriate basis for impeachment if and only if the false statement involved conduct that by itself raises serious questions about abuse of office. A false statement about an illicit consensual sexual relationship, and a "conspiracy" to cover up that relationship, is not excusable or acceptable; but it is not a "high Crime or Misdemeanor" under the Constitution. The same is true for the other allegations made thus far. It trivializes the criminal law to say that some violations of the criminal law do not matter, or matter much. But it trivializes the Constitution to say that any false statement under oath, regardless of its subject matter, provides a proper basis for impeachment.

Of course people of good faith could say that the president has a special obligation to the truth, especially in a court of law, and that it is therefore reasonable to consider impeachment whenever the president has violated that obligation. It is certainly true that as the nation's chief law enforcement officer, the president as a special obligation to the truth. Perhaps such people also believe that false statements under oath, and associated misconduct, are genuinely unique and that impeachment for such statements and such misconduct would therefore fail to do damage to our historical practice of resorting to impeachment only in the most extreme cases. But this position has serious problems of its own. Even if it would be possible, in principle, for reasonable people to confine the current alleged basis for impeachment, it is extremely doubtful that the line could be held in practice. Thus, a judgment that the current grounds are constitutionally appropriate would set an exceedingly dangerous precedent for the future, a precedent that could threaten to turn impeachment into a political weapon, in a way that would produce considerable instability in the constitutional order.

Consider, for example, the fact that reasonable people can and do find tax evasion more serious than false statements about a consensual sexual activity, and that reasonable people can and do find an alleged unlawful arms deal more serious, from the constitutional standpoint, than either. Here is the underlying problem. Whenever serious charges are made, participants in politics may well be pushed in particular directions by predictable partisan pressures. The serious risk is therefore that, contrary to the constitutional plan, impeachment will become a partisan tool, to be used by reference to legitimate arguments by people who have a great deal to gain.

A special risk of a ready resort to the impeachment instrument is that it would interact, in destructive ways, with existing trends in American democracy. Those trends–toward an emphasis on scandals and toward sensationalistic charges–have characterized the conduct of members of both parties in the last decades. For those who love this country and its institutions, the use of impeachment, in such cases, is quite ominous–not least because of the demonstrable good faith of many of those who are recommending it.

From the standpoint of the constitutional structure, it is far better to try a kind of line in the sand, one that has been characteristic of our constitutional practice for all of our history: A practice of invoking impeachment only for the largest cases of abuse of distinctly presidential authority.

Text, history, and longstanding practice suggest that the notion of "high Crimes and Misdemeanors" should generally be understood to refer to large-scale abuses that involve the authority that comes from occupying a particular public office. Thus a president who accepted a bribe from a foreign nation–or who failed to attend to the public business during a war–would be legitimately subject to impeachment. Perjury, or false statements under oath, could certainly qualify as impeachable offenses if they involved (for example) lies about using the Internal Revenue Service to punish one's political opponents or about giving arms, unlawfully, to another nation. But the most ordinary predicate for impeachment is an act, by the president, that amounts to a large-scale

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abuse of distinctly presidential authority.

If there is ever to be impeachment outside of that category of cases, it should be exceedingly rare. The current allegations against President Clinton do not justify a departure from our traditional practices. Such a departure would be not trivially but profoundly destabilizing; it would be far wiser to adhere to our traditions and to leave the hardest constitutional problems for another, and better, occasion.

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