

## Impeachment Spectacles: Perspectives and Focus on Political, Legal and Governance Lessons From the Founding to the Present

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\* This paper was submitted in connection with the October 20, 2023, symposium entitled *Lessons in Leadership on the 50th Anniversary of Watergate*. James P. Flynn is a practicing attorney at Epstein Becker Green, where he serves as the firm’s national managing partner. While at Wesleyan University, he received the Davenport Prize as the outstanding student in the Government Department. Special thanks to Christine Hoy, Editor-in-Chief of the SETON HALL UNIVERSITY SCHOOL OF LAW’S JOURNAL OF LEGISLATION AND PUBLIC POLICY, and Michael J. Flynn, Symposium Editor of the SETON HALL UNIVERSITY SCHOOL OF LAW’S JOURNAL OF LEGISLATION AND PUBLIC POLICY, for organizing that symposium and to Ms. Hoy, Michael Alderman, and the other student editors for their assistance in bringing this paper to its final form.

## I. INTRODUCTION

The House of Representatives has impeached three presidents<sup>1</sup>—one twice<sup>2</sup>, and two just once each in 1868<sup>3</sup> and 1998.<sup>4</sup> Another, famously, was almost impeached,<sup>5</sup> and much of our modern sense of what impeachment entails springs from that near-impeachment. The Senate has never convicted a president of the impeachment charges lodged,<sup>6</sup> though one president resigned before he faced an impeachment vote or Senate trial<sup>7</sup> that might well have revealed a bipartisan consensus “on his removal that would have demonstrated the health of the process.”<sup>8</sup> Presidential impeachments often contain elements of spectacle, comprised of sometimes complementary, sometimes

<sup>1</sup> The three presidents impeached by the House of Representatives are Andrew Johnson, Bill Clinton, and Donald Trump. See *How Federal Impeachment Works*, USAGov, <https://www.usa.gov/impeachment> (last updated Feb. 2, 2024).

<sup>2</sup> Donald Trump was impeached on December 15, 2019, alleging that he “solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election,” and allegedly thereafter obstructed Congress’ efforts to investigate same. See H.R. Res. 755, at 1, 116th Cong. (2020). He was also impeached on January 25, 2021, in connection with the events of January 6, 2021. See H.R. Res. 24, 117th Cong. (2021).

<sup>3</sup> See *Impeachment Trial of President Andrew Johnson*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm#7> (last visited March 28, 2024).

<sup>4</sup> See H. Res. 611, 105th Cong. (1998) (impeaching President Clinton on Dec. 19, 1998).

<sup>5</sup> The House Judiciary Committee recommended articles of impeachment against Richard Nixon on Saturday July 27, 1974. See Richard Lyons & William Chapman, *Judiciary Committee Approves Article to Impeach President Nixon: 27 to 11*, WASH. POST (July 28, 1974) <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072874-1.htm>; Carroll Kirkpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm> (noting Nixon’s resignation on Aug. 9, 1974); *How Federal Impeachment Works*, USAGov, <https://www.usa.gov/impeachment> (last updated Feb. 24, 2024) (noting that Nixon was not impeached).

<sup>6</sup> Tom Ginsburg et al., *The Comparative Constitutional Law of Presidential Impeachment*, 88 U. CHI. L. REV. 81, 85 (2021) [hereinafter GHL 2021] (“[N]o sitting president has been removed [via impeachment]”).

<sup>7</sup> *Id.* at 121; see also BRITISH ORIGINS AND AMERICAN PRACTICE OF IMPEACHMENT 22 (Chris Monaghan & Matthew Flinders eds., 2024) [ebook] (“The House of Representatives has impeached three different American presidents (one twice), each of whom has been acquitted in the Senate.”) [hereinafter M&F] [<https://doi.org/10.4324/9781003255956>]; JOHN R. VILE, *Impeachment in the 18<sup>th</sup> and 19<sup>th</sup> Centuries In The Early United States*, in M&F, *supra* at 267 (“Since the Chase impeachment, the House of Representatives has impeached presidents Andrew Johnson, Bill Clinton and Donald Trump [in Trump’s case twice], and President Richard Nixon resigned when impeachment and conviction appeared to be inevitable.”).

<sup>8</sup> JACK N. RAKOVE, *Impeachment, Responsibility and Constitutional Failure from Watergate to January 6<sup>th</sup>*, in M&F, *supra* note 7, at 305.

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competing parts: a challenge of governance,<sup>9</sup> politics,<sup>10</sup> law, theatre,<sup>11</sup> and a “who done it?” intrigue<sup>12</sup> played out in the shadows of

<sup>9</sup> GHL 2021, *supra* note 6, at 91 (“The removal of a president from office by a mechanism other than through the regular operation of elections, term limits, and the normal apparatus of political selection goes to the core of democratic governance”); (“We find that impeachment is often a response to governance problems related to waning public support for a fixed-term leader. It thus extends beyond the standard bad actor model that dominates much of the American legal discourse”).

<sup>10</sup> In his commentary on the Constitution, Justice Joseph Story noted that: §764. In the first place, the nature of the functions to be performed. The offences to which the power of impeachment has been and is ordinarily applied as a remedy are of a political character. Not but that crimes of a strictly legal character fall within the scope of the power (for, as we shall presently see, treason, bribery, and other high crimes and misdemeanors are expressly within it); but that it has a more enlarged operation, and reaches what are aptly termed political offences, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §764, at 541 (1873), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1104&context=books>; *see also* STORY, *supra*, §799, at 564 (“Congress have unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct”); STORY, *supra*, §803 at 568 (“There is also much force in the remark that an impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity”). Modern commentators have noted the same. *See generally* Paul J. Zwier, *Trump Impeachment Trial in the Senate: Caught Between Politics and Law* (Jan. 4, 2020), <https://ssrn.com/abstract=3513830>.

<sup>11</sup> *See* RAKOVE, *supra* note 8, at 319 (noting that “Watergate made great political theater”). Additionally, when Chief Justice William Rehnquist presided over the Senate impeachment trial of Bill Clinton, Rehnquist did not wear a plain black robe, as his predecessor, Chief Justice Salmon P. Chase, had in Andrew Johnson’s impeachment trial, or as his successor, Chief Justice John Roberts, had in presiding over Donald Trump’s trial. Instead, Rehnquist wore a robe emblazoned with gold arm striping “as an homage to a character in *Iolanthe*, one of Gilbert and Sullivan’s operettas.” *See* Harvard Law, *A Decorated Sleeve*, <https://exhibits.law.harvard.edu/decorated-sleeve>; *see also* Richard Wolf, *Chief Justice John Roberts’ Fashion Choice: No Stripes*, USA TODAY (Jan. 21, 2020), <https://www.usatoday.com/story/news/politics/2020/01/21/chief-justice-john-roberts-rehnquist-drops-stripes/4532521002/> (“[Chief Justice John Roberts] does not wear stripes on the arms of his black judicial robe. The last time the Senate conducted a president’s impeachment trial in 1999, Chief Justice William Rehnquist presided. And Americans immediately were struck by his fashion statement: four gold stripes on each arm”); Brenda Wineapple, *How to Conduct a Trial in the Senate*, ATLANTIC, (Dec. 15, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/how-senate-conducts-impeachment-trial/601954/> (“On Thursday, March 5, 1868, Chief Justice Salmon Portland Chase, dressed in his long black-silk robe, marched to the head of the Senate chamber and solemnly announced that ‘in obedience to notice, I have appeared to join with you in forming a Court of Impeachment for the trial of the President of the United States’”).

<sup>12</sup> Senator Howard Baker, a member of the Senate Committee investigating Watergate, famously asked “What did the President know, and when did he know it?”

considerations of criminal law.<sup>13</sup> The Watergate hearings conducted by Chairman Peter Rodino (D-NJ) before the House Judiciary Committee are often praised for their tempered, workman-like approach to addressing the important issues before the Committee with less of such sense of spectacle,<sup>14</sup> though certainly all of those elements of spectacle presented in one way or another across the related congressional Committees, hearings, and proceedings.<sup>15</sup> This history leaves us with the question of whether the Founders envisioned, or perhaps even intended such spectacle, and whether the impeachment processes have alternatives that might better serve the constitutional order.

This paper examines presidential impeachment, the spectacles that it has produced, and the lenses through which that history ought to be viewed. Part II examines the six references to impeachment in the Constitution<sup>16</sup> as well as the discussion of it in the Federalist Papers, in Madison's papers, and by the anti-federalists and others to establish its original place in the U.S. constitutional system. Part III discusses the presidential impeachments and near impeachments of Andrew Johnson, Richard Nixon, Bill Clinton, and Donald Trump with an eye toward understanding how the constitutional framework has been applied in practice, and whether this power deserves being "described as 'the most

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Video: *Howard Baker and John Dean "What Did the President Know and When Did He Know It,"* (Richard Nixon Presidential Library and Museum), <https://www.nixonlibrary.gov/media/video/howard-baker-and-john-dean-what-did-president-know-and-when-did-he-know-it>.

<sup>13</sup> Library of Congress, Justices and Judges, in *Richard Nixon's Political Scandal: Researching Watergate in the Manuscript Collections at the Library of Congress*, <https://guides.loc.gov/watergate-manuscripts/justices-judges> (last visited Apr. 2, 2024) (noting, through references to the papers of Justices Harry Blackmun, William Brennan, and Thurgood Marshall, as well Judges Gerhard Gessell, J. Skelly Wright, and John Sirica, the criminal cases connected to Watergate, and the important criminal law considerations driving the Supreme Court decision in *United States v. Nixon*, 418 U.S. 683 (1974)).

<sup>14</sup> Paula A. Franzese, Eugene D. Mazo & Lawrence Spinelli, *The Lawyer-Hero: Lessons in Leadership from Watergate to the Present Day*, 54 U. OF TOL. L. REV. 359 (2023). Of course, as Harrington and Waddan have noted, "while it is tempting to compare all scandals to Watergate, and especially the dénouement of that episode, it is often an unhelpful comparison." CLODAGH HARRINGTON & ALEX WADDAN, *The US Impeachment Process: Fit for Purpose In a Hyper-Partisan Era?*, at 350, in M&F *supra* note 7. In fact, they describe past presidential impeachments as "five distinct and idiosyncratic episodes." *Id.* at 319.

<sup>15</sup> A. O. Scott, *Review: 'Watergate' Shocks Anew With Its True Tale of Political Scandal*, N.Y. TIMES, (Oct. 11, 2018) (review of documentary film on Watergate that notes that "Collectively, they tell a story that is part political thriller and part courtroom drama, with moments of Shakespearean grandeur and swerves into stumblebum comedy").

<sup>16</sup> U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, §3, cl. 6, 7; U.S. CONST. art. II, § 2, cl. 1; U.S. CONST. art. II, §4; U.S. CONST. art. III, §2, cl. 3.

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powerful weapon in the political armoury, short of civil war.”<sup>17</sup> Part IV highlights how governance, political, and criminal law perspectives have influenced the understanding and process of impeachment. Finally, Part V comments on how best to view the impeachment process in a manner aligned with the Founders’ multi-focal constitutional perspective.

## II. IMPEACHMENT’S BEGINNINGS: THE CONSTITUTION AS A NATIONAL TREASURE

### A. *The Constitution Itself & Madison’s Notes On Getting There*

Every day, tourists travel near and far to visit the National Archives Building in downtown Washington, D.C.<sup>18</sup> Many of these visitors find themselves drawn to the U.S. Constitution,<sup>19</sup> which references impeachment six times.

The first reference to impeachment in the Constitution is Article I, Section 2, clause 5, which reads, “The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.” The “Power of Impeachment” is not expressly defined or further elaborated upon, but it was by 1787 a familiar concept within the British constitutional system, having first been recognized in 1376.<sup>20</sup> It was then used intermittently throughout the next few centuries up to and through the American Revolution, and the Framers ultimately included it in the U.S. Constitution.<sup>21</sup> Monaghan and Flinders, in fact, contend that the Declaration of Independence itself was essentially an article of impeachment against King George III, who, as monarch, was

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<sup>17</sup> GHL 2021, *supra* note 6, at 109 (quoting T.F.T. Plunkett, *Presidential Address: Impeachment and Attainder*, 3 TRANSACTIONS ROYAL HISTORY SOCIETY 145, 145 (1953), [<https://doi.org/10.2307/3678713>]).

<sup>18</sup> Allen Weinstein, *The Constitution: A Treasure Worth the Wait in Line*, PROLOGUE MAG., Vol. 40, No. 3 (Fall 2008).

<sup>19</sup> *Id.*

<sup>20</sup> M&F *supra* note 7, at 39 (noting that “The origins of impeachment can be traced back to the Good Parliament of 1376,” during which the Commons proceeded against Lord Latimer and he was tried in front of the Lords); *see also* FRANK O. BOWMAN III, *HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* 32–33 (2d Ed. 2024) [ebook] [hereinafter Bowman] [<https://doi.org/10.1017/9781009401005>] (“The first true ‘impeachments’ occurred in 1376, during the reign of Edward III in what was known as “the Good Parliament.”).

<sup>21</sup> M&F, *supra* note 7, at 43–50; *see also* THE FEDERALIST No. 65 (Alexander Hamilton) (“The model from which the idea of this institution has been borrowed, pointed out that course to the convention. In Great Britain it is the province of the House of Commons to prefer the impeachment, and of the House of Lords to decide upon it. Several of the State constitutions have followed the example”). For a detailed history of Colonial era impeachments from 1607 through the creation of the Declaration of Independence and through the adoption of the Constitution, *see* Bowman, *supra* note 20, at 72–91, 100–109.

outside the power of impeachment and provided an impetus to assuring that the Constitution would make the American chief executive subject to impeachment.<sup>22</sup> This approach, even with its inherent ambiguity, suited the colonists-turned-self-governors as it tracked their experience.<sup>23</sup>

But controversy arose from the decision to give this “sole” power to the House of Representatives. At the convention, John Dickinson, a representative from Delaware, urged on June 2, 1787, that the power of impeachment be initiated by “the request of a majority of the Legislatures of individual States.”<sup>24</sup> But Roger Sherman argued that “the National Legislature should have [the] power to remove the Executive at pleasure.”<sup>25</sup> According to Madison’s notes, George Mason objected to this contention, stating that he, Mason, “opposed decidedly the making the Executive the mere creature of the Legislature as a violation of the fundamental principle of good Government” later to be known as separation of powers.<sup>26</sup> Neither Dickinson nor Sherman prevailed that day, and the convention returned to the question of impeachment later, on July 20, 1787.<sup>27</sup> On July 20, after much debate, the convention agreed that the chief executive would be subject to impeachment, though the details of that process would await later resolution, which finally came

<sup>22</sup> As noted in M&F:

In formally breaking ties with England, the founders’ generation issued a Declaration citing of Independence that levelled 27 impeachment charges levelled against King George III. It was no accident that the Declaration of Independence took the form that it did: The king was the only person in all of England not subject to impeachment, and the framers were determined to establish a system of government in which no one was above the law.

MATTHEW FLINDERS & CHRIS MONAGHAN, *Impeachment Matters*, in M&F *supra* note 7, at 17–18.

<sup>23</sup> See JOHN R. VILE, *Impeachment in the 18<sup>th</sup> and 19<sup>th</sup> Centuries In The Early United States*, in M&F *supra* note 7, at 240 (“Impeachment originated in the colonies not from written legal authorization but as a practical way of addressing perceived political corruption and injustice. The colonists did not let the absence of written authorization deter them from attempting to exercise the power”).

<sup>24</sup> *Madison Debates June 2*, YALE L. SCH. AVALON PROJECT, [https://avalon.law.yale.edu/18th\\_century/debates\\_602.asp](https://avalon.law.yale.edu/18th_century/debates_602.asp) (last visited March 28, 2024) (providing transcriptive notes for the Debates in the Federal Convention on June 2, 1787); see also JOHN R. VILE, *Impeachment in the 18<sup>th</sup> and 19<sup>th</sup> Centuries In The Early United States*, in M&F, *supra* note 7, at 244–45.

<sup>25</sup> JOHN R. VILE, *Impeachment in the 18<sup>th</sup> and 19<sup>th</sup> Centuries In The Early United States*, in M&F, *supra* note 7, at 244.

<sup>26</sup> *Id.*

<sup>27</sup> *Madison Debates June 2*, *supra* note 24; *Madison Debates July 20*, YALE L. SCH. AVALON PROJECT, [https://avalon.law.yale.edu/18th\\_century/debates\\_720.asp](https://avalon.law.yale.edu/18th_century/debates_720.asp) (last visited March 28, 2024) (providing transcriptive notes from the Debates in the Federal Convention on July 20, 1787).

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on September 8, 1787.<sup>28</sup> While informed by British history, the “Founders wanted to distinguish the impeachment power set forth in the United Constitution from the British practice,” and did so in many ways, chief among being the removal of the process from a judicial to a legislative forum and a limitation of the punishments associated with impeachment to a loss of office and disqualification from holding office in the future.<sup>29</sup>

Impeachment is next referenced in Article I § 3 cls. 6 and 7, which read:

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.<sup>30</sup>

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 nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.<sup>31</sup>

Interestingly, these provisions both merge and diverge the relevant perspectives and branches. Clause 6 gives the Senate a pseudo-judicial role to “try all impeachments” but specifies that the Chief Justice shall preside over presidential impeachments.<sup>32</sup> The clause also references

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<sup>28</sup> *Madison Debates July 20*, *supra* note 27; see also *Madison Debates September 8*, YALE L. SCH. AVALON PROJECT, [https://avalon.law.yale.edu/18th\\_century/debates\\_908.asp](https://avalon.law.yale.edu/18th_century/debates_908.asp) (last visited March 28, 2024) (providing transcriptive notes for the Debates in the Federal Convention on September 8, 1787).

<sup>29</sup> Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 605 (1999) [hereinafter *Lessons*]; Michael J. Gerhardt, *Putting The Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 906, 908–09 (1999) (explaining that “the [Founders] purposely tried to distinguish the federal impeachment process from its British counterpart” in multiple ways, and “the founders wanted to distinguish the impeachment power set forth in the US Constitution from the British practice...”) [hereinafter *Perspective*]. As explained further below, though Article III, Section 2, Clause 3 of the Constitution notes that “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed,” using that to suggest that impeachment is a criminal offense worthy of being specifically exempted from trial by jury is a somewhat anachronistic, a-historical read.

<sup>30</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>31</sup> U.S. CONST. art. I, § 3, cl. 7.

<sup>32</sup> *Id.* at cl. 6.

one being “convicted,”<sup>33</sup> a criminal law concept, but without the unanimity requirements of other criminal jury trials. And despite this language, Clauses 6 and 7 limit the associated punishments to governance and political outcomes, and reserve for the judicial process what may occur to the impeached and convicted person through “Indictment, Trial, Judgment and Punishment, according to Law.”<sup>34</sup> Despite the semantic similarities borrowed from criminal law, the Supreme Court and several Chief Justices have made clear that an impeachment trial is not something occurring in a judicial forum nor a proceeding that the Supreme Court can define.<sup>35</sup>

A modern reading of Article I, § 3, cl. 6 may suggest that the Constitution makes a traditional jury out of the Senate and a trial judge out of the Chief Justice, but that is not the case. The Chief Justice presides over presidential impeachments because it would be unseemly for the Senate’s usual presiding officer, the Vice President, to preside over an impeachment that would clear the way for that Vice President to assume higher office.<sup>36</sup> As Bowman notes in *High Crimes and Misdemeanors*, the presiding officer at any impeachment must follow Senate Standing Rule VII.<sup>37</sup> That means that the presiding officer must act in accordance with the will of the Senate as expressed by its majority.<sup>38</sup> Thus, the “Chief’s presence in the chair does not make the proceeding more ‘judicial’ in character.”<sup>39</sup> Chief Justices Rehnquist and Roberts certainly evidenced this concept in the largely ceremonial approach each took toward his duties in the Clinton and Trump I impeachments, respectively.<sup>40</sup> Chief Justice Chase did take a more assertive, seemingly judicial role during the Andrew Johnson impeachment trial, for which he was criticized as being overly assertive and coercive.<sup>41</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> U.S. CONST. art. I, § 3, cl. 6 and 7.

<sup>35</sup> See *Nixon v. United States*, 506 U.S. 224, 230 (1993) (“we cannot say that the Framers used the word “try” as an implied limitation on the method by which the Senate might proceed in trying impeachments...[T]he use of the word ‘try’ in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions”); see also Bowman, *supra* note 20, at 472.

<sup>36</sup> Bowman, *supra* note 20, at 120, 471 (noting that one of the reasons for the electoral college is “partly in order that presidents can be impeached by the House and tried by the Senate that had no role in their selection,” and “the chief justice is inserted into presidential impeachments only to resolve the conflict of interest that would arise if the Vice President presided”).

<sup>37</sup> Bowman, *supra* note 20, at 471.

<sup>38</sup> Bowman, *supra* note 20, at 471.

<sup>39</sup> Bowman, *supra* note 20, at 471.

<sup>40</sup> Bowman, *supra* note 20, at 471–72.

<sup>41</sup> Bowman, *supra* note 20, at 471–72.



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Article II, Section 2, Clause 1 restricts presidential power, noting that the president “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”<sup>42</sup> A president, therefore, may not insulate him or herself—or any other person—from impeachment by the House or conviction by the Senate. But it could also be read, at least grammatically and *in pari materia* with Article I, Section 3, clause 7, to mean that once a person is impeached in the House, the president may not grant such person pardon in connection with any ensuing judicial process.<sup>43</sup> Precluding a president from pardoning himself or others from crimes associated with grounds on which they were impeached could promote a defensible separation of powers result, requiring the executive to respect the combined force of the legislative and judicial branches in presidential impeachments. That would prove a provocative reading in the current political context as it would mean that a newly-elected President Trump in January of 2025 could not pardon himself or others from criminal prosecutions related to his previous impeachments.

But this language has not been so interpreted, as the legally uncontested Ford pardon of Nixon illustrates. This traditional understanding of the pardon power also serves the purpose of separation of powers.<sup>44</sup> As noted in Vile, “According to William Blackstone’s Commentaries on the Laws of England, an individual could not use the king’s pardon to impede an impeachment inquiry, but he could extend a reprieve to those who had been convicted.”<sup>45</sup> But remember that the Framers did not import British impeachment practices wholesale.<sup>46</sup> In this context, that means that the founders

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<sup>42</sup> U.S. CONST. art II, § 2, cl. 1.

<sup>43</sup> This raises the dual questions of whether there can be a pardon for an unconvicted impeachment or is an impeachment itself a pardonable offense. There can be and was such a pardon—Nixon was pardoned by Ford without ever being impeached by House or even charged with a crime by law enforcement. President Nixon was referenced in one grand jury proceeding as “an unindicted co-conspirator” But Ford’s pardon would not have helped Nixon avoid impeachment. The House simply closed its inquiry when he resigned, though the Judiciary Committee had, pre-resignation, voted in favor of impeachment. In 2021, the House continued its impeachment inquiry as to Donald Trump after he left office because a conviction by the Senate would have precluded him from holding the office of the presidency again. President Nixon again running for office or holding that office simply seemed unimaginable in the post-Watergate era.

<sup>44</sup> M&F, *supra* note 7, at 251–52.

<sup>45</sup> M&F, *supra* note 7, at 252.

<sup>46</sup> Bowman, *supra* note 20, at 137 (“The American Framers consciously transformed American impeachment into a noncriminal, purely political remedy, reserving any criminal penalties for official misconduct to separate proceedings in ordinary courts”).

could have employed language meant to assure that presidents could not insulate those who have been impeached from criminal prosecution.

The reference in Article II, Section 4 to impeachment may be the most well-known yet least understood of them all: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>47</sup> The Constitution defines “treason” as consisting “only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort,” and stating further, “No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”<sup>48</sup> “[B]ribery” and “other high Crimes and Misdemeanors” are not further defined in the constitutional text, leaving any test for presidential removal beyond treason “surprisingly opaque” if for no other reason than “other high Crimes and Misdemeanors” has always been a “famously cryptic phrase.”<sup>49</sup>

The delegates debated this language on several occasions during the constitutional convention, where some, like Governor Morris, sought grounds that were “enumerated & defined,”<sup>50</sup> after which “treason” and “bribery” were added. But others found that too restrictive and suggested adding “maladministration” as grounds for impeachment.<sup>51</sup> Madison found this too general and potentially destructive of executive independence; consequently, the delegates

<sup>47</sup> U.S. CONST. art. II, § 4.

<sup>48</sup> U.S. CONST. art. III, § 3, cl. 1. Note that the phrase “levying War against them” in that clause is a reference to levying war against the United States, which referenced as a plural noun and not a singular one until the end of the Civil War. See James McPherson, *Out of War, a New Nation*, 24 Prologue Mag. (2010), <https://www.archives.gov/publications/prologue/2010/spring/newnation.html> (explaining that, before the Civil War, the United States was considered a plural; therefore, it was the plural pronoun); see also National Treasure 2: Book of Secrets (Walt Disney Home Entertainment 2008), <https://kcls.bibliocommons.com/v2/record/S82C637355/quotations> (“Ben Gates: Before the Civil War, the states were all separate. People used to say ‘United States are.’ Wasn’t until the war ended, people started saying ‘The United States is.’ Under Lincoln, we became one nation”).

<sup>49</sup> GHL 2021, *supra* note 6, at 81 and 84; (quoting Aziz Z. Huq, *Legal or Political Checks on Apex Criminality: An Essay On Constitutional Design*, 65 UCLA L. REV. 1506, 1508 (2018)); see also Ben Berwick et al., *The Constitution Says ‘Bribery’ Is Impeachable. What Does That Mean?*, LAWFARE INST. (Oct. 3, 2019), <https://www.lawfaremedia.org/article/constitution-says-bribery-impeachable-what-does-mean> (stating “To the Founders, bribery was not a concept rooted in traditional criminal law at all and so was not defined with the precision that is required when applying a criminal statute”) Bowman, *supra* note 20, at 131–38.

<sup>50</sup> See *Madison Debates July 20*, *supra* note 27.

<sup>51</sup> *Madison Debates September 8*, *supra* note 28.

accepted the proposal of adding in its place “other high crimes or misdemeanors.”<sup>52</sup> Unfortunately, the record fails to explain “either why the convention so blithely adopted ‘high crimes and misdemeanors’ or what [the Framers] thought it meant.”<sup>53</sup>

The delegates never revisited the definition of high crimes and misdemeanors, but our polity has, in many senses, never let it go. As noted in the Forward to *British Origins and American Practice of Impeachment*, “[t]he debate over the meaning of the phrase ‘other high crimes and misdemeanors’ has largely split along two lines, with presidents consistently insisting that impeachable offenses should be serious felonies” and “House Managers, who press the House’s case for removal in the Senate, have argued that impeachable offenses are not limited to indictable crimes but include abuses of power for which there may be no legal remedies.”<sup>54</sup> In more modern eras, the meaning of “misdemeanors” in common use has shrunk to infractions defined by a specific legal code; this was not the word’s meaning in the late 1700s, when it likely simply meant “ill behavior.”<sup>55</sup> In fact, “high crimes and misdemeanors” is a term of art that “does not mean what it appears to mean,” and carried at English common law no requirement of criminality, high or petty.<sup>56</sup> Instead, the meaning of *high crimes and misdemeanors*, which is considered a “pregnant phrase,”<sup>57</sup> is one that the

<sup>52</sup> *Madison Debates September 8*, *supra* note 28; Bowman, *supra* note 20, at 131–43.

<sup>53</sup> Bowman, *supra* note 20, at 134 (adding that “One suspects that a good deal more was said that never made it into Madison’s notes, but that is all we have.”).

<sup>54</sup> M&F, *supra* note 7, at 19–20; *see also Perspective*, *supra* note 29, at 913 (stating that “The phrase ‘other high Crimes and Misdemeanors’ consists of technical terms of art referring to ‘political crimes.’ They also have agreed that ‘political crimes’ had a special meaning in the eighteenth century; ‘political crimes’ were not necessarily indictable crimes: Instead, ‘political crimes’ consisted of the kinds of abuses of power or injuries to the Republic that only could be committed by public officials by virtue of the public offices or privileges that they held. Although the concept ‘political crimes’ uses the term ‘crimes,’ the phrase did not necessarily include all indictable offenses. Nor were all indictable offenses considered ‘political crimes’”).

<sup>55</sup> M&F, *supra* note 7, at 252 (citing *Misdemeanor (1755)*, SAMUEL JOHNSON’S DICTIONARY ENG. LANGUAGE, <https://johnsonsdictionaryonline.com/views/search.php?term=misdemeanor> (last visited March 28, 2024)) ([Judge Posner] further noted that ‘Misdemeanor’ ‘might mean offense; ill behavior; [or] something less than an atrocious crime’”).

<sup>56</sup> Bowman, *supra* note 20, at 145–47 (discussing Blackstone’s contention that English impeachment was criminal in character was limited to the nature of the possible punishments, noting that “[b]ecause the framers severed impeachment from criminal punishment, ‘high crimes and misdemeanors’ was for them merely a signifier for the kind of conduct Parliament historically found impeachable,” and that, by 1787, the phrase “was already a term of art that included a lot of non-criminal conduct”); Bowman, *supra* note 20, at 485 (explaining that “The result was to completely decouple impeachment from ordinary criminal law”).

<sup>57</sup> Bowman, *supra* note 20, at 134.

Framers would have understood to be non-finite without being standardless, and that later generations should accept with irritation:

As frustrating as this is to us, it would probably have seemed less so the framers, particularly lawyers. They would have understood that “high crimes and misdemeanors” was a term of art only in a common law sense, which is to say that its meaning at any given time is roughly ascertainable, but open for debate depending on one’s reading of precedents, and that its future meaning is subject to modification based on changed circumstances. In short, “high crimes and misdemeanors” was, by design, a flexible concept.<sup>58</sup>

Thus, the adopted text was fixed and static, but its meaning was not.

Finally, Article III, Section 2, Clause 3 states that:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.<sup>59</sup>

This significantly differed from the English practice because, as Vile points out.<sup>60</sup>

#### *B. The Federalists and Responses*

Federalist 65 references the notion that the Senate, under the constitutional system, is to be a “well-constituted court for the trial of impeachments;” but it makes very clear that the perspective through which one must view that court, and through which that court must view its task, is political:

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

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<sup>58</sup> Bowman, *supra* note 21, at 144.

<sup>59</sup> U.S. CONST. art. III § 2, cl. 3.

<sup>60</sup> M&F, *supra* note 7, at 251–252 (“the Constitution did not vest Congress with power, which the British Parliament had exercised, to impeach and punish private citizens who had not held public office or to inflict any punishment on those who had held office other than removal, and possible exclusion from, future office. Individuals who were removed from office were subject to future criminal prosecution”); *see also* Bowman, *supra* note 21, at 135–37.

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other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.<sup>61</sup>

Indeed, the political perspective is so dominant in Federalist 65's vision that "the Supreme Court would have been an improper substitute for the Senate, as a court of impeachments."<sup>62</sup>

Federalist 81 then drives that same point home by emphasizing the distance the Supreme Court will have from impeachments.<sup>63</sup> Federalist 81 focuses largely on the legislative impeachment and conviction of judicial officers and executive officers other than the president, pointing out that that occurs without the Chief Justice's participation.<sup>64</sup> Hamilton had an aversion to judicial impeachment forums:

Hamilton suggested that impeachment proceedings "can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security." He further referred to "[t]he awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community."<sup>65</sup>

Similarly, as Rakove noted, Hamilton seemingly wished to protect the judiciary from involvement in impeachments, which he saw as inherently politically divisive.<sup>66</sup> Monaghan and Flinders agreed, noting that "[i]t is impossible . . . to filter partisan politics out of impeachment or any other disciplinary process."<sup>67</sup> The Supreme Court trying impeachments or hearing appeals from Senate convictions would create an untenable situation in which the Court could potentially reverse a legislative determination over which the House and Senate respectively had sole power. That is a political entanglement of the sort courts have long avoided.

The anti-federalists point out quickly, of course, that resting the trial of impeachments in the Senate alone essentially neuters the "sole power" given to the House of Representatives to initiate impeachments

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> THE FEDERALIST NO. 81 (Alexander Hamilton).

<sup>64</sup> *Id.*

<sup>65</sup> M&F, *supra* note 7, at 255–56.

<sup>66</sup> THE FEDERALIST NO. 81 (ALEXANDER HAMILTON); M&F, *supra* note 7, at 255–56.

<sup>67</sup> Forward to M&F, *supra* note 7, at 34.

in the first place.<sup>68</sup> Arthur Lee, writing as Cincinnatus, expressed that position:

[The House of Representatives'] transcendent and incommunicable power of impeachment—that high source of its dignity and control—in which alone the majesty of the people feels his scepter, and bears aloft his fasces—is rendered ineffectual, by its being triable before its rival branch, the senate, the patron and prompter of measures against which it is to sit in judgment. It is therefore most manifest, that from the very nature of the Constitution the right of impeachment apparently given, is really rendered ineffectual.<sup>69</sup>

Others, such as the person or persons writing as Brutus and Cato, thought giving the Senate the power to try impeachments neutered the House's rights and violated separation of powers by assigning a judicial function to the Senate, at the time a state-appointed legislative body,<sup>70</sup> already overly connected to the executive branch in other ways that the anti-federalists criticized.<sup>71</sup>

The anti-federalists also argued that the “high crimes and misdemeanors” language limited removal to corrupt actors, which was too strict a standard, given the people's interest in good administration:

The only clause in the constitution which provides for the removal of the judges from office, is that which declares, that “the president, vice-president, and all civil officers of the United States, shall be removed from office, on impeachment

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<sup>68</sup> THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION (John P. Kaminski, et al. eds., 2009).

<sup>69</sup> Cincinnatus IV, November 22, 1787, available at *Teaching American History*, <https://teachingamericanhistory.org/document/cincinnatus-iv-to-james-wilson-esquire/> [last accessed April 7, 2024].

<sup>70</sup> *Brutus XVI*, N.Y.J. (April 10, 1788) (noting that “it shall be the business of this, to make some remarks upon the constitution and powers of the Senate, with whom the power of trying impeachments is lodged ... They are part of the judicial, for they form the court of impeachments. It has been a long established maxim, that the legislative, executive and judicial departments in government should be kept distinct ... I admit that this distinction cannot be perfectly preserved. . . . But still the maxim is a good one, and a separation of these powers should be sought as far as is practicable. I can scarcely imagine that any of the advocates of the system will pretend, that it was necessary to accumulate all these powers in the senate”), [https://archive.csac.history.wisc.edu/Brutus\\_XVI.pdf](https://archive.csac.history.wisc.edu/Brutus_XVI.pdf) (last accessed April 7, 2024).

<sup>71</sup> *Cato V*, N.Y.J. (November 22, 1787) (noting that “that the senate and president are improperly connected, both as to appointments, and the making of treaties, which are to become the supreme law of the land; that the judicial in some measure, to wit, as to the trial of impeachments, is placed in the senate, a branch of the legislative, and some times a branch of the executive”), available at [https://archive.csac.history.wisc.edu/Cato\\_V\(1\).pdf](https://archive.csac.history.wisc.edu/Cato_V(1).pdf) [last accessed April 7, 2024].

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for, and conviction of treason, bribery, or other high crimes and misdemeanors.” By this paragraph, civil officers, in which the judges are included, are removable only for crimes. Treason and bribery are named, and the rest are included under the general terms of high crimes and misdemeanors. — Errors in judgment, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, high crimes and misdemeanors. A man may mistake a case in giving judgment, or manifest that he is incompetent to the discharge of the duties of a judge, and yet give no evidence of corruption or want of integrity. To support the charge, it will be necessary to give in evidence some facts that will show, that the judges committed the error from wicked and corrupt motives.<sup>72</sup>

The federalists seemed to have effectively responded to this notion and convinced the populace at the time that the power was appropriately assigned and inclusive of more liberal applications.

It is true that “the scholarly consensus is that presidents can be removed without committing indictable crimes[.]”<sup>73</sup> Indeed, there seems to be a scholarly consensus that not every crime is an impeachable offense, nor is every impeachable offense a crime.<sup>74</sup> But the “practice has increasingly phrased impeachment charges as criminal indictments.”<sup>75</sup> This has led defenders of challenged presidents to often insist that proof supporting that impeachment must also support a criminal indictment.<sup>76</sup>

Federalist 69 furthers the conundrum of whether an impeachment limits the pardon power:

The power of the President, in respect to pardons, would extend to all cases, EXCEPT THOSE OF IMPEACHMENT. The governor of New York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor, in this article, on a calculation of political consequences, greater than that of the President? ... A President of the Union, on the other hand, ... could shelter

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<sup>72</sup> The American Founding, Debate and Ratification, Brutus XV, New York Journal, March 20, 1788, [https://archive.csac.history.wisc.edu/30\\_Brutus\\_XV.pdf](https://archive.csac.history.wisc.edu/30_Brutus_XV.pdf). (last visited April 7, 2024).

<sup>73</sup> Vile, in M&F, *supra* note 7, at 253–254.

<sup>74</sup> Vile, in M&F, *supra* note 7, at 254.

<sup>75</sup> Vile, in M&F, *supra* note 7, at 253.

<sup>76</sup> Bowman, *supra* note 20, at 147 (“[t]he assertion that impeachment can lie only for indictable criminal conduct is a hardy perennial trotted out in nearly every major impeachment battle of the last two centuries. But that is not what ‘high crimes and misdemeanors’ meant to the framers”).

no offender, in any degree, from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty, than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? ... [I]t [is] necessary to recollect, that, by the proposed Constitution, the offense of treason is limited “to levying war upon the United States, and adhering to their enemies, giving them aid and comfort”; and that by the laws of New York it is confined within similar bounds.<sup>77</sup>

Hamilton’s penchant for rhetorical questions leaves unclear whether he describes a system in which the President may or may not, in fact, post-impeachment, pardon the impeached person from further prosecution in the ordinary course of law.

The constitutional conventions at the state level grappled with this same question, which Hamilton left unanswered. For instance, delegate George Mason raised at Virginia’s convention regarding the adoption of the U.S. Constitution the question of whether the president could pardon those accused of plotting with him against the country, but Madison noted that doing so would be grounds to impeach the president.<sup>78</sup> Madison records no argument or assertion that the previous impeachment of non-presidential conspirators limited the president’s prerogative to pardon them, and that may have been part of the inherent ambivalence of constitutional thinkers considering executive power.<sup>79</sup> Yet, at that Virginia Convention, another federalist, George Nicholas, suggested that impeachment may limit the presidential pardon power.<sup>80</sup>

At the most basic level, the anti-federalists decried the limited nature of the power of impeachment held by the House of Representatives. “Antifederalists belittled the House’s power to

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<sup>77</sup> THE FEDERALIST NO. 69 (Alexander Hamilton).

<sup>78</sup> GHL 2021, *supra* note 6, at 111–12.

<sup>79</sup> Epps, Garrett, *The Ill-Made Prince: A Modest Proposal for a New Article II* (August 7, 2009), at 9, n.41., <https://ssrn.com/abstract=1445643> [<http://dx.doi.org/10.2139/ssrn.1445643>].

<sup>80</sup> See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 17 (Jonathan Elliot, ed., 2d ed., 1836), <https://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-vol-3>. Representative George Nicholas, at the Va. Convention, stated on June 4, 1788 that “Few ministers will ever run the risk of being impeached, when they know the king cannot protect them by a pardon. This power must have much greater force in America, where the President himself is personally amenable for his mal-administration; the power of impeachment must be a sufficient check on the President’s power of pardoning before conviction.” *Id.*



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impeach government officials, saying no convictions and removals would take place in trials held in the Senate,”<sup>81</sup> a sentiment proven both untrue and true by subsequent history as convictions have occurred of judges, for instance, but never of a president.<sup>82</sup> While many, like Madison, “thought of impeachment as a necessary part of republicanism,”<sup>83</sup> and indeed an “indispensable” one to address presidential problems not cured or avoided by the “limitation of the period of service,”<sup>84</sup> the question of where to place the trials was not easily solved because, despite anti-federalist notions, others thought that the president “under no circumstances ought to be impeachable by the legislature. This would be destructive of his independence, and the principles of the Constitution” establishing a separation of powers.<sup>85</sup>

The next logical question is how these disparate themes, challenges, and justifications have played out in practice.

### III. IMPEACHMENTS IN PRACTICE: NATIONAL NIGHTMARES AND OTHER FITS

#### A. Andrew Johnson

Andrew Johnson’s 1868 impeachment sprang from his effort, without Senate approval, to sack a Cabinet member, the Secretary of War, contrary to the Tenure in Office Act.<sup>86</sup> Though there was a specific statute at issue, Congressman Butler, one of the House Manager’s bringing the case in the Senate, argued in the disjunctive that the standard for impeachment was met:

An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or

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<sup>81</sup> *Lesson Five: The Debate over the Branches of Government*, [https://archive.csac.history.wisc.edu/creation\\_ratification5.pdf](https://archive.csac.history.wisc.edu/creation_ratification5.pdf).

<sup>82</sup> See *Perspective*, *supra* note 29, at 917 (noting that seven people have been impeached by the House and convicted and removed from office by the Senate); GHL 2021, *supra* note 6, at 85 (“[N]o sitting president has been removed” via impeachment).

<sup>83</sup> Bowman, *supra* note 20, at 135 (quoting HOFFER & HULL, *IMPEACHMENT IN AMERICA 1635–1805* 74 (1984)).

<sup>84</sup> Bowman, *supra* note 20, at 135 (quoting 2 FARRAND’S *FEDERAL CONVENTION RECORDS* 65–66).

<sup>85</sup> Bowman, *supra* note 20, at 123 (quoting Rufus King statement at Constitutional Convention, July 20, 1787).

<sup>86</sup> For fuller background, see *Finding Precedent: The Impeachment of Andrew Johnson*, HARP WEEK <https://www.impeach-andrewjohnson.com/default.htm> (last visited Apr. 2, 2024); Les Benedict, *From Our Archives: A New Look at the Impeachment of Andrew Johnson*, 113 POL. SCI. Q. Fall 1998 at 493–511, [https://ciaotest.cc.columbia.edu/olj/psq/psq\\_98benedict.html](https://ciaotest.cc.columbia.edu/olj/psq/psq_98benedict.html) [<https://doi.org/10.2307/2658078>]; EDMUND G. ROSS, *HISTORY OF THE IMPEACHMENT OF ANDREW JOHNSON PRESIDENT OF THE UNITED STATES*, (1868), <https://www.gutenberg.org/files/2442/2442-h/2442-h.htm>.

essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, *or* of duty, by an act committed or omitted, *or, without violating a positive law*, by the abuse of discretionary powers from improper motives or for an improper purpose.<sup>87</sup>

Those arguing against Johnson's impeachment advocated the necessity of finding a violation of specific positive and pre-existing law, taking the position that the Constitution's references to treason, bribery, and other high crimes "[include] only, high criminal offences against the United States, *made so by some law of the United States existing when the acts complained of were done, . . .*"<sup>88</sup>

President Johnson's acquittal by a single vote did not likely boil down to a choice between Butler's approach and a positivist one articulated by former Justice Curtis on the president's behalf. But this same debate would mark a part of every ensuing impeachment spectacle.<sup>89</sup>

Though multiple perspectives impact any and every presidential impeachment, Johnson's impeachment primarily centered around presidential power.<sup>90</sup> Thus, while the criminal law perspective may shed some light on those proceedings, the governance and political perspectives provide more valuable insight. During the Civil War, a faction of the Republican Party, referred to as the Radical Republicans, pushed forcefully for the immediate end to slavery, full equality before the law, and enfranchisement for former slaves.<sup>91</sup> After the Civil War and Lincoln's assassination, Radical Republicans pushed even harder for progress on these fronts, causing friction with more moderate Republicans and with President Andrew Johnson, the former Tennessee Senator and Democrat who had been Lincoln's Vice President on a unity

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<sup>87</sup> *The Johnson Impeachment, Annotations*, JUSTIA US LAW (citing 1 Trial of Andrew Johnson, President of the United States on Impeachment 88, 147 (1868) (emphasis added)) <https://law.justia.com/constitution/us/article-2/53-the-johnson-impeachment.html>.

<sup>88</sup> *Id.* (citing 1 Trial of Andrew Johnson, President of the United States on Impeachment 88, 409 (1868)) (emphasis added).

<sup>89</sup> *Id.*

<sup>90</sup> Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 426 (2000); *see also* Bowman, *supra* note 20, at 147 ("The battle over Johnson's removal was political in the largest sense. It was a debate over fundamental questions of the separation of powers and even more fundamental questions about the course the nation would chart in the century following the Civil War").

<sup>91</sup> Radical Republican, Britannica, at <https://www.britannica.com/topic/Radical-Republican>.

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ticket in 1864.<sup>92</sup> In the struggle to gain over control of Reconstruction policy, the Radical Republicans by overriding a number of Johnson vetoes and forming Joint Committee on Reconstruction (made up of nine members of the House and six senators, with only three of which were Democrats) “to ensure congressional rather than presidential control of Reconstruction.”<sup>93</sup>

Though the general context of Reconstruction contributed much to the approach to Johnson’s impeachment, one must remember that the 1868 articles of impeachment were, in fact, the fourth such attempt directed at Johnson,<sup>94</sup> so this was a long-simmering feud. The House only successfully moved for impeachment after Johnson attempted to replace Edwin Stanton as Secretary of War without following the dictates of the Tenure in Office Act.<sup>95</sup>

That Act set an open impeachment trap into which Johnson essentially purposely stepped. The Radical Republicans who would later make Johnson the first impeached president had earlier made him the first to have a veto overridden.<sup>96</sup> Then the same Radical Republican majority passed a military appropriations bill that included communication and appointment limitations on the President’s duties as commander in chief.<sup>97</sup> Finally, leaving aside any sense of subtlety, the same Congress passed the Act, which limited the presidential appointment power, described violations of the Act as a crime, and “categoriz[ed] that crime as a ‘high misdemeanor,’” a term “almost unknown in ordinary law and []plainly employed to create a compelling case for impeachment” should Johnson persist in contradicting Congress.<sup>98</sup> Johnson then suspended Stanton pending termination and advised the Senate of his reasons.<sup>99</sup> The Senate refused to consent, Johnson nonetheless removed him from office, and the House impeached Johnson on February 24, 1868.<sup>100</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Whittington, *supra* note 90, at 430.

<sup>95</sup> Whittington, *supra* note 90, at 430.

<sup>96</sup> Bowman, *supra* note 20, at 222.

<sup>97</sup> Bowman, *supra* note 20, at 224; *see also* William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 Nw. U. L. Rev. 903, 914 (1990).

<sup>98</sup> Bowman, *supra* note 20, at 225; *see also* Rehnquist, *supra* note 97, at 917 (“One section of the Tenure in Office Act provided that any knowing violation of it should be ‘high misdemeanor,’ thus tying that statute into the language of the Impeachment Clause”).

<sup>99</sup> Rehnquist, *supra* note 97, at 915.

<sup>100</sup> *Id.*

Though short-term partisan politics surely played a role, this was really a governance challenge revolving around Reconstructions and related policies.<sup>101</sup> Indeed:

A central purpose of the impeachment was to reconstruct the constitutional basis of the presidency and the system of separated powers. The impeachment by the House and trial by the Senate represented the fullest flowering of congressional supremacy and symbolized the appropriate location of political power under the Constitution as the Republicans understood it. Johnson's missteps and political weakness may have been necessary conditions for the impeachment, and his removal may have been its immediate goal, but the Republicans were looking past the Johnson administration when building their case for impeachment.<sup>102</sup>

In other words, the Republicans combined in the impeachment process a longer-term constitutional vision with a present political objective attainable within the institutional setting in which they found themselves. In many ways, "[p]residential power" itself "was the target of the Johnson impeachment" because "Johnson had demonstrated the dangerous potential of the presidency, and the impeachment was an effort to check that threat."<sup>103</sup>

As Whittington notes, "The high crimes with which Johnson was charged were unique to the presidency and were not analogous to normal criminal charges or even applicable to other government officials."<sup>104</sup> Whittington's observation that "[t]he impeachment became a central venue for the Republicans to articulate and establish their constitutional vision of congressional supremacy" illustrates well that the political and governance perspectives drove the Johnson impeachment process much more than any acceptance or rejection of the Curtis' argument that some specific crime be alleged and proven.<sup>105</sup>

But the Republicans failed not only in achieving their ultimate end, but also in deploying their desired means. As Bowman notes, the Radical Republicans never made the broad, policy-based impeachment case that might have been made.<sup>106</sup> Instead, they wound up "yielding to the understandable temptation to build a case around a discrete violation of law," thereby "consign[ing] the central questions of the

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<sup>101</sup> Whittington, *supra* note 90, at 431.

<sup>102</sup> Whittington, *supra* note 90, at 442.

<sup>103</sup> Whittington, *supra* note 90, at 442 ("In order to make their case for removing Johnson from office, Republicans were forced to attack the office itself.")

<sup>104</sup> Whittington, *supra* note 90, at 443.

<sup>105</sup> Whittington, *supra* note 90; *see also* Bowman, *supra* note 20, at 227–30.

<sup>106</sup> Bowman, *supra* note 20, at 240–47.

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postwar period—what should be the course of the country in the aftermath of civil war and who had the power to set it—to the periphery of the case.”<sup>107</sup> In essence, they stopped to some degree looking through the political and governance lenses on impeachment by over-focusing on the criminal, or as later described, “criminal-like,”<sup>108</sup> aspects of impeachment, and lost sight of where they wished to take the process.

Of note, Chief Justice Salmon Chase played a significant role during the five-week Johnson impeachment trial. Even before the trial began, he had written to the Senate to confirm that he would cast the deciding vote in the event of a tie.<sup>109</sup> He also took on the role of deciding (at least initially) legal disputes and evidentiary admissibility.<sup>110</sup> As Brenda Wineapple noted, Chase “wished to rule on the admissibility of evidence—subject to the vote of the Senate—and on the reliability of witnesses,” and “[h]is campaign to organize the Senate as a legal court was largely successful.”<sup>111</sup> Indeed, unlike later Chief Justices, such as Rehnquist and Roberts, Chase inserted himself into the process with some force.<sup>112</sup> This had perhaps the unintended and implicit effect of overuse of a criminality lens on impeachment to preside over presidential impeachments, which tends to obscure its fundamental political nature.<sup>113</sup>

#### B. Richard Nixon

On February 6, 1974, the United States House of Representatives authorized its Judiciary Committee to begin a formal impeachment

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<sup>107</sup> Bowman, *supra* note 20, at 231.

<sup>108</sup> Bowman, *supra* note 20, at 482.

<sup>109</sup> BRENDA WINEAPPLE, *THE IMPEACHERS: THE TRIAL OF ANDREW JOHNSON AND THE DREAM OF A JUST NATION* 277, 280 (2019) [ebook].

<sup>110</sup> *Id.* at 280, 306–08.

<sup>111</sup> *Id.* at 277–278.

<sup>112</sup> *Id.* at 277–80; see also Douglas O. Linder, *The Impeachment Trial of Andrew Johnson: An Account*, UMKC SCH. L. FAMOUS TRIALS, <https://www.famous-trials.com/johnson/488-home>.

<sup>113</sup> WINEAPPLE, *supra* note 109, at 272–80 (“The trial of the President conducted mostly as if it were a legal proceeding slanted the definition of impeachable offense toward a breach of law and away from questions of fitness, folly, or the autocratic abuse of power. The tide was already turning”); *Perspective*, *supra* note 29, at 906 (“For the most part, the founders did not regard political crimes as the functional equivalent of indictable crimes nor did they regard all indictable crimes as constituting impeachable offenses,” but “proof [of] an impeachable official’s commission of an indictable crime has tended to increase the odds of impeachment. This trend poses a problem of constitutional dimension because it blurs the lines that the framers tried to draw between criminal and impeachable offenses”).

inquiry against President Richard Nixon.<sup>114</sup> That 410 to 4 vote actually supported the Judiciary Committee efforts that had begun in October 1973. The Committee's inquiries had focused on a break-in at the Democratic National Committee headquarters at the Watergate office complex during the 1972 presidential election, and the Nixon administration's attempted cover-up of its knowledge of, or involvement in, the break-in and related activities. The Committee's efforts followed and then paralleled the investigations of the Senate's Select Committee on Presidential Campaign Activities. The investigations revealed activities well beyond the break-in, including but not limited to attempted cover-ups, and revealed the existence of an audio-taping system in the Nixon White House.

Against that backdrop:

In 1974, the House Judiciary Committee recommended articles of impeachment against President Richard Nixon on the theory that he abused the powers of his office. First, the articles alleged that the President, "using the powers of his high office," attempted to obstruct the investigation of the Watergate Hotel break-in, conceal and protect the perpetrators, and conceal the existence of other illegal activity. Second, that he used the power of the office of the Presidency to violate citizens' constitutional rights, "impair[]" lawful investigations, and "contravene[]" laws applicable to executive branch agencies. Third, that he refused to cooperate with congressional subpoenas.<sup>115</sup>

Then, "President Nixon resigned before the House voted on the articles."<sup>116</sup>

The House Judiciary Committee approved the articles of impeachment against Nixon, but because of Nixon's resignation, the full House never voted on the articles. Those articles charged the President with obstruction of the investigation into the Watergate break-in, misuse of law enforcement and intelligence agencies for political purposes, and refusal to comply with the Committee's subpoenas.<sup>117</sup>

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<sup>114</sup> For further background and records of these proceedings and Richard Nixon more generally, see *Richard Nixon*, LIB. OF CONG., RSCH. GUIDES, <https://guides.loc.gov/federal-impeachment/richard-nixon#s-lib-ctab-22544088-1> (last visited Apr. 2, 2024).

<sup>115</sup> JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV. IMPEACHMENT AND REMOVAL, 12 (Oct. 29, 2015), [https://digital.library.unt.edu/ark:/67531/metadc795443/m1/1/high\\_res\\_d/R44260\\_2015Oct29.pdf](https://digital.library.unt.edu/ark:/67531/metadc795443/m1/1/high_res_d/R44260_2015Oct29.pdf).

<sup>116</sup> *Id.*

<sup>117</sup> *Articles of Impeachment*, WATERGATE.INFO, <https://watergate.info/impeachment/articles-of-impeachment> (last visited March 28, 2024); see also *The Nixon Impeachment Proceedings: Annotations*, JUSTIA US L.,

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Many view the three articles of impeachment the Committee adopted against President Nixon as a “paradigm” for presidential impeachment—an abuse of power in which there is “not only serious injury to the constitutional order but also a nexus between the misconduct of an impeachable official and the official’s formal duties.”<sup>118</sup>

That paradigm skirted the criminal law perspective by assuring that the articles were imbued with evidence of criminality without resting on a specification of any crime: “None of [Nixon’s articles of impeachment] alleged a violation of a particular federal criminal statute, even though the facts adduced in support of Articles 1 and 2 made plain that he had committed crimes and conspired with others to do so.”<sup>119</sup> Ultimately, as in every impeachment spectacle, “the president’s defenders” would take the position that “impeachment require[s] a violation of the criminal law.”<sup>120</sup> But the Judiciary Committee rejected those notions, deciding that “[i]mpeachment and the criminal law serve fundamentally different purposes,” noting that impeachment is a “remedial process” and “its function is primarily to maintain constitutional government” rather than punish any particular person.<sup>121</sup>

Notably, the Committee actually rejected two other proposed articles of impeachment against President Nixon:

The first rejected article concerned receiving compensation in the form of government expenditures at his private properties in California and Florida—which allegedly constituted an emolument from the United States in violation of Article II, Section, 1, Clause 7 of the Constitution—and tax evasion. Those Members opposed to the portion of the charge alleging receipt of federal funds argued that most of the President’s expenditures were made pursuant to a request

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<https://law.justia.com/constitution/us/article-2/54-the-nixon-impeachment-proceedings.html> (last visited March 28, 2024).

<sup>118</sup> *Lessons*, *supra* note 29, at 617; *see also Perspective*, *supra* note 29, at 907; *The Clinton Impeachments: Annotations*, at n.900, JUSTIA US LAW, (last visited Feb. 27 2024), <https://law.justia.com/constitution/us/article-2/55-the-clinton-impeachment.html>.

<sup>119</sup> Bowman, *supra* note 20, at 262–263.

<sup>120</sup> Bowman, *supra* note 20, at 263; *see also* Bowman, *supra* note 20, at 264 (Minority staff report noted that it need not be a statutory crime, opining that “willful misconduct in office by public men’ would have been a crime at common law at the time of the founding”).

<sup>121</sup> Bowman, *supra* note 20, at 265; *see also* Bowman, *supra* note 20, at 484 (noting that James Wilson, a delegate to the Convention and later Justice of the Supreme Court, wrote that “Impeachments, and offences and offenders impeachable, come not ...within the sphere of the ordinary jurisprudence. They are founded on different principles; are governed by different maxims; and are directed to different objects.”); *see also Perspective*, *supra* note 29, 912 (also citing Wilson’s lectures).

from the Secret Service; that there was no direct evidence the President knew at the time that the source of these funds was public, rather than private; and that this conduct failed to rise to the level of an impeachable offense. Some Members opposed to the tax evasion charge argued that the evidence was insufficient to impeach; others that tax fraud is not the type of behavior at which the remedy of impeachment is directed.

The second rejected article accused the President of concealing from Congress the bombing operations in Cambodia during the Vietnam conflict. This article was rejected for two primary reasons: some Members thought (1) the President was performing his constitutional duty as Commander in Chief and (2) Congress was given sufficient notice of these operations.<sup>122</sup>

These rejected articles, nonetheless, raised the same sorts of conundrums concerning the place of criminal law violations in considerations of impeachment that we have discussed elsewhere in this paper. Nonetheless, the question of whether a criminal violation was necessary for impeachment, or alone sufficient for impeachment, continued as a debate point in later impeachment proceedings. Thus, the need remains to view impeachment through multiple lenses.

It is interesting to note that, despite Nixon's widespread malfeasance and disrespect for the law in connection with Watergate and other matters, "President Nixon obeyed the order of the courts" when "[h]e might not have . . . . There, too, Richard Nixon, almost despite himself, remained bound by historical norms and expectations of American political culture."<sup>123</sup> As Bowman observed, Nixon was sometimes "contemptuous of legal rules," but "it does not seem to have occurred to him to deny the authority of the law or its institutions."<sup>124</sup>

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<sup>122</sup> Art. II S4.4.7 *President Nixon and Impeachable Offenses*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S4-4-7/ALDE\\_00000695/](https://constitution.congress.gov/browse/essay/artII-S4-4-7/ALDE_00000695/) (last visited March 28, 2024); see also Bowman, *supra* note 20, at 200 (noting that "the House Judiciary Committee chose not to include Richard Nixon's tax violations in its articles of impeachment").

<sup>123</sup> Bowman, *supra* note 20, at 287.

<sup>124</sup> Bowman, *supra* note 20, at 287. While many saw Nixon as a tragic character at the time of his resignation and fall from grace, few saw him as either patriotic or heroic. But, viewed against the events of the last few years, the way he "retained an instinctive reverence for the presidency and American constitutional government" is laudable as "a president who has no respect for the criminal justice system or the courts or Congress as a coordinate branch, then a very different sort of constitutional challenge will ensue." Bowman, *supra* note 20, at 287; see also Alton Frye, *Trump Is No Nixon—He's Much Worse*, THE HILL (Sept. 6, 2023), <https://thehill.com/opinion/criminal-justice/4187692-trump-is-no-nixon-hes-much-worse/>.



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Consequently, as we view impeachments, it becomes important to understand not only the lenses through which we must view the process and the events but to also consider the lenses through which the participants (especially the president) are viewing the events. As the Nixon near-impeachment illustrates, the lenses through which the president views the process will also have a great impact on how the process itself unfolds, which certainly was true in the Clinton, Trump I, and Trump II impeachment spectacles that followed Watergate.

C. *Bill Clinton*

Bill Clinton's impeachment arose out of an investigation conducted by Ken Starr as special counsel. Starr first investigated Bill and Hillary Clinton's involvement in the Whitewater real estate deal, which charge was later expanded to include investigating: (i) Webster Hubbell and billing practices at the Rose Law Firm; (ii) issues concerning the termination of employees of the White House Travel Office; (iii) allegedly improper use of the FBI for background investigations; (iv) alleged perjury by White House Counsel Bernard Nussbaum; (v) Hubbell's taxes, and, finally; (vi) whether former White House intern Monica Lewinsky or other persons violated federal criminal law in dealing with "witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*."<sup>125</sup> President Clinton was ultimately impeached for alleged perjury and related obstructive conduct in civil and grand jury proceedings relevant to item (vi).<sup>126</sup> Though impeached by the House in late 1998, the Senate did not convict him.<sup>127</sup>

Whereas the Johnson impeachment and Nixon near-impeachment had been about the power of the office, "the impeachment of Bill Clinton targeted the individual, not the office."<sup>128</sup> The failure of the Senate to convict him in that case in some ways vindicated the views of one of the framers, Gouverneur Morris, who had said that "when impeached, a president 'should be punished not as a man, but as an officer, and

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<sup>125</sup> John Q. Barrett, *The Leak and the Craft: A Hard Line Proposal to Stop Unaccountable Disclosures of Law Enforcement Information*, 68 *FORDHAM L. REV.* 613, 613 n. 1 (1999); see also Lawrence Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 *DAYTON L. REV.* 529, 544 (2019) (providing a detailed timeline of events relevant to the Clinton impeachment).

<sup>126</sup> See H. Res. 611, 105th Cong. (1998) (impeaching President Clinton on Dec. 19, 1998).

<sup>127</sup> See, e.g., Peter Baker & Helen Dewar, *The Senate Acquits President Clinton*, *WASH. POST* (Feb. 13, 1999, 12:00 AM), <https://www.washingtonpost.com/politics/clinton-impeachment/senate-acquits-president-clinton/>.

<sup>128</sup> Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 *U. PA. J. CONST. L.* 422, 450 (2000).

punished only by degradation from his office.”<sup>129</sup> Although few of the voting Senators were likely considering Morris’ convention comments as they voted.

It nonetheless raised interesting questions of governance as political motivations seemed to influence the deployment of criminal law concepts as part of the impeachment process.<sup>130</sup> In that sense, it might be said that the Clinton impeachment touched on every perspective but decided on none, and therefore was left wanting as precedent:

the Clinton impeachment raised the issue of what the threshold is for “high crimes and misdemeanors.” While the Nixon charges were premised on the assumption that an abuse of power need not be a criminal offense to be an impeachable offense, the Clinton proceedings—or at least the perjury charge—raised the issue of whether criminal offenses that do not rise to the level of an abuse of power may nonetheless be impeachable offenses. The House’s vote to impeach President Clinton arguably amounted to an affirmative answer, but the Senate’s acquittal leaves the matter somewhat unsettled. There appeared to be broad consensus in the Senate that some private crimes not involving an abuse of power (*e. g.*, murder for personal reasons) are so outrageous as to constitute grounds for removal, but there was no consensus on where the threshold for outrageousness lies, and there was no consensus that the perjury and obstruction of justice with which President Clinton was charged were so outrageous as to impair his ability to govern, and hence to justify removal. Similarly, the almost evenly divided Senate vote to acquit meant that there was no consensus that removal was justified on the alternative theory that the alleged perjury and obstruction of justice so damaged the judiciary as to constitute an impeachable “offense against the state.”<sup>131</sup>

Still, the Clinton impeachment could at least be said to have set, or continued, a precedent of asking the right questions. These questions went beyond whether the president violated a specific criminal law, and,

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<sup>129</sup> Bowman, *supra* note 20, at 128 (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787 69 (Max Farrand ed., 1911)).

<sup>130</sup> Bowman, *supra* note 20 at 306–311.

<sup>131</sup> *The Clinton Impeachments: Annotations*, JUSTIA US LAW, (last visited Mar. 1, 2024), <https://law.justia.com/constitution/us/article-2/55-the-clinton-impeachment.html> (citations omitted). As the annotations observed, “Some Senators who explained their acquittal votes rejected the idea that the particular crimes that President Clinton was alleged to have committed amounted to impeachable offenses.” *Id.* at n. 903 (citing specific examples).

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like the Nixon near-impeachment that preceded it, the respective proceedings raised the questions of character and integrity traditionally considered integral to presidential leadership and fitness.<sup>132</sup> Ultimately, the differing political and legal perspectives must come together with the governance perspective to allow line of sight to and through the single question of whether that “nexus” existed between cited misconduct and the President’s formal duties, either because the former had occasioned “serious injury to the constitutional order” or “effectively robbed [the President] of the requisite moral authority to continue to function as President.”<sup>133</sup>

D. *Donald Trump*

1. *Trump’s First Impeachment*

The first impeachment of Donald Trump began on December 15, 2019, when the House of Representatives adopted two articles of impeachment against Trump: (1) abuse of power, and (2) obstruction of Congress.<sup>134</sup> A previous House inquiry had concluded that President Trump had solicited foreign interference in the 2020 U.S. presidential election and then obstructed the inquiry itself by telling his administration officials to ignore subpoenas for documents and testimony.<sup>135</sup> The inquiry reported that President Trump withheld military aid, and an invitation to the White House, during a phone call with Ukrainian President Volodymyr Zelenskyy.<sup>136</sup> The charge was that the President did so to influence Ukraine to announce an investigation into Trump’s political opponent, Joe Biden, and to promote a discredited conspiracy theory that Ukraine was behind interference in the 2016 presidential election.<sup>137</sup> The articles were submitted to the Senate on

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<sup>132</sup> Bowman, *supra* note 20, at 311–317.

<sup>133</sup> *Lessons*, *supra* note 29, at 617.

<sup>134</sup> Bowman, *supra* note 20, at 457. Donald Trump was impeached on December 15, 2019, amid allegations that he “solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election,” and allegedly thereafter obstructed Congress’ efforts to investigate same. H.R. REP. NO. 116-346, at 2 (2019); *see also* H.R. RES. 755, 116th Cong. (2019).

<sup>135</sup> Bowman, *supra* note 20, at 455–457; Michael D. Shear & Nicholas Fandos, *Impeachment Report Says Trump Solicited Foreign Election Interference*, NY TIMES (Dec. 3, 2019), <https://www.nytimes.com/2019/12/03/us/politics/impeachment-trump-intelligence-committee.html>.

<sup>136</sup> Bowman, *supra* note 20, at 457, 461; Zachary B. Wolf & Sean O’Key, *The Trump-Ukraine Impeachment Inquiry Report, Annotated*, CNN (Dec. 3, 2019), <https://www.cnn.com/interactive/2019/12/politics/trump-ukraine-impeachment-inquiry-report-annotated/>.

<sup>137</sup> Bowman, *supra* note 20, at 424–425; Zachary B. Wolf & Sean O’Key, *The Trump-Ukraine Impeachment Inquiry Report, Annotated*, CNN (Dec. 3, 2019),

January 15, 2020, initiating the trial.<sup>138</sup> The trial saw no witnesses or documents being subpoenaed, as Republican senators rejected attempts to introduce subpoenas.<sup>139</sup> On February 5, 2020, the Senate acquitted Trump on both counts, as neither count received 67 votes to convict.<sup>140</sup>

Part of the challenge of the first Trump impeachment was how it retread worn ground, dragging out yet again the question of whether “‘high Crimes and Misdemeanors’ embrace[d] only violations of ‘established law’” and the closely aligned but “‘undefined category [Trump’s counsel] styled ‘criminal-like conduct.’”<sup>141</sup> Of course, as noted

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<https://www.cnn.com/interactive/2019/12/politics/trump-ukraine-impeachment-inquiry-report-annotated/>.

<sup>138</sup> Kevin Breuninger, House delivers Trump impeachment articles to the Senate, CNBC.COM, <https://www.cnbc.com/2020/01/15/house-delivers-trump-impeachment-articles-to-the-senate.html>.

<sup>139</sup> Bowman, *supra* note 20, at 472; *see also* Art. II, S4.4.9 President Donald Trump and Impeachable Offenses, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S4-4-9/ALDE\\_00000035/](https://constitution.congress.gov/browse/essay/artII-S4-4-9/ALDE_00000035/) (last visited Mar. 1, 2024).

<sup>140</sup> Bowman, *supra* note 20, at 514; Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES, (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html>.

<sup>141</sup> Bowman, *supra* note 20, at 482; *see also* Art. II, S4.4.9 President Donald Trump and Impeachable Offenses, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S4-4-9/ALDE\\_00000035/](https://constitution.congress.gov/browse/essay/artII-S4-4-9/ALDE_00000035/) (last visited Mar. 1, 2024). Indeed:

The Senate trial was characterized by deep partisan divides and complicated disagreements over questions of law and fact, including presidential motive. But one clear constitutional conflict that arose during the trial involved the proper relationship between impeachment and criminal law. Trial briefs and debate made clear that the House managers and President Trump’s attorneys reached very different conclusions on the question of whether high crimes and misdemeanors require evidence of a criminal act or other legal violation. The House, consistent with past impeachment practice, asserted that for purposes of Article II high Crimes and Misdemeanors need not be indictable criminal offenses. In response, however, the President’s attorneys asserted that an impeachable offense must be a violation of established law, and that the articles fail[ed] to allege any crime or violation of law whatsoever, let alone ‘high Crimes and Misdemeanors,’ as required by the Constitution. The acquittal provided no clear resolution to these conflicting positions, but the debate over a link between illegal acts and impeachable acts appears to have had some impact on individual Senators. Indeed, the House’s managers’ failure to allege an explicit criminal act appears, along with criticism of the House investigation and failure of the House to prove its case, to have been among the primary reasons given for acquittal.

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repeatedly in this paper, that is not the constitutional standard required by the document's text nor the concept's history.<sup>142</sup> But that argument is still made by managers and counsel, referenced by Senators,<sup>143</sup> and is, in fact, expected to be made at every impeachment.

The debate over terminology and timing also emerged anew, as the Ukraine situation focused the impeachment debate for the first time on the constitutional reference to "bribery." The question emerged whether, during a 21st-century impeachment, that term should be restricted to "its original public meaning at founding or defined based on federal criminal law in effect at the time" of this impeachment.<sup>144</sup> Similarly, one could also ask whether the originalist position was a restriction at all since, at common law, the crime of bribery was sometimes considered the equivalent of what is now described as extortion.<sup>145</sup> Though such focus might have made sense if one looked at this situation as a matter of criminal law, the Democratic House leadership sought to avoid such a "complex legal debate" and instead charged President Trump with what "they framed . . . as abuse of power, a charge that fit within the traditional ambit of 'high Crimes and Misdemeanors' rather than bribery."<sup>146</sup> Despite Trump partisans' claims to the effect that the charges against Trump were unprecedented, "[c]orruption in the sense of misuse of official power for private gain, pecuniary or political, is the most common ground of impeachment throughout Anglo-American history."<sup>147</sup>

In the end, the Trump I impeachment seemed, from start to finish, almost purely political. While Bowman decries what occurred in the Senate as such, laying blame on Republicans,<sup>148</sup> the House's path to impeachment was no less political, which Bowman does not expressly acknowledge. Impeachment is a political process, and one cannot drape only certain politics in a criminal law gown to distinguish it from the political pressures that an opposition unleashes. Indeed, Bowman later states that the Trump I impeachment was "worth doing" because one

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<sup>142</sup> See *supra* notes 54–60, 87, 104–108, 119–121, and 141 and related text, *supra* pp. 11–12, 17, 20–21, 23–24, and 29.

<sup>143</sup> Bowman, *supra* note 20, at 522.

<sup>144</sup> Bowman, *supra* note 20, at 460–461; JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., RL R46013, IMPEACHMENT AND THE CONSTITUTION 46–49 (2023) ("What is the Constitutional Definition of Bribery?").

<sup>145</sup> Bowman, *supra* note 20, at 460; JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., RL R46013, IMPEACHMENT AND THE CONSTITUTION 47 (2023).

<sup>146</sup> Bowman, *supra* note 20, at 462.

<sup>147</sup> Bowman, *supra* note 20, at 462.

<sup>148</sup> Bowman, *supra* note 20, at 530; see also Bowman, *supra* note 20, at 581 (laying blame on Republicans in connection with Trump I and II impeachment).

“must give even one’s perhaps despised opponents a chance to surprise themselves by doing the right thing.”<sup>149</sup>

## 2. Trump’s Second Impeachment

Donald Trump’s second impeachment occurred on January 13, 2021, seven days before his term would expire.<sup>150</sup> The single article of impeachment was based on the “incitement of insurrection” and “lawless action at the Capitol” during the attack on the U.S. Capitol on January 6, 2021.<sup>151</sup> Before January 6th, President Trump pushed voter fraud conspiracy theories through social media channels and other mechanisms, all of which became part of what drew people to Washington DC that day to hear him speak and then proceed to the capitol.<sup>152</sup> The single article of impeachment was introduced to the House of Representatives on January 11, 2021, with more than 200 co-sponsors, and received ten Republican representatives’ votes,<sup>153</sup> “the largest number of members ever to vote against a President of their own party on impeachment.”<sup>154</sup> While the Senate acquitted him,<sup>155</sup> Trump was later indicted in state and federal courts for the conduct in the Article of Impeachment as well as the election nullification campaign that preceded it.<sup>156</sup>

<sup>149</sup> Bowman, *supra* note 20, at 531.

<sup>150</sup> Bowman, *supra* note 20, at 459; *see also* H. Res. 24, 117th Cong. (2021) (impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors).

<sup>151</sup> H. Res. 24, 117th Cong. (2021) (impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors).

<sup>152</sup> Robert Yoon, *Trump’s Drumbeat of Lies About the 2020 Election Keeps Getting Louder. Here Are the Facts*, ASSOCIATED PRESS (Aug. 23, 2023), <https://apnews.com/article/trump-2020-election-lies-debunked-4fc26546b07962fdbf9d66e739fbb50d>; *see also* Bowman, *supra* note 20 at 536–45.

<sup>153</sup> Bowman, *supra* note 20, at 559.

<sup>154</sup> Susan B. Glasser, *Trump Impeachment II Was Just as Awful as the Original*, NEW YORKER (Jan. 13, 2021), <https://www.newyorker.com/news/letter-from-trumps-washington/trump-impeachment-ii-was-just-as-awful-as-the-original>.

<sup>155</sup> Bowman, *supra* note 20, at 574; *see also* Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans’ Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUST SEC. (Feb. 15, 2021), <https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial/>.

<sup>156</sup> Charlie Savage, *How Jack Smith Structured the Trump Election Indictment to Reduce Risks*, NY TIMES (August 4, 2023), <https://www.nytimes.com/2023/08/04/us/politics/trump-indictment-jack-smith-charges.html>; Indictment, in *United States v. Donald J. Trump*, United States District Court for the District of Columbia, Case No. 23-CR-257 TSC, [https://www.justice.gov/storage/US\\_v\\_Trump\\_23\\_cr\\_257.pdf](https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf).

The second impeachment trial of Donald Trump was, in many ways, pure spectacle, viewed only through the political lens.<sup>157</sup> Questions of both law and governance implications were largely ignored, and a strange pantomime process of political images and foregone conclusions played out.<sup>158</sup> The failure to consider those multiple perspectives, however, has left the country in many ways with an uncompleted process.<sup>159</sup> Whereas the Nixon near-impeachment resulted in a completed political process and perhaps a truncated legal one, the opposite occurred here. But, given that the purpose of impeachment is to bring a political process to a conclusion, the damage occurring in the Trump era may be longer lasting. The political aspects of Trump's second impeachment continue to play out in the courts, which are an ill-suited venue for the sorts of determinations and conclusions that ultimately were reached as a matter of consensus, perhaps begrudging, in the Nixon era.<sup>160</sup> This, especially, drives home the notion that the Framers were prescient in assigning impeachment processes to the political, legislative branch where "sui generis" decisions left to history's judgment (rather than appellate courts) are more palatable as expedient,<sup>161</sup> as opposed to the process of criminal trials and punishments as had been the case in the United Kingdom before the American Revolution.<sup>162</sup> While Tribe and Matz aptly observed that because "the United States has never actually impeached and removed a president ... [w]e therefore have no historical experience with the full consequences,"<sup>163</sup> the country is now in many ways living with the consequences of not completing that process

<sup>157</sup> Maeve Reston, *Republicans Acquitted Trump Again, But This Time Is Different*, CNN (Feb. 15, 2021), <https://www.cnn.com/2021/02/14/politics/donald-trump-impeachment-republican-vote/index.html>.

<sup>158</sup> Stephanie Wideman, et al., *Visualizing the Incitement of Insurrection: A Context of Analysis of Visual Symbols Used in Donald J. Trump's Second Impeachment Trial*, 8 POL. RHETORIC AND THE MEDIA: THE YEAR IN C-SPAN RSCH. 95, 96 (2022) [<https://doi.org/10.2307/j.ctv33t5gjm.10>].

<sup>159</sup> Jan Wolfe, *The Legal Questions Left Unanswered by Trump's Impeachment Trial*, REUTERS (Feb. 17, 2021), <https://www.reuters.com/article/idUSKBN2AH20U/>.

<sup>160</sup> David Crary, *GOP Unlikely to Reprise Role It Played in Nixon's 1974 Exit*, ASSOCIATED PRESS (Oct. 5, 2019), <https://apnews.com/article/ff1504ddaa5446e5903d4e883e79ff51>.

<sup>161</sup> *Perspective*, *supra* note 29, at 907.

<sup>162</sup> Frank O. Bowman III, *British Impeachments (1376-1787) and the Preservation of the American Constitutional Order*, 46 HASTINGS CONSTITUTIONAL LAW QUARTERLY 745, 748 (2019) ("British impeachment employed many of the forms of a criminal trial and could produce dire personal punishments of the sort we associate with criminal law").

<sup>163</sup> Laurence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 533 (2019) (quoting LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* xiii (Basic Books, 1st ed., 2018)).

satisfactorily earlier. The question is whether the country should have merely “relied on presidential term limits, the forces of civil society, federalism, and checks and balances to mitigate the damages inflicted” in and around January 6th or whether those may prove insufficient.

#### IV. IMPEACHMENTS IN PERSPECTIVE: GOVERNANCE, POLITICS AND THE RULE (AND RULES) OF LAW

Recent commentators have struggled with what presidential impeachment is and how it should be viewed.<sup>164</sup> Many have taken the “bad actor” theory, concluding that impeachment is “a tool for removing criminals and other ‘bad actors’ from the presidency.”<sup>165</sup>

But, at least in other democracies, “impeachment does not always focus on the criminal behavior or bad acts of an individual president.”<sup>166</sup> Some countries have seen impeachments resting on the need for a “political reset” to address governance failures, a process that is much more overtly political, though not necessarily more destabilizing.<sup>167</sup> Indeed, as noted above, the famous “high crimes and misdemeanors” language seemingly emerged to ensure that removal should not be limited to criminal or quasi-criminal acts.<sup>168</sup>

In fact, in many ways, the U.S. experience of presidential impeachments and near impeachments has not remained steadfastly committed to the criminal law perspective. As M&F note in their foreword, “[h]istory demonstrated that impeachment has always been more about politics than crime and this instance was no exception.”<sup>169</sup> One can see that history playing out with Andrew Johnson, where “[n]one of Johnson’s articles of impeachment alleged criminal conduct as such. Two did not even allege illegality.”<sup>170</sup> Similarly, the articles passed by the House Judiciary Committee during Watergate “did not charge Nixon specifically with committing crimes, focusing instead on

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<sup>164</sup> See generally GHL 2021, *supra* note 6, at 81–91.

<sup>165</sup> GHL 2021, *supra* note 6, at 81.

<sup>166</sup> GHL 2021, *supra* note 6, at 88.

<sup>167</sup> GHL 2021, *supra* note 6, at 89.

<sup>168</sup> GHL 2021, *supra* note 6, at 109–12. Though not limited to such acts, criminal acts alone can provide a basis for impeachment if those acts preclude one from fulfilling the duties of the office. Bowman, *supra* note 20, at 314 (“[H]igh Crimes and Misdemeanors’ includes not only crimes that ‘political’ in nature, but also crimes that are ‘political’ in effect . . . Accordingly, what makes a crime, or other presidential behavior, a ‘high Crime or Misdemeanor,’ and therefore a proper basis for impeachment, is a combination of moral gravity and political character, which is difficult to define with precision . . .”) (emphasis in original); see also *Perspective*, *supra* note 29, at 906.

<sup>169</sup> M&F, *supra* note 7, at 50 (referring to Reagan and Iran-Contra hearings).

<sup>170</sup> BRIAN C. KALT, *Parallel Evolution of American Impeachment and the Two-Party System*, in M&F, *supra* note 7, at 280.



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his violation of the public trust.”<sup>171</sup> Additionally, though the articles of impeachment proffered against Clinton referenced the crime of perjury, Clinton’s impeachment seemed to have different and deeper routes,<sup>172</sup> as borne out by the articles of impeachment against him.<sup>173</sup> Similarly, despite the current myriad of criminal charges facing Donald Trump concerning the events of January 6, 2021, and other matters,<sup>174</sup> neither set of the articles of impeachment claimed treason or other criminality as the prohibited high crime or misdemeanor, resting instead on violations of his oath and other political obstructions.<sup>175</sup> This strongly suggests that, despite the framing devices often used to discuss impeachment, it is not invariably or predominantly a criminal law proceeding; rather, “impeachment is a quasi-legal process and whether it is applied against a president is inevitably political and not a strict assessment of whether a president broke any specific law.”<sup>176</sup> That is both its vice and its virtue, its power and its problem.

Still, there is an important parallel between the way in which criminal law attempts to establish guidance over future conduct and how impeachments attempt to set appropriate political guardrails:

The idea, though different commentators define it a bit differently and find slightly different uses for it in criminal law theory, is that the application of the criminal law in individual cases and across a population of offenders establishes moral boundaries that the society at large internalizes as guides to

<sup>171</sup> *Id.* at 282.

<sup>172</sup> Rakove, *Impeachment, Responsibility and Constitutional Failure from Watergate to January 6th*, in M&F, *supra* note 7, at 322; see also Bowman, *supra* note 20, at 424 (“[T]he Clinton affair, however, was an early marker of an incipient deterioration of American public life to its current condition of poisonous division and governmental dysfunction”).

<sup>173</sup> There were two articles of impeachment against Clinton, and each focused on the “violation of his constitutional oath . . . and . . . his constitutional duty to take care that the laws be faithfully executed.” See Articles of Impeachment Against William Jefferson Clinton, H.R. 611, 105th Cong. art. 1 (1998). Though perjury and obstruction were referenced as part of the factual context, the articles did not charge him with such as crimes. *Id.*

<sup>174</sup> See generally Amy O’Kruk & Curt Merrill, *Donald Trump’s Criminal Cases, In One Place*, CNN POLITICS (March 25, 2024), <https://www.cnn.com/interactive/2023/07/politics/trump-indictments-criminal-cases/>.

<sup>175</sup> In his first impeachment, Trump faced two articles of impeachment, one for abuse of power and one for obstruction of Congress. See Articles of Impeachment Against Donald John Trump, H.R. 755, 116th Cong. (2019). In his second, the single article of impeachment charged him with “incitement of insurrection,” but no charge of treason was made nor were any criminal statutes cited. See H.R. 24, 117th Cong. art. 1 (2021).

<sup>176</sup> Harrington & Waddan, *The US Impeachment Process: Fit for Purpose In a Hyper-Partisan Era?*, in M&F, *supra* note 7, at 348.

future behavior. As one author put it, criminal punishment may be viewed as “a teacher of right and wrong.” Impeachments, rare though they are, can and should serve precisely this function in the political realm. They define and educate both about the kinds of conduct that are impermissible for public officials and about the nature of the constitutional order itself.<sup>177</sup>

That concept seemed to apply well, and aptly, to Johnson and Nixon, though it began to fray a bit in the context of Clinton and perhaps Trump I, where those seeking impeachment in each case perhaps acted too politically. This concept has arguably become undone in Trump II, where those objecting to impeachment have not simply looked through a wrong viewing lens but closed their eyes altogether.

#### V. IMPEACHMENT SPECTACLES: TOOLS FOR ACTUALLY SEEING WHAT WE ARE LOOKING AT

“Put simply, [the authority to impeachment] matters because of power and the need to ensure that those who exercise power are held to account.”<sup>178</sup> As Rakove has noted, presidential “[i]mpeachment is the constitutional remedy for a collapse of executive responsibility,”<sup>179</sup> whether such collapse comes through failure to meet one’s responsibilities or through attempts to extend one’s power beyond its constitutional limits. As the very inquiry orbits central questions of power in a constitutional republic, its answers are, and must be, simultaneously sensitive to legal, political, and governance concerns. This can create analytical uncertainty because it is near impossible through unaided human observation to ascertain exact measurements on differing factors simultaneously.<sup>180</sup> Uncertainty can and likely will create the spectacle of faction, as Hamilton predicted in Federalist 65.<sup>181</sup>

All presidential impeachments, or near impeachments, become spectacles. In fact, that word seems to attach through the U.S. history of

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<sup>177</sup> Bowman, *supra* note 20, at 316.

<sup>178</sup> Forward, in M&F, *supra* note 7, at 45.

<sup>179</sup> Rakove, *supra* note 172, at 304.

<sup>180</sup> Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 2 n.5 (1986) (“[A]ny attempt to achieve certainty regarding any important constitutional issue is unlikely to succeed—and even if it does succeed in the short run—will inevitably create uncertainty as to more issues than it settles” and “the term is borrowed from the science of nuclear physics, where the uncertainty principle—often denoted the Heisenberg Uncertainty Principle—holds that it is impossible to ascertain with complete accuracy both the position and the velocity of a particle because the process of measuring one characteristic introduces great uncertainty in the measurement of the other”) [<https://doi.org/10.2307/1372445>].

<sup>181</sup> THE FEDERALIST NO. 65 (Alexander Hamilton).

impeachments, as well as its English pre- and parallel history. Indeed, multiple authors covering multiple periods in the recently published Monaghan and Flinders' tome use that word in describing early English impeachment proceedings,<sup>182</sup> famous proceedings involving British rule in India,<sup>183</sup> impeachments in the 17th Century,<sup>184</sup> and the Nixon near-impeachment.<sup>185</sup> Others have not shied away from that term when describing the Johnson,<sup>186</sup> Clinton,<sup>187</sup> or Trump<sup>188</sup> impeachments.

The current fractured political setting is marked by an unwillingness to look at various issues from a political opponent's perspective or through the lenses through which they view such issues. When each side is locked into a myopic perspective, the nuance, compromise, and creativity most often needed on the toughest issues is simply unreachable. With the highest stakes present, such as those involved at times of presidential impeachment or government crisis, the need to look through something other than one's own lens colored only by one's own perspective is most pressing. In an age when too many are

<sup>182</sup> M&F, *supra* note 7, at 38.

<sup>183</sup> M&F, *supra* note 7, at 48 ("Hastings' impeachment proved to be so significant, not just in terms of the spectacle, but crucially in terms of articulating different views of empire").

<sup>184</sup> Mark Goldie, *Impeachment in 17th Century England*, in M&F, *supra* note 7, at 104 ("Not least of the risks of submitting a political enemy to due process was the spectacle of bravura public vindications by the defendant: virtuoso demolitions of the case against them"); *see also Id.* at 111 ("The permanence of the committee for public accounts from the 1690s onwards was perhaps the fruit of the sheer waywardness of impeachment: measured scrutiny displaced spectacles of retribution").

<sup>185</sup> Harrington & Waddan, *supra* note 176, at 373 ("Americans were spared the spectacle of their president being judged unfit for office").

<sup>186</sup> *See, e.g.*, David O. Stewart, Review of *Impeached The Trial of President Andrew Johnson and the Fight for Lincoln's Legacy*, KIRKUS REVIEWS (May 12, 2009), <https://www.kirkusreviews.com/book-reviews/david-o-stewart/impeached/> ("By the winter of 1868 congressional Republicans, enraged by Andrew Johnson's systematic attempts to thwart Reconstruction, believed they'd finally caught Lincoln's accidental successor in the 'crime' necessary to remove him from office. The irascible and politically maladroit president—memories of his drunken vice-presidential inauguration were still fresh—had fired Secretary of War Edwin Stanton, thereby violating the Tenure of Office Act. The ensuing impeachment spectacle qualifies as the last battle of the Civil War and the first act of the tawdry Gilded Age").

<sup>187</sup> *See, e.g.*, Stanley A. Renshon, *The Polls: The Public's Response to the Clinton Scandals, Part 2: Diverse Explanations, Clearer Consequences*, 32 PRESIDENTIAL STUD. Q. 412, 419 (2002) (citing Dennis Farney, *The Spectacle of Impeachment Magnifies Voter Estrangement*, WALL. ST. J. (Dec. 21, 1998)) [<https://doi.org/10.1111/j.0360-4918.2002.00228.x>].

<sup>188</sup> *See, e.g.*, Gary C. Jacobson, *Donald Trump and the Parties: Impeachment, Pandemic, Protest, and Electoral Politics in 2020*, 50 PRESIDENTIAL STUD. Q. 762, 775 (2020) (noting that Trump's first "impeachment spectacle was absorbing the nation's attention" as "the coronavirus was spreading quietly from China to the rest of the world.") [<https://doi.org/10.1111/psq.12682>].

too content with the courage of their own convictions, one needs to express courageously the uniting power of doubt.

Such courageous expression has happened before. Benjamin Franklin brought the Constitutional Convention to an important agreement by expressing just such a sentiment:

It is therefore that the older I grow the more apt I am to doubt my own Judgment and to pay more Respect to the Judgment of others. Most Men indeed as well as most Sects in Religion, think themselves in Possession of all Truth, and that wherever others differ from them it is so far Error . . . Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure that it is not the best. The Opinions I have had of its Errors, I sacrifice to the Public Good . . . On the whole, Sir, I cannot help expressing a Wish, that every Member of the Convention, who may still have Objections to it, would with me on this Occasion doubt a little of his own Infallibility, and to make manifest our Unanimity, put his Name to this Instrument.<sup>189</sup>

In the impeachment context, that means that a proper understanding must look through “Franklin spectacles,” not the bifocals he actually invented but that fanciful “ocular device” for decoding attributed to Poor Richard in the movie *National Treasure*.<sup>190</sup> Those sort of spectacles let us look at these presidential impeachment spectacles through the multiple lenses of governance, politics, and the rule of law simultaneously or in alternating combinations so that we can follow the path, not always clear, that our founding documents and principles laid out for us.

One must see and understand that, to solve the puzzle of what impeachment means in any given case, one must look through the criminal law lens, the political lens, and the governance lens alternatively, all at once, or in shifting combination to see all that needs to be seen. If one wants a concrete image of what this is, think of Ben Gates, the character played by Nicholas Cage in *National Treasure*, using that ocular device to see a first clue revealed when looking through all

<sup>189</sup> Benjamin Franklin, Closing Speech at the Constitutional Convention (Sept. 17, 1787).

<sup>190</sup> *Ocular Device*, NATIONAL TREASURE WIKI, [https://nationaltreasure.fandom.com/wiki/Ocular\\_Device](https://nationaltreasure.fandom.com/wiki/Ocular_Device) (last visited March 28, 2024); see also *National Treasure—FBI Scene | Sadusky*, YOUTUBE (Apr. 21, 2020), <https://www.youtube.com/watch?v=drbQfeXNyXc> and *National Treasure Inside Independence Hall*, YOUTUBE (Feb. 16, 2016), <https://www.youtube.com/watch?v=LqVxaRiekac>.

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lenses at the same time,<sup>191</sup> then Peter Sadusky, the FBI agent played by Harvey Keitel, toying with spectacles, revealing to Ben Gates that moving lenses provides different perceivable texts depending on how many are looked through at any one time,<sup>192</sup> and then Ben Gates adjusting spectacles,<sup>193</sup> and revealing the alternative text.<sup>194</sup> Only through such multiple and varying focuses can one truly understand what Gerhardt has aptly described as “the popular law of impeachment.”<sup>195</sup> Only in applying such perspectives fully can one appreciate and apply “this imperfect but durable emergency measure”<sup>196</sup> referenced throughout this paper, a measure that has for long periods of our history laid “dormant for long periods before being aroused to action.”<sup>197</sup>

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<sup>191</sup> *National Treasure Inside Independence Hall*, YOUTUBE (Feb. 16, 2016), <https://www.youtube.com/watch?v=LqVxaRiekac>.

<sup>192</sup> *Ocular Device on Table*, NATIONAL TREASURE WIKI, [https://nationaltreasure.fandom.com/wiki/Ocular\\_Device](https://nationaltreasure.fandom.com/wiki/Ocular_Device) (last visited on Mar. 28, 2024).

<sup>193</sup> *Ben using The Ocular Device*, NATIONAL TREASURE WIKI, [https://nationaltreasure.fandom.com/wiki/Ocular\\_Device](https://nationaltreasure.fandom.com/wiki/Ocular_Device) (last visited on March 28, 2024).

<sup>194</sup> *Man Goes to Find Treasure Which He Saw in His Dream as a Kid!*, YOUTUBE (June 20, 2022), <https://www.youtube.com/watch?v=652VcXbAfV4>.

<sup>195</sup> *Perspective*, *supra* note 29, at 905–09.

<sup>196</sup> M&F, *supra* note 7, at 348.

<sup>197</sup> M&F, *supra* note 7, at 305.