Duke Law Journal

VOLUME 49 OCTOBER 1999 NUMBER 1

SENATE TRIALS AND FACTIONAL DISPUTES: IMPEACHMENT AS A MADISONIAN DEVICE

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ABSTRACT

In this Article, Professor Turley addresses the use of impeachment, specifically the Senate trial, as a method of resolving factional disputes about an impeached official's legitimacy to remain in office. While the Madisonian democracy was designed to regulate factional pressures, academics and legislators often discuss impeachments as relatively static events focused solely on removal. Alternatively, impeachment is sometimes viewed as an extreme countermajoritarian measure used to "reverse" or "nullify" the popular election of a President. This Article advances a more dynamic view of the Senate trial as a Madisonian device to resolve factional disputes.

This Article first discusses the history of impeachment and demonstrates that it is largely a history of factional or partisan disputes over legitimacy. The Article then explores how impeachment was used historically as a check on the authority of the Crown and tended to be used most heavily during periods of political instability. English and colonial impeachments proved to be highly destabilizing in the absence of an integrated political system. The postcolonial impeachment process was modified to convert it from a tool of factional dissension to a vehicle of factional resolution. This use of Senate trials as a Madisonian device allows for the public consideration of the full rec-

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ord as the foundation for a vote of "true consent." In this unique forum, an impeached official is subject to a decision of the public—through the cipher of the Senate—as to his legitimacy in carrying out constitutional duties. As such, Professor Turley concludes that, properly utilized, the Senate trial represents the quintessential Madisonian moment.

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INTRODUCTION

Alexander Hamilton once warned that charges of impeachable conduct "will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused."[1] Hamilton's words have proven prophetic in the two

1. THE FEDERALIST NO. 65, at 396-97 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

presidential impeachments and the majority of judicial impeachments brought before Congress. Given this history, it is striking how little attention has been paid to the role of impeachment in the resolution of factional divisions over the legitimacy of judges and Presidents to continue in office. While the Madisonian democracy[2] was designed to regulate factional pressures, the moment of greatest factional division—impeachments (and specifically presidential impeachments)—has largely escaped academic attention. Rather, academics and legislators often discuss impeachment as simply a process of removal and ignore the important institutional functions beyond its corrective conclusion.

This Article addresses the use of impeachment, and specifically the Senate trial, as a method of resolving factional disputes over executive or judicial legitimacy. The Senate impeachment function is distinct from the function of the impeachment decision in the House of Representatives in both its structural and political characteristics. The House of Representatives performs a critical role as a check on presidential misconduct and deters such conduct through its detection and referral of impeachable offenses. The Senate function is quite different.[3] It is "political" in a uniquely Madisonian sense. The

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2. Like many academics, I use the term Madisonian democracy with the understanding that it is an often imprecise generality. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29-30 (1985) [hereinafter Sunstein, *Interest Groups*]; *see also Big Government Lawsuits: Are Policy Driven Lawsuits in the Public Interest?: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. (1999) (testimony of Prof. Jonathan Turley) (discussing Madisonian democracy and the separation of powers). As will be shown, however, the main focus of this Article is Madison's emphasis on factions and procedural checks and balances.

3. While both judicial and presidential impeachments will be discussed, this Article will address presidential impeachments as the working analytical model because of the emphasis on presidential impeachments in the constitutional debates and the heightened controversy over such decisions by the legislative branch. The thrust of the argument in this Article was made by the author as a witness in the House Impeachment Hearings of President William Jefferson Clinton. *See Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 250-76 (1998) [hereinafter *House Hearings*] (testimony of Prof. Jonathan Turley); *see also Indictment or Impeachment of the President: Hearings Before the Comm. of the Judiciary, Subcomm. on the Constitution, Federalism, and Property Rights*, 106th Cong. (1999) (testimony of Prof. Jonathan Turley); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999) [hereinafter Turley, *Congress as Grand Jury*]; Jonathan Turley, *The Executive Function Theory, the Hamilton Affairs, and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999) [hereinafter Turley, *Executive Function Theory*]; Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. (forthcoming 1999) [hereinafter Turley, *Murder, Misdemeanors, and Madison*]; Jonathan Turley, From Pillar to Post: The Impeachment and Indictment of a

Senate trial serves as a unique forum for resolving highly divisive questions over the legitimacy of a President or judge to continue to exercise constitutional authority. As such, it performs a role central to the maintenance of a representative system based on true consent of the governed.

Senate trials are often presented as relatively static events solely focused on removal.[4] This Article advances a more dynamic view of the Senate trial as a Madisonian device to resolve factional disputes.[5] In crafting the American legislative process, Madison sought to address the destabilizing effects of factional disputes within democratic systems. Madison believed that leaving such disputes unaddressed would create intrigue and instability within a political system.[6] For that reason, the Madisonian process does not seek to suppress, but to transform factional interests. This emphasis on resolving factional disputes gives the system the ability to withstand crushing pressures during periods of enormous social, political, and economic turmoil.

Presidential impeachment cases constitute the most extreme and the most dangerous form of factional dispute in the legislative branch. When a President is impeached, the House certifies not only that impeachable conduct may have occurred but that a majority of House members question the legitimacy of the President to govern.

Sitting American President (Oct. 1, 1999) (unpublished manuscript, on file with author).

4. During the Clinton impeachment, this dominant view emerged from the testimony and writings of a number of academics. These scholars rejected the notion that the House of Representatives should impeach a President when there are clearly insufficient votes to remove in the Senate. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 782-83. This view was also prevalent in the Senate, where members questioned the need or value of a trial when over one-third of the Senate was likely to oppose removal. *See id.* Since President Clinton's party controlled 45 votes, it was viewed as extremely unlikely that a trial would produce a two-thirds majority for conviction.

5. The view of the Senate trial as a Madisonian device is coherent despite the fact that Madison initially opposed the use of the Senate in the impeachment process. Madison was concerned that allowing the Senate to try a President would make him "improperly dependent." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 551 (Max Farrand ed., 1966) [hereinafter RECORDS]. Madison's motion to remove the Senate from the process was rejected, and he did not pursue the matter further. *See infra* notes 156, 545-48 and accompanying text. Madison's later view of the Senate's role is shrouded in mystery. His letters do not indicate that he was fundamentally opposed to the Senate during the early constitutional impeachments. Nevertheless, this Article relies upon Madison's general theory of factions and bicameralism, as opposed to his specific view of the Senate in the process of impeachment. It is accepted, at the time of the Constitutional Convention, that Madison did not view impeachment in a bicameral model. *See* Turley, *Congress as Grand Jury*, *supra note* 3, at 768-71; *infra* note 155 and accompanying text.

6. *See infra* notes 507-21 and accompanying text.

Such cases will often arrive at the Senate with the support and the opposition of large and passionate factional groups. As will be shown, the history of impeachment is largely a history of such factional or partisan disputes over legitimacy. This history, however, also shows how factional interests can be transformed under the catalytic influence of a full Senate trial.

The value of the Senate trial as a Madisonian device is largely dependent on the trial procedures. Impeachment has never been treated as a contiguous part of the Madisonian process and, deprived of its constitutional moorings, the rules of Senate trials have proven fluid and case-specific. Senate trials often appear to be constitutional dramas with central characters but no central theme. To serve a Madisonian function in resolving factional disputes, the central obligation of the Senate trial must be a faithful presentation of the allegations, evidence, and witnesses in the case. The presentation of this evidence provides the context needed for a vital political discourse containing the underlying legitimacy issues. Such a full presentation may not always be necessary to reach a fair judicial verdict, but it is essential to fulfill the political function of the Senate trial.[7]

When such issues have been raised in past trials,[8] the emphasis has been on the outcome rather than the process of deliberation. The Senate has debated the "need" for such evidence to arrive at a verdict.[9] Accordingly, the necessity of additional evidence or witnesses turned on its value to the Senate membership rather than its value to the political system. Yet, the Framers appeared to craft the Senate rules specifically to address factional disputes amidst "the anticipated passions of the whole community."[10] A mere verdict alone does not address such passions. Rather, it is the process used to come to a verdict that can be transformative for factional disputes. By allowing House managers to present their strongest case justifying impeach-

7. Senators often use the term "political" to refer to voting the views of their constituents or their party. This is based in part on a misconstruction of Hamilton's writings in *The Federalist No. 65*. *See infra* notes 587-96 and accompanying text.

8. This Article places impeachment in the context of the bicameral legislative process designed by Madison. While some legislative functions like oversight investigations are more closely analogous to aspects of the impeachment process, this is not to suggest that impeachment is a form of legislative product in any technical sense. Rather, this Article suggests that the same factional principles that define the legislative process are equally relevant in the drafting, approval, and trial of articles of impeachment.

9. *See infra* notes 492-94, 603-11 and accompanying text.

10. THE FEDERALIST NO. 65, *supra* note 1, at 396.

ment and removal, the Senate forces these factional views into a process that can be both dialogic and transformative.

As will be shown, impeachment trials have proven effective in moderating factional views. Citizens may continue to harbor their original convictions about the integrity or innocence of an impeached official. However, the Senate trial provides a critical forum in which these views are fully aired and resolved. Even when public opinion remains polarized, the bicameral process of impeachment can fulfill the same dialogic role as the bicameral process of legislation. In the legislative process, no citizen can demand to prevail, but the process of deliberation allows for vertical integration of factional views.[11] Madison realized that factions are primarily destabilizing when they are ignored in a legislative process. Even more significant than unaddressed factional views on legislative issues, the failure fully to address factional views of legitimacy issues creates the dangerous alienation of some citizens within the country.

This view of the Senate trial as a Madisonian device is clearly at odds with the dominant view of impeachment. Academics have denounced impeachment in cases where removal is unlikely in the Senate, defining the legitimacy of Senate trials by outcome.[12] Impeachment is viewed as an extreme countermajoritarian measure used to "reverse" or "nullify" the popular election of a President.[13] In this

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11. As will be shown, the absence of both vertical (between constituents and the government) and horizontal (between branches of government) channels in the English and colonial systems led to armed conflict. *See infra* Part II.

12. *See infra* note 567 and accompanying text.

13. This argument was used extensively by both the Clinton White House and academics testifying against impeachment. *See, e.g.*, *House Hearings*, *supra* note 3, at 228 (testimony of Prof. Laurence Tribe) ("[T]he legislative branch essentially cancels the results of the most solemn collective act of which we as a constitutional democracy are capable . . . ."); *id.* at 235 (testimony of Prof. Susan Low Bloch) ("[Impeachment] undoes a national election . . . ."); *The Consequences of Perjury and Related Crimes: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 71 (1998) [hereinafter *Consequences of Perjury*] (prepared statement of A. Leon Higginbotham, Jr., Partner, Paul, Weiss, Rifkind, Wharton & Garrison) ("[Impeachment in the Clinton case] could result in the nullification of the will of the majority of the electorate, not to mention the profound weakening of the institution of the presidency."); *Impeachment of President William Jefferson Clinton, The Evidentiary Record Pursuant to S. Res. 16*, S. DOC. NO. 106-3, at 36 (1999) (statement of Abbe D. Lowell, Chief Minority Investigative Counsel) (warning that, by impeaching President Clinton, Congress "would overturn two national elections"); 145 CONG. REC. S824 (daily ed. Jan. 20, 1999) (statement of Gregory Craig, Special Counsel to the White House) ("[W]e believe, short of a declaration of war, there is nothing more serious for our elected representatives to contemplate than, through the process of impeachment, to undo the results of a national election and to remove the man chosen by the American people to be their President.").

way, impeachment is portrayed as inherently inimical to the democratic process. What is missing from this view of impeachment is the concept of "true consent."[14] If impeachment concerns questions of legitimacy, those questions turn on the concept of government by consent. The thrust of an impeachment trial is that the individual standing before the Senate is not the individual who secured an office by election or appointment. Rather, the later disclosure of misconduct revealed critical information about the individual's virtue or ability to hold public office. When a President secures the consent of the voters, he promises not simply that he will pursue certain policies, but that he will meet certain minimal standards. When a President is impeached, the consent given in the previous election is thrown into question, just as it is in cases of consent by fraud or misrepresentation: it is neither legally nor constitutionally recognized. Impeachment allows a renewed vote to determine whether a President, in light of his conduct, can regain the consent of the public. If a President retains his office, he regains legitimacy through a democratic decision of renewal. Regardless of any negative factional views of his conduct, he undeniably has the consent to complete his term. In all of the criticisms of impeachment as an inherent threat to presidential power, little attention is given to the value of resolving such questions of legitimacy or to the countervailing danger of leaving such questions unresolved. It is to these questions that this Article is ultimately directed.

In Part I, this Article will address the historical use of impeachment in the English system and the American colonial system. Impeachment was used historically as a check on the authority of the Crown and tended to be used most heavily during periods of political instability. English and colonial impeachments proved to be highly destabilizing in the absence of an integrated political system. The efficacy and use of the English impeachment model declined with the corresponding rise of more representative forms of government. In the colonies, political alienation and factionalism continued under the unrepresentative conditions of the royal charters and proprietary grants. Impeachment became a weapon of factional struggle and served to destabilize the political system further.

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14. By "true consent," I am referring to the combination of informed consent and the representative authority to act. Informed consent sometimes requires the presentation of evidence despite the inclination of the public, who may want a speedy conviction or acquittal. As will be shown, however, the legitimacy of any outcome is dependent on the full disclosure of evidence before a final resolution is reached. *See infra* notes 599-613 and accompanying text.

In Part II, the Article will address the incorporation of impeachment into the Constitution. This review of the Constitutional Convention and subsequent ratification debates indicates significant changes in the view of impeachment from the colonial period to the postcolonial period. Impeachment took on a unique character and function under the new representative system. Specifically, the postcolonial impeachment process was modified to convert it from a tool of factional dissension to a vehicle of factional resolution.

Part III will then address the actual Senate trials and the American postcolonial period. This historical review includes a division of American impeachments into three groups: Presidents, judges, and "other civil officers." All three categories evidence factional divisions and the use of impeachment to address issues beyond removal of the individual officeholder.

Part IV will then turn to impeachment as a Madisonian device to resolve factional disputes. Senate trials will be examined as a forum in which the most divisive and dangerous factional disputes can be resolved in a representative system. This use of Senate trials as a Madisonian device allows for the public consideration of the full record and evidence as the foundation for a vote of true consent. It is in this unique forum that an impeached official is subject to a decision of the public, through the cipher of the Senate, as to his legitimacy in carrying out constitutional duties. As will be shown, it is perhaps the most transcendent political moment for a Madisonian democracy.

I. THE HISTORICAL USE OF IMPEACHMENT TRIALS DURING THE EARLY ENGLISH AND COLONIAL PERIODS

Any consideration of the modern role of impeachment trials in the United States must naturally begin with a review of its historical antecedents. While the historical record is sparse, it is clear that impeachment trials have varied considerably in both their purposes and procedures. Many trials were directed not at the accused but at the government, while other trials appeared to have served a more symbolic purpose. Still other trials were raw political exercises involving personal animus and opportunistic conduct.[15] These trials often reflected the role of impeachment as a broad check on executive power

15. There are certainly more able treatments of this historical record, and this brief review is merely offered as a modest foundation for the analysis of the standards and procedures of impeachment. Throughout the Article, more comprehensive treatments will be cited for the respective periods of impeachment trials.

with important functions beyond the mere removal of a perceived wrongdoer. The Framers were clearly influenced by the English and colonial trials, including trials in which Framers played active roles. When it came time to draft the impeachment provisions of the Constitution, the Framers opted to make notable changes in the process to avoid the destabilizing aspects of impeachments under the English model. Like other forms of factional disputes addressed in the legislative system, the American impeachment process was crafted to direct the pressures into a process of deliberation and settlement. As will be shown, where prior impeachments tended to explode in the English system, impeachments were structured to implode within the Madisonian system.

A. English Impeachment Trials

American impeachments stand on English feet.[16] The Framers expressly relied on English precedent and standards in fashioning the impeachment process, including the use of the "high crimes and misdemeanors" standard.[17] Nevertheless, any review of the English impeachment model reveals striking differences between it and its American offshoot.[18] Unlike American impeachments, English impeachments extended to any citizen (excluding only members of the royal family) rather than to "civil officers."[19] Thus, unlike American legislative officials, who are excluded from impeachment, members of Parliament were subject to impeachment.[20] The penalty of im-

16. *See* THE FEDERALIST NO. 65, *supra* note 1, at 397 (explaining that the English experience was "[t]he model from which the idea of this institution has been borrowed").

17. U.S. CONST. art. II, § 4.

18. The Senate trial of President Andrew Johnson would highlight these differences. Johnson's defenders insisted that impeachment was confined to indictable crimes. They used English history to show that this was the standard for the House of Lords, particularly in the case of Viscount Melville, in which the House of Lords appeared to acquit after learning that the underlying conduct was not criminally indictable. *See* MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 28 (1973). Nevertheless, the Senate concluded correctly that "'[t]he power of Parliament over the subject is far greater than that which . . . Congress can exercise over the citizen.'" *Id.* (quoting H.R. REP. NO. 40-7, at 68 (1867)).

19. Private citizens were impeached, including two religious figures—Dr. Mainwaring in 1628 and Dr. Sacheverell in 1709—for "preaching seditious libel from their pulpits." PETER C. HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA 1635-1805, at 4 (1984); *see also id.* at 5-8 (discussing other cases of private citizens impeached under the English system.).

20. Such was the case of John Thornborough, Bishop of Bristol, who was impeached in 1604 for writing a book discussing the controversial union with Scotland. *See* COLIN G.C. TITE, IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND 57 (1974).

peachment was also extended beyond removal to include fines, forfeiture, incarceration, and, in rare cases, death.[21] In this sense, impeachment authority was related to the authority of Parliament to order bills of attainder.[22] As will be shown, however, Parliament preferred impeachment to attainder as a political tool to use in its struggle with Crown authority.[23] Otherwise, the difference between an attainder and an impeachment could be slight for the accused. In both circumstances, Parliament exercised aspects of legislative, judicial and executive authority to try citizens and then to carry out punishments upon verdict.

While the two systems shared terminology and bicameralism, the English system was the antithesis of the Madisonian model. It is precisely the differences in the two systems that makes a review of English cases so valuable in understanding the American process. In some ways, reviewing the English cases offers a negative image of the picture that would emerge after the Constitutional Convention. The English system lacked critical procedures and limitations to channel factional disputes. Impeachment trials, therefore, were factional

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Thornborough was a member of the House of Lords, and his impeachment proved one of the many divisive issues between the two houses that ended in a draw. The Lords would ultimately rebuke the Bishop, but the House of Commons failed to secure a conviction. *See id.* at 58.

21. These punishments could at times take bizarre form. Edward Floyde, a lawyer and a justice of the peace, was impeached for speaking of the daughter of King James, Elizabeth, and her husband, Prince Palatine Frederick, "in most despiteful and scornful manner with a fleering and scoffing countenance." William Renwisk Riddell, *Impeachment in England and English Colonies*, 7 N.Y.U. L.Q. REV. 702, 704 (1930) (internal quotation marks omitted). Floyde, who was at the time a prisoner "in the Fleet," was tried, convicted, and ordered "to stand in the pillory and to ride from Westminister to the Exchange, then to the Fleet, then to Cheapside on a horse with his face to the tail, holding the tail in his hand." *Id.* at 704-05. If this were not enough, he was further sentenced to be whipped during his passage from Westminister to Cheapside, to pay a fine of £5,000, to be imprisoned for life in Newgate, to be stripped of the right to bear arms as a gentleman, to be proclaimed to be infamous, to be stripped of the right to be a witness in any proceeding, and to be branded with the letter K in the forehead. Remarkably, this punishment was more moderate than the rejected demands of some of the Lords that Floyde's ears also be nailed to the pillory. *See id.*

22. The Framers appeared to link impeachment and attainder authority in their deliberations for this reason. *See infra* note 137 and accompanying text. Although rare, in at least one case in the 17th century, and six cases in the 18th century, the penalty for conviction upon impeachment was death. *See* HOFFER & HULL, *supra* note 19, at 3.

23. Attainder was the preferred option for the simple removal of opponents on a nonpolitical basis. *See* Riddell, *supra* note 21, at 705.

> The practice of impeachment, while firmly established by the reign of Richard II, gave way during the Wars of the Roses to acts of attainder, which were and effective means for getting rid of a political opponent; and during the times of the Tudors the act of attainder continued in favor . . . .

Id.

without being dialogic or transformative. The result was a process that served as a check on Crown authority, but at a highly destabilizing cost for the system.

For much of English history, the procedure for impeachment was highly fluid and varied. Depending on the period, an impeached individual could be tried by the Crown, designated officials, the House of Lords, or a combination thereof.[24] It was not until 1399 and the reign of Henry IV that impeachment was subjected to a set of procedures and precedents.[25]

The operative standard for determining guilt or innocence was as varied as the procedures. Before the adoption of the "high crimes and misdemeanors" standard, individuals were tried under standards ranging from "'treasons, felonies, and mischiefs done to our Lord, The King'" to "'divers deceits.'"[26] The phrase "high crimes and misdemeanors" was first clearly applied in the 1386 trial of Michael de la Pole, Earl of Suffolk, who stood accused of a host of impeachable offenses, including the appointment of incompetent officers[27] and "'advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of the laws.'"[28] The trial of Suffolk was a striking example of impeachment authority used by the Parliament as a method of exercising some control over executive officers in a monarchy.[29] Rather than addressing criminal conduct exclusively, these English impeachment trials allowed Parliament not only to punish abusive officials but also to respond to Crown policies in the absence of more representative devices.

After the trial of Suffolk, impeachment on the basis of high crimes and misdemeanors covered a range of conduct traditionally considered noncriminal, including the impeachment of Peter Pett, Commissioner of the Navy, for "loss of a ship through neglect to

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24. *See* John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 5 n.20 (1970).

25. *See id.* at 5.

26. Leon R. Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, 26 GEO. L.J. 849, 853 (1938).

27. A precise date for the first English impeachment is a matter of academic debate. *See generally* Alexander Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651, 651 (1916) (observing that some academics trace impeachment to "David, brother of Llewellyn" in 1283).

28. *House Hearings*, *supra* note 3, at 38 (testimony of Prof. Gary McDowell) (footnote omitted).

29. It should go without saying that the public reason for these impeachments may be deceptive, particularly during periods of political or religious upheaval.

bring it to mooring."[30] Richard Lyons, a merchant and customs officer, was impeached in 1376 for, among other acts, the offense of removing a staple of wool from the port of Calais.[31] In 1388, Robert Belknap[32] and five other judges were impeached for the offense of answering "'certain questions submitted to them as judges, wrongfully.'"[33] Likewise, the Earl of Oxford was tried for the "high crime and misdemeanor" of "giving pernicious advice to the Crown."[34] Others, like the Bishop of Ely, were impeached over religious dogma.[35] Under this standard:

> [P]ersons have been impeached for giving bad counsel to the king; advising a prejudicial peace; enticing the king to act against the act of parliament; purchasing offices; giving medicine to the king without advice of physicians; preventing other persons from giving counsel to the king, except in their presence; . . . . [O]thers . . . were founded in . . . malversations and neglects in office; for encouraging pirates; for official oppression, extortions, and deceits; and especially for putting good magistrates out of office, and advancing bad.[36]

During the 1600s, Parliament repeatedly used impeachment to exercise control over Crown officials in the absence of alternative constitutional means. Between 1620 and 1649, over one hundred im-

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30. HOUSE COMM. ON THE JUDICIARY, CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 10 (1974) (quoting 4 COBB PARL. HIST. ENG. 408 (1668), *reprinted in* 6 STATE TRIALS 866-67 (T. B. Howell ed., London, R. Bagshaw 1810). Grounds for impeachment in other cases included "depriving the Crown of revenue and improper use of tax funds," "acting without authority," "bribery and corruption," "formulating a seditious petition," "circulating illegal proclamation," "speeches against the government," "sale of judicial offices," "circulation of a seditious petition," "enforcement of the illegal ship money tax and preventing the filing of lawful petitions," "inciting an unlawful assembly," "illegally confin[ing] and refus[ing] to accept bail [of a member of Parliament to prevent his voting]," "drawing and passing an illegal petition," "sale of his official influence," "unlawfully affixing the Great Seal to treaties and commissions," and "maladministration." *Id.*

31. *See* Feerick, *supra* note 24, at 5 n.18 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 233-34 (Joseph Chitty ed., London, W.E. Dean 1851) (1765)).

32. The Belknaps appear a highly impeachable line. *See infra* notes 223-47.

33. Feerick, *supra* note 24, at 6 (quoting ALEXANDER SIMPSON, A TREATISE ON FEDERAL IMPEACHMENTS 88 (1916)).

34. RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 70 (1973).

35. Bishop Wren of Ely was impeached in 1640 for "unlawful innovations and restrictions on religious practices." Feerick, *supra* note 24, at 8 n.38. Bishop Wren, who spent 18 years in the Tower of London, was the uncle of Sir Christopher Wren, the architect of St. Paul's Cathedral. *See infra* note 63 and accompanying text.

36. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 798, at 269 (Fred B. Rothman & Co. rev. ed. 1991) (1883).

peachments were passed by the House of Commons.[37] These impeachment proceedings included charges against abusive judicial officers for such conduct as incarcerating juries that had decided cases against the views of the court.[38] During this period, many of the specific impeachment procedures were systematized and put into regular use.[39] Under the English system, the House of Commons was expected to hold a trial, though without a requirement to hear the accused's defense. Thus, the transmittal of a case to the House of Lords was to be accompanied by evidence and testimony. The action taken by the House of Lords bore obvious resemblance to the current Senate proceeding. Once in the House of Lords, the members "granted the accused counsel in matters of law, allowed a full hearing of his defense, and permitted him to summon his own witnesses."[40] There is evidence that the House of Lords would at times rely on committees to hear evidence of impeachable offenses.[41] These proceedings, however, closely followed trial procedures since the penalties included penal sentences.[42] The upper house repeatedly acted to counter impulses of the lower house in its independent proceedings.[43]

During the period between 1626 and 1715, the House of Lords permitted only five of fifty-seven impeached officials to be tried to verdict.[44] The upper house openly disagreed with the lower house often, to the point where they would periodically refuse to hold trials or to try accused parties on the specific charges from the lower house.[45]

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37. *See* 3 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES 707 (1974).

38. Such was the case of Lord Chief Justice John Keeling, who managed to escape a final vote of impeachment in the House of Commons despite his abusive conduct. *See* Feerick, *supra* note 24, at 7.

39. *See* HOFFER & HULL, *supra* note 19, at 3.

40. *Id.* at 5.

41. This was a precursor to the Senate Rule XI committee procedures. *See infra* notes 331-34 and accompanying text.

42. One significant difference between the House of Lords and the Senate was that the former held trials with the participation and advice of judges. *See* HOFFER & HULL, *supra* note 19, at 60.

43. The House of Lords historically asserted its effective veto in impeachment cases even when it agreed with the need for impeachment. For example, in the case of Peter Floyde, the House of Commons attempted to impose punishment without the agreement of the House of Lords. The latter house objected, but ultimately increased the penalty for Floyde. *See* Riddell, *supra* note 21, at 705.

44. *See* HOFFER & HULL, *supra* note 19, at 6.

45. The House of Lords would occasionally not consider an impeachment from the House of Commons. In the case of Sir Francis North, Chief Justice of the Court of Common Pleas, the Commons impeached North for his role in the drafting of a controversial proclamation. The

English impeachments were often politics by another means. Hoffer and Hull noted in their exceptional study that "[i]mpeachments and trials invariably were surrounded by political questions . . . [and the] struggle for control of national impeachment cases, particularly when the defendants were the King's ministers or advisors."[46] Professor Colin G. C. Tite observed that "[f]rom the beginning, impeachment was associated with moments of political crisis and was often enough used as a weapon in factional rivalry."[47] Such accounts appear to be borne out by a review of the grounds for English impeachments.

Some impeachments were clearly tied to civil unrest and offered a political vehicle to oppose the Crown that stopped short of civil war.[48] For example, nine lords were impeached in 1642 for their "support of the King in his determination to wage war on Parliament."[49] Likewise, many of the impeachments were tied to "illegal" or "seditious" proclamations or petitions.[50] Other impeachments were clearly linked to the religious upheavals that preceded and followed the Protestant Revolution, such as "unlawful innovations and restrictions upon religious practices."[51]

English impeachments tended to ebb and flow with the political currents of the realm. The seventeenth century witnessed the sharpest increase during a time of tremendous upheavals. In the 1620s, Parliament was on a collision course with the Stuarts that would ultimately lead to the beheading of Charles I. Similarly, ravages of the Black Death in the summer of 1348 added social discord to existing political discord. Parliament became increasingly active in governance, and impeachment was the preferred method for checking the authority of the king. Parliament could and did use attainders against individuals as well. However, impeachments appeared to be preferred as the legislative check with a clear political message.

Lords simply failed to address the charges. Likewise, Lord Chief Justice Scroggs and other judges were impeached for interfering with a grand jury and other misconduct on the bench. No trial was ever held on the charges. *See* Feerick, *supra* note 24, at 7.

46. HOFFER & Hull, *supra* note 19, at 5.

47. TITE, *supra* note 20, at 7.

48. *See* GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 348 (1955) ("Parliament could bring royal advisers to account by the ancient device of impeachment, a valuable tool because it enabled Parliament to attack royal policy without starting rebellion or war.").

49. Feerick, *supra* note 24, at 8 n.38.

50. *See supra* note 36.

51. Feerick, *supra* note 24, at 8 n.38.

Aside from control over the Crown, impeachment could also operate as a vital release in a largely unrepresentative system. As such, it was a dangerous release valve to shut. This lesson was learned by Charles I when Parliament sought to impeach George Villiers, the first Duke of Buckingham, for corruption and maladministration. Charles I dissolved Parliament to end such assertions of authority. Charles I instructed Parliament to "[r]emember . . . that Parliaments are altogether in my power for their calling, sitting, and dissolution; and therefore, as I find the fruits of them to be good or evil they are to continue or not to be."[52] With impeachment blocked, a more direct method of removal was selected: Buckingham was assassinated[53] by John Felton, who attributed his act in part to "a Remonstrance in Parliament."[54] Ultimately, the beheading of Charles I can be seen as the ultimate expression of the failure of a political system to develop alternative means of political expression, or (to borrow a term from Hart and Sacks) as methods of "institutional settlement."[55] After the victory over the Crown in 1647, impeachments declined with the ascendancy of Parliament.

English impeachments increased briefly with the restoration of the Stuarts in 1660 and the resumption of institutional tension. Parliament continued to exercise considerable authority, but the Stuarts resisted parliamentary meddling in foreign and military affairs. In these areas, impeachment continued to be a viable method for expressing political opposition to Crown policies and officials. For ex-

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52. SMITH, *supra* note 48, at 318 (footnote omitted in original).

53. *See* Riddell, *supra* note 21, at 706. This is precisely the circumstance that Benjamin Franklin sought to avoid with the impeachment provisions in the American system. *See infra* notes 175, 635-38 and accompanying text.

54. JAMES HEATH, TORTURE AND ENGLISH LAW: AN ADMINISTRATIVE AND LEGAL HISTORY FROM THE PLANTAGENETS TO THE STUARTS 161 (1982). A record of Felton's interrogation includes an intriguing exchange with the Bishop of London, who pressed Felton for the names of his co-conspirators. Felton stated that "he was induced to this partly for private displeasure, and partly by reason of a Remonstrance in Parliament, having also read some books which he said defended that it was lawful to kill an enemy of the republic." *Id.* (footnote omitted). When the Bishop stated that he would be racked for names, Felton responded that "if it must be so, he could not tell whom he might nominate in the extremity of torture." *Id.* (footnote omitted). The record states that "[a]fter this he was asked no more questions, but sent back to prison." *Id.* (footnote omitted).

55. HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (William N. Eskridge & Philip P. Frickey eds., 1994). The Parliament actually attempted various means to remove Buckingham as alternatives to impeachment, including a simple declaration that the king should remove him. *See* TITE, *supra* note 20, at 202 ("On the 14th the Commons asked Charles to receive them with the declaration; on the 15th he replied with a dissolution.").

ample, Pett's impeachment in 1668 appeared to be a response to the poor preparation for the Dutch invasion.[56] Parliament's use of impeachment as a tool in the institutional struggle with the Crown culminated with the attempted impeachment of Thomas Osborne, the Earl of Danby and the Lord High Treasurer of England.[57] Parliament had passed an appropriation act to support a war against France. A few days later, Danby wrote a letter to the King of France offering neutrality for 600,000 livres.[58] Parliament used the impeachment inquiry to call Charles II personally to account for his actions in a public session of the House of Lords. Charles II admitted that the letter had been written at his request, but "[b]ecause the King was beyond reach, Parliament settled for [Danby]" to settle the matter and to preserve "constitutional balance" with the Crown.[59]

The Crown also recognized the political value of impeachment, albeit with mixed results.[60] For example, the 1709 impeachment of Dr. Henry Sacheverell, an Anglican minister, was initiated by Queen Anne's government in preference to a criminal trial.[61] From the outset, the government sought a political decision from Parliament. Sacheverell had used the annual sermon on Gunpowder Day at St. Paul's Cathedral to question the legitimacy of the Glorious Revolution (including the legitimacy of nonhereditary succession) and to

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56. *See supra* note 30 and accompanying text

57. *See* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 487-95 (1977) (discussing the Osborne impeachment).

58. The calls for impeachment reflected not only a highly protective view of recently won parliamentary prerogatives, but an intense hatred for the French. Parliament viewed the Crown as Francophilic as well as pro-papist. *See id.* at 488.

59. *Id.* This effort was frustrated when Charles II used his pardoning power to remove Danby from danger of impeachment. Even then, however, the House of Commons attempted to circumvent the pardon and to try Danby, albeit unsuccessfully. *See id.* at 490.

60. The government also sought impeachments of judicial officers, despite the fact that they served at the pleasure of the king and could be removed by the simple act of withdrawing their "patent." Nevertheless, judges were often subject to this procedure, as was the case of Chief Justice Scroggs in 1680, whose abusive conduct was so severe that it was described as "the highest scandal on the public justice of the kingdom." Nevertheless, judges were often subject to this procedure. The government attempted to impeach Chief Justice Scroggs in 1680 because his abusive conduct was so severe that it was described as "the highest scandal on the public justice of the kingdom." 3 DESCHLER, *supra* note 37, at 707 n.15 (citing 8 STATE TRIALS 200 (T.B. Howell ed., London, R. Bagshaw 1810)). Scroggs's offenses included "browbeating witnesses and commenting on their credibility, and with cursing and drinking to excess." *Id.*

61. *See* HOFFER & HULL, *supra* note 19, at 7. Although Queen Anne disfavored the Whigs, Sacheverell's criticism of the results of the Glorious Revolution and of the validity of nonhereditary succession was no doubt viewed as seditious by the queen.

lambaste the ruling Whig government.[62] The government demanded impeachment to allow for a public trial on these lingering factional issues. The government's belief that it could quell such unrest over the course of the trial ultimately turned out to be wrong. The trial lasted twenty-five days and was held before both houses of Parliament.[63] Public opinion shifted toward Sacheverell, and the government was barely able to secure a conviction. The trial only hastened the calls for a new Tory government, and the Whigs ultimately lost control of the government.[64] More importantly, the impeachment process did not defuse violent factional interests. To the contrary, after the conviction, the public rioted.

The English impeachment process proved unstable politically because it lacked certain limiting procedures and principles. Used against citizens as an anti-sedition measure, the impeachment trial was a judgment on a political viewpoint as opposed to a political figure. As such, for the Tory factional members, the verdict was an act of exclusion as opposed to inclusion. While the trial did prompt the Tory party to change its rigid view of hereditary succession,[65] it served only to polarize and to alienate citizens.

The English system already lacked meaningful aspects of consent for average citizens. When the Parliament ruled in the Sacheverell case, it ruled on a political view held by a large factional group in a largely unrepresentative system. As such, it was the antithesis of the Madisonian concept of a bicameral system. The trial created a unique forum, but one that was jurispathic rather than dialogic for factional group members.

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62. *See generally* John Louis Lucaites, *Constitutional Argument in a National Theater: The Impeachment Trial of Dr. Henry Sacheverell*, *in* POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW 31-54 (Robert Hariman ed., 1990) (discussing the events surrounding Sacheverell's impeachment trial).

63. *See id.* at 32 ("The [Sacheverell] trial itself was a *public* spectacle unlike any other impeachment trial in England's history."). The famous Surveyor of the Queen, Sir Christopher Wren, was commissioned to create the trial setting at Westminister with over two thousand people in attendance. *See id.* There was some irony in this assignment since the Wren family was intimately familiar with impeachment trials. The famous architect of St. Paul's was given his first commission by his uncle, the Bishop of Ely, who was impeached in 1640. *See supra* note 35. Bishop Wren gave his nephew the commission in thanksgiving for his release from the Tower of London. *See* Christopher S. Wren, *Making the Oxbridge Connection*, N.Y. TIMES, May 9, 1982, § 10, at 16 (providing an account of a descendent of the Bishop Wren and Sir Christopher Wren).

64. *See* Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 747 (1985).

65. *See* Lucaites, *supra* note 62, at 53.

The Sacheverell trial revealed the instability of impeachment as a political device in a system without meaningful vertical and horizontal structures for dialogue and settlement. While reforms were under way, including the Act of Settlement of 1701,[66] the English system was still struggling with guarantees of due process, parliamentary governance, and separation of powers.[67] Without these elements established, English impeachments were often little more than raw power plays by either the Crown or Parliament. Some impeachments over the abuses of Crown officials in office were proper subjects for impeachment. However, the overall system lacked legitimacy for citizens, particularly the exercise of judicial powers in attainder cases and impeachments of average citizens for such acts as sedition. Since the system lacked both vertical and horizontal forms of political expression and inclusion, impeachments only served to polarize and to deepen divisions in the absence of dialogic elements. Since the Crown before the Restoration rejected the concepts of shared authority with Parliament in executive policy, impeachments were monologic—a conversation of Parliament with itself.

The increase of English impeachments to criticize Crown policies was a sign of systemic collapse. When individuals are pursued in order to create an ad hoc forum for political discourse, a political system is in an advanced anaerobic stage of self-consumption. Impeachment trials like Sacheverell's exploded outwardly into the streets rather than inwardly in intragovernmental debate because, even after the Restoration, the English system lacked the essential structural elements for impeachment. It remained a verdict-driven exercise detached from any integrated role in the political system.

The role of the trial in the House of Lords also contributed to the instability of English impeachments. The extensive use of impeachments against the Stuarts contributed to a further widening of political factions and eventually to civil war. The trials themselves of-

66. *See infra* notes 80-81 and accompanying text.

67. During the earlier impeachments, the separation of powers deficiencies were reflected by: (1) the absence of a court system truly independent from both the executive and legislative authority; (2) the failure to commit trials of citizens to the judiciary as opposed to the political branches; and (3) the absence of a supremacy rule on issues of constitutional interpretations. These deficiencies were most evident in 1388, during the reign of King Richard II, when the king solicited opinions from the courts as to the authority of Parliament to impeach Crown officials with the king's consent. When the judges endorsed the king's theory, the jurists were promptly impeached, tried, and convicted by Parliament. *See* BUCKNER F. MELTON, JR., THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT 28 (1998).

fered little to change this course. Trials in the Commons tended to be predictably factional and conclusory. The House of Lords often exercised its effective bicameral veto by choosing not to hold trials, which would have forced them to deal with these issues in an open and deliberative fashion.

As noted earlier, most impeachments were not tried to verdict. The House of Lords was poorly suited to play a meaningful political role. Socially and politically, the members of the House of Lords eschewed notions regarding their representation of ordinary citizens and were not especially concerned with factions outside of the ruling class. What the system lacked was shared values in the process of deliberation and institutional settlement. Such values can mollify factional divisions by satisfying citizens that their views have been fully and fairly addressed. Even if the English Parliament had excluded impeachments over policy disputes and limited trials to public officials, it is doubtful that the system would have been completely stable without such process values.

Many of the destabilizing elements of the English system would be eliminated in the United States by the new Constitution. One aspect of the English impeachments, however, may have been adopted by some Framers (and certainly assumed by later legislators)[68] in impeachment cases: English impeachment trials addressed issues beyond mere removal of the accused official. This was most evident in the English impeachment case discussed by the Framers in the Constitutional Convention: the trial of Governor General Warren Hastings of the East India Company.[69] The articles of impeachment against Hastings were approved in 1787 and included "maladministration" and other noncriminal acts.[70] These charges included "cruelty" and a variety of conduct incompatible with representation of the Crown.[71] As will be discussed later,[72] the Hastings impeachment could not have served the purpose of removal since Hastings had already left office under controversy. Rather, Hastings's chief antagonist, Edmund Burke, wanted to use the case to reaffirm his views of representative government and legitimacy:

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68. *See infra* Part IV.A.

69. Watching this trial was at least one future legislator, John Rutledge, Jr., who would play a role in the first impeachments under the new American system. *See infra* notes 86, 247.

70. *See* HOFFER & HULL, *supra* note 19, at 113.

71. *See id*.

72. *See infra* notes 248, 592, and accompanying text; *see also* Turley, *Congress as Grand Jury*, *supra* note 3, at 790.

> Most of the facts, upon which we proceed, are confessed; some of them are boasted of. The labour will be on the criminality of the facts, where proof, as I apprehend, will not be contested. Guilt resides in the intention. But as we are before a tribunal, which having conceived a favourable opinion of Hastings (or what is of more moment, very favourable wishes for him) they will not judge of his intentions by the acts, but they will qualify his Acts by his presumed intentions. It is on this preposterous mode of judging that he had built all the Apologies for his conduct, which I have seen. Excuses, which in any criminal court would be considered with pity as the Straws, at which poor wretches drowning will catch, and which are such as no prosecutor thinks is worth his while to reply to, will be admitted in such a House of Commons as ours as a solid defence. . . . We know that we bring before a bribed tribunal a prejudged cause. In that situation all that we have to do is make a case strong in proof and in importance, and to draw inferences from it justifiable in logick, policy and criminal justice. As to all the rest, it is vain and idle.[73]

Burke pursued the impeachment of a former official despite the fact that removal was not sought and the House of Commons was in control of the party favoring the accused.[74] Burke's prediction of acquittal would come true. However, the matter was submitted to the House of Lords.[75] Burke's argument strongly demonstrates the use of impeachment as a method of addressing legitimacy questions and serving a function beyond mere corrective action.[76]

English impeachments offered stark examples of impeachment used both as a check on executive authority as well as an instrument in factional disputes. While impeachment proved a useful tool to

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73. Letter from Edmund Burke to Philip Frances, *in* 5 THE CORRESPONDENCE OF EDMUND BURKE 241 (Holden Furber ed., 1965), *cited in* HOFFER & HULL, *supra* note 19, at 114.

74. Burke was resolute to the point of taunting in his commitment to proceed despite the majority view. Burke promised that "neither hope, nor fear, nor anger, nor weariness, nor discouragement of any kind, shall move me from this trust." ISAAC KRAMNICK, THE RAGE OF EDMUND BURKE 127 (1977).

75. Burke himself was ultimately censured for his comments in the course of the impeachment. *See id.* Burke was never one to suffer fools gladly, and he often went out of his way to confront the chauvinism of the English Parliament by referring to its comparative "insect origins" as compared to the people abused by Hastings. *See* 6 THE WRITINGS AND SPEECHES OF EDMUND BURKE 304 (P.J. Marshall ed., 1991) ("My Lords . . . [these Hindu people are] the original people of Hindostan. . . . God forbid we should go to pass judgment upon people who formed their Laws and Institutions prior to our insect origins of yesterday.") .

76. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 790.

check the Crown "during the factional contests," "parliamentary fascination with impeachment flagged [once] [o]ther political forms emerged to allow a quieter and more efficient test of ministerial popularity and influence."[77] Ultimately, the advent of the cabinet government[78] and the ability of Parliament to force new elections were the chosen methods of addressing legitimacy issues. Such was not the case with the colonial governments in the New World. In the colonies, impeachment continued to play a unique political and structural role.

B. Colonial Impeachment Trials

The colonists had more than a passing interest in impeachment.[79] The conditions of political alienation and unrepresentative government that led to the rise of impeachments in England were even more acute in the colonies. By the late 1600s, the English Parliament had achieved considerable authority over Crown policy, with the exception of foreign and military matters. Despite continued conflicts with the Stuarts after Restoration, Parliament was able to force through such critical reforms as the Act of Settlement of 1701,[80] which removed Crown controls over judges in England.[81] With such reforms and the advent of the cabinet system, impeachments declined as avenues for institutional settlement developed. Conversely, in the colonies, these political changes in England had little effect.

Colonialists were not represented in Parliament, and they remained alienated, in a manner reminiscent of English parliamentarians of the early 1600s. The colonies were exempted from reforms such as the Act of Settlement, a point of considerable contention for

77. HOFFER & HULL, *supra* note 19, at 8.

78. *See* 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 384 (4th ed. 1922) ("[U]ntil the growth of . . . Cabinet government, impeachment was the only remedy open to [Parliament]. The king chose his ministers; and, unless they could be convicted of crimes, there was no way of getting rid of them."), *cited in* Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2205 n.48 (1998).

79. The word "impeachment" was first used in a colonial action by the lower house of Rhode Island in 1657. This occurred in the trial of William Harris for heresy and treason. *See* HOFFER & HULL, *supra* note 19, at 17.

80. An Act for preventing any Inconvenience that may Happen by Priviledge of Parliament (The Act of Settlement), 12 & 13 Will. III, ch. 3 (Eng. 1701).

81. The Act of Settlement established, among other things, that judges would serve during good behavior as opposed to service at the pleasure of the king. *See id.* (directing that judges' commissions shall be made *quamdiu se bene geserint*—"as long as he shall behave himself well").

colonists. The colonies were in a more extreme position than the pre-Revolution Parliament owing to the governing structure derived from the original charters and propriety grants. Colonial governors were expected to govern with the "assent" of the colonists, but the royal charters and grants offered little opportunity for a participatory role.[82]

The most defined factional groups in the colonial impeachment cases centered their on the question of representative government and participatory values. The "assembly" advocates asserted the right not just of "assent," but of active governing authority over the colonies as English citizens.[83] This group was opposed not only by the Crown but by other colonists who supported the "proprietary" cause over the assembly movement.[84] Proprietary advocates viewed proper authority as running from the Crown through the governor and charter to the citizens. Under this arrangement, political grievances were properly resolved by petitions and consultation rather than direct assembly authority. Assembly advocates attempted by various means, particularly petitions, to achieve a degree of self-governance; however, the colonial system simply did not have integrated vertical procedures that would allow colonists to have a meaningful or active role in governance. Governed under charter rather than constitutional conditions, the colonists had no effective outlet for airing assembly grievances or for reconciliation with proprietary factions. The result was steadily growing hostility between the factions that would eventually lead to open conflict.

Impeachments became a method of creating ad hoc forums for colonial grievances; however, unlike Parliament, there was a compelling argument that colonies did not possess such authority. The Framers were obviously aware of the use of this tool as a check on Crown officials in England and viewed the assertion of impeachment authority as fundamental to self-governance. Despite the consistent argument by Crown officials that only the House of Commons possessed impeachment authority, colonists quickly seized upon im-

82. The government structures of the colonies reflected their origins as corporate units. *See* David S. Bogen, *The Individual Liberties Within the Body of the Constitution: The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 804 (1987) ("Each colony's legislative authority was vested in the King's representative or grantee. The corporate charters gave lawmaking power to the corporation.").

83. *See* HOFFER & HULL, *supra* note 19, at 35 (discussing the conflict between assembly advocates and crown loyalists).

84. *See id.* at 42.

peachment as a method of asserting assembly authority. As English citizens, colonial leaders emphasized impeachment as an inherent right of legislators—even colonial legislators.[85]

Influential figures such as John Adams[86] were involved in these early assertions of impeachment authority and were personally familiar with impeachment procedures.[87] Not only did impeachments symbolize assembly authority, but they also created public tribunals with obvious interest and resonance with an increasingly alienated populace. Impeachments were utilized by the colonies as early as 1635, and continued until the final colonial impeachment in 1774. During the 139-year period of colonial impeachments, impeachments were highly political and often utilized trials to contest policies or to advance republican or self-rule values. Even early colonial impeachments focused on individual misdeeds or corruption of officials, while reflecting factional disputes over assembly authority.[88] Impeachments became increasingly direct in their intended challenge to Crown authority as the Revolution neared.

Owing to the unrepresentative form of government in the colonies, however, these impeachments were not a vehicle for resolving factional disputes, but only a tool of factional groups. The impeachments achieved little in terms of dialogue and reconciliation. Instead, the impeachments reflected the conditions of a political system in failure. The impeachments proved crude and unstable. Most importantly, during the most critical political period of discord, the impeachments primarily deepened divisions and further polarized the factional groups. Like the English cases of the early 1600s, colonial impeachments were the prelude to open armed conflict and a tool of an alienated majority faction. It was only following the Revolution that this factional tool was converted into a process that would resolve questions of legitimacy in a bicameral system.

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85. *See id.* at 42-44.

86. Adams was directly involved in the Oliver impeachment case. *See infra* notes 115-20 and accompanying text. Benjamin Franklin was also familiar with these procedures through the impeachment of William Moore, the protégé of his nemesis, Reverend William Smith, in Pennsylvania. *See* Leonard W. Levy, *Historical Perspectives on the Free Press: The Legacy Reexamined*, 37 STAN. L. REV. 767, 786 (1985). John Rutledge and Charles Pinckney of South Carolina were also familiar with the near impeachment of Chief Justice Charles Skinner in 1766 over his insistence on complying with the unpopular Stamp Act. *See* HOFFER & HULL, *supra* note 19, at 46.

87. *See* HOFFER & HULL, *supra* note 19, at 51.

88. *See id.* at 25.

The first colonial impeachment, which occurred in 1635, was the impeachment of Governor John Harvey of Virginia for misfeasance in office.[89] Beginning with the Harvey case, colonial impeachments were used as a political vehicle to oppose either colonial officials or policies in the absence of alternative methods of political expression. While not called an impeachment at the time, the accusation of Harvey reflected a nascent frustration with the colonial system.[90] Not only did Harvey act in a "tyrannical" fashion in overruling objections, but he disregarded demands for petitions to be sent to England, as well as objections to trade policies with other colonies.[91] Harvey's accusers persisted with their case despite the objection that there was "'no provision in the Virginia Charter for such authority.'"[92] Unlike later impeachments by assembly advocates, however, this early assertion of authority did not claim the right to try Harvey, who was instead sent to England for trial under an abuse of power charge. In the first of many such communications, the Crown instructed the colony that it had no authority over the Crown officer and returned Harvey to power.[93] The Harvey case was an early signal that the colonial system lacked vertical political channels to resolve factional disputes, ultimately a fatal flaw in the system and a strong incentive for colonial impeachments.

Colonial impeachments were generally less lethal than their English counterparts. Colonial impeachments often sought only removal, on the ground that an official's conduct was inconsistent with his office. One example was the impeachment of Charles James, sheriff of Cecil County, Maryland. In 1676, James was impeached for battery and perjury. James was accused of "falsely swearing before a justice of the peace, inducing two other witnesses to follow his lead, and then assaulting another settler."[94] The perjury charge was particularly disabling for this office since the county sheriff was central to resolving land disputes.[95] The Harvey and James impeachments re-

89. *See id*.

90. For example, one of the central complaints concerned Harvey's failure to send letters from tobacco planters asking for renegotiation of their contracts with the Crown. *See id.* at 16.

91. *See id.* at 15-17.

92. *Id.* at 15 (footnote omitted).

93. *See id.* at 17.

94. *Id.* at 19.

95. *See id*. This disabling effect of perjury allegations was raised by the author with regard to the impeachment of President Clinton. *See House Hearings*, *supra* note 3, at 253-54, 274-75 (testimony of Prof. Jonathan Turley); Turley, *Congress as Grand Jury*, *supra* note 3, at 756-59.

flected a growing assembly faction that would become more evident at the beginning of the eighteenth century, when the colonies had grown into significant economic units.

The impeachments in the early 1700s revealed that assembly and proprietary factions were supported by large groups in a highly fluid political environment. Both factions would denounce the other as a "junto."[96] This environment was evident in 1706 when James Logan, Pennsylvania provincial agent and secretary of the Pennsylvania council, was impeached. Among the thirteen articles of impeachment were allegations of various controversial policy decisions, concealment, and "'a wicked intent to create Divisions and Misunderstandings between him and the people.'"[97] In the course of these proceedings, however, public opinion shifted in favor of the accused, and he remained in office. Like the Whig accusers in the Sacheverell case, the public then denied Logan's accuser, David Lloyd, his seat in the assembly.[98]

The Logan trial was illustrative of the use of impeachment as a colonial forum for factional disputes. The case was actively framed by colonists against proprietary authority, particularly over the courts. Logan had been given governing responsibilities by William Penn during his absence in England.[99] He clashed with assembly advocates opposed to proprietary authority, including Lloyd. Logan had opposed assembly demands that "several Things . . . be granted away from the Proprietary and Governor,"[100] including controls over the judiciary. The legislature then enacted a bill claiming impeachment authority in resolving the dispute. As a result, the colonialists intentionally created a circumstance to impeach the acting governor as part of their antiproprietary efforts. The trial, however, only hardened factional hatred for the same reasons as the early English impeachments. Since the upper house had been abolished in 1701, the assembly attempted to try Logan with Lieutenant Governor John Evans as presiding judge. While Evans would allow the trial to begin,

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96. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 152 (1967) (quoting Massachusetts Tories as describing assembly advocates as "a junto to serve particular designs and purposes of their own . . . tending directly to sedition, civil war, and rebellion").

97. HOFFER & HULL, *supra* note 19, at 34 (quoting the 12th article of impeachment against James Logan).

98. *See id.* at 35.

99. *See id.* at 32.

100. *Id.*

he later stated that the charter did not allow for such an impeachment and that any complaints should be made to the Crown through his office—a pure proprietary position.[101] Thus, there was no trial to verdict, and the factional disputes would continue to harden in Pennsylvania until the Revolution.

Since colonial impeachments were used as a check on executive authority, articles of impeachment often included such allegations as the "loss of public trust," as in the 1774 attempted impeachment of Stephen Skinner, treasurer of the eastern district of New Jersey.[102] The Skinner case showed that, in a polarized political environment, the subjects of impeachment were often secondary to the political need for impeachment trials. Skinner had the misfortune of being in office when £6000 was stolen. However, it was not until a year later that Skinner was impeached. There was no question as to his innocence, but the New Jersey assembly considered his negligence with treasury funds sufficient for removal. Behind the impeachment were assembly advocates who wanted control over colonial funds and the office of the treasurer. While Governor William Franklin[103] contested the authority of the assembly to remove an official, Skinner resigned before he could be formally impeached. The jurisdictional issues remained unresolved. In the absence of any dialogue or settlement in these confrontations, cases like Skinner's deepened the factional anger of the respective parties. A staunch advocate of the proprietary cause, Governor Franklin, to his personal detriment, would continue his assertion of Crown authority well into the Revolution.[104]

Many of the Framers were active participants or supporters of the colonial impeachments as a method of asserting assembly authority and later as raw challenges to Crown authority. Benjamin

101. *See id.* at 34-35.

102. *See id.* at 47.

103. What happened to William Franklin, the illegitimate son of Benjamin Franklin, may be the best example of how deep and bitter the factional divisions became over proprietary and assembly supporters.

104. Franklin was taken into custody at the beginning of the Revolution. He was allowed to sign a "parole" in exchange for his agreement that he would not take any actions in support of the Crown during his captivity. For this agreement, he was allowed to travel freely within the area of Middletown. He used his freedom to engage in intelligence-gathering for the Crown and to assist Loyalists in taking amnesty oaths offered by the king. Franklin became the target of a "sting" operation by colonialists who procured one of the oaths and Crown pardons with his signature. He was then forced into a dungeon cell in solitary confinement for eight months. *See generally* SHEILA L. SKEMP, WILLIAM FRANKLIN: SON OF A PATRIOT, SERVANT OF A KING 192-266 (1990).

Franklin supported the use of impeachment against proprietary supporters such as William Moore and William Smith.[105] In 1757, the Pennsylvania assembly contested Crown authority and the growing factional disputes led to the impeachment of Moore, a justice of the peace.[106] When Moore attempted to defend himself, he was arrested for libel by the assembly faction.[107] After Smith, a leading proprietary figure and provost of the College of Pennsylvania, wrote in support of his ally, Smith was convicted of contempt of the assembly.[108] The colonists used the trial as a *cause célèbre* and produced direct conflict with the Privy Council, which once again insisted that the colonists had no impeachment authority.[109] Moore's later reinstatement by the Crown exemplified the absence of any ability of the system to deal with factional disputes except through forced verdicts and zero-sum conclusions. The case served to worsen the factional disputes and was later described as "a straw in the wind, tossed by proprietary politics [and] notice of conflict to come . . . ."[110]

By the time of the final colonial impeachment, this device had become an overt political challenge to British rule and a reaffirmation of republican values. The Oliver impeachment strongly resembled the institutional conflict and outcome of the Buckingham case before the Protestant Revolution. In 1774, Massachusetts Chief Justice Peter Oliver[111] was impeached over a dispute regarding the control of the colonial courts.[112] Colonists protested Crown control over colonial judges and their exception from the guarantees of the Act of Settlement of 1701. Colonists condemned Crown judges as "men who depended upon the smiles of the crown for their daily bread" and thereby ruled "at the will of the crown."[113] Massachusetts colonial

105. Professor Levy described Franklin's role as "actively support[ing] the prosecution of William Smith and William Moore in 1758 by championing their 'kangaroo' trial—by assembly—for breach of parliamentary privilege in the form of seditious libel." Levy, *supra* note 86, at 786.

106. *See* HOFFER & HULL, *supra* note 19, at 42.

107. *See id.* at 43.

108. *See id.*

109. *See id.* at 43-44.

110. *Id.* at 46.

111. While Oliver may have been motivated simply by financial need in accepting the Crown funds, he was a die-hard Tory, as evidenced by his "vilification" of the opposing factions before and after the Revolution. *See* BAILYN, *supra* note 96, at 152. Oliver's post–Revolutionary War book, *Origins & Progress of the American Rebellion* (1781), has been described by one modern reader as "scurrilous" and "extreme." *Id.* at 152, 157.

112. *See* HOFFER & HULL, *supra* note 19, at 54.

113. BAILYN, *supra* note 96, at 106-07.

leaders, having been frustrated in every effort to petition for change, forced a confrontation with impeachment as their final weapon. The assembly ordered judges to accept only a colonial, as opposed to a Crown, salary. While four of the justices refused the Crown salary, Oliver accepted it and triggered the impeachment trap.[114]

At the head of this factional effort was John Adams. Defending the authority to impeach, Adams argued that "the power of impeachment was essential to a free government."[115] Adams described the moment in which impeachment was embraced as the only action in the face of political and legal alienation:

> I believed there was one constitutional Resource. . . . Several Voices at once cryed out, a constitutional Resource! what can it be? I said it was nothing more nor less than an Impeachment of the Judges by the House of Representatives before the Council. An Impeachment! Why such a thing is without Precedent. I believed it was, in this Province: but there had been precedents enough, and by much too many in England.[116]

There was great outcry for a trial, and the General Court proceeded with the impeachment. As in the Buckingham case, however, the Crown governor chose to prorogue the body to avoid a trial.[117] The result was disastrous for the Crown, as the Oliver case proved an accelerant for the Revolution: "While the majority of the patriot faction was not yet ready for violent resistance, impeachment of the chief justice was an effective weapon against royal government."[118] The action by Governor Thomas Hutchinson to terminate the trial only further alienated the public from Crown authority and faith in the governing system. As for Oliver, the terminated trial deprived him of perceived legitimacy in carrying out his duties. Unlike Logan, who weathered a trial and won public support to continue in office,[119]

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114. *See* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 595 (1993).

115. HOFFER & HULL, *supra* note 19, at 51.

116. *Id.* (quoting 3 JOHN ADAMS, DIARY AND AUTOBIOGRAPHY 299-300 (Lyman H. Butterfield ed., 1961) (1804)).

117. *See id.* at 55.

118. *Id.*

119. In fairness to Oliver, the degree of political alienation from the government had deteriorated significantly from 1706 to 1774. As such, it is doubtful that he would have been acquitted in either the General Court or the public view. However, the termination of the proceeding made his case more notorious and symbolic for assembly advocates teetering on the edge of revolution.

Oliver returned to his duties under a cloud. Colonial jurors refused to sit in trials in which he presided or even to take an oath before him.[120] All that remained of Crown authority in Massachusetts was coercive authority, a final stage in the progress toward revolution.

While colonists had learned the value of impeachment as a political tool, they could not use impeachment as a component of a representative system until after the Revolution. Perhaps for this reason, colonial impeachments often proved clumsy and incomplete. Some colonies still referred such matters to the executive branch for resolution in the fashion of a certified or collective grievance.[121] Given the strides of Parliament in forcing reforms with the Crown, colonists hoped to secure similar concessions. The Crown's refusal to make these concessions reflected the fact that, after the Restoration, the Stuarts had steadfastly reserved their concentrated authority over foreign and military affairs. The Crown viewed the Colonies as part of its reduced area of near-absolute monarchical authority. The governance concessions sought by the colonists threatened an area of jealously guarded Crown authority and met with a glacial response. This absence of vertical participation in governance magnified the importance of colonial impeachment as a factional device. In reviewing this colonial history, Hoffer and Hull note the significance of the use of impeachment as "an effective weapon against royal government" and stress:

> Behind the partisan effort to check and balance royal government stood a larger constitutional achievement. Consensus among the legislators and their constituents upon the appropriateness and the

120. This is precisely what John Adams had hoped would occur. Adams attended Oliver's return to the bench and described the refusal to recognize the legitimacy of the court as a type of coming of age for the citizens:

> [Adams] said afterwards the scene "filled his eyes and heart," and that he wept as he stood by the lawyers' table and watched his countrymen, "those honest freeholders, in the moment of their fiery trial." Chief Justice Oliver, sitting in his robes, called Grand and Petit Jurors to approach the bench and take the oath. One by one they refused. "What is the matter?" Oliver demanded as the men came forward to the bar and stood stubbornly, lips closed. "Are all of you Quakers that you cannot take an oath?" "No sir," they answered. "The Chief Justice of this court stands impeached of high crimes and misdemeanors, and of a conspiracy against our rights written in our charter. We cannot serve under him. We will not take the oath."

CATHERINE DRINKER BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 438-39 (1950) (footnote omitted); *see also* Landsman, *supra* note 114, at 595 (recounting jurors' refusal to participate in cases heard before Judge Oliver).

121. *See* Bogen, *supra* note 82, at 804 (discussing the extensive legislative authority vested in colonial executives as the king's representatives).

> force for the impeachment of a public official for violation of a public trust bespoke commitment to certain constitutional assumptions. Bound to an ideology of the supremacy of representative legislatures, impeachment moved from an expeditious tactic toward becoming a fixture of American government.[122]

Impeachment was primarily used in the colonies as a tool for political expression rather than reconciliation or settlement. While impeachment procedures varied widely among the colonies, impeachment was well known to critical figures like Adams and Franklin.[123] It was not until the Constitutional Convention that impeachment was made a formal part of the representative system.[124] It was then that the Framers adapted impeachment from its use as a tool of public dissension to a vehicle of public resolution. A review of the record of the Constitutional Convention and later sources reveals highly varied and at times contradictory statements by the Framers. As the following part demonstrates, however, the Framers were quite clear on static procedural issues while incorporating a highly evolutionary standard for impeachment.

II. THE ROLE OF THE SENATE TRIAL IN THE CONSTITUTION AND THE CONSTITUTIONAL DEBATES

Both the British and colonial history of impeachment saw the use of impeachment rise with social or political discord. In the absence of participatory elements in government, impeachment was often used as a valve to release public pressure during chaotic periods

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122. HOFFER & HULL, *supra* note 19, at 56. This point has been noted by other historians:

> In light of the continuing power struggles between the Commons and the councilors of William and Mary, Anne, and George I, the colonists became increasingly aware of impeachment's potential as a political weapon, and they finally began to use it as such. While in the 1600s colonial assemblies aimed impeachments at individual wrongdoers in response to corruption or mismanagement, in the 1700s they often did so in order to attack the power of other branches of government. This trend culminated in the Revolutionary era as Whig assemblies began to use the process to attack royal officials, and through them the very concept of English rule.

MELTON, *supra* note 67, at 32-33.

123. *See supra* notes 86-87 and accompanying text. While Franklin would participate in the later Constitutional Convention, Adams (like Jefferson) would not. This has created some controversy over referring to people like Adams as "Framers" as opposed to "Founding Fathers." *See, e.g.*, Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1583 (1989). The author will happily leave this debate to others.

124. *See* Jonathan Turley, *High Crimes and Misdemeanors*, WALL ST. J., Nov. 9, 1998, at A23 [hereinafter Turley, *High Crimes and Misdemeanors*]; *see also* Jonathan Turley, *The New Originalists*, LEGAL TIMES, Oct. 19, 1998, at 27.

or to express public discontentment with the Crown. With the Revolution, the Framers of the Constitution were well versed in the use of impeachment as a factional device. The former Revolutionaries were practitioners of factional politics. The destabilizing effect of impeachment cases like Oliver's had a positive Revolutionary value, but the Framers, as creators of a new government, sought ways to stabilize a system governing one of the most pluralistic nations on Earth. One element of the impeachment history that would have appealed to some Framers was its use as a check on executive power. The Framers were also aware of impeachment as the great leveler of power between an executive and his people.

Impeachment, while unstable, was long recognized as lending credibility to representational claims of English and colonial governments. During the trial of Warren Hastings, Edmund Burke emphasized this importance of impeachment to the integrity of the system and the danger if "this form of trial should . . . vanish out of the constitution." Burke declared:

> [W]e must not deceive ourselves; whatever does not stand with credit cannot stand long. And if the constitution should be deprived . . . of this resource, it is virtually deprived of everything else, that is valuable in it. For this process is the cement which binds the whole together . . . here it is that we provide for that, which is the substantial excellence of our constitution . . . by which . . . no man, in no circumstance, can escape the account, which he owes to the laws of his country.[125]

The Framers would ultimately embrace the same view of impeachment as a critical part of a new constitutional system. When the division of authority in the tripartite system was debated, impeachment became a familiar guarantee for delegates uncomfortable with the unitary executive.[126] Whereas impeachment authority was once

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125. Raoul Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1137 (1974) (quoting Edmund Burke).

126. Impeachment would become more personally familiar to some of the delegates than to others. John Pickering of New Hampshire and William Blount of North Carolina would be impeached. (Pickering was selected but did not actually attend the Constitutional Convention.) Jared Ingersall of Pennsylvania would defend Blount in the Senate. Abraham Baldwin of Georgia would sit as a juror in the trial of Pickering and Chase. Baldwin would actually attest that the most incriminating letter against Blount in his trial was written by his hand, and he would serve as one of the House managers seeking Blount's conviction. *See* MELTON, *supra* note 67, at 161. Jonathan Dayton of New Jersey would serve in the House during the impeachment of Blount. Luther Martin of Maryland would defend Chase in his trial. *See* John C. Yoo, *The First Claim: The Burr Trial,* United States v. Nixon*, and Presidential Power*, 38 MINN.

denied to the colonies, the Framers would expressly affirm impeachment as part of a system of self-governance.

During the Constitutional Convention, impeachment was first introduced exclusively with regard to presidential trials. In the words of William Davie of North Carolina, impeachment was presented as the "essential security for the good behaviour of the Executive."[127] Since that time, impeachments have remained works-in-progress with evolving rules and standards, often reflecting the contemporary period. From the first impeachment of Judge John Pickering to the recent impeachment of President William Jefferson Clinton, legislators have repeatedly revisited the records of the Constitutional Convention for hints of original intent in carrying out their constitutional duty. As a result, different theories and standards have emerged under the claim of original intent, despite the fact that the Framers appeared intentionally to leave these questions for each generation to answer within a provided static structural system.[128]

A textual analysis of the constitutional provisions relating to impeachment yields little insight into the intended function of a Senate trial. There are five provisions dealing with the impeachment process.[129] Only one pertains to the Senate trial. Article I, Section 3, establishes the Senate's jurisdictional and procedural foundation for impeachment trials:

> 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.[130]

L. REV. 1435, 1443 (1999).

127. 2 RECORDS, *supra* note 5, at 64.

128. *See* Turley, *High Crimes and Misdemeanors*, *supra* note 124, at A23 (discussing the purpose of an evolutionary standard for impeachment).

129. *See* U.S. CONST. art. I, §2, cl. 2 (establishing that the House "shall have the sole Power of Impeachment"); *id.* art. I, § 3, cl. 6 (directing that "the Senate shall have the sole Power to try all impeachments," that trials will proceed under "Oath or Affirmation," and that the Chief Justice shall preside and a two-thirds vote is required for conviction); *id.* art. I, § 3, cl. 7 (providing that impeachments "shall not extend further than to removal from Office and disqualification to hold and enjoy any Office" and that removed officials shall still be liable for indictment and trial); *id.* art. I, § 4 (establishing that "[t]he 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"); *id.* art. II, § 2, cl. 1 (barring the use of presidential pardons in cases of impeachment).

130. *Id.* art. I, § 3, cl. 6.

In comparison with other areas of constitutional interpretation, the Senate Impeachment Clause is one of the most clear and concrete provisions in the Constitution. The entirety of the Senate Impeachment Clause is static, establishing structural guidelines for the trial without evolutionary standards such as "high crimes and misdemeanors" from Article II, Section 4. To put these procedures in context, it is necessary to look at the Constitutional Convention and later ratification debates.

While impeachment was not a central focus of the Constitutional Convention, it was an issue of modest controversy. Delegates came to the Constitutional Convention with preconceived notions of impeachment procedures and standards, largely derived from their state constitutions. The debate centered on the purpose of impeachment, the standard for impeachment, and, most controversial, the proper court to render a verdict.

As a threshold matter, Madison and other Federalists had to overcome the opposition of such delegates as Charles Pinckney of South Carolina,[131] Gouverneur Morris of Pennsylvania, and Rufus King of Massachusetts to the very notion of impeaching the chief executive.[132] This resistance may have been due as much to the familiarity with the English impeachments as to any qualification of republican values. As noted above, while high officials were subject to impeachment in England, members of the royal family (and certainly the monarch) were excluded from such a trial.[133] Moreover, the President's limited tenure in office lowered the perceived need for such extreme intervention. Nevertheless, these objections easily gave way to the arguments of Madison and others that impeachment was a vital guarantee of good behavior in the chief executive.[134]

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131. In a decision that bordered on the malicious for later historians, South Carolina sent to the Convention a Charles Cotesworth Pinckney and a Charles Pinckney, second cousins. This leaves the source of some comments in question since the record often refers to simply "Mr. Pinkney" [sic] or "Mr. P." Usually, references to General Charles Cotesworth Pinckney were designated as "C.C. Pinckney" or "Gen. Pinckney." Mr. C. Pinckney is, therefore, often taken as denoting the younger Charles Pinckney. General Pinckney had a particular insight into English precedent as a former student of Sir William Blackstone at Oxford. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 467 (1994). To make matters more difficult, South Carolina's ratification convention selected Thomas Pinckney as its president. *See* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 318 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES].

132. *See, e.g.*, 2 RECORDS, *supra* note 5, at 64-69.

133. *See supra* note 19 and accompanying text.

134. *See House Hearings*, *supra* note 3, at 257-61 (testimony of Prof. Jonathan Turley).

There has been considerable academic attention given to the ensuing debate at the Constitutional Convention over the specific standard for impeachment. This debate is relevant to this Article in two important respects. First, the originalist or intentionalist claims over the meaning of "high crimes and misdemeanors" often limit the suggested use of Senate trials by confining the subject of impeachment to official acts or abuses of power.[135] These arguments tend to elevate removal as the primary purpose of impeachment in a narrow band of cases. Such arguments, if accepted, would radically reduce the role of impeachment in addressing the factional disputes and legitimacy questions discussed in this Article. Second, these debates indicate the view of the Framers as to the role of the Senate trial within the bicameral impeachment process. If impeachment has a broader value as a Madisonian device, it is necessary to address the questions raised over the intended scope of offenses subject to Senate trials. While the Framers did debate the scope of impeachable offenses, this debate has been radically overstated. The most concentrated debate on standards occurred on a single day and constitutes a couple of pages of record.[136] Consider the exchange between the main protagonists, containing some of the most-repeated quotations:

> The clause referring to the Senate, the trial of impeachments agst. the President, for Treason & bribery, was taken up.
>
> Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offense. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.
>
> He movd. to add after "bribery" "or maladministration."[137]

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135. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 745-49; Turley, *Executive Function Theory*, *supra* note 3, at 1802-17.

136. This point was made most strongly by Professor Jack Rakove in the Clinton hearing. *See House Hearings*, *supra* note 3, at 242 (testimony of Prof. Jack Rakove) (emphasizing that "there is, in fact, no debate on [the meaning of the impeachment standard] . . . at least no debate that testifies directly as to what the framers exactly thought, precisely thought, they were doing").

137. Mason's discussion of the Hastings incident and his suggested use of "maladministration" may suggest more than a passing knowledge of the case since one of the impeachable of-

> Mr. Gerry seconded him—
>
> Mr. Madison[.] So vague a term will be equivalent to a tenure during pleasure of the Senate.
>
> Mr. Govr Morris[.] [I]t will not be put in force & can do no harm—An election of every four years will prevent maladministration.
>
> Col. Mason withdrew "maladministration" & substitutes "other high crimes & misdemeanors" ("agst. the State").[138]
>
> On the question thus altered [Ayes—8; Noes —3][139]

There is no evidence that the debates over the standard of impeachment were particularly divisive or significant in the view of the delegates. Among the changes made during the debates was the elimination of the words "against the State." While this distinction of impeachable offenses being tied to official misconduct would be repeatedly raised in later trials (including in the Clinton trial),[140] the elimination of the language was made in committee without a mention or objection in the Committee of the Whole.[141] The different proposed standards, however, did indicate sharply differing views on the expected use of impeachment procedures.[142] Delegates like Roger Sherman of Connecticut "contended that the National Legislature

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fenses alleged by Burke against Hastings was "maladministration." *See supra* note 70 and accompanying text.

138. After this language was added, Mason moved to change the words "against the State" to "against the United States." This was done "in order to remove ambiguity" and was approved unanimously. Then, the Committee of Style dropped "against the United States," producing our current language. For a discussion of these changes, see Turley, *Executive Function Theory*, *supra* note 3, at 1812-15.

139. 2 RECORDS, *supra* note 5, at 550. The specific vote of 11 delegations was: New Hampshire (in favor); Massachusetts (in favor); Connecticut (in favor); New Jersey (against); Pennsylvania (against); Delaware (against); Maryland (in favor); Virginia (in favor); North Carolina (in favor); South Carolina (in favor); Georgia (in favor).

140. *See House Hearings*, *supra* note 3, at 257-66 (testimony of Prof. Jonathan Turley); *see also* Turley, *Congress as Grand Jury*, *supra* note 3, at 747-59.

141. This debate is less relevant to this Article than to prior academic works. *See* articles cited *supra* note 3.

142. Once again, some of these standards came from state constitutions. Other delegates were probably influenced by their legal experiences under the English and colonial experiences. When John Adams was arguing for colonial impeachments, he claimed that the "grand inquest" of impeachment should be used in cases of "misbehaviour." HOFFER & HULL, *supra* note 19, at 65.

should have power to remove the Executive at pleasure."[143] Notably this standard would have created a unique type of parliamentary removal, where the legislature could replace the chief executive, but not the government, at will.[144]

Beyond rejecting such a low "at will" standard, little can be established with certainty from the debates, despite academic claims to the contrary.[145] For example, it is often noted that, when George Mason offered the standard of "maladministration,"[146] Madison objected to the standard and ultimately favored the English standard of "high crimes and misdemeanors."[147] What is rarely noted, however, is that Madison later interpreted the impeachment standard to include "maladministration."[148] Indeed, maladministration would be repeatedly cited in impeachment cases extending into the twentieth century.[149] Likewise, Madison described impeachment as a way of ad-

143. 1 RECORDS, *supra* note 5, at 85; *see also id.* at 78 (citing a proposal by Dickenson that the President is "removable by the national legislature upon request by a majority of legislatures of the individual States"). In the English system, the Parliament had the authority to impeach "by address," which allowed the members to remove judges at pleasure. *See* 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2013, at 334-35 (1907), *cited in* Brendan C. Fox, *Justiciability of Challenges to the Senate Rules of Procedure for Impeachment Trials*, 60 GEO. WASH. L. REV. 1275, 1279 (1992); *see also* 2 RECORDS, *supra* note 5, at 428-29.

144. One interesting question is the likely result of this vote if the Framers knew of the eventual creation of a party system in which the Vice President would be a member of the President's party and a supporter of his policies. This dynamic factor could well have changed some of the opposition to Sherman's proposal.

145. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 763-69 (discussing contrary theories); Turley, *The Executive Function Theory*, *supra* note 3, at 1802-17 (same).

146. *See* 2 RECORDS, *supra* note 5, at 550.

147. *See id.* According to Blackstone, who was a highly influential authority for the Framers, "maladministration" was a "high misdemeanor." 4 WILLIAM BLACKSTONE, COMMENTARIES *121.

148. 1 ANNALS OF CONG. 498 (Joseph Gales ed., 1789); *see also* Turley, *Executive Function Theory*, *supra* note 3, at 1804-07. This oversight is evident in the testimony and public statements of many law professors opposing the Clinton impeachment. For example, Professor Laurence Tribe has stated to members of Congress that "Madison, clearly one of the towering figures of our history, or of the world's history, recognized that the power to remove a president for something as nebulous as maladministration could lead to something to[o] awfully close to Roger Sherman's idea that you could remove a president at will." *Democratic Roundtable on the Impeachment Process*, Federal Document Clearing House Political Transcripts, Oct. 15, 1998, *available in* LEXIS, News Library, POLTRN File. In fact, while maladministration was not expressly put into the standard, at Madison's insistence, Madison did believe that a President could be removed for maladministration under the standard of "high crimes and misdemeanors." 1 ANNALS OF CONG. 498 (Joseph Gales ed., 1789).

149. This standard appears repeatedly in the House records of impeachment and was used by House managers in the 1905 Senate trial of Judge Swayne. *See infra* notes 294-301 and accompanying text.

dressing "the incapacity, negligence or perfidy of the chief Magistrate."[150] Alexander Hamilton referred to impeachable offenses as "those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."[151]

The records from the Constitutional Convention and state ratification debates are simply too sparse and varied to sustain any clear interpretation of the adoption of the English standard. Three conclusions about this standard, however, appear well established and generally accepted. First, the impeachment standard was clearly intended to extend beyond criminal acts to include some noncriminal acts. Second, the impeachment standard was not intended to address political disputes or mere unpopularity.[152] Finally, whatever the Congress determined to be impeachable conduct was not to be reviewable by the judiciary.[153]

The relatively scant attention paid to the impeachment standard reflected a pronounced tendency of Madison and other Federalists to look to structural solutions to deal with potential substantive problems.[154] Consistent with this procedural inclination, the most debated issue of impeachment concerned the proper court and process for impeachment. Once again, the rivaling proposals were closely related to procedures employed in the various state constitutions.[155] The

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150. 2 RECORDS, *supra* note 5, at 65. While not participating in the debate, John Adams described impeachment as allowing for trial in cases of "misbehaviour" or official misdeeds. HOFFER & HULL, *supra* note 19, at 65.

151. THE FEDERALIST NO. 65, *supra* note 1, at 396.

152. James Iredell stressed this commonly held point when he noted in the North Carolina debates:

> God forbid that a man, in any country in the world, should be liable to be punished for want of judgment. . . . Whatever mistake a man may make, he ought not to be punished for it, nor his posterity rendered infamous. But if a man be a villain, and wilfully abuse his trust, he is to be held up as a public offender, and ignominiously punished.

3 ELLIOT'S DEBATES, *supra* note 131, at 26.

153. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 237-38 (1993) (observing that the procedures of impeachment were to be decided by the Senate and that this decision was not reviewable by the courts because of the political question doctrine).

154. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 740-43, 769-77.

155. A variety of alternative systems existed or were proposed in the various states. The most complex proposed system actually came from Thomas Jefferson outside of the constitutional debate. In Virginia, Jefferson argued for the following system:

> There shall moreover be a court of IMPEACHMENTS to consist of three members of the Council of state, one of each of the Superior courts of Chancery, Common law, and Admiralty, two members of the House of Delegates and one of the Senate, to be

"Virginia Plan," advocated by Edmund Randolph and James Madison, called for the federal courts to try impeachments.[156] An alternative "New Jersey Plan," put forward by William Paterson, would have established that the federal courts "shall have authority to hear & determine in the first instance on all impeachments of federal officers" and would have created a jury of true peers for the chief executive—the governors of the various states.[157] John Dickenson of Delaware recommended a third option that would have made the chief executive "removable by the national legislature upon request by a majority of the legislatures of the individual States."[158] The "New York Plan," advanced by Alexander Hamilton, allowed for "all impeachments to be tried by a Court to consist of the Chief or Judge of the Superior Court of Law of each State."[159] Ultimately, with the Pennsylvania and Virginia delegates in continued opposition, the delegates agreed on leaving the impeachment decision to Congress.[160]

Once the delegates resolved on leaving impeachments exclusively to the legislative branch, the bicameral process was adopted with limited debate. This was the English model, "which assigned the role of prosecutor to the Commons while the Lords sat in judg-

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> chosen by the body respectively of which they are. Before this court any member of the three branches of government, that is to say, the Governor, any member of the Council, of the two houses of legislature or of the Superior courts may be impeached by the Governor the Council or either of the said houses or courts for such misbehavior in office as would be sufficient to remove him therefrom: and the only sentence they shall have authority to pass shall be that of deprivation and future incapacity of office. Seven members shall be requisite to make a court and two thirds of those present must concur in the sentence.

THOMAS JEFFERSON, *Proposal for Revision of the Virginia Constitution*, *reprinted in* 6 THE PAPERS OF THOMAS JEFFERSON 301 (Julian P. Boyd et al. eds., 1952).

156. *See* 1 RECORDS, *supra* note 5, at 22. The resolution calling for the federal courts to be given authority over "impeachments of any National officers" was written in Madison's hand. *Id.* at 22-23.

Notably, Madison was uncomfortable with the role of the Senate as the jury and voted against the Senate as the court of impeachment. Madison favored a role—but not an exclusive one—for the judiciary in the final decision of removal. Madison indicated that he was willing to have removal decided by legislative officials in association with judicial officials. Madison suggested the Supreme Court as one possibility, "or rather a tribunal of which that should form a part." 2 *id.* at 551. Presumably, such a tribunal would have been composed of both legislative and judicial officers. Yet, after his view failed to receive general support in the Convention, Madison did not object to the bicameral impeachment model in later years. *See infra* note 165 and accompanying text.

157. 1 RECORDS, *supra* note 5, at 244.

158. *Id.* at 78.

159. *Id.* at 292-93.

160. *See* 2 *id.* at 551.

ment."[161] Notably, the delegates made few references to English impeachment cases or standards in the debate. Nevertheless, the delegates modified the English model to fit the demands of the new constitutional structure, including the imposition of a two-thirds vote in the Senate for conviction,[162] the requirement of acting upon oath or affirmation,[163] and the limitation of what persons would be subject to impeachment.[164]

The divisions on impeachment and its standards often reflected the growing divide between Federalists and anti-Federalists. While Federalists like Madison believed in the need for representative democracy, the anti-Federalists were generally suspicious of any departures from direct democracy.[165] Consistent with these views, anti-Federalists like Elbridge Gerry preferred a more readily available means for replacing the chief executive.[166] George Mason stressed that impeachment was needed as a democratic process to guarantee the people a chief executive who would continue to meet the minimal requirements of office: "Some mode of displacing an unfit magistrate

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161. BERGER, *supra* note 34, at 54.

162. *See* U.S. CONST. art. I, § 3, cl. 6.

163. *See id.*

164. *See id.* art. II, § 4. This point was eloquently made by Senator Frederick T. Frelinghuysen in the Senate trial of President Andrew Johnson:

> The procedure of impeachment was imported into our Constitution from the common parliamentary law of England, but it was placed there clipped and pruned of very many of its baneful incidents. Impeachment, associated with bills of attainder and of pains and penalties and *ex post facto* laws, was made in Great Britain an instrument of political persecution and partisan aggrandizement. It was through those agencies that the grossest injustice was perpetrated in the name of law, that men of political power were destroyed, that families of influence were blotted out, and that their estates were confiscated to become a reward to those who persecuted those who owned them.

IRVING BRANT, IMPEACHMENT TRIALS AND ERRORS 157 (1972) (citation omitted).

165. For a discussion of anti-Federalist views, see *Symposium: Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 NW. U. L. REV. 1 (1990); *see also* Wilson Carey McWilliams, *The Anti-Federalists, Representation, and Party*, 84 NW. U. L. REV. 12, 12 (1990) ("Both Anti-Federalists and Federalists claimed to champion representation, but . . . . Anti-Federalists regarded representation as a second-best substitute for local self-government—a potentially dangerous attenuation of personal responsibility and assent."). While the anti-Federalists did not advocate direct democracy, they viewed government ideally as local rather than an "extended" republic in the Madisonian image. Thomas L. Pangle, *The Classical Challenge to the American Constitution*, 66 CHI.-KENT L. REV. 145, 156 n.20 (1990) ("The Anti-Federalists largely rested their hopes . . . on libertarian state and local governments that would be simpler, more restricted, smaller scaled, and closer to a more rural, homogenous, and virtuous populace than the national government proposed and the society envisioned by the Federalists.").

166. *See* 2 RECORDS, *supra* note 5, at 66.

is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen."[167] The debates indicate that even the Federalists viewed the Senate trial as a political determination of the viability of an officer remaining in office. Madison stated that he was concerned about any system that would prevent the minority from "remov[ing] . . . an officer who had rendered himself justly criminal in the eyes of a majority."[168] For the Federalists, the Senate trial served the prototypical representative function: guaranteeing the public the authority to remove a chief executive while protecting the chief executive from the direct factional pressures of public sentiment. Madison noted that the Senate would at times be expected to serve the public interests by ignoring the public will.[169] This is certainly the case with impeachment trials and, as will be shown, was at the heart of the acquittal of President Andrew Johnson.[170]

Owing to the limited textual and historical sources, both academics and legislators have tended to conflate the functions of both houses. In particular, some academics hold the view that the House of Representatives votes on the same question of the Senate,[171] as well as the related view that impeachment was inappropriate where removal was not likely to result. In a prior article, I offered an alternative view of the role of the House of Representatives as distinct from the Senate role.[172] Under this view, the impeachment authority is best understood as a check on the chief executive and a deterrent to presidential misconduct.[173] Specifically, impeachment functions as a

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167. 1 *id.* at 86.

168. *Id.*

169. *See infra* note 538 and accompanying text. In the debates, and most of the contemporary writings, the discussion of impeachment almost exclusively focused on the Senate. While the House of Representatives was given the sole authority to impeach, the delegates were largely silent on the process or substance of House deliberations. Conversely, the Senate was given guidelines for its trial in the Constitution and considerable guidance in the constitutional debates. *See House Hearings*, *supra* note 3, at 257-66 (testimony of Prof. Jonathan Turley).

170. *See infra* notes 430-36 and accompanying text.

171. This view was expressly adopted by former Congresswoman Elizabeth Holtzman before the House Judiciary Committee. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 781 n.248.

172. *See id*.

173. James Iredell emphasized the role of deterrence in his remarks to the North Carolina Convention:

> Mr. Chairman, I was going to observe that this clause, vesting the power of impeachment in the House of Representatives, is one of the greatest securities for a due execution of all public offices. Every government requires it. Every man ought to be amenable for his conduct, and there are no persons so proper to complain of the

deterrent to presidential misconduct in the detection and referral of impeachable offenses.

Impeachment has a second purpose beyond a check on or deterrent to presidential misconduct. In the Senate, impeachment takes on a more political role by addressing legitimacy questions raised with respect to presidential and judicial misconduct. The Framers were already familiar with this political dimension from their own experiences with such trials as the impeachment of Warren Hastings. This political role in impeachment decisions was directly linked by Hamilton to the Senate, not the House, determination:

> The subjects [of the Senate's] jurisdiction [in an impeachment trial] 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.[174]

The question presented at a Senate trial is not simply removal but redemption. This point was made by Benjamin Franklin, who noted that a President's conduct can be sufficiently "obnoxious" to require a public decision on his continuation as chief executive. The impeachment process, he concluded, is "the best way . . . to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused."[175] Franklin's statement reflects the need for a President to address legitimacy concerns in order to continue with the full authority of his office. Without such "honorable acquittal," a President can continue in a political condition akin to partial impeachment, possessing the office but not the perceived legitimacy to hold it. The Framers were well aware that the President cannot lead a free nation by coercion or threat. Rather a chief executive can only demand the greatest sacrifice from citizens based on the general acceptance of his moral and legal authority. A President who

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> public officers as the representatives of the people at large. . . . It will be not only the means of punishing misconduct, but it will prevent misconduct. A man in public office who knows that there is no tribunal to punish him, may be ready to deviate from his duty; but if he know there is a tribunal for that purpose, although he may be a man of no principle, the very terror of punishment will perhaps deter him.

4 ELLIOT'S DEBATES, *supra* note 131, at 32.

174. THE FEDERALIST NO. 65, *supra* note 1, at 396.

175. 2 RECORDS, *supra* note 5, at 65.

is widely viewed as a law-breaker carries a dangerous disability as the leader of a nation of laws.

As previously noted, the use of the Senate trial as a method of dealing with legitimacy concerns about a chief executive was a predictable resolution for the Framers.[176] If a President is to be subjected to a second political decision on his tenure, the Federalists viewed the Senate as the proper body not only to register but to regulate such public sentiment. Hamilton expressed this view when he asked, "[W]hat other body would be likely to feel confidence enough in its own situation to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused and the representatives of the people, his accusers?"[177] The delegates clearly did not consider the impeachment trial to be a real trial in any criminal sense, since they excluded criminal punishments and reserved the right to prosecute impeached officials. Rather, they saw impeachment trials as a continuation of the political process when a public decision of retention (rather than election) is required. This may be one of the reasons that the procedures of the Senate trial were largely left to Senate members to determine within their own contemporary context and preferences.[178]

Much has been made of the debate over the evolutionary standard of "high crimes and misdemeanors." The constitutional standard does play a vital role in restricting Senate trials to the most serious questions of legitimacy, and it has restrained factional impulse over policy differences or political disputes. It is the Senate trial, however, that yields the most significant and potentially transformative effect on factional preferences in impeachment.

As will be shown below, the political role of the Senate trial is unique in the American constitutional system.[179] The factional disputes raised by allegations of misconduct by a President or judge demand resolution in a public forum. The Senate trial supplies a forum

176. *See supra* notes 154-68 and accompanying text; *see also* BERGER, *supra* note 34, at 98 (noting that the separation of powers doctrine "left no room for removal by a vote of no confidence" and that, therefore, "impeachment was adopted as a safety valve, a security against an oppressive or corrupt President and his sheltered ministers").

177. THE FEDERALIST NO. 65, *supra* note 1, at 398. For further discussion of Hamilton's views, see *supra* notes 154-60 and accompanying text.

178. *See* Nixon v. United States, 506 U.S. 224, 230 (1993) ("'[T]he Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require.'" (quoting Dillon v. Gloss, 256 U.S. 368, 376 (1921))).

179. *See infra* notes 580-95 and accompanying text.

that would not be possible in any other branch. In the Senate trial of a President, representatives of all three branches are present in a proceeding in which all factional views can be openly expressed and debated. This is vitally important to the integrity of the system, as it has often changed the views of both senators and the public regarding the basis of impeachment allegations.

III. FACTIONAL DISPUTES AND SENATE TRIALS IN THE CONSTITUTIONAL PERIOD

A review of the constitutional period is obviously limited to the thirteen judicial impeachments, two nonjudicial impeachments, and two presidential impeachments. This record also includes rarely discussed terminated impeachment cases in which judicial officers resigned shortly before or during impeachment inquiries.[180] A review of these cases yields some interesting patterns. First, non-presidential impeachments can be divided into two basic periods: partisan and bipartisan impeachments. Most of the early judicial impeachments were openly partisan and factional. This factionalism was most apparent in the Senate trials, in which the primary presentation of evidence occurred. After the 1930s, a trend toward more bipartisan inquiries, impeachments, and trials developed. Second, in the two presidential trials, factional interests were on open display. These two trials proceeded along different procedural courses and left different political and constitutional legacies. Third, in both judicial and presidential trials, the Senate trials produced notable defections. Under the bicameral system, there appeared greater pressure for compromise and consensus than under the English system. While early impeachment trials like the Lloyd case showed how trials could vindicate an accused (and vanquish his accusers), there is more evidence of defections and compromise under the constitutional system. Fourth, even in the most factional periods, impeachment and removal authority was not used widely as a political tool. To the contrary, most of the impeachments are highly defensible regardless of the partisan rhetoric. While almost sixty judges have faced House inquiries, only seventeen covered officials have been impeached. Of these impeachments, the vast majority appear to have had legitimate basis. In the one case lacking credible allegations of high crimes or misde-

180. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1819-55.

meanors, the accused was acquitted in the Senate trial.[181] Finally, most of the impeachments and Senate trials expressly touched on questions of legitimacy in office. From the case of Judge Pickering to that of President Clinton, the Senate faced factional disputes over the authority of the accused individuals to carry out constitutional duties in light of their conduct. Congress repeatedly rejected the view that impeachable conduct was limited to official acts or abuses of authority.[182]

Impeachable conduct often included acts that were incompatible with continuing to hold an office of authority, including crimes or misconduct outside the official realm.[183] In each of these cases, it was clear that the officeholder faced lingering and lasting questions of authority. Some officials were impeached at the request of state legislators, the Justice Department, or bar associations. It is difficult to imagine most of these officials' continuing with the disability of unresolved allegations of misconduct. Whether the allegations turned on official misconduct or crimes related to private affairs, these cases reflect the danger of the state of "partial impeachment," in which an official holds the title, but not the perceived authority to use it.

These past impeachments fall into three categories based on status: impeachments of Presidents, judges, and "other civil officers." It is also possible to divide impeachment cases by periods because, as noted above, the tenor and regularity of impeachment proceedings changed over time. Senate trials gradually became less partisan over the course of this history, with the exception of the Clinton trial. However, the office or status of impeached officials is more relevant to a review of factional disputes over legitimacy questions.

A. Early Federal Impeachments of "Other Civil Officers"

Only two Senate trials concerned impeached officials other than judges or Presidents. Ironically, both of these anomalous cases—the cases of William Blount and William Belknap—created significant precedent for later cases on the scope of impeachment and the role of Senate trials. Moreover, both of these cases reveal the interplay of political controversy and Senate trials. In both of these trials, notable

181. This was the case of President Andrew Johnson. *See infra* Part IV.C.1. Another case, that of Judge Halsted Ritter, *see infra* notes 306-14 and accompanying text, has been criticized (with some basis) as questionable both procedurally and substantively.

182. *See infra* notes 351-60 and accompanying text.

183. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1819-55.

defections occurred over the course of the proceedings at times of extreme polarization. Finally, in both of these trials, removal was not at issue. Rather, the Senate became a forum in which the conduct of *former* officials was subjected to political judgment. As a result, factional concerns that could have been destabilizing were given expression in the Senate in the type of vertical integration that was missing in both the English and colonial systems.

1. *The Blount Case*. The most fascinating test for impeachment within a Madisonian system occurred soon after the Constitution was ratified. In the late 1700s and early 1800s, the country was riddled with divisions, conspiracies, and sporadic violence. Regional and political factions came with real threats of civil war and secession.[184] The two largest factional groups during this period were the Federalists, associated with John Adams, and the Republicans, associated with Thomas Jefferson.[185] These two factions created dangerous political conditions that would forge the Madisonian democracy under intense political heat. These were precisely the types of factions that had proven unstable and ultimately violent in the colonial impeachment era.

One of the greatest factional issues of the time concerned foreign relations and the status of the territories. After the Revolutionary War and Jay's Treaty, a vacuum had formed in the territories, with British and Spanish troops facing an ever-expanding population of American settlers. The Revolution and the Constitutional Convention could not resolve a host of fundamental questions over policies ranging from western expansion to a national bank, policies which were debated in an atmosphere of mutual distrust and loathing. Professor Presser aptly describes this period:

> This was the era of the two rebellions in Pennsylvania, of the Jay Treaty, of the X, Y, Z affair, and of the undeclared war with France, and the era when our national political schizophrenia began to manifest itself. Spurred on by the world's first largely unshackled periodical press, Americans in the late eighteenth century began to divide profoundly along regional, class, and economic lines, as the emerging Jeffersonian party (which preferred France to England, localism

184. Secession threats continued in the early 1800s with one threat associated with Aaron Burr and his companions in New York. *See* NOEMIE EMERY, ALEXANDER HAMILTON: AN INTIMATE PORTRAIT 226-27 (1982).

185. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1819-22.

> to cosmopolitanism, and agrarian pursuits to high finance) campaigned to wrest control of the legislative and executive branches from the Federalists.[186]

Even on issues of committing troops in war, the factions remained divided.[187] At the same time, the French Revolution had created deep divisions within the country. Anglophile Federalists detested the abuses and killings of the French Revolution.[188] Federalists believed that Francophile Republicans would bring about an American terror and seize property.[189] The Republicans feared that Federalists sought monarchy and, with justification, sought sedition prosecutions of Republican members.[190] Factional divisions based on distrust and fear of retribution constituted the greatest test of a system designed for factional dialogue and settlement.[191]

The first impeachment involved Senator William Blount.[192] The impeachment triggered extreme factional responses and confirmed public rumors of conspiracies over control of the territories.[193] Blount

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186. Stephen B. Presser, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*, 13 CONST. COMMENTARY 213, 214 (1996) (book review).

187. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 293 (1996) (commenting that "[i]n the Indian War, President Washington pursued a limited war that rejected the hopes of both New England Federalists, who opposed the war because of its costs, and Southern Republicans, who sought an aggressive war to secure territorial gain").

188. *See* Presser, *supra* note 186, at 214.

189. *See* Stephen B. Presser & Becky Bair Hurley, *Saving God's Republic: The Jurisprudence of Samuel Chase*, 1984 U. ILL. L. REV. 771, 814-15; *see also* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 924 (1985) (describing the Federalist-controlled Congress's enactment of the Alien and Sedition Acts as stemming from their fear of subversion by Francophile Republicans).

190. *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 230 (1990).

191. Professor Wedgwood describes the unrest of the period:

> a decade's dissidence—citizen Genêt appealing to the people to resist Washington's declaration of neutrality, western Pennsylvania farmer-soldiers marching in resistance to federal taxation in the Whisky Rebellion, eastern Pennsylvania farmers violently disputing taxes in Fries Rebellion, the blandishment of Republican voices seeking alliance with revolutionary France in war against the European powers, High Federalists seeking alliance with England in war against the French.

Id.

192. In addition to the excellent account by Professors Hoffer and Hull, *see* HOFFER & HULL, *supra* note 19, at 151-63, a full treatment of this case can be found in a comprehensive account by Buckner Melton, *see* MELTON, *supra* note 67, at 441-57.

193. *See* ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 26 (1992) (describing the "partisan hostility" of the Blount impeachment proceedings).

was a Republican[194] from Tennessee when he was accused of conspiracy with the British to invade the Southwest.[195] His conspiracy with British operatives was discovered in a letter[196] that found its way to

194. Early federal impeachment inquiries included members of Congress. These inquiries often addressed issues of character and virtue. Such was the case in a dispute between Kentucky Senator Humphrey Marshall and two state judges who had accused him of perjury. The Kentucky legislature submitted the matter directly to the United States Senate, since issues of legitimacy were raised in the allegations:

> Our duty under these circumstances strongly and unequivocally requires that we should request your serious attention to the considerations which this case suggests—important indeed it is to society, that those intrusted with the exercise of the powers of government should be men of unshaken virtue and integrity. . . . But it is further to be observed that they should not only be virtuous, but free even from the imputations of crime; more especially of those infamous crimes, the perpetration of which destroys the bonds of society, prostrates the obligations of truth . . . and falsehood—the sole support of well-grounded confidence . . . .

HOFFER & HULL, *supra* note 19, at 148 (footnote omitted).

195. Behind this intrigue was Blount's large land holdings in the area. It was alleged that Blount was facing dire economic circumstances owing to heavy investments in land under Spanish control. While the land remained under Spanish authority, the value of the property would remain low. Should the property become part of the English empire, however, Blount would have received a windfall from the expansion of settlers. Under considerable financial strain owing to his fixed holdings, Blount went to extraordinary lengths to engineer independence from Spain, including a private army. *See id.* at 148.

196. Various letters were recovered, but the roughly two-page letter from Blount to James Carey, an Indian interpreter, proved his downfall. *See* MELTON, *supra* note 67, at 99-101. In this letter, Blount notes some of the conspirators in the incitement of the Creeks and Cherokees in the alliance with England against Spain. He then stated:

> I believe, but am not quite sure, that the plan then talked of will be attempted this fall; and if it is attempted, it will be in a much larger way than then talked of; and if the Indians act their part, I have no doubt but it will succeed. . . . you must take care, in whatever you say to Rogers, or any body else, not to let the plan be discovered by Hawkins, Dinsmore, Byers, or any other person in the interest of the United States or Spain.
>
> . . . .
>
> . . . *I* have advised you, in whatever you do, to take care of yourself. I have now to tell you to take care of me too; for a discovery of the plan would prevent the success and much injure all the parties concerned.
>
> . . . .
>
> . . . When you have read this letter over three times, then burn it.

Id. (footnotes omitted). Not only did the letter reveal knowledge of the conspiracy and the need to conceal it from "any other person in the interest of the United States," but the letter also included instructions for Carey to shift blame for an earlier treaty away from Blount to President Washington. *Id.* at 99. "This sort of talk," Blount advised, "will be throwing all the blame off me upon the late President, and as he is now out of office, it will be of no consequence how much the Indians blame him." *Id.* at 100 (footnote omitted). Unfortunately for Blount, Carey was a bad candidate for conspiracies and promptly showed the letter to one of the very men listed by Blount as untrustworthy, James Byers, a government trader. *See id.* at 102.

John Adams.[197] Enraged, Adams demanded an investigation by the Senate.[198] Before such investigation, however, the Senate expelled Senator Blount on the basis of the letters.[199] The expulsion, on July 8, 1797, was carried out under the Senate's inherent authority to discipline its members and was officially based on "a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator."[200] The vote was virtually unanimous, with both Federalists and Republicans voting 25-1 to expel the senator.[201] Professors Hoffer and Hull note in their review of this case that the use of "high misdemeanor" is somewhat curious because "Blount was not accused of any recognized crime or any violation of the law. His *misdemeanor* was to misdemean himself; to misuse his office for his own speculative ends."[202] The articles of impeachment against Senator Blount referred to ambiguous violations of international and domestic laws in this conduct.[203]

The Blount impeachment began with the Senate, but the House of Representatives initiated its own inquiry. The House debated an issue that would reappear in later impeachments, including the im-

197. *See* WILLIAM H. MASTERSON, WILLIAM BLOUNT 298 (1954).

198. *See* HOFFER & HULL, *supra* note 19, at 152.

199. In one of the most dramatic moments of any impeachment, Blount actually was wholly unaware of the discovery of his conspiracy and actually ran into Adams's secretary, Samuel B. Malcolm, as he was bringing the incriminating letter to the Senate floor to be disclosed. *See* BUSHNELL, *supra* note 193, at 29; MELTON, *supra* note 67, at 107-08. Blount asked about the content of the President's message, but "Malcolm only replied that the message was secret and confidential." MELTON, *supra* note 67, at 107. When Blount returned to the Senate floor, he was confronted with the letter, which was read to him. "Blount turned visibly pale as Thomas Jefferson, the presiding officer, asked him whether he was in fact the letter's author." *Id.* Blount admitted to being the author. *See id.*

200. HOFFER & HULL, *supra* note 19, at 152-53.

201. *See* MELTON, *supra* note 67, at 125.

202. HOFFER & HULL, *supra* note 19, at 153. This point, however, is debatable since Blount may have been in violation of the Act of June 5, 1794, ch. 50, 1 Stat. 381, which made it a crime to organize a military expedition with a foreign power with which the United States was at peace, *see id.* § 5, 1 Stat. at 384; *see also* Act of March 2, 1797, ch. 5, 1 Stat. 497 (extending the Act of June 5, 1794, for two years). The articles repeatedly accuse Blount of acting "in violation of the obligation of neutrality, and against the laws of the United States." HOUSE COMM. ON THE JUDICIARY, 93d CONG., IMPEACHMENT: SELECTED MATERIALS 126-28 (Comm. Print 1973) [hereinafter SELECTED IMPEACHMENT MATERIALS]. The Neutrality Act itself was expressly raised by Attorney General Charles Lee as a possible criminal violation, though no such charge was ever brought. *See* MELTON, *supra* note 67, at 126. This Act remains in effect and was invoked in the calls for impeachment of President Reagan roughly two hundred years later. *See infra* note 378.

203. The actual articles, however, speak of conduct "against the laws of the United States." SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 126.

peachment of President Clinton. While Blount had few friends in either House, members were concerned about the basis for impeaching an official for conduct undertaken as a private citizen rather than as a public official.[204] This controversy, however, was ultimately resolved against Blount. In its first impeachment, the House established that it did not view the public/private distinction to be determinative. Rather, the articles of impeachment repeatedly stressed that Blount's conduct was inappropriate given his position as a Senator of the United States. The House then voted to impeach an official for the first time in the history of the United States.[205] This was done with extremely limited factfinding and without a committee investigation. All of the House managers at the Senate trial were Federalists, though one Republican had been elected.[206] The first formal referral to the Senate began with the following statement of Representative Samuel Sitgreaves in the well of the Senate:

> *Mr. President*: I am commanded, in the name of the House of Representatives, and of all the people of the United States, to impeach William Blount, a Senator of the United States, of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles against him, and make good the same. I am further commanded to demand that the said William Blount be sequestered from his seat in the Senate; and that the Senate do take order for his appearance to answer the said impeachment.[207]

The Senate was quick to respond to the referral. In fact, adopting a technique that would be repeated by House managers,[208] the Federalists pushed for a quick trial against the more proceduralist Republicans.[209] The Senate promulgated the first set of rules for Sen-

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204. *See* MELTON, *supra* note 67, at 115.

205. *See* BUSHNELL, *supra* note 193, at 30.

206. One House manager, Abraham Baldwin, was a Republican but opted out of the duty with the acquiescence of the House. *See* MELTON, *supra* note 67, at 161.

207. *Id.* at 119-20.

208. In Senate trials of officials like Andrew Johnson, House managers pushed unsuccessfully for quick trials to secure conviction and to limit any attrition of Senate votes. *See infra* notes 417-20 and accompanying text.

209. *See* MELTON, *supra* note 67, at 165. The Federalists pushed for a broad interpretation of impeachment authority in anticipation of the trial. Jefferson and the Republicans objected in favor of a strict construction of the language. Jefferson expected the Federalists to declare:

> [N]ot only officers of the State governments, but every private citizen of the United States are impeachable. Whether they will think this the time to make the declaration, I know not; but if they bring it on, I think there will be not more than two votes

ate investigations and trials. Blount was formally called to appear (despite the fact that he was known to be in Knoxville, Tennessee), a tradition that would be followed in later trials, such as President Andrew Johnson's.[210]

One of the issues that was resolved in this first impeachment trial was whether, under the Sixth Amendment, impeached officials were entitled to a jury.[211] The Republicans were particularly concerned about this point, and Thomas Jefferson viewed the issue as of paramount importance.[212] Jefferson was generally uncomfortable with impeachment procedures, and he viewed the jury issue as a possible limit on partisan cases.[213] Interestingly, this jury debate was the last effort to impose aspects of the Virginia impeachment process, which failed in the Constitutional Convention, on the federal system.[214] The Senate, however, correctly rejected this argument and created lasting precedent for Senate juries.

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north of the Potomac against the universality of the impeaching power.

BUSHNELL, *supra* note 193, at 30 (footnote omitted).

210. *See infra* notes 421-23 and accompanying text.

211. Blount's defense attorney, Alexander Dallas, also argued that impeachment was restricted to presidential candidates and was designed exclusively "to check executive abuses of power." MELTON, *supra* note 67, at 216. Dallas was described as "'the most violent Republican of all lawyers at the Bar.'" BUSHNELL, *supra* note 193, at 330 n.8 (quoting 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 298 (2d ed. 1926).

212. The case of Blount was advanced in the Senate by Jefferson's close friend, Virginia Senator Henry Tazewell. Tazewell argued the jury issue at Jefferson's strong urging. *See* Letter from Thomas Jefferson to Henry Tazewell, *in* 7 THE WRITINGS OF THOMAS JEFFERSON 195 (Paul L. Ford ed., 1896). Jefferson wrote to Madison on the issue, but Madison responded that he was not persuaded that there was a need for the added procedural protection. Madison simply responded that "[m]y impression has always been that impeachments were somewhat sui generis, and excluded the use of Juries." Letter from James Madison to Thomas Jefferson, *in* 17 THE PAPERS OF JAMES MADISON 88 (David B. Mattern et al. eds., 1991). For a discussion of this trial, see MELTON, *supra* note 67; *see also* Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framers' Intent*, 52 MD. L. REV. 437, 441-57 (1993) (discussing the Jefferson and Madison letters).

213. The irony of Jefferson's discomfort cannot be ignored given his support for highly partisan uses of impeachment during his own term in office to rid the courts of Federalist judges. *See infra* notes 255-57, 265 and accompanying text.

Jefferson's role is interesting in another respect. In accounts of the Blount conspiracy, Jefferson appears in one of the critical meetings with Blount and two other conspirators for invasion, General James Wilkinson and John Chisholm. *See* MELTON, *supra* note 67, at 96. Jefferson was a strong advocate of expansion, particularly expansion to assume control of New Orleans. *See id.* Federalists suspected that Jefferson was involved in the conspiracy. *See id.* at 117 n.31 (citing newspaper accounts speculating about Jefferson's involvement).

214. This was not lost on the Senate, which reviewed the various state systems and discovered that only Virginia followed a judicial rather than a political approach to the process. *See id.* at 177.

Predictably, one of Blount's main defenses was that he was not a civil officer. While, as noted above, English impeachments included members of the House of Lords, the American variation had narrowed the scope of subject individuals. Now, the Senate faced a former official from the legislative branch. The prosecutors insisted that "civil officers" excluded only military officers.[215] After a full debate, the Senate voted against this argument and affirmed the principle that legislative officials are not civil officers subject to impeachment.[216] It is noteworthy that this final vote included seven Federalists who joined every Republican in defeating the impeachment.[217] The final words of the drama must have pleased Jefferson, given his opposition to the impeachment:

> The Court, after having given the most mature and serious consideration to the question, and to the full and able arguments urged on both sides, has come to the decision which I am now about to deliver.
>
> The Court is of the opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this Court ought not to hold jurisdiction of the said impeachment, and that the impeachment is dismissed.[218]

The Blount verdict was a critical victory for the Madisonian system. At a time of the most extreme political conditions, the Senate trial proved its ability to fashion compromise and settlement among factional groups. Almost half of the Federalists would join the Republicans in terminating the case. A simple partisan vote could have secured a conviction that would have had the appearance of the Republicans' attempting to protect a foreign intriguer and conspirator. Nothing inflamed public opinion more in the early 1800s than conspiracy with the British respecting an invasion. Since Blount was a fallen-away Federalist turned Republican, it is astonishing that the Federalists could resist such impulses.

The Senate trial proved transformative for the members who had received the case amid intense factional conditions. The House was intent on impeachment and dissatisfied with the initial action of the Senate. These factional passions were so high that, during the

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215. *See id.* at 209-21.

216. *See* 8 ANNALS OF CONG. 2318 (1799).

217. All of the 11 votes to proceed, therefore, were cast by Federalist senators.

218. MELTON, *supra* note 67, at 232 (footnote omitted).

House proceedings, repeated physical confrontations occurred on the floor.[219] Following formal impeachment, however, the Senate exercised a degree of discretion and restraint that was at odds with the public sentiment. The impeachment of Blount would have mirrored the English model in scope and threatened the integrity of the tripartite system. Over the course of the debates and testimony, the Senate trial performed as Hamilton and others had hoped in the Constitutional Convention.[220]

The Blount decision was as important legally as it was politically; a conviction would have made all legislative figures subject to impeachment, as under the English model. More importantly, it would have inaugurated impeachment as a raw political tool.[221] Whereas the last colonial impeachment in the Oliver case was used as a factional weapon, the first constitutional impeachment in the Blount case was used to reach factional settlement. Unlike Oliver, no backlash or public outcry ensued. Although factional turmoil would continue, the Blount conspiracy and controversy gradually faded with the Senate vote.[222]

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219. These confrontations occurred between Federalist Roger Griswold of Connecticut and Republican Matthew Lyon of Vermont. Lyon commented in Griswold's presence that he could easily prompt revolution in Connecticut, to which Griswold suggested that he "had better wear [his] wooden sword." MELTON, *supra* note 67, at 160. This was a reference to the story that General Horatio Gates had forced Lyon to wear a wooden sword as a mark of cowardice during the war. Lyon responded by spitting in Griswold's face, creating an outburst. Later, when Republicans voted down a motion to expel Lyon, Griswold beat Lyon with a stick. Lyon responded by grabbing the chamber fire tongs and attacking Griswold. *See id.* at 160-61.

220. The Federalists actually considered impeachment of legislative officials and rejected the need for such a check in the Constitution. Madison noted that this makes the President more dangerous than legislative officers with the same failings:

> The case of the Executive Magistracy was very distinguishable, from that of the Legislative or of any other public body, holding offices of limited duration. It could not be presumed that all or even a majority of the members of an Assembly would either lose their capacity for discharging, or be bribed to betray, their trust. Besides the restraints of their personal integrity & honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or few members only should be seduced, the soundness of the remaining members, would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administrated by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.

1 RECORDS, *supra* note 5, at 66.

221. Notably, the Senate did not question that impeachment could be used against a civil officer after leaving office (to disqualify him from future officeholding).

222. Blount himself was not ostracized in Tennessee and is described as popular upon his return. However, the trial appeared to have taken its toll, since he became ill soon after his return and died a year later. *See* MELTON, *supra* note 67, at 235-36.

2. *The Belknap Case*. The Blount decision established the exclusion of legislative members from the jurisdiction of Senate trials. The Senate, however, would deal with a second defining case in the impeachment of the Secretary of War, General William Belknap, the only subordinate executive officer ever impeached.[223] Belknap was accused of accepting bribes at a time when corruption was a national scandal.

Belknap was tried in the aftermath of the Civil War. The Grant administration was riddled with corruption and scandals ranging from the St. Louis Whiskey Ring scandal to the Credit Mobilier scandal.[224] In 1870, the Democrats opposing Grant had blocked his nominations on a partisan basis and had called hearings on the various bribery scandals.[225] The Belknap trial would occur at the apex of a period of intense factional politics: "The period of 1828 until Grant left office in 1877 was one of bitter partisanship, marked by the grosser forms of political patronage and spoils. Appointments were influenced greatly by political consideration, and the action of the Senate was fully as political as that of the President."[226]

The Belknap scandal would unleash the growing public outrage over corruption, including suggestions that Grant's brother Orvil was involved in the Belknap corruption.[227] When an investigation of corruption in military contracts uncovered Belknap's kickbacks, Belknap moved quickly to avoid the inevitable public outcry resulting from his conviction. Just two hours before his impeachment, Belknap resigned. On March 2, 1876, the House went ahead and impeached the former cabinet member, just as it had impeached former Senator Blount.[228] With Belknap, however, there was no question that, as a cabinet member, he was subject to impeachment as a civil officer.

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223. *See* Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMMENTARY 479, 488 (1998).

224. *See* Richard T. Cooper, *Second Term a Rare and Risky Task*, L.A. TIMES, Dec. 14, 1996, at A1.

225. *See* Orrin G. Hatch, *Save This Court from What?*, 99 HARV. L. REV. 1347, 1351 (1986).

226. David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900, 907 (1990) (citing JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 303 (1953)).

227. *See* Michael Farquhar, *And Now for Some More Sibling Revelry: A Brief History of Crime*, WASH. POST, Jan. 24, 1993, at F1.

228. *See* BUSHNELL, *supra* note 193, at 169.

The only question was whether a former cabinet member remained a "civil officer" for the purposes of impeachment.[229]

When Belknap's case was exhibited to the Senate by the House managers, it was framed as articles of impeachment against "William W. Belknap, late Secretary of War."[230] That first sentence would prove the entirety of the issue for a minority, but a determinative number, of senators. The managers, however, presented five articles of impeachment detailing alleged bribes[231] largely related to a trading post at Fort Sill which supported the cavalry companies in the Indian territory.[232] After such figures as General George Armstrong Custer testified against Belknap,[233] the House managers demanded that Belknap be called so that he "[could] be put to answer the high crimes and misdemeanors in office . . . and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice."[234]

The case of the House managers against Belknap was already quite detailed when it arrived at the Senate owing to an investigation by the House Ways and Means Committee.[235] Nevertheless, the trial lasted five months.[236] The Senate responded to the public outcry with a full trial that included witnesses who detailed the evidence of corruption.

The ensuing debate eventually turned to the purpose of impeachment when removal no longer remains a possible remedy upon conviction. This point was addressed by the Chair of the House Judiciary Committee, Representative J. Proctor Knott:

> Was the only purpose of this disqualification simply to preserve the Government from the danger to be apprehended from the single convicted criminal? Very far from it, sir! That in reality constituted but a very small part of the design. The great object, after all, was that his infamy might be rendered conspicuous, historic, eternal, in order to prevent the occurrence of like offenses in the future. The purpose was not simply to harass, to persecute, to wantonly degrade,

229. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1828.

230. SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 143.

231. These bribes included a $6000 per year payment and $1500 for other appointments. *See id*. at 145-48; *see also* BRANT, *supra* note 164, at 155.

232. *See* SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 145-48.

233. *See* Farquhar, *supra* note 227, at F1.

234. SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 148.

235. *See* Broyde & Schapiro, *supra* note 223, at 489; Feerick, *supra* note 24, at 36.

236. *See* BUSHNELL, *supra* note 193, at 188.

> or take vengeance upon a single individual; but it was that other officials through all time might profit by his punishment, might be warned by his political ostracism, by the ever-lasting stigma fixed upon his name by the most august tribunal on earth, to avoid the dangers upon which he wrecked, and withstand the temptations under which he fell; to teach them that it they should fall under like temptations they will fall, like Lucifer, never to rise again.[237]

Belknap's lawyers challenged the impeachment before the Senate on jurisdictional grounds, hoping for a result like the Blount decision. If Belknap could be impeached, they argued, so could any citizen.[238] While many members argued that impeachment did not extend to former officers,[239] the majority ruled by a vote of 37-29[240] that the Senate had jurisdiction in such a case.[241] After losing this vote, Belknap was asked to answer the articles of impeachment, which he refused to do.[242] Ultimately, only two senators believed Belknap was innocent, but roughly two dozen had doubts about the jurisdictional decision.[243] The final vote was 37-25 on the closest article.[244] This was

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237. PROCEEDINGS OF THE SENATE SITTING FOR THE TRIAL OF WILLIAM W. BELKNAP 203 (1876) (statement of Rep. Knott) [hereinafter BELKNAP PROCEEDINGS]; *see also* Broyde & Schapiro, *supra* note 223, at 489 (noting that the House managers believed that "impeachment branded the wrongdoers with a permanent mark of shame and provided an important deterrent to others who might yield to the temptations of tyranny or corruption").

238. *See* 3 HINDS, *supra* note 143, §2007, at 313.

239. The senators exchanged extremely thoughtful written statements on the dangers and purpose of impeachment. *See* BRANT, *supra* note 164, at 160 (noting that 24 senators submitted written opinions on the underlying constitutional questions). This debate repeatedly touched on the English model and the need to avoid the factional abuses of impeachment and attainder. For example, Republican Senator Frederick T. Frelinghuysen of New Jersey warned:

> The procedure of impeachment was imported into our Constitution from the common parliamentary law of England, but it was placed there clipped and pruned of very many of its baneful incidents. Impeachment, associated with bills of attainder and of pains and penalties and *ex post facto* laws, was made in Great Britain an instrument of political persecution and partisan aggrandizement. It was through those agencies that the grossest injustice was perpetuated in the name of law, that men of political power were destroyed, that families of influence were blotted out, and that their estates were confiscated to become a reward to those who persecuted those who owned them.

Id. at 157 (quoting Sen. Frederick T. Frelinghuysen).

240. It is interesting that Belknap's counsel would later object that this vote should have ended the trial because a two-thirds rule should apply to such a jurisdictional issue. Since less than two-thirds voted in favor of jurisdiction, it was claimed that the continuation to verdict was unconstitutional. *See* 3 HINDS, *supra* note 143, §2461, at 936-37; Feerick, *supra* note 24, at 36-37 (1970). The Senate wisely rejected this argument.

241. *See* 3 HINDS, *supra* note 143, §§ 2459-60, at 934-35.

242. *See* Feerick, *supra* note 24, at 37.

243. *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A

only four votes short of conviction. Accordingly, Belknap was saved by two senators who believed that jurisdictional barriers prevented conviction.[245] Fourteen Republicans defected to vote for conviction.[246]

The most important aspect of the Belknap case was not his narrow escape but the trial itself. Members of both parties ultimately concluded that a trial of Belknap was needed as a corrective political measure. If impeachment was simply a matter of removal, the argument for jurisdiction in the Belknap case would be easily resolved against hearing the matter. The Senate majority, however, was correct in its view that impeachments historically had extended to former officials, such as Warren Hastings.[247]

Impeachment, as demonstrated by Edmund Burke,[248] serves a public value in addressing conduct at odds with core values in a society.[249] At a time of lost confidence in the integrity of the government, the conduct of a former official can demand a political response. This response in the form of an impeachment may be more important than a legal response in the form of a prosecution. Regardless of the outcome, the Belknap trial addressed the underlying conduct and affirmed core principles at a time of diminishing faith in government. Absent such a trial, Belknap's rush to resign would have succeeded in barring any corrective political action to counter the damage to the system caused by his conduct. Even if the only penalty is disqualification from future office, the open presentation of the evidence and witnesses represents the very element that was missing in colonial impeachments. Such a trial has a political value that runs vertically as a response to the public and horizontally as a deterrent to the executive branch.

CONSTITUTIONAL AND HISTORICAL ANALYSIS 52 (1996). Only one senator failed to give his reason for voting against conviction. *See* BRANT, *supra* note 164, at 160.

244. There were majority votes in favor of conviction on all five articles ranging from 35 to 37. *See* 3 HINDS, *supra* note 143, §2467, at 945.

245. The 22 Senate votes for acquittal on jurisdictional grounds were just slightly above the one-third vote needed.

246. *See* BUSHNELL, *supra* note 193, at 186.

247. One representative, John Rutledge, Jr., actually had attended part of the Hastings trial as a young man. *See* MELTON, *supra* note 67, at 114-15.

248. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 790; *supra* notes 73-76 and accompanying text.

249. Moreover, the disqualification of officials from holding later offices serves a clear continuing interest in an impeachment trial. The legitimacy questions underlying impeachment trials are directed at the officeholder and not the office. If a former officeholder has proven to be a disgrace or lawbreaker, the public has an interest in resolving the legitimacy questions and, when appropriate, barring the individual from further positions of public trust.

B. Impeachments of Judicial Officers

Factionalism in the impeachment process was most evident in the judicial cases.[250] These judicial cases reflected a trend toward more bipartisan trials, though factional interests continued to be evident in modern cases. The partisan judicial trials are interesting for the purposes of this Article precisely because they were so partisan. These trials served the same function as presidential controversies in funneling factional disputes into a political adjudicatory process. These cases were often the result of considerable local debate over a judge's legitimacy to carry out his constitutional duties.

The Senate trials allowed for the most serious cases to be heard in a responsive political process. This was central for the legitimacy of the system as a representative government. Even in the most political and factionalized trials, a dialogic element was often present either in its verdict or its aftermath. If agreement on a verdict was not always politically attainable, the Senate trials periodically forged consensus on correcting the underlying conduct in future cases. These Senate trials served to review judicial conduct, rather than the judges themselves. Despite acquittals or convictions along partisan lines, there was often agreement on strengthening emerging values such as judicial neutrality. Some cases led to new laws and ethical canons to address ambiguous issues. These cases also reflect the importance of legitimacy questions in impeachment by the House and in the deliberations of the Senate.

Judicial officers were impeached on a variety of crimes and misdeeds. Notably, some of these offenses were neither criminal nor official acts. Judges often came to the Senate in the midst of raging controversy with highly diminished authority in carrying out their duties. Most importantly, these cases show that, even in the most raw and vicious political periods, impeachment and removal authority was not abused as a standard political tool, despite the ability of dominant parties to do so.

Almost immediately after the ratification of the Constitution, impeachment procedures were used against various judicial officers.[251] This was accelerated after the Federalists were replaced in

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250. For an individual review of the judicial impeachments and terminated impeachment cases, see Turley, *The Executive Function Theory*, *supra* note 3.

251. Thirteen judges have been impeached in history. These judges are: (1) John Pickering (1804), District of New Hampshire; (2) Justice Samuel Chase (1805), U.S. Supreme Court; (3) James H. Peck (1830), District of Missouri; (4) West H. Humphreys (1862), Eastern, Middle,

power by the Republicans. Eager to rid the bench of Federalist judges, President Jefferson and his allies looked to the impeachment process. The first judicial officer selected for impeachment, however, offered considerable nonpolitical basis for removal.

John Pickering was actually placed on the federal bench while a state impeachment was pending to remove him from his position as Chief Justice of the New Hampshire courts.[252] The grounds for the state impeachment were virtually identical to the later federal impeachment and quite simple: Pickering was rather obviously deranged.[253] Even Pickering's good friend, Federalist Senator William Plumer of New Hampshire, described Pickering as possessing an "abnormal mentality" that would lead him "to seek seclusion at periodic intervals" and as having such open phobias as travelling over water.[254] Nevertheless, Federalists put Pickering on the federal bench, where his conduct grew more extreme. At the urging of President Jefferson,[255] Pickering was impeached on the grounds that he ignored legal precedents and failed to exhibit the necessary virtues for holding the office of a judicial officer.[256] Article Four of the articles of impeachment addressed this legitimacy concern:

> That whereas for the due, faithful, and impartial administration of justice, temperance and sobriety are essential qualities in the character of a judge; and the said John Pickering, being a man of loose morals and intemperate habits, on the 11th and 12th days of November, in the year 1802, being then judge of the district court, in

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and Western Districts of Tennessee; (5) Mark H. Delahay (1872), District of Kansas; (6) Charles H. Swayne (1905), Northern District of Florida; (7) Robert W. Archbald (1913), U.S. Court of Appeals for the Third Circuit (and judge by designation for the U.S. Commerce Court); (8) George W. English (1925), Eastern District of Illinois; (9) Harold Louderback (1932), Northern District of California; (10) Halsted L. Ritter (1936), Southern District of Florida; (11) Harry Claiborne (1986), District of Nevada; (12) Alcee L. Hastings (1989), Southern District of Florida; and (13) Walter L. Nixon, Jr. (1989), District of Mississippi.

Of this number, only seven were actually removed by Congress from the bench. They were John Pickering in 1804, West Humphreys in 1862, Robert Archbald in 1913, Halsted Ritter in 1936, Harry Claiborne in 1986, Alcee Hastings in 1989, and Walter Nixon in 1989. Four impeached judges were acquitted by the Senate. They were James Peck in 1830; Samuel Chase in 1805; Charles Swayne in 1905; and Harold Louderback in 1932. Two impeached judges resigned before the completion of any Senate trial. They were Mark Delahay in 1872 and George English in 1925. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1821-37.

252. *See* HOFFER & HULL, *supra* note 19, at 207.

253. *See id.*

254. *Id.*.

255. *See* BUSHNELL, *supra* note 193, at 45.

256. In his madness, Pickering's response was to demand the right of "trial by battle" and to challenge Jefferson to a duel. *See* HOFFER & HULL, *supra* note 19, at 212.

> and for the district of New Hampshire, did appear on the bench of said court, for the administration of justice, in a state of total intoxication, produced by the free and intemperate use of intoxicating liquors; and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all good citizens of the United States; and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge, and degrading to the honor of the United States.[257]

After a two-month delay following impeachment, Pickering's trial lasted eight days. At trial, John Quincy Adams and other Federalists insisted that Pickering was insane and that any Senate trial should be delayed until he possessed the mental capacity to appear before the Senate.[258] Even Pickering's own son, in arguing against removal, acknowledged that his father, who did not appear at the trial, was deranged. Pickering's son Jacob actually raised insanity as a defense, arguing that, at the time of the specific instances of misconduct,[259] his father was "altogether incapable of transacting any kind of business which requires the exercise of judgment, or the faculties of reason; and, therefore . . . is incapable of corruption of judgement, no subject of impeachment, or amenable to any tribunal for his actions."[260] In a trial with Vice President Aaron Burr presiding and John Quincy Adams serving as defense counsel, the Senate tried the judge in an atmosphere of sharp political division between the Federalists and Republicans. Despite his insanity, Pickering was seen by Federalists as part of a wider conspiracy encompassing their now-bitter Republican enemies. Plumer insisted that "[t]he removal of the Judges, and the destruction of the independence of the judicial department, has been an object on which Mr. Jefferson had long been resolved, at least even since he has been in office."[261]

The Senate trial brought these factional disputes into the open.[262] The defense's argument was based almost entirely on the Senate's

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257. *Id.* at 209 (quoting 13 ANNALS OF CONG. 353 (1803)).

258. *See* BUSHNELL, *supra* note 193, at 48.

259. The most specific instance involved the case of *United States v. Brig Eliza*, 11 U.S. (7 Cranch) 113 (1812), a confiscation case. In this case, Pickering simply refused to apply the Custom Duty Act of 1789 in favor of the United States.

260. HOFFER & HULL, *supra* note 19, at 214 (footnote and internal quotation marks omitted).

261. BUSHNELL, *supra* note 193, at 44 (footnote and internal quotation marks omitted).

262. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1821-22.

discretionary authority to suspend a trial in order to allow for the accused to appear when legally capable. Nevertheless, while charges like the handling of a confiscation case raised issues best addressed by the testimony of the accused, the thrust of the impeachment appeared to be a question of competence and legitimacy. Pickering's conduct rendered the authority of his court a mockery and a public scandal. No crime was alleged, only conduct sufficiently outrageous to demand a second public determination on the legitimacy of his continuation in office.[263] Thus, if Pickering was selected by the Republicans as an initial case to open the door for judicial impeachments of Federalist judges, they chose wisely. Pickering was convicted by a vote of 19-7, with one Federalist defecting to vote for conviction.[264]

While the Republicans were pursuing Pickering in the Senate, they were preparing for a far more significant Federalist impeachment in the House. Supreme Court Justice Samuel Chase was despised by Republicans and was on the top of all Republican lists for removal.[265] Like Pickering, Chase supplied grounds for his impeachment through clearly intemperate and political conduct as a judge. Chase appeared biased and abusive in court sessions, and he pursued critics of the Federalists by various means, including the abusive use of grand juries to go after Republican publishers[266] and other citizens.[267] These incidents were far more than simply acts of an irascible iconoclast. They were serious abuses made even worse by Chase's open contempt for the suggestion that his power was limited in such matters.[268] The articles of impeachment included allegations of an array of individuals pursued by Chase, allegations of Chase's abuse of the grand jury, and allegations that his conduct was "highly disgrace-

263. Ironically, Pickering could have argued that his Senate appointment was based on full disclosure and consent, since he had already been subject to state impeachment proceedings for similar conduct before his appointment.

264. *See* BUSHNELL, *supra* note 193, at 52.

265. *See generally* Presser & Hurley, *supra* note 189.

266. The focus of Chase's greatest anger was James Callender, who was a muckraking journalist with a deep dislike for Federalists. Callender often made modern tabloids appear tame in comparison. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1858-60. Callender would repeatedly earn the ire of the Framers. It was Callender who would later publish the details of Hamilton's affair with Maria Reynolds and the alleged impeachable offenses during his term as Secretary of the Treasury. *See id.* (discussing the Hamilton affair and contesting the suggestion of criminal acts by Hamilton).

267. *See* SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 133.

268. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1823.

ful to the character of a judge."[269] The articles of impeachment were given to the Senate on December 7, 1804. With Vice President Aaron Burr again presiding,[270] the Senate trial began on February 4, 1805. Many of the same threshold issues raised in earlier cases like Blount and Pickering were repeated in the Chase trial, including the need for an impeachable act to be criminal.[271] After a spirited defense and two weeks of presentations, the final vote largely followed party lines, although a sufficient number of Republicans defected to allow Chase to escape removal.[272] Chase's trial often followed a "dangerous tendency" argument as the basis for impeachment, along with the corresponding suggestion that the public desired removal.[273] The basis for the defections can only remain a point of speculation. However, given how recently the Pickering case had been decided, it is unlikely that there was a change in the definition of impeachable offenses by the Senate. If these senators viewed the question as one of "dangerous tendency," Chase had already indicated an intention to modify his conduct while contesting the technical grounds for impeachments.[274] Certainly, Pickering's mental instability eliminated any meaningful modification of his conduct on the bench. For whatever reason, the Senate process proved sufficient to alter the powerful factional views of these members. The Chase trial allowed for a full presentation of evidence and argument. The seven articles of impeachment were presented to the Senate on December 7, 1804, and Chase's personal answer to the charges on the Senate floor began on January 4, 1805. The trial lasted until March 1, 1805. Over the course of the trial, factional pressures had receded to the point where only three of the articles received majorities and not even the most ardent Republican voted for one of the articles.[275] It was the greatest test of the bicameral impeachment process in the most factional period of

269. HOFFER & HULL, *supra* note 19, at 236.

270. Burr's presence added a rather bizarre element to the trial, since he was a fugitive at the time after killing Alexander Hamilton in a duel at Weehawken, New Jersey, in the preceding summer. At the time, there were two state indictments outstanding against Burr. Burr's performance as presiding judge at the trial was criticized by Chase's defenders, who accused Burr of harassing Chase when the Justice addressed the Senate. *See id.* at 238.

271. *See* BUSHNELL, *supra* note 193, at 87.

272. *See* HOFFER & HULL, *supra* note 19, at 253.

273. This dangerous tendency was evident in early English impeachments, in which judges abused their authority over litigants or jurors. *See supra* notes 32-33 and accompanying text.

274. *See* HOFFER & HULL, *supra* note 19, at 241.

275. The fifth article, dealing with Chase's actions in the Callender affair, did not receive a single vote. *See id.* at 253.

the Senate's history. Faced with credible charges against a highly visible and despised Federalist, the Senate trial produced a limited but determinative change in factional interests.

The early judicial cases demonstrate the value of Senate trials in dealing with intense factional pressures. Such conditions were at their apex during the trial of Judge James Peck of the District Court of Missouri in 1831.[276] Peck was impeached at a time when the federal courts were unpopular with both the public and with Congress.[277] Peck faced a Congress overwhelmingly controlled by Jacksonian Democrats, who were highly antagonistic to Peck's decisions on land policies and who demanded greater removal authority over all federal judges. Professor Bushnell suggests in her study that Peck was the chosen target of this intense hostility.[278] Peck was impeached for ordering the arrest, incarceration, and suspension of an attorney who simply criticized one of his decisions in a local newspaper.[279] The House managers included the entire letter with the article of impeachment, which accused Peck of actions "to the great disparagement of public justice, the abuse of judicial authority, and to the subversion of the liberties of the people of the United States."[280] The trial lasted from May 4, 1830, until January 31, 1831. Once again, despite a highly charged factional environment, the Jacksonians allowed for a full presentation of evidence on both sides. The result was transformative. The Senate soon faced the problem that common law contempt was highly uncertain in its scope and use. Peck insisted that Luke Lawless, the attorney whom he had incarcerated, was properly held in contempt and was trying to influence cases awaiting jury decisions.[281] While the Democrats voted overwhelmingly for impeachment in the House, Democratic senators gradually defected over the course of the long trial. Peck was acquitted, with fifteen Democrats defecting (roughly half of the majority party).[282] The vote, however,

276. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1824-26.

277. *See* BUSHNELL, *supra* note 193, at 91.

278. *See id.*

279. Judge Peck's defense counsel was none other than Daniel Webster. *See* WALTER EHRLICH, PRESIDENTIAL IMPEACHMENT: AN AMERICAN DILEMMA 55 (1974).

280. SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 137-38.

281. The article by Lawless does appear to have been a highly inaccurate account. For a discussion of his case, see Turley, *Executive Function Theory*, *supra* note 3, at 1824-25.

282. Professor Daniel Pollitt concludes that the acquittal was due to the fact that "judicial abuse alone was not an impeachable offense." Daniel H. Pollitt, *Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259, 272 (1999). This conclusion, however, is itself subject to debate. *See generally* Turley, *Executive Function Theory*, *supra* note

did not necessarily reflect a decision that Peck's conduct did not warrant removal.[283] Peck's "tyrannous" treatment of counsel legitimately raised questions about abuse of an office to pursue personal critics.[284] Rather, both senators and House managers agreed that the contempt authority of federal courts was dangerously undefined.[285] Accordingly, after the acquittal, a federal contempt law was enacted with bipartisan support to establish clear lines for future cases.[286] The Peck case also demonstrated the ability of a Senate trial to partially redeem a challenged judge. Peck's acquittal was later described as sufficient to "'end[] the great humiliation which had hung over Judge Peck for almost five years . . . .'"[287] While a stigma certainly lingered to some degree, the case was viewed as "a vindication" of the judge, who returned to his duties.[288]

Past judicial trials often addressed intense factional interests in the state or territory of a judge. These factional disputes reflected questions of legitimacy that had disabling effects for local communities. One of the most partisan cases was the Senate trial of Judge Charles Swayne in 1905.[289] Swayne's impeachment was initiated outside of Congress, as a result of a resolution sent by the Florida legislature. Florida legislators objected to a wide range of misconduct, including incompetence, residency violations, and corruption.[290] The impeachment also reflected deep political tensions in Florida and the view of Swayne as carrying out partisan policies of the Republican administration of President Benjamin Harrison.[291] The Swayne case took one of the longest and most convoluted impeachment paths in history, over the course of a year and a half. After the initial impeachment by the House of Representative, the House again took up

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283. This was also analogous to early English cases involving abusive conduct on the bench by judges. *See supra* notes 32-33 and accompanying text.

284. *See* JOSEPH BORKIN, THE CORRUPT JUDGE: AN INQUIRY INTO BRIBERY AND OTHER HIGH CRIMES AND MISDEMEANORS IN THE FEDERAL COURTS 240 (1962).

285. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1825-26.

286. The contempt statute prohibited the use of judicial authority at issue in the Peck case. *See* Act of Mar. 2, 1831, ch. 99, 4 Stat. 487. The statute was enacted at the behest of Chief House manager and Judiciary Committee Chairman James Buchanan, the future President.

287. BUSHNELL, *supra* note 193, at 112 (quoting the account of Judge Charles B. Davis, a successor of Peck in what became the Eastern District of Missouri).

288. *See id.*

289. *See* 3 HINDS, *supra* note 143, §§ 2469-85, at 948-80.

290. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1828-29.

291. *See* BUSHNELL, *supra* note 193, at 192.

the case and held a post-impeachment debate. Ironically, after this second debate, the second vote of impeachment was closer than the first.[292] Professor Eleanore Bushnell notes in her impressive historical account that "[p]arty affiliation emerged as the dominant factor in this 'second' impeachment . . . . The Democrats' commitment to impeaching Swayne, although shared by a few Republicans, became nearly extinguished by strong, if recently activated, Republican opposition."[293] Yet, after a long process of debate, a Republican-controlled House voted to impeach the Republican judge by a 207-178 margin; four of the seven House managers came from that party. In the Senate, the Republicans also controlled the majority with fifty-one of the eighty-two seats. Twelve articles of impeachment were presented, alleging (with a fair degree of support) a pattern of misconduct by Swayne.[294] Swayne was described as "[a] weak, vain, vicious judge; a cruel, vengeful, unrelenting judge."[295] It is important to note that, from the outset, a conviction was viewed as extremely unlikely. Nevertheless, the Senate allowed the managers to present their full case against Swayne, with twenty-nine witnesses for the prosecution.[296] The thirty-four-day Senate trial remained partisan to the end, although defections did occur, with six Republicans voting to convict the judge.[297] Despite the outcome, the Swayne case represented a full presentation of the allegations of Democrats against Swayne, despite the control of both houses by the Republicans. The factional pressures in Florida and in Washington were clearly evident, but in both Houses procedural bipartisanship gave the process legitimacy.

Swayne's case represented the high-water mark of strong party identification in judicial impeachments. Unfortunately for Judge Robert Archbald of the United States Commerce Court, the importance of party identification had declined by the time he faced similar

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292. *See id.* at 193:

> A month earlier it had impeached Charles Swayne by a vote of 198 to 61. This time it voted 165 yes and 160 no on the charge of filing false expense accounts; yes 162, no 138 for improperly using a private railroad car; yes 159, no 136 for not living in his district; and agreed, without voting, to impeach Swayne for imposing unlawful sentences for contempt of court.

293. *Id*.

294. House managers argued that Swayne lacked any continued authority in his community and further cited "maladministration" as a basis for his removal. *See id.* at 211.

295. *Id*.

296. *See id.* at 200. The majority even supported the managers in critical procedural votes. *See id.* at 204.

297. *See id.* at 212.

charges in 1913. Although Archbald's case occurred only ten years later, it followed the modern model of a largely nonpartisan impeachment. Archbald was charged with using his official position to secure coal leases, accepting loans from litigants, and accepting questionable gifts.[298] The evidence of corruption was strong, but the House Judiciary Committee emphasized removal as a method of restoring the integrity of the court system.[299] Henry D. Clayton, the Chairman of the House Judiciary Committee, informed the full House that Archbald's "overweening desire to make gainful bargains with parties having cases before him . . . has degraded his high office and has destroyed the confidence of the public in his judicial integrity."[300] Archbald's conviction was almost unanimous, with sixty-eight votes to convict (including almost equal numbers of Democrats and Republicans) and only five votes to acquit.

Archbald's case reflected the nonpartisan pattern of later impeachment decisions. In 1933, the Senate tried and acquitted Judge Louderback of the United States District Court for the Northern District of California.[301] The Louderback case reflected another trend in Senate trials: a growing dislike of senators for this constitutional obligation. The Louderback trial would last seventy-six days, with one of the lowest attendance rates.[302] In a bipartisan decision, the charges against Louderback were found to be wanting, and he was acquitted by a wide margin.[303] While some partisanship was evident,[304] the Louderback decision is consistent with the later Senate trials.[305]

The nonpartisan pattern had one notable exception: Judge Halsted L. Ritter.[306] The case against Judge Ritter can be viewed as a par-

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298. *See* BORKIN, *supra* note 284, at 221. The article of impeachment receiving the greatest support in the Senate alleged that Archbald and a partner purchased a culm dump from Erie Railroad while the railroad was a litigant before him. *See* BUSHNELL, *supra* note 193, at 221.

299. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1830-31.

300. 3 PROCEEDINGS IN THE UNITED STATES SENATE AND THE HOUSE OF REPRESENTATIVES IN THE TRIAL AND IMPEACHMENT OF ROBERT W. ARCHBALD, S. DOC. NO. 62-1140, at 1682 (1913).

301. Louderback was charged with five articles of impeachment. *See* SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 184-87.

302. This is a notable point of comparison with the trials in the 1980s under the Senate Rule XI procedures. The trials of Claiborne, Hastings, and Nixon lasted less than two weeks.

303. The House managers were only able to secure a majority on one article. *See* BUSHNELL, *supra* note 193, at 263.

304. As Professor Bushnell notes, one article did appear to reflect some partisanship, with Democrats making up "84 percent of those senators who favored conviction." *Id*.

305. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1832-33.

306. *See id*. at 1833-34.

tisan relapse. Ritter was a Republican appointee of Calvin Coolidge who found himself at risk in a period of intense partisanship. The Democratic Party controlled both Houses as part of the New Deal movement. The public blamed the Republicans for the Depression, and Congress was outraged by the Supreme Court's invalidation of key New Deal programs. It was in this highly factionalized environment that Ritter found himself accused of tax evasion, bankruptcy irregularities, illegal practices, and allowance of excessive fees in a federal case.[307] The House of Representatives impeached Judge Ritter in 1936. The charges against Judge Ritter were sufficiently controversial that the House Judiciary Committee had resolved not to impeach.[308] The House returned to the impeachment question despite the fact that "[n]early three years had elapsed between the beginning of the investigation and the decision to impeach."[309] Professor Bushnell appears to attribute the Ritter impeachment to interbranch politics:

> The [Supreme] Court had found unconstitutional several New Deal measures advanced by Franklin D. Roosevelt and passed by large majorities in Congress, an apparent thwarting of the popular will . . . . Because the House of Representatives had already investigated him in 1933, perhaps Judge Ritter's impeachment emerged as a ready-made and quick route for showing the judicial branch that Congress possessed, and would use, power to chasten it. If so, Ritter became a victim of the politically dramatic moment, a handy target only because proceedings, if inconclusive, had been instituted against him before the deadlock between the Court and the executive and legislative departments reached lethal proportions.[310]

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307. *See* SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 199-200.

308. Judge Ritter unsuccessfully challenged his impeachment. *See* Ritter v. United States, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937).

309. BUSHNELL, *supra* note 193, at 270. Ritter was not unique in the reconsideration of impeachment. Judge John Watrous of the District of Texas was subject to a House vote of impeachment in 1858, but the House rejected articles of impeachment. Motivated in part by the encouragement of Senator Sam Houston, the House voted four times to secure votes for impeachment but repeatedly failed. *See* Emily Field Van Tassel, *Resignation and Removals: A History of Federal Judicial Service—And Disservice—1789-1992*, 142 U. PA. L. REV. 333, 377 (1993). *See generally* WALACE HAWKINS, THE CASE OF JOHN C. WATROUS, UNITED STATES JUDGE FOR TEXAS: A POLITICAL STORY OF HIGH CRIMES AND MISDEMEANORS (1950). Nor was the delay unique. Such cases can be found extending back to England, where Sir Robert Berkley of the King's Bench stood for impeachment for two years before conviction. *See* Feerick, *supra* note 24, at 7.

310. BUSHNELL, *supra* note 193, at 286. *But see* Van Tassel, *supra* note 309, at 378 ("The assertion that the Ritter impeachment is an example of congressional use of the impeachment power to intimidate a politically uncooperative judiciary is inconclusive.").

There is certainly evidence of a partisan environment. However, there was support for the allegations, which were sufficient, if proven, to justify removal.[311] Moreover, the Democrats overwhelmingly controlled the Senate and could have convicted on all articles on a straight party vote. Instead, Democrats allowed an exhaustive presentation of witnesses by Judge Ritter. Defections from both parties are evident in the final vote. Judge Ritter was acquitted on all articles of impeachment except the final article.[312] This final article was an omnibus charge that was a combination of the allegations in the earlier rejected articles.[313] On the close final article, which passed by one vote, ten Democrats defected to vote to acquit and seven Republicans defected to vote to convict. After removing Judge Ritter, both parties then voted unanimously not to disqualify him from further federal office.[314]

After the Ritter trial, Congress did not impeach a federal judge until the 1980s. This fifty-year hiatus has been the source of considerable interest to academics, though the record may be deceiving. Many judges were targeted for impeachment but simply resigned before formal proceedings were commenced. At least twenty-four judges have resigned under allegations of wrongdoing,[315] seven of

311. Even Judge Ritter admitted to errors in judgment, including underreporting income (which he insisted was de minimis given overpayment in other areas). *See* BUSHNELL, *supra* note 193, at 279.

312. *See* 80 CONG. REC. 5602-06 (1936).

313. *See id.* at 5606. However, the Ritter case was not without some support, and the underlying allegations were certainly sufficient to justify, if proven, removal. The conviction of Ritter was controversial because he was acquitted on the first six articles but convicted on a seventh omnibus article that consolidated the allegations of the previous articles. This was criticized as undermining the supermajority requirement, since an insufficient number of senators supported any individual article. There is no requirement, however, for individual articles, despite a compelling fairness argument. More importantly, it is often ignored that in the first article, the most serious charge of favoritism and corruption, the House managers only fell one vote short of conviction. Thus, the omnibus article only produced one additional vote, since presumably those senators voting to convict on Article 1 were prepared to convict on the same element in Article 7. *See id.*

314. *See* BUSHNELL, *supra* note 193, at 282-83.

315. These judges include: William Stephens (1818), District of Florida; Matthias B. Tallmadge (1818), District of New York; Thomas Irwin (1859), Western District of Pennsylvania; Charles Sherman (1873), Northern District of Ohio; Richard Busteed (1874), Middle District of Alabama; Edward H. Durrell (1874), Eastern District of Louisiana; William Story (1875), Western District of Arkansas; Peter S. Grosscup (1911), U.S. Court of Appeals for the Seventh Circuit; Cornelius H. Hanford (1912), Western District of Washington; Daniel T. Wright (1914), District of the District of Columbia; John A. Marshall (1915), District of Utah; Kenesaw M. Landis (1922), Northern District of Illinois; Francis A. Winslow (1929), Southern District of New York; Joseph Buffington (1938), U.S. Court of Appeals for the Third Circuit; Mar-

them during the interim between the Ritter and Claiborne impeachments.[316] Two additional judges, Judge Robert Collins and Judge Robert Aguilar, resigned after the Claiborne trial.[317] This fifty-year hiatus is misleading not only because of the number of resignations but also because it creates a somewhat misleading record as to the view of what constituted removable conduct.[318] Judges confronted with personal scandals appear more likely to resign than to face a public airing of their intimate affairs.[319] Many of these cases dealt not with issues related to the use of judicial power but with conduct that brought disrepute upon the office through personal or (non-judicial) criminal misconduct.[320] For example, Judge Herbert Fogel of the Eastern District of Pennsylvania left the bench after he invoked the Fifth Amendment during grand jury testimony concerning irregular business activities that preceded his appointment to the bench.[321] Likewise, Judge Delahay of the District of Kansas was impeached

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tin T. Manton (1939), U.S. Court of Appeals for the Second Circuit; Edwin S. Thomas (1939), District of Connecticut; Albert W. Johnson (1945), Middle District of Pennsylvania; Abe Fortas (1969), U.S. Supreme Court; Otto Kerner (1974), U.S. Court of Appeals for the Seventh Circuit; Herbert A. Fogel (1978), Eastern District of Pennsylvania; Robert Collins (1993), Eastern District of Louisiana; and Robert Aguilar (1996), Northern District of California. As noted above, two judges, Mark H. Delahay (1872) and George W. English (1926), resigned after impeachment. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1826-27, 1831-32.

316. For a comprehensive and insightful study of these judges, see Van Tassel, *supra* note 309, at 408. The Borkin study details 55 cases of judicial officers investigated by Congress, including 17 resignations, and notes an "undetermined number of judges who resigned upon mere threat of inquiry." BORKIN, *supra* note 284, at 204. Joseph Borkin's study ends in 1962.

317. Judge Robert Aguilar sat on the District Court of the Northern District of California and was accused of a variety of criminal conduct including racketeering, disclosure of wiretap evidence, and attempting to influence a criminal proceeding for a former union official. The Justice Department pursued Aguilar for seven years. After the first jury deadlocked, the Justice Department prosecuted him a second time and secured a conviction for obstruction of justice and disclosing wiretap evidence. He was sentenced to six months in jail, but the United States Court of Appeals for the Ninth Circuit overturned the conviction on the basis of a jury instruction violation. *See* United States v. Aguilar, 515 U.S. 593, 595-97 (1995). Throughout this litigation, Aguilar retained his title and salary. While both House and Senate members indicated the likely commencement of impeachment proceedings, no action was taken while the case was on appeal. In 1996, Judge Aguilar resigned and retained his pension. Although the Court of Appeals was partially reversed by the Supreme Court, *see Aguilar*, 515 U.S. at 606, the Justice Department agreed to drop further efforts in exchange for the resignation.

318. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1838-44.

319. *See id*.

320. *See id.* Such was the case of Judge John Marshall of the United States District Court of Utah, who resigned in 1915 after he "became enmeshed in a scandal involving the cleaning woman of his courtroom." CLIFFORD L. ASHTON, THE FEDERAL JUDICIARY IN UTAH 57 (1988).

321. *See* Van Tassel, *supra* note 309, at 385.

and chose to resign rather than face a Senate trial over "personal habits."[322] Other judges faced likely impeachment over "habitual drunkenness" or other embarrassing personal proclivities.[323] While two judges refused to resign even after convictions,[324] other federal judges have resigned shortly before or during impeachment proceedings.[325] For example, Judge Otto Kerner, Jr., of the United States Court of Appeals for the Seventh Circuit resigned before inevitable impeachment after he was convicted for conduct that preceded his service.[326] These resignations may create the appearance that most impeachable offenses relate to official misconduct, while in reality there is evidence of self-selection by judges who resign before impeachment proceedings probing personal misconduct.[327]

Senate trials appear to follow a declining trend of partisanship. This decline may be due to the fact that the judicial offices are more professionalized[328] and less identified with party agendas.[329] Judges like Pickering had little legal training and did not possess the appropriate judicial temperament.[330] As law became more professionalized,

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322. Turley, *Executive Function Theory*, *supra* note 3, at 1826-27. This case technically was terminated in the Senate; by the time the resignation occurred, the case was no longer in the House.

323. Judge Cornelius Hanford of the Western District of Washington was facing imminent impeachment when he resigned under allegations that included "being an habitual drunkard" and "being morally and temperamentally unfit to hold a judicial position." 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 526, at 746 (1936).

324. Judge Harry Claiborne continued to accept his judicial salary for two years despite his incarceration. Likewise, Judge Robert Collins drew his salary for a similar period while in jail. *See* Van Tassel, *supra* note 309, at 337-38.

325. *See* Jacobus ten Broeck, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185, 185 n.3 (1939); Van Tassel, *supra* note 309, at 348.

326. Kerner was charged with bribery, fraud, and tax evasion during this term as governor of Illinois. *See* United States v. Isaacs, 493 F.2d 1124, 1131 (7th Cir. 1974).

327. This issue was raised repeatedly during the Clinton trial. The House impeachment debate became a case in point. Confronted with his own personal scandal involving a sexual relationship, Speaker-designate Bob Livingston announced his intended resignation shortly before the final vote. It was without question the most dramatic moment of the House proceedings. Livingston began his speech with a call for President Clinton's resignation, only to be met with Democrat members shouting, "You resign!" He then promptly did so and again called upon President Clinton to do the same. *See* Robert G. Kaiser, *Livingston Resignation Crystallized Debate*, WASH. POST, Dec. 20, 1998, at A37. President Clinton refused to follow Livingston's lead.

328. Many of the early American judges had little formal legal training. John Pickering, for example, was trained for the ministry rather than the law. *See* HOFFER & HULL, *supra* note 19, at 207.

329. For an interesting view on the different perspective of judges from the 1800s, see generally Presser & Hurley, *supra* note 189, at 773.

330. Pickering's background was primarily political and activist. After distinguishing him-

judges (like lawyers) joined a more professional cadre with stronger traditions against partisan rulings and conflicts of interest. Moreover, strong new precedents barred courts from delving into political questions and encroaching upon First Amendment rights. Perhaps as a result, modern judicial cases became less controversial and divisive. A reflection of this change was the creation of Senate Rule XI in 1935, allowing for trial committees to avoid the need for full Senate trials.[331] While challenged as a departure from procedures guaranteeing a full Senate trial,[332] Rule XI reflected a changing Senate with more pressing schedules[333] and less perceived partisan interest in judicial impeachments.[334]

It would be a mistake, however, to view factional disputes in judicial impeachments as a matter of historical interest alone. Partisan interest in judicial impeachments continues in modern cases. In the 1990s, a call for greater use of impeachment for "activist" judges was heard by Congress in a fashion reminiscent of the Jacksonian Congress.[335] While this interest is unlikely to spawn a true trend of parti-

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self in the Revolution, he became a leading Federalist in the New Hampshire legislature and the state ratification convention. He was appointed to the federal bench by George Washington in 1795.

331. This rule was developed in response to the lack of attendance by senators at these trials. *See* Fox, *supra* note 143, at 1275 n.4 (citing 79 CONG. REC. 8309-10 (1935)). Under Rule XI, the full Senate reviews the findings of the committee.

332. Injunctions were sought to prevent the use of such committees in *Hastings v. United States Senate, Impeachment Trial Comm.*, 716 F. Supp. 38 (D.D.C. 1989), and in *Claiborne v. United States Senate*, No. 86-02780 slip op. (D.D.C. Oct. 8, 1986).

333. *See* Howell Heflin, *The Impeachment Process: Modernizing an Archaic System*, 71 JUDICATURE 123, 123-24 (1987). The Senate increasingly viewed impeachments as consuming precious time with no political return. During the trial of Judge Ritter, only three senators were at times present at what one manager referred to as "the greatest farce ever presented." TIME, Mar. 16, 1936, at 18. In the trial of Judge Louderback, only 20 senators were in attendance on most occasions. *See* Rose Auslander, *Impeaching the Senate's Use of Trial Committees*, 67 N.Y.U. L. REV. 68, 78 (1992).

334. Although enacted in 1936, the Senate did not utilize the committee option until the Claiborne case in 1986. The presentation of evidence and witnesses before the Senate proved vital in defeating allegations from the House. It is for this reason that the record of Senate trials after the use of Rule XI committees can be viewed as inimical to the historical role of the Senate. Before the use of Rule XI, eight trials were held by the Senate. Four impeached officials were acquitted, representing half of the cases. After the use of Rule XI, three judges were tried, and all three judges were convicted. Rule XI reduces the personal exposure of senators to the witnesses and evidence in a way that may facilitate convictions. There is a considerable difference between seeing a central witness testify and reading an account of the testimony. The use of the Senate impeachment committee reflects a more routine response to a once intensely partisan role of the Senate.

335. *See* Peter Baker, *Clinton Says Republicans Are 'Threat' to Judiciary; Hill GOP Blamed for 'Intimidation,' Delays*, WASH. POST, Sept. 28, 1997, at A6 (discussing calls for impeachment

san impeachments, there is also continuing evidence of factional issues unrelated to political agendas or party identification. Such was the case of Judge Alcee Hastings.[336] Unlike judges such as Claiborne[337] and Collins,[338] who continued to receive salaries after they were incarcerated,[339] Hastings presented the novel issue of a judge who had been acquitted in a criminal trial.[340] After his acquittal, Judge Hastings was subject to a Judicial Conference investigation that led to a referral for impeachment on the same charges on which he had been acquitted.[341] Judge Hastings was the first federal judge to be subject to a recommendation for removal by the Conference.[342] Judge Hastings argued racist motives in his impeachment, just as he had alleged such motives during his unsuccessful prosecution.[343] He also alleged

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of "activist" judges). There was also increased use of "litmus" tests for nominees in the 1980s to assure greater conservative values on the bench. These litmus tests, however, are still far from the type of open political entanglements of jurists like Chase.

336. *See generally* REPORT OF THE IMPEACHMENT TRIAL COMM. ON ARTICLES AGAINST JUDGE ALCEE L. HASTINGS, S. REP. NO. 101-156 (1989); COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE ALCEE L. HASTINGS, H.R. REP. No. 100-810 (1988).

337. *See* United States v. Claiborne, 870 F.2d 1463 (9th Cir. 1989); United States v. Claiborne, 781 F.2d 1327 (9th Cir. 1986).

338. *See* United States v. Collins, 972 F.2d 1385 (5th Cir. 1992).

339. *See supra* note 334. Collins ultimately resigned when the House indicated that impeachment proceedings would begin. In fairness to judges like Collins, these judges have often argued that they should be entitled to complete their appeals before resignation, a compelling due process argument. Collins had failed in his appeal when he resigned. *See Collins*, 972 F.2d at 1388. Judge Robert Aguilar of the United States District Court for Northern California was also indicted while on the bench. *See* United States v. Aguilar, 515 U.S. 593, 597 (1995).

340. *See* Hastings v. Judicial Conference of the United States, 829 F.2d 91, 95 (D.C. Cir. 1987) (affirming the denial of an injunction barring House certification of the Judicial Conference's determination that impeachment might be warranted); Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1097 (D.C. Cir. 1985) (affirming the dismissal of Hastings's suit to enjoin an investigation of charges of bribery by the Eleventh Circuit Judicial Conference).

341. *See* Alan I. Baron, *The Curious Case of Alcee Hastings*, 19 NOVA L. REV. 873, 873-75 (1995) (noting that the Judicial Investigating Committee reviewed "approximately 2800 exhibits . . . issu[ing] a report which concluded that there was clear and convincing evidence that Hastings had in fact engaged in a corrupt conspiracy with Borders to solicit a bribe"); *see also* REPORT OF THE INVESTIGATION COMM. TO THE JUDICIAL COUNSEL OF THE ELEVENTH CIRCUIT 338-39 (1986).

342. Despite repeated references to the contrary, Hastings was not the first federal judge to be prosecuted while a sitting judge. Other judges have previously been indicted while in office, including Judge Martin T. Manton of the United States Court of Appeals for the Second Circuit and Judge Albert W. Johnson of the United States District Court for the Middle District of Pennsylvania in 1939 and 1945, respectively. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1839 n.238.

343. Hastings was the first African-American appointed to the Florida federal bench, and the racism charges received considerable media attention at the time of his impeachment. *See*

that the government was pursuing him for making "decisions adverse to the government."[344] The Hastings investigation in the House included dozens of witnesses during the roughly twenty days for the presentation of evidence and pretrial motions.[345] Ultimately, Judge Hastings was convicted on eight of the seventeen articles of impeachment referred to the Senate.[346] The racism charges created factions within the African-American community;[347] however, during the impeachment and trial, African-American legislators came forward to call for removal in a critical public showing.[348] While Judge Hastings's allegation of racism proved unconvincing in the Senate, it was more compelling in the Florida district in which he secured a House seat after his removal.[349]

What is interesting about the Hastings case is the importance of the Senate trial in dealing with the factional dispute over racism in the prosecution and later impeachment of the judicial officer. Judge Hastings proved a compelling figure in the Senate trials, and many Americans believed his claims of racial animus. If Judge Hastings was to continue on the bench, however, the allegations of criminal acts

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Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 768 n.24 (1989) (citing various media stories on the racism charges).

344. Steven W. Gold, Note, *Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement*, 53 BROOK. L. REV. 699, 701 n.11 (1987).

345. Hastings himself chose not to testify in the House. Hastings was allowed to make an opening statement without taking questions, but then opted on the advice of counsel not to testify in the House. *See* Baron, *supra* note 341, at 899.

346. *See* 135 CONG. REC. 25, 330-34 (1989).

347. *See, e.g.*, Michael J. Ybarra, *Racism Charged in Trial of U.S. Judge*, L.A. TIMES, Oct. 10, 1989, at A4 (noting that Hastings, who belatedly "added the charge of racism to the already volatile mix" of the case, described the impeachment trial as a "legal lynching"); Jack Bass, *Why the Alcee Hastings Case Is Still Not Settled*, WASH. POST, Jan. 10, 1993, at C4 (noting that Hastings took the case to the public as "ultimate proof of the selective prosecution of blacks in this country").

348. *See, e.g.*, Bill McAllister, *Hastings Backers Accuse Senate of Racism in Vote*, WASH. POST, Oct. 21, 1989, at A4 (discussing factional disputes over the racism charges but noting the effect of Black members like Rep. John Conyers in supporting impeachment).

349. The Hastings impeachment included the omission of disqualification language in the impeachment articles. While removal and disqualification have been voted on separately, the failure to seek disqualification with a removal is conceptually difficult to understand. Both removal and disqualification were viewed in the debates as the natural results of conviction. In the case of Judge Hastings, if a senator believed him to be guilty of the crimes, it is difficult to see how he would not be viewed as properly disqualified. Absent the express incorporation of disqualification in the articles of impeachment, an impeached and convicted official can assume a new office, including (albeit unlikely) the office from which he was impeached. *See* Waggoner v. Hastings, 816 F. Supp. 716, 720 (S.D. Fla. 1993) (ruling that Hastings was not barred from future offices because of his removal upon impeachment).

had to be addressed in a public forum. If Judge Hastings convinced his Senate jurors, he would receive a second vote of consent from the same body that had appointed him. If he was unsuccessful, citizens supporting Judge Hastings would witness a process in which his defense was considered and the majority view of the citizens expressed. The trial was a determination, not of his guilt, but of his legitimacy as a judicial officer, and this legitimacy was determined in the very factional environment foreseen by the Framers.

The judicial impeachment cases yield a vast variety of actual crimes or misdeeds tried under an undefined standard of proof.[350] These cases reveal an underlying emphasis on issues of legitimacy rather than a focus simply on the criminal or official acts.[351] Legitimacy questions are raised most directly in the form of official acts of misconduct. Congress, however, has also considered the malicious or abusive tendency of judicial officers. Such cases can be traced from the impeachment of John Pickering to those of Samuel Chase, James Peck, George English, and Charles Swayne. Other cases may deal with conduct unrelated to judicial office, such as tax evasion in the case of Judge Claiborne,[352] or the personal habits of Judge Delahay.[353]

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350. Virtually every Senate trial has seen some debate over the standard of proof, with the same outcome. The Senate is not required to review evidence under the "beyond the reasonable doubt" standard, as preferred by impeached officials. This issue was argued, for example, in the case of Judge Claiborne. *See* B. REAMS, JR. & C. GRAY, 5 THE CONGRESSIONAL IMPEACHMENT PROCESS AND THE JUDICIARY: DOCUMENTS AND MATERIALS ON THE REMOVAL OF FEDERAL DISTRICT JUDGE HARRY E. CLAIBORNE doc. 41 (1987). The Senate rejected this argument 17-75, and the House managers correctly advised each member to apply the standard that they considered the appropriate basis for their vote. *See* 132 CONG. REC. 29, 152-53 (1986).

351. This point was not lost on some judges who resigned before impeachment. Even though these judges insisted on their innocence, they often stressed the inability to exercise judicial authority when questions regarding their legitimacy to hold office lingered. As noted by Professor Van Tassel, Judge Francis Winslow justified his resignation during his impeachment inquiry by saying that "'his usefulness as a member of the judiciary was . . . impaired'" even if he was not impeached. Van Tassel, *supra* note 309, at 367 n.121 (quoting 6 CANNON, *supra* note 323, §550, at 790-93).

352. In his first trial, Claiborne (like Judge Aguilar later) was not convicted owing to a hung jury. *See* United States v. Claiborne, 781 F.2d 1327, 1327 (9th Cir. 1986) (Reinhardt, C.J., dissenting from a denial of rehearing en banc). The Justice Department retried the case, and Claiborne was convicted by a second jury in the United States District Court for the District of Nevada for filing a false income tax return. *See* United States v. Claiborne, 870 F.2d 1463, 1464 (9th Cir. 1989). Claiborne was impeached on four articles, all of which concerned the criminality of such filings. There was no direct connection between Claiborne's criminal acts and any judicial function. Ultimately, Claiborne was convicted on three of the four articles and removed from office. *See generally* PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE, S. DOC. NO. 99-48 (1986).

Other cases involved conduct that brought disrepute on the courts, such as the case of Judge Ritter, who was accused of bringing "his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the federal judiciary."[354] Yet, other impeachments involved perjury charges that were collateral to "official" misconduct, such as the case of Judge Walter Nixon.[355] They all, however, reflect controversies that raise fundamental questions of legitimacy and conduct that is viewed as incompatible or demeaning to judicial office. This point has been repeatedly stressed, as it was in the impeachment of Judge George W. English.[356] English's impeachable offenses ranged from "tyrannical" use of office to "gross betrayal of public trust."[357] While Judge English resigned before conviction in 1926, the House Report emphasized the use of impeachment as a method for public rebuke or corrective measure distinct from indictment:

> A civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and he would continue to do this until his name became a public stench and yet might not be subject to indictment under any law of the United States, but he certainly could be impeached. Otherwise the public would in this and kindred cases be beyond the protection intended by the Constitution . . . .
>
> The conduct of Judge English has been of such a character that one must regard it as reprehensible and tending to bring shame and reproach upon the administration of justice and destroy the confidence of the public in our courts if it be allowed to go unrebuked. . . . No one reading the record in this case can conclude that this man has

353. *See supra* note 324; *see also* Turley, *Executive Function Theory*, *supra* note 3, at 1826-27.

354. 80 CONG. REC. 5606 (1936).

355. Nixon was indicted on one count of bribery and three counts of perjury. *See* Nixon v. United States, 703 F. Supp. 538, 543 (S.D. Miss. 1988). Nixon was impeached on the basis of perjury and conduct bringing disrepute upon the judiciary. *See* REPORT OF THE IMPEACHMENT TRIAL COMM. ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR., S. DOC. NO. 101-164, at 191-95 (1989); H.R. REP. NO. 101-36, at 16 (1989); 135 CONG. REC. 27, 101-03 (1989).

356. English sat on the District Court for the Eastern District of Illinois. He was impeached for securing personal loans from banks after using the banks to hold bankruptcy funds and other acts of favoritism in office. *See* SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 164-73.

357. *Id.* at 172-73. English is the only case in which a motion to adjourn was made after the accused resigned shortly before the trial. *See* 68 CONG. REC. 344-48 (1926).

> lived up to the standards of our judiciary, nor is be [sic] the personification of integrity, high honor, and uprightness, as the evidence presents the picture of the manner in which he discharged the high duties and exercised the powers of his great office.[358]

This legitimacy element is evident in both the Senate trials and the lesser-known cases in which judges resigned before impeachment proceedings or final impeachment votes.[359] Despite their differences, all of these cases were argued in terms of conduct that deprived the judges of legitimacy to fulfill their offices and degraded the authority of these courts.[360]

The Hastings trial shows the continued potential for factional disputes in judicial impeachments. The judicial cases demonstrate how impeachments tend to reflect the divisions of their time. As Madison observed, factions are inherent in any free society. Factional issues are still present in these cases; only the subjects of the disputes have changed. Where party identification was once the dominant characteristic, factions may now form over a judge's race or judicial philosophy.[361] Preference changes do not diminish the value of the Senate trial, which has repeatedly proven effective under the most extreme factional conditions. Those conditions are the rule rather

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358. SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 164.

359. In at least one case, removal or resignation was not viewed as sufficient by the House. The allegations of bribery and corruption against Judge Warren Davis of the United States Court of Appeals for the Third Circuit were extremely detailed. The scandal involved allegations that Davis had written and sold decisions under the name of another judge, Senior Judge Joseph Buffington, who is described as "aging, deaf, and nearly blind," Van Tassel, *supra* note 309, at 369, and as "helpless and senile," BORKIN, *supra* note 284, at 101. Judge Buffington also resigned. For a discussion of this case, see *id.* at 97-137. Despite his resignation, Congress continued impeachment proceedings until Davis agreed to give up his pension. *See id.* at 120.

360. This nexus between judicial integrity and removal was reinforced by judicial tribunals who sought the removal of the three judges impeached in the 1980s. *See* United States v. Nixon, 816 F.2d 1022, 1023-25 (5th Cir. 1987) (affirming a judge's conviction for perjury before a grand jury that was investigating bribery charges); Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1097-99 (D.C. Cir. 1985) (affirming the dismissal of Hastings's suit to enjoin an investigation of charges of bribery by the Judicial Conference of the 11th Circuit); United States v. Claiborne, 765 F.2d 784, 788-89 (9th Cir. 1985) (affirming a judge's conviction for underreporting income discovered during a bribery investigation).

361. All three judges tried in the 1990s raised allegations of retaliation based on their rulings against the government in criminal cases. These allegations are given more credence by members' calling for increased use of judicial impeachments as punishment for rulings considered too "liberal" or "activist." *See supra* note 335. My colleague Todd Peterson has explored the institutional tensions produced by the prosecution of judicial officers by the executive branch. *See* Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. ILL. L. REV. 809.

than the exception in the final category of cases: presidential impeachments.

C. Impeachments of Presidents

In over two hundred years, there have only been two Senate trials of American Presidents: President Andrew Johnson and President William Jefferson Clinton. Various Presidents, however, have been subject to impeachment inquires, with President Nixon's case coming the closest to a Senate referral. Presidents John Tyler,[362] Andrew Johnson, Grover Cleveland,[363] Herbert Hoover,[364] Harry Truman,[365]

362. The charges against Tyler were made by Representative John Botts of Virginia, who moved for a House investigation. Tyler was accused of nine offenses, including: (1) exercising improper and illegal conduct over the accounting officers of the Treasury Department; (2) abusing the appointment and removal power; (3) encouraging states to "disregard and disobey a law of Congress"; (4) retaining executive officers in office after their appointments had been rejected by the Senate; (5) withholding assent to laws that were necessary to "the just operations of government"; (6) "arbitrary, despotic, and corrupt abuse of the veto power"; (7) "shameless duplicity, equivocation, and falsehood, with his late Cabinet and Congress"; (8) illegal and unconstitutional appointment of a commission to investigate the custom house in New York City; and (9) withholding information on the misdeeds of government agents. CONG. GLOBE, 27th Cong., 3d Sess. 144 (1843). The House voted and rejected the resolution 127-83, with no further action taken in the matter. *See id.* at 146.

363. Cleveland was accused by Alabama Representative Milford on May 23, 1896, of eight instances of high crimes and misdemeanors. These included allegations that Cleveland: (1) "sold or directed the sale of bonds without authority of law"; (2) "sold or aided in the sale of bonds at less than their market value"; (3) "directed the misappropriate of the proceeds of said bond sales"; (4) "directed the misappropriation of the proceeds of said bond sales"; (5) "directed the Secretary of the Treasury to disregard the law which makes United States notes and Treasury notes redeemable in coin"; (6) "ignored and refused to have enforced the anti-trust law"; (7) "sent United States troops into the State of Illinois without authority of law and in violation of the Constitution"; (8) "corrupted politics through the interference of Federal officeholders"; and (9) "used the appointment power to influence legislation detrimental to the welfare of the people." STEPHEN W. STATHIS & DAVID C. HUCKABEE, CRS REPORT FOR CONGRESS: CONGRESSIONAL RESOLUTION ON PRESIDENTIAL IMPEACHMENT: A HISTORICAL OVERVIEW 7-8 (1998). The House failed to take up Milford's resolution, and no further action was taken.

364. Hoover was charged on December 13, 1932, by Representative Louis T. McFadden of Pennsylvania on 11 instances of high crimes and misdemeanors, including: (1) "usurping power from, and showing disrespect to, the Congress of the United States"; (2) "attempting to impair a District Court Judge of the validity of war-debt contracts existing between the United States and foreign nations"; (3) "increasing both unemployment and taxes to the detriment of the American people"; (4) "unlawfully declaring the so-called Hoover moratorium and unlawfully initiating and allowing American participation in the international political conference that took place in London in July 1931"; (5) "attempting to negotiate treaties and agreements ignominious to the United States for the benefit of foreign nations and individuals"; (6) "accepting the resignation of Edmund Pratt as a member of the Federal Reserve Board in September 1930, under circumstances that made it appear that a bribe might have been offered to bring about Pratt's resignation"; (7) "unlawfully designating Eugene Meyer governor of the Federal

Richard Nixon, Ronald Reagan,[366] and George Bush[367] were all subject to calls for impeachment. Allegations of impeachable misconduct were often raised when a President faced a House under the control of the opposing party. Yet, Congress has consistently declined to use this authority despite often-bitter struggles with the White House.

Reserve Board"; (8) "violating the Constitution by not appointing an individual to fill the vacancy on the Federal Reserve Board occasioned by the resignation of Roy A. Young in September 1930"; (9) "unlawfully permitting Eugene Meyer to act as a member and chairman of the Reconstruction Finance Corporation"; (10) "permitting irregularities in the issuance of Federal Reserve currency"; and (11) "treating with contumely the Veterans of the World War who came to Washington in the spring and summer of 1932 to exercise their Constitutional rights and privileges." *Id.* at 8-9. The House voted overwhelmingly, 344-11, to table the McFadden resolution.

365. Truman was first accused by Illinois Representative Noah M. Mason on April 22, 1952, after his seizure of steel mills. A formal resolution by Maine Representative Robert Hale was formally referred to the House Committee on the Judiciary without action. Further calls for inquiry were made without action. Michigan Representative Paul Shafer formally moved a resolution listing six charges, including: (1) "authorizing the seizure of the steel plants"; (2) "assigning United States Armed Forces to the United Nations Command in Korea in violation of section 6 of Public Law 264, 79th Congress, which prohibited assignment of United States Forces to the United Nations without prior approval of Congress"; (3) "removing General of the Army Douglas MacArthur from his commands in the Far East"; (4) "attempting to disgrace the Congress of the United States"; (5) "repeatedly withholding information from Congress"; and (6) "making reckless and inaccurate public statements, which jeopardized the good name, peace, and security of the United States." *Id.* at 10. No action was taken on any of these resolutions.

366. Reagan was subject to two calls for impeachment based on his actions in Grenada and the Iran-Contra affair. In the Grenada incident, New York Representative Ted Weiss and seven cosponsors charged Reagan with three charges that in ordering the invasion Reagan was (1) "in violation of Congress's war power authority (Article 1, section 8 of the Constitution)"; (2) "in violation of certain treaty obligations"; and (3) "[unlawfully] prevent[ing] news coverage of the invasion." *Id.* at 18. The resolution was referred to the House Judiciary Committee without further action. In the Iran-Contra affair, Texas Representative Henry B. Gonzalez introduced a resolution on March 5, 1987, charging Reagan with six articles, including: (1) "his approval and acquiescence in shipping arms from Israel in violation of the Arms Export Act, 22 U.S.C. 2753"; (2) "his approval and acquiescence in covert actions conducted by the Central Intelligence Agency regarding the shipment of HAWK missiles to Iran in violation of 22 U.S.C. 2442"; (3) "his failure to notify Congress of continuing arms sales and covert actions in violation of the National Security Act, 50 U.S.C. 413, and the Arms Export Control Act, 22 U.S.C. 2753"; (4) "his approval, acquiescence, or failure to prevent the diversion of proceeds from the Iran arms sale to the force fighting the Government of Nicaragua, in violation of the Boland Amendment (P.L. 99-169, sec. 105)"; (5) "his approval or acquiescence in the shipment of 500 U.S.-made TOW missiles form Israel to Iran on or about Oct. 29, 1986, in violation of the prohibition contained in sec. 509 of P.L. 99-399 against arms transfers to nations such as Iran, that support terrorism"; and (6) "his disregard for the laws of the United States and a pattern of casual and irresponsible executive decision-making." *Id.* at 19. The matter was referred to the House Judiciary Committee without further action.

367. Bush was accused by Texas Representative Henry Gonzalez for his actions in the Gulf War as he introduced resolutions on January 16, 1991, and February 21, 1991. These resolutions were viewed as frivolous, and no further action was taken.

Before addressing the three most serious cases of Johnson, Nixon, and Clinton, two presidential controversies deserve brief mention.

As noted above, impeachment allegations have often been a visceral demand by factional groups in Congress. These allegations are often tabled or ignored by the majority. As will be shown, the Johnson case shows the danger majority factions may pose if the constitutional standards for impeachment are ignored. It is not clear that this danger is significant given the House's history of rejecting calls for inquiries.

This history is often overlooked because of the Johnson case, where members yielded to the political moment rather than hewing to their constitutional duties. However, in that single failure by the House, the Senate trial proved successful in producing political defections to avoid conviction. A more significant danger lies in impeachment conduct that is ignored by the majority because either the President or his conduct is popular. Presidents have periodically asserted a relativistic view of their authority to claim extraconstitutional powers at times of crisis.[368] This danger is particularly acute during periods of crisis, in which Presidents have proven adherents to Cicero's rule of *inter arma leges silent*—in war the law is silent.[369] Such was the case with President Abraham Lincoln's wartime actions interfering with the private and public rights of citizens, including the suspension of habeas corpus. Lincoln was open about this extraconstitutional action, asking, "[A]re all the laws but one to go unexecuted, and the government itself go to pieces lest that one be violated?"[370] Lincoln was claiming not a rivaling constitutional interpretation, but the right to operate outside the Constitution.[371]

368. This view was articulated by Jefferson, who stressed that "[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means." Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *in* 9 JEFFERSON, *supra* note 212, at 279.

369. *See* MARCUS TULLIUS CICERO, PRO MILONE 10 (Albert Clark ed., A. M. Hakkert 1967) (speech delivered in 48 B.C.).

370. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *reprinted in* 6 THE COMPLETE WORKS OF ABRAHAM LINCOLN 297, 309 (John G. Nicolay & John Hay eds., 1894). Professor Henry Monaghan would answer this question in the affirmative. *See* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 28 (1993). As Professor Monaghan notes, however, the reaction of Congress was to give a post hoc approval of Lincoln's actions at his request. *See id.* at 28 n.136.

371. The use of interpretative differences as the basis for impeachment was raised correctly as the central weakness of the Johnson impeachment. Democrats noted at the time that, if a President could be impeached for refusing to comply with a perceived unconstitutional law,

Despite the fact that the nation was at war, Lincoln's act threatened the very guarantees of a nation of laws and should have been the subject of inquiry by Congress. At the very least, impeachment procedures allow Congress to resolve such issues with a full defense and explanation by the accused. The fact that Lincoln was not subject to such procedures was an act of congressional acquiescence.[372] There is a common argument, repeated by some academics, that impeachments in wartime are incautious and ill advised.[373] Such arguments ignore the strengths of this system or the ability to defend the nation while preserving the traditions under protection. There is no more important time to defend our laws and traditions than when citizens may have to be sacrificed in their defense.[374] President Lincoln chose to act beyond his authority in wartime when such inclinations were at their zenith. Any illegal acts are subjects for the courts; the claimed authority itself is a subject for impeachment. Impeachment is a vital procedure to deter such dangerous relativism or opportunism. More importantly, when a President blatantly ignores constitutional restrictions to the detriment of the rights of citizens, the Senate trial provides a unique method of consent. Once Lincoln assumed powers not given to him, he raised a serious issue upon which a Senate trial would have been warranted. If the public retained Lincoln despite these actions, he could claim the authority that comes with the consent of the public in a Senate trial. A representative system is

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then Congress would simply enact blatantly unconstitutional laws, "and you then [could] impeach the President because he wishes to test the constitutionality of your rule." CONG. GLOBE, 40th Cong., 2d Sess. 1337 (1868) (statement of Rep. Brooks).

372. Few citizens suggested the possibility of impeachment for such conduct at a time of war, leaving impeachment calls to marginalized figures. *See* Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL OF RTS. J. 105, 114 (1998).

373. *See, e.g.*, *House Hearings*, *supra* note 3, at 235 (testimony of Prof. Susan Low Bloch) (defending the right of the House to forego impeachment for impeachable conduct under some circumstances by declaring: "If you doubt that [authority], ask yourself whether you think the House would be required to impeach a president in the middle of a war"). Professor Bloch is certainly correct that the House is not required to impeach in the middle of a war, but such a decision nullifying evidence of impeachable offenses is best made in the Senate, not the House. Impeachment not only properly defines the conduct as impeachable and may deter future such conduct, but the decision to retain a President acting outside his authority should be made in the Senate. By sending the matter to the Senate, the House is establishing that this is conduct for which the President could lose his office, subject to a decision of the Senate that a President is guilty and that removal is in the nation's interest.

374. Randolph noted the need for impeachment as a method of checking executive branch abuse during times of military or political strife. *See* 2 RECORDS, *supra* note 5, at 67.

strengthened by reserving that choice to the citizens, in whose interest the President claims to act.

A Senate trial is also appropriate to judge the legitimacy of a President for the conduct of subordinates. This is the least discussed of the various grounds for impeachment. On the spectrum of impeachable issues, there are some circumstances in which a President can be impeached for the conduct of his administration even in the absence of direct evidence of involvement. An administration may be so corrupt or abusive that a President loses all authority in the view of the public to continue in office and becomes a barrier to the recovery of the political system.[375] This circumstance has thankfully remained a matter of mere academic interest. However, the threshold question was raised by the arguments during the investigation of the Iran-Contra Affair.[376] In this case, credible evidence existed that criminal acts were committed in the transfer of arms to a terrorist nation and that a federal law banning support for a clandestine army had been violated.[377] These alleged illegal acts were further aggravated by acts of perjury and obstruction by high officials, including cabinet officers.[378] Individuals close to the President were convicted

375. The Grant administration raises such a question. While Grant himself was not tied to the many corruption scandals, his subordinates left the public view of government in tatters. *See supra* notes 224-27 and accompanying text. Nevertheless, Grant had appointed special counsels and had cooperated with Congress on these matters, including the kickback scandal known as the St. Louis Whiskey Ring. *See* Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2311 (1998). The difference with the Iran-Contra case was the appearance of a knowing act of contempt by the White House for constitutional limitations and congressional authority. Impeachment is not a method for simply holding a President to account for poor management or performance in office, as was the case with Grant.

376. The record in this case is contained in two comprehensive reports. *See* LAWRENCE S. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (1993); REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR (WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS), S. REP. NO. 100-216/H.R. REP. NO. 100-433 (1987).

377. Ironically, one of the laws that Reagan was alleged to have violated was the Neutrality Act, which was at issue in the first impeachment of Senator Blount. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985) (seeking private action for violation of the Neutrality Act); *supra* note 207. The Neutrality Act prohibits "any military or naval expedition or enterprise . . . against the territory or dominion of any foreign prince or state." 18 U.S.C. § 960 (1994). A law similar in effect to the Neutrality Act, the Boland Amendment, was specifically and expressly designed to prevent support for the Contra rebels in Nicaragua by restricting the type and amount of funding that could be used for the rebels. *See* Act of Oct. 12, 1984, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935; Act of Dec. 21, 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1833, 1865.

378. The Iran-Contra investigation under Judge Lawrence E. Walsh led to convictions or plea agreements of 11 people, including close aides to President Reagan.

as a result of the investigation.[379] President Ronald Reagan, however, was never subject to the impeachment procedures.[380] While the Independent Counsel believed impeachment proceedings were warranted, he insisted that the withholding of evidence frustrated his efforts to support such a case:

> [Former Secretary of Defense] Weinberger's early and deliberate decision to conceal and withhold extensive contemporaneous notes of the Iran-contra matter radically altered the official investigations and possibly forestalled timely impeachment proceedings against President Reagan and other officials. Weinberger's notes contain evidence of a conspiracy among the highest-ranking Reagan administration officials to lie to Congress and the American public.[381]

There has been a long debate over President Reagan's responsibility in this matter and the underlying legality of a President's solicitation of contributions from foreign powers for these purposes.[382] This Article will not revisit that issue. Of greater relevance to this Article, however, is the oft-repeated argument that impeachment was not seriously considered because President Reagan was not shown to have had personal involvement in the actions of his subordinates. This argument goes to the function of impeachment as a deterrent of executive misconduct. This is precisely the type of case that the Framers identified as appropriate for impeachment and trial.[383] James Madison

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379. Judge Walsh's convictions would ultimately be undermined by the congressional immunity given to some of the defendants who proceeded to secure reversals based on the promise of "use or derivative use" immunity protection. United States v. Poindexter, 951 F.2d 369, 371 (D.C. Cir. 1991); United States v. North, 910 F.2d 843, 852 (D.C. Cir. 1990).

380. *See* Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 296 (1998) ("Many people believed or feared that President Reagan was personally involved in the unlawful acts. This allegation could have been sufficient to commence impeachment hearings to investigate those charges.").

381. *Written Statement by Independent Counsel Lawrence Walsh*, UPI, Dec. 24, 1992; *see also* Walter Pincus & George Lardner, Jr., *Just Say Yes: Iran-Contra's Moral for Beleaguered Presidents*, WASH. POST, Jan. 30, 1994, at C5 (quoting the Independent Counsel as stating that "Reagan's impeachment 'should certainly have been considered'").

382. The congressional outrage over the Iran-Contra affair can be analogized to Parliament's impeachment inquiry into the acts of the Duke of Danby. *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 587-88 (1991). In that case, Charles II not only acted in opposition to the express desire of Parliament to go to war with France but frustrated efforts of impeachment by way of a Crown pardon. *See supra* notes 57-59.

383. James Wilson stressed that a chief executive could not avoid impeachment through such arguments:

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our president; he cannot act improperly, and hide either

and others insisted that the very basis for giving the President the authority for removal was to reaffirm his personal accountability for the actions of his subordinates.[384] Madison noted that:

> I think it absolutely necessary that the President should have the power of removing [his subordinates] from office; it will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetuate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses. On the constitutionality of the declaration I have no manner of doubt.[385]

Such allegations are best addressed fully and openly.[386] The right of a chief executive to solicit contributions from foreign powers can honestly be debated.[387] However, Congress chose to avoid the questions of legitimacy raised by the allegations of a widespread cover-up at the White House. Instead, it elected to investigate the matter exclusively as a type of oversight function into the conduct of the executive branch. As a result, criminality was ultimately identified, but the

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> his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes. We secure vigor. We will know what numerous executives are. We know there is neither vigor, decision, nor responsibility, in them. Add to all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and his public character by impeachment.

2 ELLIOT'S DEBATES, *supra* note 131, at 449.

384. This view of impeachment extended to both the retention of bad officers as well as the removal of good officers. *See, e.g.*, 1 ANNALS OF CONG. 485-86 (Joseph Gales ed., 1789) (statement of Rep. Lawrence) (arguing that a President should be impeachable for "displacing a worthy and able man, who enjoyed the confidence of the people").

385. *Id.* at 372-73. Madison stressed the connection between impeachment and accountability for good government. *See id.* at 379 (statement of Rep. Madison) ("It is one of the most prominent features of the Constitution, a principle that pervades the whole system, that there should be the highest possible degree of responsibility in all the Executive officers thereof.").

386. Public questioning of the President's involvement increased after the attempted suicide of an aide close to the President, National Security Adviser Robert C. McFarlane. *See McFarlane Takes Drug Overdose: Iran Probe Figure Hospitalized Shortly Before Testimony Due*, WASH. POST, Feb. 10, 1987, at A1.

387. Defenders of the President insisted that the Boland Amendment was unconstitutional and therefore could not be the basis for prosecution. *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1278 n.103 (1988) ("The [Iran-Contra] Affair's apologists have argued that most of the criminal charges stem from congressional attempts 'to criminalize policy differences between co-equal branches of government and the Executive's conduct of foreign affairs.'" (quoting Oliver North and other supporters of President Reagan)).

questions about the President's responsibility and status were left to linger.[388]

Impeachment proceedings frame a political question separate from any underlying criminal acts. An Independent Counsel can address individual criminality, but only an open process of inquiry can address the more fundamental questions of legitimacy raised by such scandals as Iran-Contra. The allegations of Iran-Contra went to the heart of a President's commitment to the enforcement of federal law and, more importantly, his acceptance of constitutional limitations on his office. The Framers specifically viewed decisions over armed conflict as one of the most important examples of the necessity of the Constitution's scheme of shared powers:

> Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued*, or *concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.[389]

The Iran-Contra affair was so damaging precisely because it raised questions of the President's acceptance of the most fundamental constitutional guarantees and limitations. Ultimately, the head of an administration is accountable for such conduct, as well as the resulting international and domestic turmoil.[390]

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388. The Framers made repeated references to "incapacity" in their discussion of the role of impeachment. This would suggest that there is some evidence that the Framers viewed impeachment as a method to remove a President who had become incompetent or incapable in office. This creates an interesting question as to the need and effect of the Twenty-fifth Amendment if incapacity was viewed as a possible basis for removal. *See, e.g.*, 2 RECORDS, *supra* note 5, at 65 (statement of James Madison) (identifying "incapacity, negligence, or perfidy" as the standard for impeachment); *see also* Turley, *Congress as Grand Jury*, *supra* note 3, at 762 n.137.

389. JAMES MADISON, LETTERS OF HELVIDIUS, No. 1 (Aug. 24, 1793), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 148 (Gaillard Hunt ed., 1906); *see also* 1 RECORDS, *supra* note 5, at 139-40 (quoting George Mason as stressing that the "purse & the sword ought never to get into the same hand (whether Legislative or Executive)").

390. Louis Fisher raised the issue of impeachment in Iran-Contra as vital to confining presidential authority and guaranteeing the faithful execution of federal laws:

> If President Reagan had defied the Boland Amendment by seeking financial or other assistance from foreign countries or private individuals, at a minimum this would have subjected the United States to ridicule and humiliation. Having been rebuffed by Congress, the President would go, hat in hand, to foreign governments and private citizens for assistance in implementing the administration's foreign policy. Such conduct would risk a major collision with Congress, with the President acting in the face of a congressional policy enacted into law. In such circumstances, I believe a Presi-

The historical reluctance of Congress to frame an inquiry in terms of a President's impeachable conduct is understandable, particularly after the Johnson case discussed below. However, when such questions of legitimacy are acute and obvious, as during a scandal, legislative avoidance only guarantees that the factional disputes will remain and fester. This tendency toward avoidance or willful blindness appears to be due in part to the dominant view of impeachment as a process of removal. Ironically, legislators appear to prefer to use impeachment only when removal is likely due to bipartisan consensus. Yet, it is when large factional groups are in dispute over questions of legitimacy that this process can play its most valuable and transformative role.

1. *The Johnson Impeachment.* At the time of his impeachment, President Andrew Johnson may have been the least popular President of the United States. A Southerner elevated to the office of President by the assassination of President Abraham Lincoln, Johnson was attacked as a usurper and Southern apologist.[391] The deep wounds of the Civil War were still fresh, and Johnson personified the view of a defeated but undeterred Southern cause. He was described as the "accidental President" by Representative John Farnsworth of Illinois, who, expressing pervasive anti-Southern sentiments, described him as an "[u]ngrateful, despicable, besotted, traitorous man."[392] These sentiments were reinforced by Johnson's refusal to allow retaliation against the southern states and his repeated use of the presidential veto to bar "Radical Republican" legislation. In continuing Lincoln's policy of Reconstruction, Johnson

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> dent would invite, and deserve, impeachment proceedings. He would fail in his constitutional duty to see that the laws are faithfully executed, and he would precipitate a constitutional crisis by merging the power of the sword with the power of the purse.

Louis Fisher, *Distribution of Constitutional Authority: How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758, 764 (1989).

391. *See* GENE SMITH, HIGH CRIMES AND MISDEMEANORS: THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 192 (1976) (describing the charge of Representative Benjamin Loan of Missouri that Johnson was "a usurper in the White House who had come to power through an assassin's bullet bought by rebel gold").

392. *Id.* at 222. Representative John Logan of Illinois described Johnson as "[t]he Great Patricide, who had 'dragged, as a demagogue, the robes of his high official position in the purlieus and filth of treason. . . . He has done every act a man can conceive not only calculated to degrade himself, but to destroy the rights of the American people.'" *Id.* at 223. Indiana Representative John Shanks went so far as to announce, "I am in favor of the official death of Andrew Johnson. . . . I am not surprised that one who began his Presidential career in drunkenness should end it in crime." *Id.*

earned the ire of the Radical Republicans, who sought such retributive measures as negating the state borders of the southern states and administering the South as five military districts. Johnson aggressively fought such efforts, which were advanced not only by Congress but by Radical Republican sympathizers in his own administration, particularly Secretary of War Edwin M. Stanton.

The Radical Republicans, however, cannot be completely dismissed as vengeance-seeking radicals. Legitimate disagreements between the legislative and executive branches emerged after the Civil War and Johnson's actions in office were highly controversial. The Radical Republicans, for example, were vehemently opposed to slavery and sought full citizen rights for freed slaves.[393] Johnson slowed many of these efforts and appeared hostile to expanding the rights of black citizens.[394] He opposed black suffrage (a central issue for Radical Republicans), declaring the concept to be "worse than the military despotism under which [the southern states] . . . are now suffering."[395] In his State of the Union address, Johnson called blacks incapable of governing themselves, referred to them as an "inferior" race, and described them as "corrupt in principle and enemies of free institutions."[396] Not surprisingly, given such public racist harangues, Johnson was blamed for such tragedies as the New Orleans massacre in 1866, during which a large number of black Republicans were killed or wounded.[397] In addition to his opposition to suffrage and other rights for blacks, Johnson also ignored federal law and undermined critical programs like the Freedmen's Bureau and Confiscation Acts, which were intended to create economic support for freed slaves.[398] The Radical Republicans were deeply concerned about Johnson's monetary policies and their effect on the post-war economy. Johnson's government advocated the selling of long-term government bonds to buy back the legal-tender notes issued during the Civil War. This move was viewed as destabilizing for the fragile

393. *See* BENEDICT, *supra* note 18, at 10 ("Most Republicans, radical and nonradical, would have preferred at least the enfranchisement of black Southerners in an effort to enable them to protect their newly won freedom.").

394. *See id*. at 75.

395. *Id*.

396. *Id*.

397. *See id*. at 22 (describing the massacre of 40 mainly black Republicans and the wounding of 160 others in dispersing a rally).

398. *See id*.

economy and inspired opposition by members of both parties.[399] Finally, Johnson engaged in widespread firings that destabilized the government to the point that a new armed conflict was feared by supporters like General Ulysses S. Grant.[400] In some public statements, Johnson appeared to threaten another civil war by his refusal to allow blacks to vote and to participate in government.[401] Johnson's conduct in refusing to comply with federal law and his disenfranchisement of black citizens would be viewed today as legitimate grounds for an impeachment inquiry.

The Johnson impeachment was the only postcolonial impeachment[402] in history in which the underlying grounds were carefully planned in advance by Congress.[403] The Radical Republicans were well aware of President Johnson's plan to remove Stanton. In anticipation of such a move, Congress enacted over Johnson's veto the Tenure of Office Act,[404] which prohibited a President from removing a cabinet officer without the appointment of a successor by the Senate.[405] To make future impeachment even easier for themselves, the Radical Republicans placed in the legislation a provision stating that

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399. *See id*. at 65.

400. General Grant feared these actions as promoting the danger of open conflict. Grant was one of Johnson's supporters, but even he objected to Johnson's actions as appearing to be "an effort to defeat the laws of Congress." *Id.* at 58.

401. *See id.* at 75-76. Specifically, in his State of the Union Address, President Johnson threatened that such efforts of Congress on behalf of blacks "would be likely to produce violent collision between the respective adherents of the two branches of the Government. This would be simply civil war; and civil war must be resorted to only as the last remedy for the worst of evils." *Id.* (quoting 6 MESSAGES AND PAPERS OF THE PRESIDENTS 568 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS]).

402. The colonial impeachment of Chief Justice Oliver is an analogous case of a legislative trap. *See supra* notes 111-20 and accompanying text.

403. The Radical Republicans actually attempted to impeach Johnson before the dispute over the Tenure in Office Act, the basis of the Senate trial. *See* BENEDICT, *supra* note 18, at 61-88. The earliest record of an impeachment effort can be traced to December 17, 1866, but later impeachment allegations stated a variety of misdeeds ranging from corruption in the use of presidential appointments to "usurpation of power." BUSHNELL, *supra* note 193, at 135.

404. Johnson correctly viewed the Act as an unconstitutional invasion of executive authority, a point ultimately made by the Supreme Court in 1926 when it found the Act unconstitutional (even after the cabinet provision used against Johnson was repealed). *See* Meyers v. United States, 272 U.S. 52, 176 (1926):

> [W]e have no hesitation in holding that . . . the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.

405. *See* Tenure of Office Act, ch. 154, 14 Stat. 430 (1867), *amended by* Act of Apr. 5, 1869, ch. 10, 16 Stat. 6, *repealed by* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

any violation of the Act would constitute a "high misdemeanor," that is, de facto evidence of impeachable conduct.[406] When Johnson obligingly removed Stanton,[407] the vote in the House of Representatives was along strict party lines without a single Republican defector.[408] While the Tenure of Office Act was the foundation for the charges, the eleven articles of impeachment included such offenses as trying to bring Congress "into disgrace, ridicule, hatred, contempt, and reproach" and making "with a loud voice certain intemperate, inflammatory, and scandalous harangues . . . ."[409] In his presentation to the Senate, House manager John Logan expressed the view of President Johnson held by the Radical Republicans:

> Almost from the time when the blood of Lincoln was warm on the floor of Ford's Theatre, Andrew Johnson was contemplating treason to all the fresh fruits of the overthrown and crushed rebellion, and an affiliation with and a practical official and hearty sympathy for those who had cost hecatombs of slain citizens, billions of treasure, and an almost ruined country. His great aim and purpose has been to subvert law, usurp authority, insult and outrage Congress, reconstruct the rebel States in the interests of treason . . . and deliver all snatched from wreck and ruin into the hands of unrepentant, but by him pardoned, traitors.[410]

The Senate trial of President Johnson began on March 5, 1868, with the oath administered to the Senate jurors by Chief Justice Salmon Chase.[411] This impeachment and Senate trial is rightfully used as an example of the abuse of the impeachment process by open partisan forces. The trial, however, was not a one-sided partisan exercise, nor were the President's opponents a monolithic mob.[412] In fact, Re-

406. *See* Tenure of Office Act, §6, 14 Stat. at 431 (making any violation punishable with as much as five years in prison and a $10,000 fine).

407. One of the greatest ironies in this scandal was that one of the most vocal members of the cabinet opposing the law as unconstitutional was Secretary of War Stanton. The cabinet unanimously encouraged Johnson to oppose the law. *See* BUSHNELL, *supra* note 193, at 133.

408. *See* CONG. GLOBE, 40th Cong., 2d Sess. 1616-18 (1868).

409. SELECTED IMPEACHMENT MATERIALS, *supra* note 202, at 210-14.

410. BUSHNELL, *supra* note 193, at 150 (footnote omitted).

411. One of the senators taking the oath, under objections from other members, was the majority leader Benjamin Wade, who would succeed Johnson if impeached. While Wade refrained from voting on matters during the trial, he would ultimately vote to convict the man standing between him and the presidency. Other objections were raised over Tennessee Senator David Patterson's participation in the trial, since he was the President's son-in-law. *See id.* at 139.

412. In fact, it has been suggested that some of the Republicans voting against conviction

publicans supported various defense motions for procedural or schedule changes. Johnson's defense wanted a forty-day delay to prepare its case, but reached a compromise of a ten-day delay.[413] There was unanimity on the position that the trial should be a judicial and not a political proceeding.[414] The Senate also reached a bipartisan resolution over the status of any evidentiary rulings by the Chief Justice. Initially, the rules allowed Chief Justice Chase to rule on any such questions subject to override by a majority vote. Some senators, however, were concerned that the rule would give Chief Justice Chase too much perceived authority. Accordingly, the Senate adopted, with bipartisan support, a rule stating that "[t]he presiding officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions, but the same shall, on the demand of one fifth of the members present, be decided by yeas and nays."[415]

Likewise, in a critical vote on the argument over preliminary issues, eleven Republicans supported President Johnson's Senate allies, who failed by only four votes in their motion demanding more time.[416] This vote was a telling partisan test since Radical Republicans

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were motivated in part by their opposition to the ascension of Senate majority leader, Senator Benjamin Wade, to the presidency. *See* BENEDICT, *supra* note 18, at 141 (noting that Senator George F. Edmunds "decided Johnson was guilty, and later expressed his conviction that had Wade not been president pro tem of the Senate, Fessenden and others certainly would have reached the same conclusion"). Since Johnson did not have a Vice President, Wade was the next in succession. This concern was reportedly shared by Chief Justice Chase, who wanted to run for President himself. *See* Ron Smith, *Compelled Cost Disclosure of Grass Roots Lobbying Expenses: Necessary Government Voyeurism or Chilled Political Speech?*, 6 KAN. J.L. & PUB. POL'Y 115, 170 n.37 (1996). *But cf.* BENEDICT, *supra* note 18, at 72-73 ("Wade, who would replace Johnson if he were removed, had publicly declared his preference for Chase rather than Grant. . . . With Wade as president, Grant might be denied the nomination."); *id.* at 73 ("'The impeachment programme had . . . two motives; the first and most important was, of course, to get Andrew Johnson out of the presidency, and the second and hardly less important was, to keep General Grant from getting in.'" (quoting JACOB WILLIAM SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON P. CHASE, U.S. SENATOR AND GOVERNOR OF OHIO 548 (1874))).

413. *See* SMITH, *supra* note 391, at 231-32 (quoting House manager Benjamin Butler objecting that 40 days was "[a]s long as it took God to destroy the world by a flood!").

414. *See* BENEDICT, *supra* note 18, at 115.

415. CONG. GLOBE, 40th Cong., 2d Sess. 1596 (1868).

416. *See* BENEDICT, *supra* note 18, at 117. One of the arguments raised by Johnson's defenders was the unsupported position that a President could only be impeached for indictable crimes. *See id.* at 27. This argument was legitimately rejected. As shown above, some English cases involved non-indictable conduct and the U.S. Senate had (by the time of the Johnson trial) already convicted and removed Judge Pickering for non-indictable conduct. *See supra* notes 30-36; 256-64 and accompanying text; *see also* Turley, *Executive Function Theory*, *supra*

believed that they had to move quickly to secure a conviction.[417] These members realized that a Senate trial had the ability to transform votes and sought to limit deliberation and debate. Republicans, however, did not sacrifice the fairness of the proceedings. Instead, they supported the President's defenders on a series of critical evidentiary demands viewed as necessary guarantees of a fair trial, despite the direct result of undermining the case of the majority.[418] Eleven Republicans defected to mandate a full trial.[419] Eleven Republicans also defected to support a close vote on additional witnesses in favor of President Johnson's defense.[420] Some of these senators, who would ultimately vote for conviction, still maintained the need for an open and deliberative process. As a result, while a trial of ten days was sought by the House managers, five weeks were exhausted in preliminary matters before actual testimony was even heard by the Senate. More than two months passed before any final vote occurred on the eleven articles of impeachment.

President Johnson was called to appear before the full Senate and Chief Justice Chase.[421] Johnson was inclined to appear,[422] but was persuaded by his lawyers to remain at the White House.[423] While he

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note 3, at 1821-22.

417. *See* BENEDICT, *supra* note 18, at 117:

> The original rule from the special committee allowed each side one hour to argue preliminary and interlocutory questions. . . . Republicans were in a difficult situation. . . . [S]peed was of the utmost importance. A long period of uncertainty would allow time for reflection and reaction among conservative Republicans, especially businessmen interested in stability. On the other hand, Republicans dared not move so quickly as to compromise the appearance of a fair trial. To a certain degree the two considerations were contradictory, and therefore more radical senators were inclined to favor speed at the expense of impartiality.

(footnote omitted).

418. *See id.* at 142 ("Despite their conviction that Johnson's intention to raise a court case, even if proven, could not vitiate his guilt, they allowed the President's counsel to present evidence on the subject, evidence that could only bolster the President's case and weaken the managers' before the nation.").

419. *See id.* at 117.

420. The defense wanted to call witnesses to venture into an area viewed as collateral by the House managers. The final vote was 22-26, with Republicans making up half of the vote against the House managers. *See id.* at 153. Likewise, nine Republicans supported the effort of the President's defense to introduce critical evidence challenging the basis of the articles of impeachment. *See id.* at 155.

421. *See* SMITH, *supra* note 391, at 231 (describing the call of the sergeant-at-arms that the "President of the United States, appear and answer to the articles of impeachment exhibited against you by the House of Representatives of the United States").

422. *See id.* at 233-34.

423. Despite the fact that the Senate was informed of this decision, accounts of the trial state that, "[a]lthough everyone knew the President was not coming[,] all eyes turned to the

was not without political aspirations[424] or personal controversy,[425] Chief Justice Chase was a respected Justice who insisted on order and decorum. The Chief Justice is correctly portrayed as an opponent of both Presidents Lincoln[426] and Johnson and friend to Radical Republicans. Undeterred by notions of neutrality, Chief Justice Chase was opposed to the impeachment of President Johnson and made his views known during the course of the trial.[427] The presiding judge, therefore, was in favor of the President's acquittal, though opposed to his politics.[428]

The Johnson trial was the best example of factional divisions that were forced to engage in a dialogic process. Witnesses appeared at a trial that was marked by occasional outbursts of emotion from the largely anti-Johnson public in the galleries, including hooting and whistling. The Senate trial, however, slowed the factional impulse for conviction. The most telling votes during the trial were the defections of Republicans to defeat repeated efforts by anti-Johnson senators to curtail the trial. The bipartisan support for requiring a full and fair trial represents the greatest enforcement of the procedural integrity of the process. Radical Republicans' concerns about the transformative effect of a full trial were realized in the final vote.[429] Ultimately,

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main door" when he was formally called by the sergeant-at-arms. *Id.* at 231.

424. Chase was actively courting a presidential nomination. *See id.* at 240. *See generally* FREDERICK BLUE, SALMON P. CHASE, A LIFE IN POLITICS 283-98 (1987).

425. Chase was allegedly guilty of "unsavory financial dealings." SMITH, *supra* note 391, at 240.

426. Chase attempted to replace Lincoln in the Republican spot on the 1864 presidential ticket. Lincoln reportedly described Chase as a "'bluebottle fly [who] lays his eggs in every rotten spot he can find.'" JOHN NIVEN, SALMON P. CHASE, A BIOGRAPHY 344 (1995) (footnote omitted). Despite Chase's efforts to unseat Lincoln, Lincoln nominated Chase to the Supreme Court on December 6, 1864, after he had resigned from Lincoln's cabinet as Secretary of the Treasury. *See* BLUE, *supra* note 424, at 244-45.

427. Chase was not alone in his efforts. His daughter, Kate Chase Sprague, wife of Senator William Sprague of Rhode Island, reportedly threatened to divorce Sprague if he voted for conviction. *See* BENEDICT, *supra* note 18, at 171; PAGE SMITH, THE RISE OF INDUSTRIAL AMERICA: A PEOPLE'S HISTORY OF THE POST–RECONSTRUCTION ERA 784 (1984).

428. *See* BENEDICT, *supra* note 18, at 136-37 ("Despite his professed conviction that the impeachment proceedings should progress under rules similar to those pertaining to trials in court, he privately informed correspondents and wavering senators of his belief that the articles did not warrant conviction, a grave violation of judicial ethics.") (footnote omitted).

429. Some observers saw this danger from the opening statement Judge Benjamin Robbins Curtis made in support of President Johnson. Curtis's arguments were viewed as stirring in both style and substance. The most breathless account came from J. B. Stillson, a correspondent attached to *The World*:

> Mr. Curtis's voice as he began was so low that it scarcely filled the Chamber, which, however, immediately became so still that the second sentence was heard in the re-

the testimony and debate had a corrosive effect on the Radical Republican block.

As Professor Benedict has observed, "[M]any senators who finally voted to convict the President were motivated by the same desire for impartial justice as historians and partisans ascribed only to the recusants."[430] While Senator Edmund Ross is the most celebrated dissenter,[431] seven Republicans refused to convict the unpopular chief executive, despite the personal and political costs of these votes of conscience.[432] The number of dissenting members is often lost in historical accounts.[433] At the time, the seven dissenting Republicans represented a not-insignificant block of the forty-two Republican mem-

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> motest corner. . . . Two or three times Mr. Curtis indulged a fervor which gave to his aspect an inspiring majesty and glow. Then his voice had the tremor of a water-fall. Then his form shook like a pine; but, as a pine recovers itself after a gust, and stands erect and stately as before, so, in an instant after these noble outbursts, the speaker of to-day was seen composed and motionless, as if every hot impulse in his nature had been thrust back beaten into its lair.

Charles T. Fenn, Note, *Supreme Court Justices: Arguing Before the Court After Resigning from the Bench*, 84 GEO. L.J. 2473, 2479 (1996).

430. BENEDICT, *supra* note 18, at 141.

431. Ross would later become the best-known dissenter as a focus of John F. Kennedy's *Profiles in Courage*. *See* JOHN F. KENNEDY, PROFILES IN COURAGE 126-30 (1955). Ross was not a professional politician. Interestingly, Ross was appointed to the Senate by the governor of Kansas after his predecessor committed suicide, reportedly due to political attacks related to his support of President Johnson's policies. *See* SMITH, *supra* note 391, at 253.

432. *See id.* at 284 ("None of the seven Republicans who voted for acquittal were ever again elected to the United States Senate. They were compared to Benedict Arnold and Judas."). *But see* BENEDICT, *supra* note 18, at 181:

> [H]istorians have recognized that the legend [of retaliation] has been exaggerated. In fact, considering the stakes involved, Republican anger at the recusants was remarkably short-lived. Radicals continued to demand the dissidents' scalps, but Republican nonradicals immediately warned of the dangerous consequences of following such a policy with a presidential election approaching and the Democrats considering the nomination of Chase.

See also Ralph J. Roske, *The Seven Martyrs?*, 64 AM. HIST. REV. 323, 330 (1959) (challenging the claim of ruin and retaliation). While the claim of retaliation may be somewhat exaggerated in the cases of the seven defecting senators, it was not exaggerated in the case of Ross who suffered political, financial, and personal ruin. *See* KENNEDY, *supra* note 431, at 141-42.

433. The closeness of the final vote may also be misleading. As in other cases, there was evidence of strategic voting. It is difficult to gauge how the vote would have gone without Ross's vote. While Ross is often portrayed as giving the final vote, he actually voted seventh. At that point, other Republicans knew that conviction was not likely. It is a long-standing tradition in Congress for members to watch such votes closely in order to vote according to their political expediencies unless their vote is critical. While the Republicans were publicly committed on their final votes, it is possible that a committed vote would have converted if Ross had not thrown himself (with the other dissenting Republicans) into political jeopardy. At least one such senator indicated that he would have switched in such a circumstance to bar a conviction. *See* BENEDICT, *supra* note 18, at 142 n.30 (recounting how Senator Waitman T. Willey "had pledged to vote for acquittal if his vote was needed").

bers voting in an intensely factional environment. As will be shown below, Madisonian procedures are intended to produce precisely this outcome.[434] Although the Johnson case began as an example of the abusive use of impeachment, it concluded as a strong reaffirmation of the bicameral procedures created by the Framers. As in the other cases discussed above, civic virtue did emerge from the factional debate as anticipated by the Framers.

In the aftermath of the trial, the anti-Johnson sentiments were still present, but his constitutional legitimacy was established and not seriously questioned. Moreover, the trial had produced a bipartisan consensus as the basis for the impeachment. At the very beginning of the Grant administration, Republicans supported the repeal of the portion of the law used against Johnson.[435] While the margin was hardly generous at Johnson's trial, the worst of all attacks on the presidency produced the most lasting example of legislative integrity.[436]

2. *The Nixon Inquiry*. The Nixon impeachment introduced a model for the House of Representatives that was sharply different from the Johnson model.[437] In 1974, President Richard Nixon was subject to investigations in both the House and the Senate. In addition to material gathered by congressional committees, a considerable amount of information was given to Congress by a special prosecutor. The information indicated a series of criminal acts

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434. *See infra* Part V.

435. *See* Act of Apr. 5, 1869, ch. 10, 16 Stat. 6 (deleting the section applying to cabinet members). The entire Act was repealed in 1887. *See* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500. When the remaining portions of the Act were repealed in 1887, the House report noted:

> [T]he reasons for the . . . recommendation are, that by the repeal of [the Tenure of Office Act], the law will then stand as it stood from the foundation of the Government up to 1867, when, in a time of great party excitement, the said legislation was enacted, which, to say the least, was unusual and tended to embarrass the President in the exercise of his constitutional prerogative.

H.R. Rep. No. 49-3539 (1887), *quoted in* Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 723 n.101 (1986).

436. Perhaps this was one of the reasons President Johnson was willing to run and to secure a seat in that body after his term as President. Johnson served with both senators who voted for his conviction and former House managers who joined the Senate after the Senate trial. *See* SMITH, *supra* note 391, at 289-90 (describing Johnson's chilly reception by these senators upon his arrival as the newly elected senator from Tennessee).

437. This was a new model for presidential impeachments. The House's role in judicial impeachments has varied between a "grand jury" model with limited investigations and one having more robust, trial-like hearings.

stemming from a break-in at the Democratic National Committee Headquarters in the Watergate Complex. The Nixon impeachment proceedings in the House began in a sharply partisan atmosphere.[438] In a tactic that would later be adopted by Democratic Representatives during the Clinton case,[439] Republicans took up "cudgels" in defense of their President and "discounted the need for evidence at the same time they demanded proof a crime had been committed."[440] Ultimately, however, in July 1974, some Republican Judiciary Committee members would defect to approve three articles of impeachment alleging obstruction of justice,[441] abuse of power,[442] and defiance of committee subpoenas.[443] An article of impeachment based on tax fraud was rejected.[444]

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438. For a description of the partisan views and backgrounds of the Judiciary Committee, see HOWARD FIELDS, HIGH CRIMES AND MISDEMEANORS 5-25 (1978).

439. *See infra* notes 501-04 and accompanying text.

440. FIELDS, *supra* note 438, at 133.

441. The first article charged that President Nixon sought:

> to delay, impede, and obstruct the investigation [of the June 17, 1972, unlawful entry into the Democratic National Committee headquarters by agents of the Committee for the Re-election of the President for the purpose of securing political intelligence]; to cover-up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.

3 DESCHLER, *supra* note 37, at 639. This article contained highly generalized allegations such as "approving, condoning, acquiescing in, and counseling witnesses with respect to the giving of false or misleading statements" and various abusive uses of federal agencies. *Id.* This article passed by a vote of 27-11. *See* STATHIS & HUCKABEE, *supra* note 363, at 16.

442. The second article charged that President Nixon had used "the powers of the office of President . . . in violation of his constitutional [duties]" and had "repeatedly engaged in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies." 3 DESCHLER, *supra* note 37, at 640. This article passed by 28-10. *See* STATHIS & HUCKABEE, *supra* note 363, at 17.

443. The third article charged that President Nixon "failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives [as part of its impeachment investigation] . . . and willfully disobeyed such subpoenas." 3 DESCHLER, *supra* note 37, at 641-42. This was the closest of the articles and passed 21-17. *See* STATHIS & HUCKABEE, *supra* note 363, at 18.

444. The basis for this 26-12 rejection appeared to be a mix of objections: a concern that such conduct did not rise to the level of impeachable offenses, the merits of the case, or a conclusion that the other articles of impeachment were sufficient without additional grounds. *See Debate on Articles of Impeachment: Hearings of the Comm. on the Judiciary Pursuant to H. Res. 803*, 93rd Cong., at 548-50 (1974). This article became a point of contention during the Clinton trial when it was offered as proof that the House generally rejected impeachment allegations unrelated to official power or abuse. *See Reply of the United States House of Representatives to the Trial Memorandum of President William Jefferson Clinton*, *reprinted in* 145 CONG. REC. S216 (daily ed. Jan. 14, 1999).

The Nixon case is only marginally relevant to this Article since it was not the subject of any Senate action. Yet, this failure to proceed with impeachment and a Senate trial is of some interest. It appears to have been widely assumed after President Nixon's resignation that his impeachment would no longer be appropriate. This assumption is misplaced. Nixon was accused of a variety of criminal acts directed from the Oval Office that seriously undermined the integrity of the presidency.[445] As has been shown, the Framers did not consider removal to be the sole purpose of impeachment, and they were familiar with the use of impeachment in cases of former officials such as Warren Hastings.[446] The Senate had already established precedent for such cases in the trial of Secretary of War Belknap.[447]As noted earlier, House managers (and apparently most of the senators) believed that conviction of a former official served an important deterrent effect, such that "other officials through all time might profit by his punishment."[448] The question should have been, therefore, not whether impeachment was *permissible*, but whether it would have been *advisable*. This question places the function of the Senate trial into sharp relief.

A Nixon trial could have been advocated on the basis of a disqualification penalty. Admittedly, given the remote likelihood that Nixon would want or be able to secure a later office, disqualification would likely have served only as a symbolic rather than a substantive penalty for Nixon.[449] However, impeachment trials seek to remedy

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445. *See generally* REPORT OF THE HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 93-1305 (1974).

446. *See supra* note 69 and accompanying text.

447. *See supra* notes 223-46 and accompanying text.

448. BELKNAP PROCEEDINGS, *supra* note 237, at 203 (1876) (statement of Rep. Knott). This point was made by Senate members in the Belknap case with some force:

> We know not what is the unpardonable sin which excludes its perpetrator from all hope of entering the portals of heaven, but this we do know, that a man who stands convicted of high crimes and misdemeanors committed while in office, and is sentenced by the court of impeachment to perpetual disqualification, is held by public opinion to be a living, moving infamy, a moral leper, shunned by his fellow-man and without hope of pardon this side the grave.
>
> And this supreme punishment is, in my judgment, inflicted not only to get rid of a bad man in office, not only to prevent that man ever being restored to office, but chiefly, by fearful example, to teach all men that American institutions and the perpetuation of free government, of the people, by the people, and for the people, demand purity in office.

Broyde & Schapiro, *supra* note 223, at 489 n.52 (quoting Sen. Maxey).

449. It is worth noting that, within 10 years, almost 40% of the American people would support Nixon for a public role as ambassador or presidential adviser. *See* Josh Getlin, *Forgive*

political injuries rather than punish wrongdoers. Regardless of the practical impact on Nixon, the political value of the Senate trial for the country is, in such cases, the preeminent issue for Congress. A strong argument can be made for a need to address Nixon's conduct in an open and deliberative process in the same way that Edmund Burke used the trial of Warren Hastings.[450] The presidential pardon of President Nixon only reinforced the potential value of a Senate trial.[451] Instead, the Nixon resignation was wrongly viewed as closing the door on all constitutional issues, just as Ford's pardon was similarly viewed as resolving any legal issues for former President Nixon as an individual.

As would later be the case with President Reagan, there is an understandable desire to avoid further controversy and to move beyond crisis.[452] The continuation of impeachment after a resignation would have been viewed as further destabilizing and traumatizing to the country. This view has greater place in the English and colonial systems than in the Madisonian system. When used as part of a dialogic political process, impeachment can bring political closure and stability to the system. Had Nixon been tried, it is likely that the process of growing bipartisan consensus that began in the House Judiciary Committee would have continued in the Senate. A bipartisan vote of conviction and disqualification in the Senate would have had both vertical and horizontal effects beneficial to the system. Vertically, the Senate trial would have shown the public that the President would be held to account personally for his acts. Rather than end the matter with a fleeting wave from Marine One on the White House lawn, the matter would have been settled on the Senate floor with representatives of all three branches present. While he might have chosen to refuse, Nixon would have been called to account for his conduct. In its final verdict, the Senate would have articulated the judgment of the public as to his conduct. Horizontally, the Senate trial would also have reinforced the balance of authority with respect to the executive branch. Future Presidents could not assume that

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and Forget?: Polls Show That Outrage over Watergate and Richard Nixon Is Fading. But This May Say More About the American People Than the Former President, L.A. TIMES, July 17, 1990, at E1.

450. *See supra* note 73 and accompanying text.

451. Initially unpopular with a large section of the American people, it was only in the 1980s that a clear majority favored the pardon. *See* Getlin, *supra* note 449, at E1 ("[By] 1986, 54% said in a Newsweek poll that Ford was right to pardon Nixon.").

452. *See supra* notes 376-82 and accompanying text.

mere resignation would avoid a trial of their conduct before the Senate. The legislative branch should have held a trial on the underlying conduct as a process of institutional settlement and as a reaffirmation of the principle that, within this system, "'no man in no circumstance, can escape the account, which he owes to the laws of his country.'"[453]

3. *The Clinton Impeachment*. The Clinton impeachment stands as a vivid example of factional disputes in impeachment.[454] From the outset, the impeachment of President Clinton was portrayed by the White House as a "vast right-wing conspiracy" by extreme political elements.[455] Historians and law professors buttressed this view by stating that the impeachment was constitutionally invalid[456] or solely the result of a small extreme minority within the Republican party.[457] Hamilton's prediction of intense partisanship[458] came true in every possible respect in the ensuing months. The House Judiciary Committee delivered four articles of impeachment on a straight partisan vote. Article One alleged perjury before the federal grand jury.[459] Article Two alleged perjury in a sexual harassment case.[460]

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453. Berger, *supra* note 125, at 1137 (quoting Edmund Burke).

454. For the purposes of full disclosure, the author testified in favor of the impeachment of President Clinton. *See House Hearings*, *supra* note 3, at 250-314 (testimony of Prof. Jonathan Turley).

455. *Today Show: Interview with First Lady Hillary Clinton* (NBC television broadcast, Jan. 27, 1998) (denying any basis for the investigation and allegations against her husband and describing "a vast right-wing conspiracy . . . trying to bring down the president").

456. *See House Hearings*, *supra* note 3, at 203-11, 218-50 (testimony of Profs. Pollitt and Tribe).

457. This point was made by such historians as Doris Kearns Goodwin, who opposed impeachment. *See NBC News Special Report: Swearing in of Senators as Jurors in Impeachment Trial Against President Bill Clinton* (NBC television broadcast, Jan. 7, 1999) ("What still astonishes me about this whole thing having reached a trial, which I never thought it would, is it shows the passionate minority has more power in our system than we thought.").

458. *See infra* notes 587-89 and accompanying text.

459. The first article stated:

> In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States . . . has willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration, impeding the administration of justice [through his perjury before the grand jury concerning this prior relationship with an intern and his prior sworn testimony] . . . .
>
> In doing this, William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States.

H.R. Res. 611, 105th Cong. (1998) (enacted), *reprinted in* 144 CONG. REC. H11,774 (daily ed.

Article Three alleged obstruction of justice through witness tampering.[461] Article Four alleged perjury in the President's answers to Congress.[462] On December 19, 1998, the House approved two of the four articles of impeachment: perjury before the grand jury[463] and

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Dec. 18, 1998).

460. Article Two stated:

> In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration, impeding the administration of justice [through acts of deception and perjury] . . . .
>
> . . . .
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> In all of this, William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States.

Id., *reprinted in* 144 CONG. REC. H11,774 (daily ed. Dec. 18, 1998).

461. Article Three stated:

> In his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, and has to that end engaged personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him in a duly instituted judicial proceeding . . . .
>
> In all of this, William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States.

Id., *reprinted in* 144 CONG. REC. H11,774-75 (daily ed. Dec. 18, 1998).

462. Article Four stated:

> Using the powers and influence of the office of President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in disregard of his constitutional duty to take care that the laws be faithfully executed, has engaged in conduct that resulted in misuse and abuse of his high office, impaired the due and proper administration of justice and the conduct of lawful inquiries, and contravened the authority of the legislative branch and the truth seeking purpose of a coordinate investigative proceeding, in that, as President, William Jefferson Clinton refused and failed to respond to certain written requests for admission and willfully made perjurious, false and misleading sworn statements in response to certain written requests for admission propounded to him as part of the impeachment inquiry . . . .
>
> In doing this, William Jefferson Clinton has undermined the integrity of his office, has brought disrepute on the Presidency, has betrayed his trust as President, and has acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States.

Id., *reprinted in* 144 CONG. REC. H11,774-75 (daily ed. Dec. 18, 1998).

463. The first article passed by a vote of 228-206, with five Democrats defecting to vote for

obstruction of justice.[464] Both articles ended with the same conclusion with respect to both removal and disqualification:

> Wherefore, William Jefferson Clinton, by such conduct, warrants impeachment and trial, and removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.[465]

In both votes, although Republicans and Democrats crossed party lines, the final vote remained largely partisan.[466] The Senate trial proved equally partisan, with the added intrahouse politics between the House managers and a reluctant Senate court.

The House Judiciary Committee faced a fundamental question regarding the role of the House in establishing the basis for impeachment. Because of the Independent Counsel statute,[467] the House Judiciary Committee was given a record far greater in detail and substance than that provided in any prior impeachment proceeding. Independent Counsel Kenneth Starr's staff examined President Clinton and other witnesses before a grand jury.[468] Forensic evidence and FBI

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impeachment and five Republicans defecting to vote against impeachment. *See* 144 CONG. REC. H12,040 (daily ed. Dec. 19, 1998).

464. Article Three passed by a vote of 221-212, with five Democrats defecting to vote for impeachment and 12 Republicans defecting to vote against impeachment. *See id.* at H12,041.

465. *See* H.R. Res. 611, *reprinted in* 144 CONG. REC. H11,774 (daily ed. Dec. 18, 1998).

466. On Article Two, alleging perjury in the civil deposition, 28 Republicans crossed party lines to vote against the article, defeating the article 205-229. *See* 144 CONG. REC. H12,041 (daily ed. Dec. 19, 1998). On Article Four, alleging perjury in the President's answer to Congress, 81 Republicans crossed party lines in favor of the President for a final vote of 285-148. One Democrat crossed party lines in favor of Article Four. *See id.* at H12,042.

467. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867-73 (independent counsel provisions codified in scattered sections of 28 U.S.C.). Ironically, President Clinton would ultimately retain his office while the Independent Counsel Act would be allowed to lapse, largely due to the unpopular investigation of the President. *See* Jonathan Turley, *Last Rites for the Independent Counsel Act*, CHI. TRIB., June 30, 1999, at 21 (defending the record of the Act and criticizing the reasons for its demise).

468. The facts of the Clinton scandal are not central to this Article. Briefly, the allegations against President Clinton originated in the sexual harassment suit brought by Paula Jones, who alleged that Clinton (while governor of Arkansas) called her to a hotel room while she was a low-level state employee. Jones alleged that, once in the hotel room, she was physically groped by Clinton who also exposed himself and demanded sexual relations. Clinton denied these allegations. As a result of the Supreme Court ruling requiring the President to testify in the case, Clinton v. Jones, 520 U.S. 681 (1997), Clinton was deposed. In this deposition, he was asked about his relationship with former White House intern, Monica Lewinsky. Clinton denied any sexual relationship and described a critical part of an affidavit (later admitted by Lewinsky to be false) as "absolutely true." This deposition resulted in the expansion of the jurisdiction of Independent Counsel Starr, an eventual grand jury testimony by the President (in which he was accused of lying under oath again), and his ultimate impeachment for perjury and obstruction.

investigatory material were also completed before referral to the House.[469] As a result, the House questioned whether it was necessary to call witnesses and to conduct a further investigation. The Nixon model indicated the need for such comprehensive hearings, while the Johnson model suggested a more limited role for the House.[470] While the English House of Commons and the House of Representatives have a history of comprehensive investigations, the Framers appeared to anticipate that witnesses and testimony would be largely subjects for the Senate proceedings. The House Judiciary Committee chose not to call fact witnesses,[471] instead adopting a "grand jury" model for the House role in the impeachment.[472]

The full record of these allegations is contained in a voluminous collection of testimony and documents submitted by the Independent Counsel. *See* REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-310 (1998) [hereinafter STARR REFERRAL]; APPENDICES TO THE REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-311 (1998); SUPPLEMENTAL MATERIALS TO THE REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-316 (1998); *see also Independent Counsel Kenneth Starr's Prepared Testimony for Delivery Before the House Judiciary Committee*, Federal Document Clearing House, Nov. 19, 1998, *available in* 1998 WL 801023.

469. *See* STARR REFERRAL, *supra* note 468.

470. The author advised the House Judiciary Committee to reexamine the Nixon model and encouraged a more abbreviated investigation in the Clinton case. *See House Hearings*, *supra* note 3, at 263 n.13 (testimony of Prof. Jonathan Turley); *see also* Jonathan Turley, *Rule of Law: Perjury Isn't a Political Question*, WALL ST. J., Sept. 14, 1998, at A23. This is not to suggest approval with the standard used in the Johnson impeachment, but rather to suggest that the Nixon proceedings created a certain redundancy between the two houses. In the Johnson case, Secretary of War Stanton was dismissed on February 21, 1968, and a resolution of impeachment was introduced that very day. On February 24, 1968, Johnson was impeached. *See generally* MILTON LOMASK, ANDREW JOHNSON: PRESIDENT ON TRIAL 269-74 (1960). The members considered the issue to be obvious in the Johnson case since the President had openly violated a statute that expressly defined violations as "high misdemeanors." *See supra* note 406 and accompanying text. The abusive character of the proceedings make the Johnson model of questionable value. However, as noted earlier, the House routinely performed more limited investigations and hearings in judicial impeachments.

471. During the House hearings, the White House was given authority to call any fact or legal witnesses that it viewed relevant. The White House decided not to call fact witnesses in favor of expert witnesses. This became a point of contention on the Senate floor when the White House insisted that the House Judiciary Committee would not allow witnesses to be called. *Compare* 145 CONG. REC. S1003 (daily ed. Jan. 26, 1999) (statement of David Kendall, counsel to the President) (criticizing the absence of fact witnesses in the House), *with* 145 CONG. REC. S1009 (daily ed. Jan. 26, 1999) (statement of House manager Henry Hyde) (stressing that the White House chose not to call fact witnesses in the House and stating that the White House lawyers "have a positive allergy to fact witnesses").

472. For a discussion of this model, see *House Hearings*, *supra* note 3, at 250-76 (testimony of Prof. Jonathan Turley). The grand jury model was described in both the House debates and

The Clinton impeachment unleashed a long-needed debate over the purpose of impeachment and the underlying standards and procedures. In the House hearings on the "Background and History of Impeachment," nineteen witnesses were called to present historical and legal theories of the meaning of "high crimes and misdemeanors."[473] This unique hearing placed the different academic views in sharp relief. Emerging from this hearing was an "executive function" theory[474] limiting "high crimes and misdemeanors" to misconduct related to the office of the President or misuse of official power. While supporters of the executive function theory recognized that this theory was not absolute and that some private conduct can be impeachable, it was argued that Clinton's conduct was personal and outside the realm of "other high crimes and misdemeanors." This theory has been criticized in other articles.[475] This threshold argument, however, would appear again in the Senate trial. Notably, the defenders of the President would argue that the standard of "high crimes and misdemeanors" should be treated differently for judicial, as opposed to presidential, officers.[476] This argument was compelled by the fact that

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the Senate exhibition by the House managers. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 774-77 (citing various statements by advocates and academics during the impeachment proceedings).

473. *See House Hearings*, *supra* note 3, at 237-76 (testimony of Prof. Jonathan Turley). These witnesses included 17 academics, a former United States Attorney General, and a former Justice Department official.

474. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 745-59; Turley, *Executive Function Theory*, *supra* note 3, at 1797-1804.

475. *See, e.g.*, Turley, *Congress as Grand Jury*, *supra* note 3; Turley, *The Executive Function Theory*, *supra* note 3; Turley, *Murder, Misdemeanors, and Madison*, *supra* note 3.

476. *See, e.g.*, *House Hearings*, *supra* note 3, at 88 (testimony of Prof. Cass Sunstein) ("My basic conclusion is that the standard for impeaching the President has been much higher [than the standard for impeaching judges than the standard for impeaching judges, and properly so."); *id.* at 235 (testimony of Prof. Susan Low Bloch) ("I would caution you not to equate what is an impeachable offense for a president with what is impeachable conduct for a judge."). Various academics challenged the concept of a different standard for judicial and presidential officers. Professor William Van Alstyne addressed this issue at length in his testimony:

> Pleas suggesting somehow that the President is "different" (i.e., meaning "not as answerable" in the *same* way, or to the *same* offenses, or to the *same* degree as others subject to impeachment under the Constitution), ought not be readily entertained in this Congress. The President is *not* different, whether as to what constitutes an impeachable offense or as to whether it is to be passed over; nor does the distinction that he is elected (rather than appointed), grant him a latitude to engage in acts of perjury or other federal crimes, such as they may be, in proceedings pending in our courts of law.

Id. at 241 (testimony of Prof. William Van Alstyne).

The effort to distinguish the roles of the President and judges to support an argument for a different standard is problematic. First, the common argument that the impeachment of a

the Senate had previously removed Judge Claiborne for perjury before a grand jury and removed Judge Hastings, who had actually been acquitted on perjury charges by a court.[477]

The Senate trial of President Clinton began on January 7, 1999, with Chief Justice William H. Rehnquist taking the oath.[478] At the outset of the Senate trial, many senators argued for a vote on whether the two articles of impeachment against President Clinton constituted "high crimes and misdemeanors."[479] The vote would have

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judge will not reverse a popular election (as it would a President) ignores the fact that impeachment does not reverse an election, since the Vice President replaces the President in succession. The suggestion that this process is in any way analogous to a parliamentary system, where a government is replaced, is meritless. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 745 n.60, 749 n.79. Second, comparisons to the other branches is not always to the benefit of the President. For example, some of the delegates appeared to favor impeachment to guarantee the removal of a President because of his special powers as compared to those of Congress. Madison noted that impeachment was necessary in cases of "incapacity, negligence or perfidy" because a President guilty of such acts could not be relied upon to lead a government or foreign affairs. 2 RECORDS, *supra* note 5, at 65-66. Madison noted this makes the President more dangerous than legislative officers with the same failings:

> The case of the Executive Magistracy was very distinguishable, from that of the Legislative or of any other public body, holding offices of limited duration. It could not be presumed that all or even a majority of the members of an Assembly would either lose their capacity for discharging, or be bribed to betray, their trust. Besides the restraints of their personal integrity & honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members, would maintain the integrity and fidelity of the body. In the case of the Executive Magistracy which was to be administrated by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.

Id. at 66.

477. This argument was particularly poignant for some of the senators who actually voted on these cases for conviction, a point that the House managers brought to their attention during their argument. *See* 145 CONG. REC. S281, S290 (daily ed. Feb. 11, 1999).

478. Like Chief Justice Chase in the Johnson trial, Chief Justice Rehnquist was initially viewed as inimical to the President's policies. Rehnquist, however, may have been the best-prepared presiding officer in any impeachment trial given his personal interest in impeachment history and procedures. *See* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 915-16 (1991). Rehnquist performed his duties with far greater attention to judicial ethics than did his predecessor, Salmon Chase. Awarded by the members of the Senate with a special plaque with a golden gavel, Rehnquist was widely viewed as fair and apolitical in his rulings and conduct in the trial. *See The Senate Verdict; Rehnquist Says Senate Stint Was 'Culture Shock'; Chief Justice: Nation's Top Jurist, Who Presided Over Trial, Compliments Lawmakers on Tenor of Their Debate Before Leaving Chambers*, L.A. TIMES, Feb. 13, 1999, at A25 (quoting Trent Lott, Senate Majority Leader, as thanking Rehnquist for "a gentle dignity and an unfailing sense of purpose and sometimes a sense of humor").

479. Richard A. Serrano & James Gerstenzang, *White House Won't Delay State of Union Address*, L.A. TIMES, Jan. 5, 1999, at A12:

> The abbreviated trial plan calls for the House managers and the White House to pre-

been a Senate decision on the executive function theory. This threshold vote would have constituted a re-voting of the House impeachment decision, a redundant and unfounded vote. The Senate has never dismissed articles of impeachment. As noted earlier, the Senate had dismissed one case on jurisdictional grounds, the case against William Blount.[480] This was the first impeachment case and the critical decision as to the scope of officers subject to impeachment. Interestingly, the Blount decision was not a determination of whether the underlying conduct constituted impeachable offenses. Quite to the contrary, the vast majority of the Senate was on record as to his guilt.[481] Rather, the Senate decided as a case of first impression that legislative figures are outside the meaning of "civil officers."[482] The Senate Democrats in the Clinton case presented a different question in both kind and merit. The primary claim was that Clinton's conduct, even if constituting perjury and obstruction, did not fall under the definition of high crimes and misdemeanors because this standard was restricted to conduct related to his office. White House lawyers argued that this conduct would not be indictable in a conventional case due to technical definitions of perjury and obstruction.[483] Historically, a similar argument had been raised in the Johnson trial.[484] This claim was part of a motion to dismiss, which was defeated along nearly straight party lines, with the notable defection of a single Democrat opposing dismissal.[485]

Various other threshold arguments were made in the Clinton case, including the use of censure as an alternative to impeachment,[486]

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sent their cases over two days. Senators would ask questions on a third day, followed by a final day in which the Senate would vote on whether the charges against Clinton—even if proved—meet the constitutional standard of high crimes and misdemeanors required from removal from office.

480. *See supra* Part IV.A.1.

481. *See supra* notes 199-201 and accompanying text.

482. *See supra* notes 215-18 and accompanying text.

483. *See, e.g.*, 145 CONG. REC. S810 (daily ed. Jan. 20, 1999) (statement of Gregory Craig, Counsel to President Clinton).

484. Johnson's defenders argued both that an offense must be indictable and that it must be related to the office. Interestingly, during the Clinton hearings, one of the hypotheticals most discussed was a case of murder unrelated to any executive function. *See, e.g.*, *House Hearings*, *supra* note 3, at 101, 220, 227 (testimony of Profs. Schlesinger and Tribe). This hypothetical was also raised during the Johnson impeachment. *See* Benedict, *supra* note 18, at 79 (noting that "the report had stated that murder would not be an impeachable offense, since it did not relate directly to officeholding").

485. *See* 145 CONG. REC. S1017 (daily ed. January 27, 1999).

486. Censure had been used by Congress against Andrew Jackson, as well as against eight judges. *See* BORKIN, *supra* note 284, at 204. Censure is a shaming device that was never men-

the legitimacy of indictments written in general terms,[487] and the ability of a "lame duck" Congress to impeach a President.[488] The White

tioned, let alone endorsed, by the Framers. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 783-86; Jonathan Turley, *Checking the Executive Pulse*, L.A. TIMES, Nov. 19, 1998, at A11. When Jackson was censured on March 29, 1834, the vote was quite close (26-20) and the censure was ultimately rescinded by a later Congress, and its lasting effect can be deduced by the figure on the $20 bill. At the time, however, the dispute over the Bank of the United States was viewed by Clay as nothing short of tyranny. Clay warned that Jackson's actions placed the nation "in the midst of a revolution, hitherto bloodless, but rapidly tending towards a total change of the pure republican character of the Government, and to the concentration of all power in the hands of one man." 10 CONG. DEB. 59 (1833). Jackson was no less certain that the act of censure threatened the core of the Constitution. Jackson insisted that the "only modes in which the President of the United States is to be held liable for his official conduct" are to be found in private actions against him by any injured citizen. 3 MESSAGES AND PAPERS, *supra* note 401, at 71-72, *cited in* R. Brent Walton, *Paula Jones v. William Jefferson Clinton*, 71 TUL. L. REV. 897, 909 (1997).

487. The White House argued that the articles of impeachment were fatally flawed because they were written generally and did not specifically identify each alleged incident of perjury and obstruction. This argument was based on a broad due process claim forbidding vague indictments. *See Trial Memorandum of President William Jefferson Clinton*, *reprinted in* 145 CONG. REC. S212 (daily ed. Jan. 14, 1999) ("Under the relevant case law, the two exhibited Articles present paradigmatic examples of charges drafted too vaguely to enable the accused to meet the accusations fairly."). This argument, however, ignored the fact that prior articles of impeachment were written in general terms, including the articles of impeachment in the Nixon case. Moreover, there is no constitutional requirement that applies to the drafting of articles of impeachment. Justice Story distinguished between articles of impeachment and indictments:

> The articles . . . need not, and indeed do not, pursue the strict form and accuracy of an indictment. They are sometimes quite general in the form of the allegations; but always contain, or ought to contain, so much certainty, as to enable the party to put himself upon the proper defense, and also, in case of an acquittal, to avail himself of it, as a bar to another impeachment.

2 STORY, *supra* note 36, at 274. In its hearings concerning President Nixon, the Senate Rules Committee specifically declined to treat Senate trials as criminal trials for the purposes of standards of proof and procedural rules. *See Senate Rules and Precedents Applicable to Impeachment Trials: Executive Session Hearings Before the Comm. on Rules and Administration and Its Subcomm. on Standing Rules of the Senate*, 93rd Cong. (1974).

Finally, if articles of impeachment are drafted generally, the accused has the right to ask for a bill of particulars before the Senate trial. It is true that some articles have been quite detailed, such as false statement allegations against Judge Alcee Hastings, but this remains a matter of discretion for the House. The incorporation of judicial rulings from criminal cases offers little more than arguments for fairness rather than direct or binding precedent.

488. This point was made by Professor Bruce Ackerman, who further insisted that the electoral losses of the Republicans in the prior election only demonstrated the abuse of such a move. *See Impeachment Inquiry: William Jefferson Clinton, President of the United States: Presentation on Behalf of the President: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 37-38 (1998) (testimony of Prof. Bruce Ackerman). This was an interesting historical point to raise given the fact that the Johnson impeachment also occurred at a time when the Radical Republicans were losing electoral support. *See* BENEDICT, *supra* note 18, at 70-71 (noting that after the Radical Republicans' defeat in 1867, "they knew it would be more difficult . . . to win the majority needed to bring the impeachment before the Senate. . . . [C]entrists, who might have favored impeachment had the elections demonstrated radical strength, now

House also argued that the perjury article was fatally flawed because it allowed senators to divide on the specific instance of perjury. Thus, less than two-thirds of the Senate could agree on any individual act of perjury but still convict on the final article.[489] This argument had been raised and rejected in prior impeachments.[490] Raising a variety of such issues, the White House argued for a dismissal of articles of impeachment. The motion failed, consistent with such motions in prior trials.[491]

After considerable initial skirmishing and partisanship, the Senate adopted a set of novel Senate rules adopted by unanimous vote. These rules raised fundamental problems for the use of the Senate trial as a Madisonian device. The rules specifically required the House managers to prove their case for witnesses and imposed a witness-by-witness Senate vote on the House managers.[492] While the

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divided, most of them opposing impeachment"). The constitutional case for such an objection, however, is highly questionable. Past impeachments have occurred in such circumstances, and the adoption of such a view ignores obvious constitutional problems. While there may be compelling reasons to allow a new Congress to act in some circumstances, there are other circumstances that would make delay impracticable or even dangerous. To suggest that this is anything other than a discretionary choice is without support in either the constitutional text or its history. On a practical level, the change in Congress would not have saved the President from impeachment, assuming a party-line vote. Only one article dealing with obstruction was passed with less than five votes (the new Congress would have five less Republicans). *See* Ruth Marcus, *Clinton Team Considers Legal Fight Against Trial*, WASH. POST, Dec. 21, 1998, at A1.

489. The House managers argued that this "divisibility issue" was partially addressed by Rule XXIII. *See* 145 CONG. REC. S869 (daily ed. Jan. 22, 1999). Added in 1986, this rule discourages dividing articles of impeachment for a final vote. *See* S. Res. 479, 99th Cong. (1986) (enacted) ("An article of impeachment shall not be divisible for the purpose of voting thereon at any time during the trial.").

490. Judge Walter Nixon raised this objection when he faced 14 allegations of false statements. Judge Nixon argued that in such articles the Senate should find every statement to be false before conviction. The Senate rejected this challenge 34-63. As House manager Benjamin L. Cardin stated, "This is by no means unfair to Judge Nixon, for even if you might differ on which particular statements are lies, the bottom line is that two-thirds of you will have agreed that he concealed information, rendering him unfit for office. That is what the Constitution requires." 135 CONG. REC. 26,751 (1989) (statement of House manager Benjamin L. Cardin).

491. Articles of impeachment have been stricken in only one case, and this was done at the request of the House managers to simplify the trial. In the case of Judge Halsted Ritter, the House managers moved to strike two counts of one of the articles for which Judge Ritter was convicted. *See* 80 CONG. REC. 4898-99 (1936).

492. Under the unanimously enacted Senate Resolution 16, the Senate rules not only required a vote from the Senate on whether to depose any witnesses demanded by the House managers, but required:

> If the Senate agrees to allow either the House or the President to call witnesses, the witnesses shall first be deposed and the Senate shall decide after deposition which witnesses shall testify, pursuant to the impeachment rules. Further, the time for depositions shall be agreed to by both leaders.

Senate has always been recognized as having complete authority over the procedures of Senate trials, it has never had such a degree of control over the exhibition of the House case against an impeached official. Ultimately, the Senate would only approve three witnesses, described by House manager and Judiciary Committee Chairman Henry Hyde as "a pitiful three."[493] The tension between the two houses was more than evident on the Senate floor as House managers objected to the degree of control exercised by the Senate.[494]

The Clinton trial also saw a variation of a method used in the trial of Judge Pickering.[495] Various senators argued for a bifurcated or divided vote. Senate Republicans advocated an initial vote on a finding of fact as to the underlying criminal conduct.[496] They would then vote on the articles of impeachment. This was a variation of the use of censure as an alternative to removal. The use of censure and factfinding reflect a legislative desire to craft an alternative to the limited choices given by the Framers. Once in the impeachment pro-

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145 CONG. REC. S50 (daily ed. Jan. 8, 1999).

493. 145 CONG. REC. S1009 (daily ed. Jan. 26, 1999) (statement of House manager Henry Hyde).

494. One defining issue was the decision of the House managers to meet with former White House intern Monica Lewinsky before the Senate had voted on whether to depose witnesses. In order to compel this meeting over the objections of Lewinsky's lawyers, the House managers asked Independent Counsel Starr to request a judicial order requiring the meeting under the existing immunity agreement with Ms. Lewinsky. This led to claims that the Independent Counsel was the "fourteenth House manager" and that the meeting was a violation of the Senate procedures. *See* 145 CONG. REC. E213, E214 (daily ed. Jan. 16, 1999) (statement of Rep. Brady); 145 CONG. REC. S991, S1002 (daily ed. Jan. 26, 1999) (statement of David Kendall, counsel to the President); Peter Baker, *Starr Tries to Force Lewinsky Interview; House 'Managers' Want to Talk to Her*, WASH. POST, Jan. 23, 1999, at A1 (quoting Senator Daschle as saying that Starr had been enlisted as the "fourteenth House Manager"); Joyce Howard Price, *Senators Warm to a Finding of Fact, Acquittal*, WASH. TIMES, Feb. 1, 1999, at A1 (quoting Senator Dodd accusing Starr of attempting to become the "fourteenth House Manager").

The Senate objections reflect a common misunderstanding that the House managers are agents of the Senate as opposed to representatives of an equal and independent House with different institutional interests and prerogatives. The Senate does not exercise control over the House managers in the development of their case or interviews outside of the Senate process. The Senate can bar testimony and evidence from the Senate floor, but the suggestion of control over the managers in interviews with prospective witnesses only illustrated the continuing uncertainty as to the respective roles of the two houses in these proceedings.

495. The proposal was an interesting variation of the bifurcated vote in the Pickering case. When the Senate finally moved to vote on Judge Pickering's removal, it divided the vote into two parts. The initial vote was to determine if Pickering was "guilty as charged," as opposed to whether he had committed impeachable offenses under the articles of impeachment. *See* GERHARDT, *supra* note 243, at 5.

496. *See* Eric Pianin & Guy Gugliotta, *Senate's Fiercest Partisan Battle Possible over 'Findings of Fact'*, WASH. POST, Feb. 4, 1999, at A7.

cess, legislators often discover that not only is the standard high but the penalty is equally high. This creates a political risk that removal may be perceived as too harsh a response to the underlying offense. The use of extraconstitutional elements is inherently destabilizing for a system with few, but immutable, static characteristics. Nevertheless, there is no constitutional barrier to the Senate's voting on preliminary findings of fact before voting on the articles of impeachment. While it is highly questionable whether the Senate can "convict" but not remove a President, the Senate is unquestionably able to vote on preliminary issues such as findings of fact. Such measures are not reviewable by the courts and can be compelled over any negative ruling of the Chief Justice by a simple majority vote—a major distinction between their roles as jurors and triers in impeachment cases.[497]

No case has placed the role of the Senate trial into sharper focus. After forty-four Democrats voted for dismissal, the White House insisted that there was no value in continuing with the presentation of witnesses since the outcome of the trial was all but certain.[498] Any continuation of the trial was portrayed as nothing more than a "show trial."[499] The control over witnesses in the Clinton case illustrates the sharp difference in the interests of the two houses.[500] Senators intent

497. During the Senate trial, Senator Tom Harkin (D-Iowa) objected to the use of the term "jurors" by House manager Bob Barr to describe senators in an impeachment trial. Chief Justice Rehnquist ruled in his favor: "The chair is of the view that the objection of the Senator from Iowa is well taken, that the Senate is not simply a jury; it is a court in this case. Therefore, counsel should refrain from referring to the Senators as jurors." 145 CONG. REC. S279 (daily ed. Jan. 15, 1999) (statement of Chief Justice William Rehnquist). The Chief Justice's ruling was curious as a bench order on nomenclature, particularly on a term that has been used in many prior trials. Clearly, senators are not conventional jurors, but the point is a precious one and the term itself is not wholly inaccurate. Senators, including a number of senators during the Clinton trial, have long used the term to reflect their primary function in reaching a verdict. *See* Edwin Chen, *Gore Weighs in on Senate Trial*, L.A. TIMES, Dec. 26, 1998, at A1 (quoting West Virginia Senator Robert Byrd, Jr., warning about presidential efforts "to tamper with this jury").

498. *See* Helen Dewar, *Democrats Step Up Push for Censure; Senators in Both Parties Seek to Open Final Deliberations*, WASH. POST, Feb. 6, 1999, at A1.

499. *Id.*

500. In the House proceedings, the Democratic members were given the authority to call fact witnesses but chose (as did the majority) to call expert witnesses. The only other witnesses in the House hearings were Independent Counsel Kenneth Starr and two convicted perjurers. *See Consequences of Perjury and Related Crimes: Hearing Before the House Comm. on the Judiciary*, 105th Cong. (1998). The issue of fact witnesses, and particularly testimony from the accused official, has been debated in past House impeachments. In the proceedings related to Judge Charles T. Sherman in 1873, for example, the House members debated the need to postpone impeachment for additional testimony of the accused judge:

> [The motion for a final impeachment vote] caused an issue to be joined as to whether

on voting for acquittal not only opposed witnesses but also any videotaping of potential witnesses for public review. In attempting to bar the public review of testimony by critical witnesses, these senators demonstrated the danger of the Senate's exercising a high degree of control over the presentation of witnesses. In the trial of Warren Hastings, Edmund Burke defended the value of presenting the full case to the public regardless of the commitment of Hastings's supporters to acquittal.[501] When a partisan block promises to prevent conviction, it may be more important for the full evidence in the case to be presented.[502] Senators can then insist on a lack of evidence that might have been made public in a trial. In this way, there may be Presidents who are so popular that they would be forgiven for almost any crime.[503] Conversely, some individuals may be so unpopular that crimes committed against them are forgiven. Finally, a President's party may be in complete control of the Senate and guarantee an acquittal. In any of these circumstances, the insistence that the trial is meaningless ignores the importance of the legal process in disclosing

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> or not an officer ought to be impeached without an opportunity to be heard. It was explained that Judge Sherman had appeared before the Ways and Means Committee only as a witness, to answer such questions as were asked, and without power to explain or adduce evidence in his own belief.
>
> Those who favored delay to permit Judge Sherman to be heard seemed generally to consider that his conduct merited impeachment . . . .
>
> Mr. Butler said that in the cases of Judges Pickering and Chase the opportunity to be heard was not given, but it had been conceded in "the case of Judge Watrous, in the case of Judge Peck, in the case even of Andrew Johnson."

3 HINDS, *supra* note 143, § 2512, at 1020.

501. *See supra* notes 73-76 and accompanying text.

502. The Clinton trial also demonstrated the impact of television on impeachment proceedings. When the Framers crafted a representative system, they envisioned a Senate protected from the direct influence of factional impulse. The advent of live television and Senate coverage has made senators far more vulnerable to factional influence. Notably, senators in the Clinton trial moved to allow televised coverage of their deliberations, not just the arguments of the House managers and White House lawyers. *See* Dewar, *supra* note 498, at A1. Absent public testimony of witnesses, television may degrade the dialogic value of these procedures, while obviously advancing participatory political values.

503. This certainly seems to be relevant to the Clinton trial on some level. *See* Jonathan Turley, *Perspective on the Presidency; Is He Too Popular to Impeach?*, L.A. TIMES, Dec. 9, 1998, at A15 [hereinafter Turley, *Too Popular*]. Polls taken during the Senate trial uniformly showed that the vast majority of Americans did not believe the President and had concluded that he committed crimes in office. *See, e.g.*, Richard Benedetto, *Most in Poll Stand by Their President*, USA TODAY, Jan. 12, 1999, at 5A (citing polls in which "a remarkable 79% say they already believe that Clinton committed perjury before a federal grand jury and a majority of 53% agree that he obstructed justice in the Paula Jones lawsuit"). Yet, a similar percentage favored his retention in office. *See id.*

evidence to the public and calling both a President and his Senate triers to account.

The degree of senatorial control exercised over the House managers in the Clinton trial produced immediate factional and partisan results.[504] In past cases, the Senate treated the House managers as largely in control of the exhibition of the case. For that reason, partisan voting was kept to a minimum, with the exception of marginal limitations imposed by the Senate on such matters as scheduling and the number of witnesses. Once the Senate assumed greater operational control, particularly under the glare of television lights, each incremental issue in the Clinton trial became a partisan test of loyalty. With the first assertion of control, the Senate found itself micromanaging the House presentation on every issue, from the ability to depose witnesses, to how long a deposition would be allowed to run, to the presence of a video camera in depositions. Ironically, the result was to prolong the trial in a mire of minutiae.[505] The result was a sharp curtailment of the evidence presented against the President, with virtually no public presentation of witness testimony in a case turning in part on credibility issues. Due to the Senate management of the House case, it will never be known if the presentation of a full public case with witnesses would have led to greater defections on either side or a change in public opinion as to the President's conduct.

The Clinton trial may indicate the continued factionalism inherent in presidential impeachments, as opposed to the decline of such interests in judicial impeachments. It is more likely, however, a reflection of the importance of Senate trial rules in advancing political values other than removal. Once the Senate assumed control over the progress of the trial, every procedural issue and witness became a partisan issue. As a result, the House managers were prevented from putting on what they considered to be their strongest case. The Senate's assertion of control will likely be an irresistible temptation in fu-

504. At least one senator insisted that the failure to call witnesses prevented him from convicting the President despite his view that the President was probably guilty of the crimes alleged. Thus, Senator Arlen Specter insisted on voting "not proven" rather than guilty or not guilty, borrowing the phrase from Scottish law. *See* Eric Pianin, *Public Confusion over Secret Deliberations; Senators Are Unsure What They Can Say, and When and Where They Can Say It*, WASH. POST, Feb. 11, 1999, at A16 ("Under Scottish law, there are three possible verdicts: guilty, not guilty and not proved, and I intend to vote not proved as to both articles. That is not to say that the president is not guilty, but to specifically say that the charges, in my judgment, have not been proved.").

505. The House managers had initially proposed a two- to three-week trial with witnesses. The Senate rules prolonged the trial while reducing the actual presentation of witnesses.

ture trials. The Clinton rules allowed senators to claim that a case could not be made, even as they were simultaneously preventing the House managers from proving the contrary.

Regardless of one's view of the evidence and allegations, the significant shift of operative control over the presentation of evidence should be troubling. The Clinton rules are likely to be an irresistible temptation for future Senate courts of impeachment. Once this authority has been exercised over the House exhibition of evidence, it will be tempting for senators to fashion cases to meet their political interests and not necessarily the interests of an open deliberative process.[506] The result will be a factional contest without the open debate needed to marshal consensus over the questions of legitimacy. As will be shown below, this will only serve to preserve divisive factional issues that could be tempered, if not eliminated, under a full trial and final vote on the evidence.

IV. IMPEACHMENT AS A MADISONIAN DEVICE

A. Factions and the Madisonian Democracy

One of the unique elements of the Madisonian democracy is the recognition of, and response to, factional divisions. The greatest single instability of past governmental systems was the failure to address the inevitable development of factions. The Athenian model of direct democracy was rejected by Madison precisely because it "admits of no cure for the mischiefs of faction."[507] Rather than following the past

506. In such cases, House managers have to determine whether they should continue in a process under such senatorial intrusion. The question of the propriety or option of resignation was in fact raised with the author by one House manager in the Clinton case seeking constitutional or historical background to support such an act. Faced with limitations preventing the exhibition of their strongest possible case, this House manager was concerned that their obligation was to resign rather than to present an artificially weak case. Although this was avoided in the Clinton trial, a future confrontation between the two houses could erupt under these rules, with the refusal of House managers to present a weak case to a body presumably committed to acquittal.

507. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961). This concern of direct democratic impulse is worthy of contemporary review given the influence of television on legislative deliberation, which is now shown on live television. During the Clinton trial, senators argued for the elimination of the historical rule against public viewing of deliberation and debate by the senators. With such calls for greater openness, the Madisonian devices designed to separate senators from direct public influence will be obviously affected. Like all issues of participatory politics, this brings both benefits and possible liabilities to the legislative process.

practice of emphasizing collective aspirational goals in a constitution, Madison realized that the failure of past government was due in no small part to the failure to recognize the divisions that attend any political system.[508]

Madison had no delusions about the natural tendencies of men in power[509] or the government as a whole.[510] "If men were angels," Madison instructed, "no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[511] Even in the most homogenous nations, factions proved the destabilizing element in their political systems, largely due to the absence of static or structural procedures to deal with divisions. Madison was faced with the most pluralistic nation on earth and its promise of religious, economic, political, and racial factions.[512] Unless factions could be anticipated and controlled in some fashion, they would remain below the surface, where they would fester and eventually appear in the streets to the collective

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508. Many Framers had little faith in the ability of the public to exercise judgment in direct elections and national affairs:

> The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Given therefore to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second . . . . Nothing but a permanent body can check the imprudence of democracy.

1 RECORDS, *supra* note 5, at 299 (quoting Alexander Hamilton); *see also id.* at 48 (warning that the public immediately "should have as little to do as may be about the Government . . . [because t]hey want information and are constantly liable to be misled").

509. *See* THE FEDERALIST NO. 10, *supra* note 507, at 80 (predicting that "[e]nlightened statesmen will not always be at the helm" of government). Alexander Hamilton appeared to share this view when he warned that "men are ambitious, vindictive, and rapacious." THE FEDERALIST NO. 6, at 54 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

510. Madison's most noted comment is worth repeating in this context:

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

511. *Id.*

512. While the United States presented greater chances for factionalism, Madison also noted that the unique characteristics and the size of the new nation could help reduce these dangers since "society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. . . . The degree of security . . . will depend on the number of interests and sects." THE FEDERALIST NO. 51, *supra* note 510, at 324.

danger of the system and all within it.[513] Madison concluded that "the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*."[514] The Madisonian system was built to survive tremendous internal pressures through a process of constitutional implosion in which factional interests were directed into a core of legislative activity. This method of regulating factional interests helped to shape the separation-of-powers doctrine and the system of checks and balances in the Constitution.[515] Madison defined factions broadly:

> By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[516]

The Framers were well aware of the presence of factions in the United States from their colonial experiences. The colonies were riddled with often violent factional interests fueled by political and religious divisions. The Framers were also aware of the periodic explosion of violence under both the English and colonial systems that could be attributed in large part to the absence of any structural methods for resolving or addressing such interests.[517] Nevertheless, as Madison strove to deal with factions, the delegates divided sharply between Federalists favoring representative procedures and anti-Federalists favoring more direct democratic procedures. The Federalists believed that pure democratic systems were inherently unstable and that the solution to factional threats could be found in a representative system containing separation of powers and a system of checks and balances. This Federalist vision is central to understanding the role of the Senate in impeachment trials.

The Framers sought to address the inevitable formation of factions in a free government without simultaneously suppressing liberty

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513. *See* 2 RECORDS, *supra* note 5, at 67 (noting Benjamin Franklin's belief that impeachment could be used as a method of avoiding open conflict or assassination).

514. THE FEDERALIST NO. 10, *supra* note 507, at 80.

515. *See* Sunstein, *Interest Groups*, *supra* note 2, at 44 (discussing the use of checks and balances to counteract factional pressures).

516. THE FEDERALIST NO. 10, *supra* note 507, at 78.

517. Both the Johnson and (to a lesser extent) the Clinton impeachments saw some violent clashes of citizens. In the Johnson case, these emotions were particularly high due to the recent civil war and a widespread rumor that "rebel sympathizers had secreted nitroglycerin in buildings all over [the Capitol]." SMITH, *supra* note 391, at 231.

itself.[518] Madison sought to balance these two interests, noting that "[t]o secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."[519] The Madisonian solution was for "[a]mbition . . . to counteract ambition."[520] Under this system, factional interests and preferences were coaxed to the surface of a legislative process in which such interests could be realized in whole or in part only by majoritarian agreement. In order to secure such agreement, compromise would be required in both houses of Congress, with an appeal to values or interests broader than those of any particular narrow interest group. In such a process, civic virtue is hardly guaranteed or uniformly achieved. It is, however, a dialogic process yielding some level of informed consent in a representative system.[521]

The factional interests evident in impeachment controversies (particularly presidential impeachments) easily fulfill the expectations of the Framers. Impeachment often presents what Hamilton described as "sudden bree[zes] of passion" and "transient impulse[s] which the people . . . receive from the arts of men, who flatter their prejudices to betray their interests."[522] As the last part indicated, impeachment often begins with sharp factional interests and polarized public views of the accused. Over the course of the process, however, civic virtue has often emerged to trump factional interests: even in the most factional fights over judicial impeachments, the Senate has seen critical defections from members based on principle.[523] Gradually, the Senate trials of impeached judges became more nonpartisan. Likewise, in the case of President Johnson, seven Republicans aban-

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518. *See* THE FEDERALIST NO. 10, *supra* note 507, at 78:

> Liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

519. *Id.* at 80.

520. THE FEDERALIST NO. 51, *supra* note 510, at 322.

521. The greatest threat to this concept in modern legislation is the presence of tremendous information barriers to the pubic and hidden dealmaking. These problems have been identified with considerable success by the public-choice school and legisprudence scholars. For a description of the effect of these barriers on modern legislation, see Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339, 354-70 (1990) (describing various theories of legisprudence and public-choice scholarship).

522. THE FEDERALIST NO. 71, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

523. *See supra* notes 217, 246, 275, 300, 303, 313-14, 430-34, 441 and accompanying text.

doned their party (and their personal interests) to acquit the President.[524] This included defections on critical procedural votes—such as the presentation of witnesses—by senators who would vote to convict, but who also supported the procedural integrity of the process.[525] Where factionalism has reigned in impeachment trials, such as the trial of President Clinton, it is notable that Senate trial rules were significantly altered to reduce open deliberation and debate.[526] While such deliberation may not have transformed the tenor of the trial, there is evidence that the reduction in deliberation sustained, or even fueled, hard-line partisan voting.

The role of impeachment in addressing factional disputes is largely ignored in discussions of impeachment. There is an irresistible temptation for academics and legislators to stress the popularity of a President in opposing his impeachment.[527] Some academics tie such arguments to a misuse of Hamilton's famous description of the impeachment process as "political."[528] As the "proper guardians of the public weal,"[529] this is used to suggest somehow that popular opinion must dictate a conclusion or heavily influence a senatorial vote.[530] With some exceptions in the anti-Federalist ranks, the Framers were an unlikely group to endorse a theory of simply voting the political judgment of the electorate during impeachment proceedings or during any legislative function. The Framers repeatedly stressed that senators were expected to ignore popular will on some occasions since, as Madison stated, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves,

524. *See supra* notes 430-34 and accompanying text.

525. *See* BENEDICT, *supra* note 18, at 142 ("Despite their conviction that Johnson's intention to raise a court case, even if proven, could not vitiate his guilt, they allowed the President's counsel to present evidence on the subject, evidence that could only bolster the President's case and weaken the managers' before the nation."). During the Clinton trial, this principled stand was taken by a single Democratic senator, Russell Feingold of Wisconsin, who defected from his party to support the calling of witnesses and to oppose dismissal. Even though Feingold indicated a likely vote of acquittal, he objected to the abbreviated trial procedures suggested by his party. *See Sen. Feingold Is Lone Defector; Democrat Broke Ranks on Both Votes*, WASH. POST, Jan. 28, 1999, at A18. This position was roundly condemned in Feingold's state. *See id.*

526. *See supra* notes 328-34, 499-506 and accompanying text.

527. *See* Turley, *Too Popular?*, *supra* note 503.

528. THE FEDERALIST NO. 65, *supra* note 1, at 396; *see also* Turley, *Executive Function Theory*, *supra* note 3, at 1808-11.

529. THE FEDERALIST NO. 10, *supra* note 507, at 82.

530. *See infra* note 598 and accompanying text.

convened for the purpose."[531] Moreover, the Framers hoped that the bicameral system and the system of checks and balances would inspire civic virtue, not sustain factional voting.[532] Finally, Madison was primarily concerned with majority, not minority, factions. It is hardly necessary to create such procedures to avoid minority factions since "[i]f a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."[533] Impeachment assures the public of their continuing authority to remove a President,[534] while still allowing senators to resist majoritarian impulses for unwarranted conviction or acquittal. Arguing that the majority is opposed to an impeachment as the basis for terminating a proceeding is a reckless argument if one believes that impeachment procedures address factional disputes and encourage civic virtue.

The factionalism inherent in the impeachment process offers a unique context for the rivaling republican and pluralist theories that exploded with the "Republican Revival." In the last two decades, academics have been sharply divided over their visions of the political system. The pluralist view emphasizes private interests formed not in the political system, but exogenously. Under this view, the political system becomes a process in which private preferences are advanced as factional interests or expressions. The republican view stressed the deliberative character of the Madisonian system and its ability to transform factional interests into collective judgments. Academics like Frank Michelman,[535] Cass Sunstein,[536] and others[537]

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531. THE FEDERALIST NO. 10, *supra* note 507 at 82; *see also* THE FEDERALIST NO. 71, *supra* note 522, at 432:

> When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection.

532. *See infra* notes 592-97 and accompanying text.

533. THE FEDERALIST NO. 10, *supra* note 507, at 80.

534. Abraham Baldwin reflected the view that impeachment allowed for an element of direct popular will in the removal of a president:

> The Constitution provides for – what? That no bad man should come into office. . . . But suppose that one such could be got in, he can be got out again in despite of the President. We can impeach him, and drag him from his place . . . .

1 ANNALS OF CONG. 558 (Joseph Gales ed., 1789).

535. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Frank Michelman, *Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman, *Foreword*].

536. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988)

have rejected purely pluralist conceptions of politics and advanced a "deliberative democratic" model.[538] Under this model, private preferences and factional interests are merely an original state in the political process, but the public may, with debate and deliberation, "engage in a form of deliberation without domination through the influence of factions."[539]

In modern politics, it is often forgotten that the Madisonian democracy was designed to force factional interests into an open legislative process. Congress, particularly the House, is often criticized as openly "partisan." The change in nomenclature from concerns over "factional" to "partisan" interests reflects the emergence of organized parties and political organizations.[540] Today, "partisanism" is used generally to refer to the two major parties, while regional, economic, or other interests are generally referred to as "special interests." Such distinctions were less evident in the eighteenth century before the full development of dominant political parties and systems. While party affiliation was viewed darkly by many of the Framers,[541] particularly Washington,[542] Madison viewed their creation as inevitable, if regrettable, in a free system.[543]

[hereinafter Sunstein, *Republican Revival*]; Sunstein, *Interest Groups*, *supra* note 2.

537. *See, e.g.*, Bruce Ackerman, *Constitutional Politics, Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

538. Sunstein has argued against the view of interest-group politics as being part of the traditions of American constitutionalism, and he rejects "naked preference" theories as merely allowing "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

539. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 20 (1993) [hereinafter SUNSTEIN, PARTIAL CONSTITUTION].

540. One of the first references to the often bitter rivalry of the Republican and Federalist parties can be traced to a letter from Jefferson to Washington in which Jefferson describes his faction as "the Republicans" and his intention to organize against the "monarchical Federalists" associated with Hamilton and Adams. Arthur Schlesinger, Jr., *The Parties' Origins*, *in* OF THE PEOPLE—THE YEAR OF THE DEMOCRATIC PARTY 14 (Murray Fisher ed., 1992); *see also* Morton Horwitz & Orlando do Campo, *When and How the Supreme Court Found Democracy—A Computer Study*, 14 QUINNIPIAC L. REV. 1, 24 (1994).

541. Professor Steven Calabresi described the distrust of party factions that was prevalent in the colonial and postcolonial periods:

> [T]he idea of parties conjured up for the Framers a political world in which the "parts" of the nation were literally at war with one another and with the interests of the "whole." The memory of the English struggle between religious and feudal class-based factions and parties must have left Washington and Madison in fear of something not unlike what we see unfolding today in Bosnia . . . .

The establishment of two violently opposed political parties only magnified the importance of forced dialogue in the legislative process as a vital political forum. Political factions quickly severed lines of communications, such that, as Jefferson observed, "[m]en who have been intimate all their lives, cross the street to avoid meeting, and turn their heads another way lest they should be obliged to touch their hats."[544] The bicameral system forced communications in the interests of the parties and took conflicts from the streets into a legislative process. This dialogic process is particularly important in impeachment cases, where factional views tend to be passionate and tend to compromise faith in the legitimacy of leadership.

In applying Madisonian concepts to impeachment, it is important to reemphasize that Madison did not advocate a bicameral system for impeachment. Madison opposed the Senate as the trier of impeachments. Madison's preference for the federal courts as triers of impeachment is evident in his support of the Virginia Plan,[545] his pro-

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> Colonial Americans were united in their violent distaste for what they thought was the extreme corruption and venality of eighteenth-century English politics. The desire to escape English-style corruption contributed to the drive for Independence, and it was linked in the popular imagination with the various corrupt cabals and "juntos" that swirled around the so-called English Court party and the Country Party.

Steven G. Calabresi, *Mediating Institutions: Beyond the Public/Private Distinction: Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1487 (1994).

542. Political parties only emerged toward the end of Washington's second term, against his strong views that such organizations were detrimental to the public good:

> It serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; foments occasionally riot and insurrection. It opens the door to foreign influence and corruption . . . .
>
> In those [governments] of the popular character, in governments purely elective, it is a spirit not be encouraged. . . . A Fire not to be quenched, it demands a uniform vigilance to prevent its bursting into flame, lest instead of warming, it should consume.

George Washington, *Farewell Address*, *reprinted in* 1 MESSAGES AND PAPERS, *supra* note 401, at 219. Nevertheless, parties soon formed around the views of Jefferson (the Republicans) and Hamilton (the Federalists). Madison was a reluctant but active participant in the emerging party wing of Jefferson.

543. *See* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 26 (1969); Calabresi, *supra* note 541, at 1488.

544. Letter from Thomas Jefferson to Edward Rutledge (June 24, 1798), *in* 2 THE LIFE OF THOMAS JEFFERSON 24 (George Tucker ed., 1873), *quoted in* Stewart Jay, *Origins of Federal Common Law* (pt. 1), 133 U. PA. L. REV. 1003, 1024 (1985).

545. *See supra* note 156 and accompanying text. It is important to note that the original impeachment proposal was a mere five-word clause included in a 15-section proposal by Randolph. *See* 1 RECORDS, *supra* note 5, at 20. This proposal covered a wide range of issues, including some curious devices such as a provision allowing for veto authority to be exercised

posal to strike the words "by the Senate" in the final debate,[546] and the vote of the Virginia delegation (joined only by the Pennsylvania delegation) against approval of the impeachment provisions.[547] Madison's later view of these procedures will remain shrouded in uncertainty.[548] While it is clear that Madison and the other delegates were concerned with factions in fashioning the impeachment process, the application of Madisonian concepts relating to bicameralism and factionalism to Senate trials cannot be attributed to any originalist theory.[549] The suggested transformative value of the Senate trial as a Madisonian device is based on Madison's vision of the bicameral legislative process, not on his initial views of the best impeachment process.

B. Senate Trials and Legitimacy Questions in the Impeachment Process

Factionalism in the impeachment process is often inevitable when legitimacy questions are raised about the continuation of a

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by "the Executive and a convenient number of the National Judiciary, [who] ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate." *Id.* at 21. The Randolph proposal on May 29, 1787, supported by Madison and written in his own handwriting, reflects an early stage of debate over the tripartite system and the bicameral legislative process.

546. On September 8, 1787, Madison voted in favor of the standard of "high crimes and misdemeanors," but then moved to strike the words "by the Senate" from the impeachment clause:

> Mr. Madison, objected to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the Legislature and for any act which might be called a misdemesnor [sic]. The President under these circumstances was made improperly dependent. He would prefer the supreme Court for the trial of impeachments, or rather a tribunal of which that should form a part.

2 RECORDS, *supra* note 5, at 551. Pinckney agreed with Madison's concerns, while Sherman and Williamson objected to the change in venue for impeachment trials. The vote rejecting Madison's proposal was 9-2, with Virginia and Pennsylvania in the minority. *See id.*

547. *See id.* at 550-51.

548. It is not clear how Madison's views may have changed over time. Ironically, while Madison was the principal architect of a system that had the ability to transform factions' views through open and deliberative process, it is rarely considered that Madison's views may have changed after the Constitutional Convention. Hamilton also produced an alternative plan but came to view the Senate as the optimal trier of impeachments. Madison would correspond on the subject of impeachment cases but never expressed any lingering discontentment over the bicameral impeachment process. *See supra* note 212 (discussing correspondence between Madison and Jefferson).

549. Moreover, impeachments in the colonial and postcolonial periods were not especially open proceedings, to the degree favored in this Article. While trials were public, most legislative proceedings were not. The Madisonian system sought to achieve dialogue among representatives in the bicameral system, not a dialogue with the represented.

popularly elected President. Factional pressures will be at their apex when one party, as is often the case, seeks the possible removal of the titular head of the other party. There is no greater danger or greater test for a democratic system. The brilliance of Madison was his recognition that factions and divisions within a nation can, if left unresolved, fester into open conflict or "convulse the society."[550] Madison saw the natural inclination of citizens to divide on issues of importance to a democratic system. As he said, "[t]he latent causes of faction are . . . sown in the nature of man."[551] Rather than emphasize only aspirational collective values,[552] Madison emphasized the importance of recognizing factional divisions and the need to force such divisions into the open for a majoritarian result.[553] The bicameral system was a result of this deliberative democratic concept. As Professor Cass Sunstein has discussed:

> [T]he principle of political deliberation . . . is part and parcel of the original Madisonian conception of politics. It resonates in our governmental institutions, including national representation, checks and balances, federalism, and judicial review. It is connected with the American belief that disagreement and heterogeneity are creative forces, indispensable to a well-functioning republic.[554]

Through the Madisonian bicameral process, factional interests can evolve through the catalyst of debate and deliberation into majoritarian resolutions. Certainly, this is the "deliberative ideal,"[555] albeit a sometimes unrealized ideal.

While consensus has largely been achieved in judicial impeachment cases, there has been little consensus in presidential impeachments. Nevertheless, impeachment trials often lead to significant preference transformation as a result of the deliberative processes. With open and full trials, this transformation can occur for both leg-

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550. THE FEDERALIST NO. 10, *supra* note 507, at 80.

551. *Id.* at 79.

552. Madison criticized previous philosophers for their assumptions about human interests and behavior. *See id*. at 81 ("Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.").

553. *See id.* at 80 ("The inference to which we are brought is that the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*.").

554. SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 539, at 135.

555. *Id.* at 20.

islators and the public at large.[556] While the public-choice critique raises serious questions over the achievement of consensus or true preference transformation in modern legislation, impeachment is an area in which the open and deliberative process has yielded consensus and notable reductions of factional interests. Impeachment debates often invoke values beyond the immediate case that run to constitutional, social, and political traditions. At its ideal, an impeachment trial can involve many of the aspects of Michelman's description of "paideia," or the "process of collective enlightenment of [a community's] members through their reflections on their shared cultural inheritance, and their way of living well through engagement in that process."[557] Impeachment trials force participants to state their interests, not as naked preferences, but in terms of a greater civic virtue or societal need.[558]

With the opening of the Senate proceedings to television, this deliberative process not only influences the views of individual representatives, but also individual citizens to an extent never contemplated by the Framers. Where impeachment proceedings were once closed to the public, they are now largely open to allow the public to review the evidence and the final determination in such cases. The impeachment trial will often bring to the surface the very factions found in society, as well as their claims of partisan vengeance and partisan protection. These claims are then subjected to the test of evidence and to a full trial, with at least the promise of a transformative effect on the community as a whole. It is precisely the moment of

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556. The trial has historically proven a powerful vehicle for transformative justice in the United States due to its unique structure and rituals. *See* Jonathan Turley, Trials and Social Discourse (unpublished manuscript, on file with the author); *see also* Jonathan Turley, *Trial of the Century*, LEGAL TIMES, Sept. 27, 1999, at 27 (discussing the findings of the academic study on the most significant trials of the twentieth century). Impeachment trials contain many of the most important transformative elements in which core principles are presented within the context of a concrete dispute. In such trials, the most difficult concepts or theories can be made accessible to a wider audience, to a degree unsurpassed by any formal educational program. *See id.*

557. Michelman, *Foreword*, *supra* note 535, at 13 n.44.

558. Civic virtue is often the focus of impeachment debates as it is the goal of many republican theories:

> [C]ivic virtue should play a role in political life. There is no mystery to this claim; it refers simply to the understanding that in their capacity as political actors, citizens and representatives are not supposed to ask only what is in their private interest, but also what will best serve the community in general . . . .

Sunstein, *Republican Revival*, *supra* note 536, at 1550.

constitutional implosion of factional interests that distinguishes the Madisonian system from its constitutional predecessors.

In modern politics, factional views on impeachment are often translated into party affiliations. Even in the Johnson impeachment, strong regional and racial divisions led to divisions along party lines.[559] In modern impeachments, it is political factionalism, or partisanism, that has generally emerged in these cases. Nevertheless, within the Democratic and Republican parties, religious, racial, and gender factions are still evident. Such was the case in the Clinton crisis, where minority and women's groups were heavily supportive of Clinton but Christian groups often were highly critical.[560]

Ironically, when such partisanship is evident, it is quickly denounced as dangerous and inimical to the constitutional system.[561] During the Clinton crisis, various politicians and academics objected to partisanship in any impeachment process, arguing that it deprives the process of legitimacy. In the House, it was maintained that impeachment should occur only on a bipartisan basis.[562] The insistence on a bipartisan basis for impeachment ignores the value of a Senate trial to address factional views of legitimacy. It also ignores the transformative dimension of impeachment trials, in which factional views can be changed and even reversed over the course of testimony and argument. Articles of impeachment bring factional views to the surface, where they may be addressed openly in the Senate.[563]

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559. *See supra* notes 392-99 and accompanying text.

560. *See, e.g.*, Major Garrett, *Impeachment Politics*, U.S. NEWS & WORLD REP., Oct. 5, 1998, at 20 (detailing group polling results).

561. *See infra* notes 565-76 and accompanying text.

562. This curious position was maintained despite obvious practical problems. It can hardly be argued that, if a determined minority uniformly supported a guilty president, impeachment by the majority would be ill advised or questionable. During the Clinton hearings, former Representatives Elizabeth Holtzman and Robert Drinan testified that they insisted on bipartisan support as the basis for impeaching President Nixon. *See House Hearings*, *supra* note 3, at 120 (testimony of Elizabeth Holtzman, former Congresswoman) ("Unless this committee and the House act on a bipartisan basis and reach out for the common ground . . . you should not, you must not vote to impeach."); *id.* at 183 (testimony of Father Robert Drinan, former Congressman) (rejecting the idea of partisan impeachment, stating that "[the Democrats impeaching Nixon] wouldn't do that; there was something wrong with our judgment if some Republicans can't agree with us"). Despite this testimony, it is highly doubtful that Democrats would have terminated impeachment proceedings if all of the Republican members remained committed to their party's president.

563. This is not to question the value of bipartisanship as an important demonstration of the seriousness of allegations against a president. Bipartisanship is sought in any legislative or political process, but it was hardly expected by people like Madison.

domination of the impeachment process by 'faction' would in the view of the Framers deny the process legitimacy. The [Clinton] impeachment proceedings, judging by the strictly partisan vote in the House of Representatives, fails the legitimacy test."[566]

The suggestion that partisan impeachments "deny the process legitimacy" can hardly be attributed to the view of the Framers, as Schlesinger suggests. Certainly, there is no suggestion in the constitutional or ratification debates that a majority faction was facially illegitimate. Moreover, what gives the process legitimacy is how factional interests are allowed to be expressed within a political system designed to produce majoritarian conclusions. If the aim of the Framers had been to prevent majority factions from pursuing impeachments, they would have required a supermajority vote. Instead, they directed majority factional interests into a Senate forum, where they could be resolved in a dynamic political process.[567] What *would* be facially illegitimate is a system in which the majority could view a President as having committed impeachable offenses worthy of removal but fail to address those views in a Senate trial. It was Madi-

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thing is wrong," but not with the case. They signal that something is fundamentally wrong in the perceived illegitimacy of the President to hold office. It is "worth pursuing" precisely because it is a signal of a fundamental political crisis that is not resolved by an insistence on bipartisan impeachment. As noted earlier, Senate trials are most important in cases of impeachment by majority factions.

566. *House Hearings*, *supra* note 3, at 101 (testimony of Prof. Arthur Schlesinger, Jr.).

567. The view of impeachment as primarily about removal can create a simple test of probability for House members convinced of impeachable acts but equally convinced of a low probability of conviction. Former Congresswoman Elizabeth Holtzman also stressed this point in her testimony calling for the termination of the Clinton impeachment proceedings in part because of a lack of Senate votes:

> No indictment would be sought by a prosecutor where there is no chance for conviction. And it is almost universally conceded that there are not enough votes in the Senate to convict President Clinton and remove him from office.
>
> Impeachment should not be voted by the House unless these is a strong likelihood of conviction in the Senate.

House Hearings, *supra* note 3, at 120 (testimony of Elizabeth Holtzman). Ms. Holtzman then expressly connected this probability argument to the view that "[i]mpeachment is a tool to remove a president from office. It is a last resort to preserve our democracy." *Id.* This construct is certainly appealing in its clarity. If impeachment is simply about removal, any low-probability case becomes questionable. If, however, impeachment is a political process addressing majority factional views, this argument is wholly misplaced. Moreover, the argument (advanced by Ms. Holtzman and others) that no prosecutor would pursue a case where conviction is unlikely is far too sweeping. *See* Turley, *Too Popular*, *supra* note 503, at A15. Even when a conviction is sought in a criminal case, a prosecutor may anticipate a jury sympathetic to a popular defendant or prejudiced against a victim, but still insist on holding the defendant to account in a system of justice. *See id.*

son's concern about majority factions that led to the creation of a bicameral system to regulate and, ideally, to transform such factional preferences in legislation. Subjected to the same factional pressures, the impeachment process is best understood in this legislative, rather than a judicial, context. This view is undeniably proceduralist. The objective of impeachment is not removal or retention but, to use the concept of Hart and Sacks, a type of "institutional settlement." In framing their principle of institutional settlement in the legislative process, Hart and Sacks tied proceduralism to the resolution of factional disputes in a way reminiscent of Franklin's description[568] of the impeachment process:

> Implicit in every such system of procedures is the central ideal of law—an idea which can be described as the *principle of institutional settlement* . . . . The alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision. The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding on the whole society unless and until they are duly changed.[569]

The use of a bicameral system for impeachment shapes the relative roles of the two houses.[570] It is impossible to understand the role of one house in isolation.[571] In earlier articles, the unique role of the House of Representatives was explored.[572] These articles suggested two distinct functions of the House in performing its impeachment

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568. *See infra* notes 635-36 and accompanying text.

569. HART & SACKS, *supra* note 55, at 4.

570. Hamilton stressed the value of bicameralism in the impeachment process:

> The powers relating to impeachments are . . . an essential check in the hands of that body upon the encroachments of the executive. The division of them between the two branches of the legislature, assigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches. As the concurrence of two-thirds of the Senate will be requisite to a condemnation, the security to innocence, from this addition circumstance, will be as complete as itself can desire.

THE FEDERALIST NO. 66, at 402 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

571. The value of the bicameral system in legislation is precisely that it "would not only provide a double review of proposed legislation, but also would assure two distinct perspectives." William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 280 (1988). Similarly, the Framers appeared to anticipate that the two houses would perform different but co-dependent functions in impeachment.

572. Turley, *Congress as Grand Jury*, *supra* note 3; Turley, *Executive Function Theory*, *supra* note 3.

duties. First, impeachment was crafted as a check on both executive and judicial officers. The House plays its most significant role as a check and balance when it detects and refers impeachable conduct.[573] While the House has used the extraconstitutional vehicle of censure when impeachment efforts have failed,[574] impeachment presents a more significant public act of denunciation with a greater deliberative value in addressing the underlying allegations of legitimacy.[575] The act of referral creates a deterrent effect on all civil officers, including the President.[576] In this sense, the House role supports the structural integrity of the system as a check on the President as an individual officeholder. Even when the Senate does not remove an impeached official, the act of impeachment creates uncertainty as to possible removal for similar conduct in the future. Second, in the act of impeachment, the House identifies legitimacy concerns and moves those concerns into an open process of deliberation.[577] When such concerns meet the standard of "high crimes and misdemeanors" in the view of a majority, the House vote funnels these legitimacy issues into the Senate for resolution under the specific procedural restrictions established by the Framers.

Because it is "the People's House," the populace's majority view that high crimes and misdemeanors have been committed represents a serious political crisis that demands legislative redress. A common argument by academics in the Clinton impeachment was that, absent

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573. *See* Turley, *Congress as Grand Jury*, *supra* note 3.

574. Such was the case with Judge Harry B. Anderson of the District of Tennessee in 1930. Notably, the use of this extraconstitutional device occurred in a case in which the impeachment was criticized as a raw political act of intimidation to force Anderson to reverse his rulings. *See* Van Tassel, *supra* note 309, at 381. After the House refused to impeach, Anderson was censured. *See id.* at 382.

575. *See id.*

576. The value of impeachment as a check was recognized by early legal commentators:

> The importance of the impeaching power consists, not in its effects upon subordinate ministerial officers, but in the check which it places upon the President and the judges. They must be clothed with an ample discretion; the danger to be apprehended is from an abuse of this discretion. But at this very point where the danger exists, and where the protection should be certain, the President and the judiciary are beyond the reach of Congressional legislation. Congress cannot, by any laws penal or otherwise, interfere with the exercise of a discretion conferred by the Constitution. . . . If the offense for which the proceeding may be instituted must be made indictable by statute, impeachment thus becomes absolutely nugatory against those officers in those cases where it is most needed as a restraint upon violations of public duty.

JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 491-92 (1870), *cited in* BENEDICT, *supra* note 18, at 35.

577. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 777.

majority support for removal, impeachment would produce significant costs with little expected benefit.[578] However, when seventy percent of a country believes that a President committed crimes in office,[579] the termination of an impeachment inquiry preserves rather than resolves conflict. This is precisely what Madison sought to avoid: powerful and passionate factional views that are not addressed adequately in the legislature. The mere fact that a President is called to account, with his office in the balance, assures large factional groups that their views are represented in the political system. The standard of "high crimes and misdemeanors" serves to reserve this process to misconduct of a high order and to exclude trials resulting from mere unpopularity or political judgments. If a majority believes that a President has committed high crimes and misdemeanors, the act of impeachment by the House vents these pressures into a body best designed to handle and, ideally, to reduce them through an open trial.

Under the bicameral structure, the Senate was viewed as the body that was best suited to resist, as Hamilton described, the "bree[zes] of passion."[580] This may have been due in part to the fact that, until the Seventeenth Amendment, senators were elected by the state legislators and not directly elected by the public. Nevertheless, even with the direct election of senators, the Senate trial is structured to permit considerable discretion and considerable freedom to use that discretion. While impeachment defines conduct as sufficient for a President to be removed, the Senate vote can rest on a host of variables other than guilt.[581] "[T]he nature of the senatorial trust . . . require[s] [a] greater extent of information and stability of character."[582] The Framers intentionally left the process broadly defined and without specific procedures. Hamilton noted that impeachment trials

578. *See supra* notes 562-66 and accompanying text.

579. *See* Benedetto, *supra* note 503, at 5A (reporting the results of a *USA Today*/CNN/Gallup poll, one month before the final Senate vote, showing that "a remarkable 79% say they already believe that Clinton committed perjury before a federal grand jury and a majority of 53% agree he obstructed justice in the Paula Jones lawsuit").

580. THE FEDERALIST NO. 71, *supra* note 522, at 432.

581. There is a commonly held view of the House as the more political body in impeachments. This may be due to the largely factional voting patterns and more open debate in that body. The House role and history, however, suggests that this perception is misleading and inaccurate. The results of most House impeachments are highly defensible on legal grounds, and they cannot be entirely attributed to partisan voting. *See generally*, Turley, *Congress as Grand Jury*, *supra* note 3.

582. THE FEDERALIST NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 1961); *see id.* at 378 ("[A] senate, as a second branch of the legislative assembly distinct from and dividing the power with a first, must be in all cases a salutary check on the government.").

cannot be "tied down by . . . strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges . . . ."[583]

The static structural limitations in the Constitution primarily force compromise and deliberation among factional groups rather than engineer the course or substance of the debate. This dialogic process exposes allegations to the test of prolonged and informed debate. The result is a political debate in the Senate within a quasi-judicial framework, a unique deliberative forum. Moreover, impeachment deliberations involve values that go beyond immediate factional interests or partisan passions. Just as trials can inform juries of values outside their initial prejudices or impulses, impeachment trials often educate the public as to the gravity of a presidential offense or the countervailing gravity of the removal of a President. For advocates of a deliberative democratic model, the impeachment trial should represent the greatest constitutional moment for the resolution of moral and political disputes.[584]

It is the function of the Senate trial to resolve questions of legitimacy that properly characterizes the proceeding as political. Beyond simple questions of guilt, the Framers foresaw the need to address such questions in a quasi-judicial forum that could balance the continued viability of a President in office and the dangers in removing that President. The Senate trial, therefore, contains both judicial and political elements. Hamilton noted that the Senate must sit in "judicial character as a court for the trial of impeachments."[585] While often given an alternative meaning,[586] Hamilton's description of the Senate trial emphasized the political element in performing its quasi-judicial function:

> The subjects [of Senate] jurisdiction [in an impeachment trial] are those offenses which proceed from the misconduct of public men, or,

583. THE FEDERALIST NO. 65, *supra* note 1, at 398.

584. *See, e.g.*, JAMES S. FISHIN, DEMOCRACY AND DELIBERATION 81-82 (1991) (arguing that periodic deliberative opinion polls should be used to select presidential candidates); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 19 (1993) [hereinafter SUNSTEIN, FREE SPEECH] (observing that a well-functioning system of free expression is critical to the deliberative process because it facilitates discussion among the citizenry generally and between representatives and their constituents); SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 539, at 162 (exploring the foundations of the commitment to deliberative democracy).

585. THE FEDERALIST NO. 65, *supra* note 1, at 396.

586. *See* Turley, *Executive Function Theory*, *supra* note 3 at 1809-10 (discussing Hamilton's view in *The Federalist No. 65*).

> 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. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.[587]

Hamilton links the "political" element of the Senate trial to the fact that the Senate must adjudicate injuries to the state.[588] The subject matter was political and volatile because the underlying misconduct would be viewed as a violation of the public trust in either the appointment of an official or, most seriously, in the election of a President or Vice President. Such allegations would invariably produce social and political schisms. For that reason, Hamilton explained that a political body with the unique characteristics of the Senate was required, since "[no] other body would be likely to feel *confidence enough in its own situation*, to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused and the *representatives of the people, his accusers*."[589] The political elements of the Senate trial were not the injuries, but the verdict and the need to address a legitimacy question. For that reason, the courts were ill suited to deal with the powerful political undercurrents, "and it is still more to be doubted, whether they would possess the degree of credit and authority" to resolve the matter with finality in the public's view:

> The necessity of a numerous court for the trial of impeachments is . . . dictated by the nature of the proceeding. . . . The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distin-

587. THE FEDERALIST NO. 65, *supra* note 1, at 396-97.

588. This has been used to suggest that injuries to the state restrict impeachable offenses to official misconduct, but an alternative meaning is evident in the passage when read as a whole. *See* Turley, *The Executive Function Theory*, *supra* note 3.

589. THE FEDERALIST NO. 65, *supra* note 1, at 398.

> guished characters of the community forbids the commitment of the trust to a small number of persons.[590]

The Senate was given this role precisely because of its ability to balance interests other than guilt against the interests of the nation. It is the ultimate application of what Madison described as "refin[ing] and enlarg[ing] the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[591] Senators were imagined as a Burkean image of legislators—cognizant of, but not controlled by, popular opinion.[592] In a republican system, "debate and discussion help to reveal that some values are superior to others."[593] If civic virtue is the "animating principle" of the republican system, deliberative debate is the method of achieving civic virtue from the raw impulse of factional interest.[594] In the context of impeachments, the Senate trial is essential to achieving this animating principle.[595] Absent a trial, the Senate is more likely to vote so as to promote factional interests or to reaffirm public sentiment. Trials tend to force senators to confront the evidence, or the lack of evidence, in a public case of impeachment.

Hamilton's description of the Senate trial as "political" was not a license for opportunistic or factional voting, but was rather a recognition that a fundamental political decision would be made in impeachment verdicts.[596] At the heart of the Senate trial is a question of true consent. When faced with allegations of misconduct, an official must continue in office with the legitimacy of consent by the people through their representatives. This element of true consent is absent in past academic discussions of Senate trials.

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590. *Id.*

591. THE FEDERALIST NO. 10, *supra* note 507, at 82; *see also* 1 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 59 (1987) (arguing the need for representative government to "temper [the public's] authority in legislation with the maturer counsels of the one and the few").

592. 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 89, 95 (Boston, Little, Brown, 9th ed. 1889) ("Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.").

593. SUNSTEIN, FREE SPEECH, *supra* note 584, at 32.

594. *See id.* at 31; Michelman, *Foreword*, *supra* note 535, at 18.

595. *See* Nixon v. United States, 938 F.2d 239, 261 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part) (arguing that the impeachment process militates in favor of full Senate trials).

596. *See* Turley, *Executive Function Theory*, *supra* note 3, at 1808-10.

While academics often acknowledge that Senate trials are unique, these trials are largely presented as univocal proceedings focused on the question of removal. Academics have criticized impeachments where removal was unlikely precisely because they view Senate trials as properly performing this sole function.[597] Where conviction is unlikely, impeachments have been presented as actually harmful or abusive. What is missing is the element of true consent in the retention of an impeached official. Alexander Bickel's view of the centrality of consent in a democratic system is particularly apt for Senate trials:

> [T]he heart of democratic government, and the morality which distinguishes it from everything else, is that it rests on consent. And the secret of consent is only in part a matter of control, of the reserve power of a majority to rise up against decisions that displease it. It is, perhaps more importantly, the sense shared by all that their interests were spoken for in the decision-making process, no matter how the result turned out. Government by consent requires that no segment of society should feel alienated from the institutions that govern. This means that the institutions must not merely represent a numerical majority . . . but must reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices, that all their diverse characteristics, were brought to bear on the decision-making process.[598]

The issue of consent drives both judicial and presidential impeachments. When a judge is first appointed, the confirmation of the Senate gives the judicial officer the legitimacy that comes from true consent under a representative democracy. It is this element of consent (and not the coercive authority of the court) that gives the judicial officer the authority to rule in matters concerning other citizens. When that officer has been impeached, the act of impeachment raises a legitimacy question that must be resolved by the same body that gave its consent to the original appointment. If retained, the judicial

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597. *See House Hearings*, *supra* note 3, at 233 (testimony of Prof. Susan Low Bloch) ("I can recommend that even if you believe that some of the allegations come close to being impeachable offenses or even are impeachable, that you exercise your discretion in this case to decide to terminate this proceeding without voting out any articles of impeachment."); Adam Pertman, *Intent of Vote Questioned*, BOSTON GLOBE, Dec. 19, 1998, at A9 (interviewing Professor Stephen Carter, who criticized the House majority for impeaching a President who was unlikely to be removed).

598. ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 184 (1965).

officer regains a degree of legitimacy lost in the controversy leading to impeachment.

This element of true consent is more significant with respect to an impeached President. When a President is impeached, "the People's House" has rendered a decision not on guilt, but on the need for a trial. The President in such a case will often be viewed by a significant percentage of the population as unworthy of his office or presumptively guilty of the offenses. Such views may linger after a trial, but the significance of a verdict to retain a President cannot be lost on even the most ardent critic. While an individual may harbor legitimacy questions, the President regains political legitimacy through the act of consent by the representatives of the public.

Any value of the Senate trial as a Madisonian device, however, is largely determined by the Senate rules governing the trial. The acceptance of the result of an impeachment process is not unlike that of the legislative process. Hart and Sacks observed that "the best criterion of sound legislation is the test of whether it is the product of a sound process of enactment."[599] This self-legitimizing process requires not simply a result, but "reasoned elaboration" through an informed and deliberative process.[600] For citizens to view a Senate trial as an act of true or informed consent, they must see the central allegations fully addressed. It is the faith in the process, and not its conclusion, that stabilizes the political system. Thus, even if a citizen favors conviction, there cannot be any question as to the final judgment in the face of the strongest case for removal. Through this process, both an impeached President and his Senate jurors are held accountable in a representative system.[601] During the course of a trial, the public is exposed to the evidence against a President by House managers with an incentive to present the strongest possible case.[602]

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599. HART & SACKS, *supra* note 55, at 695.

600. *Id.* at 3-4.

601. With the direct election of senators and greater public access to deliberations, the value of the Senate trial as a method of factional resolution and deliberation has only increased. The Senate trial is vital to an open and deliberative process by which the public is given the entire record and evidence upon which to render a judgment. The Senate was given this facilitating role because the Framers believed that the most effective "inquisitors for the nation [are] the representatives of the nation themselves . . . ." THE FEDERALIST NO. 65, *supra* note 1, at 397.

602. It is noteworthy that House managers have sought summary decisions without a trial. *See supra* notes 208, 417-20 and accompanying text.

This institutional interest of the House managers may put them at odds with their juror counterparts in the Senate.[603] Senators intent on partisan acquittal may be less than eager to have the full evidentiary case presented against a President.[604] The value of such a process is realized not only in its transformative effect on citizens but in its effect on senators. Absent rules allowing for full disclosure and debate, senators are more likely to vote raw partisan interests untested over the course of a trial.[605] For these reasons, it is essential that House managers are given discretion in the presentation of evidence and witnesses in their constitutional "case-in-chief." The Clinton rules were the most significant abridgment of this discretionary authority. While the Senate clearly has the authority to determine the manner in which a President is tried, it historically gave the House managers discretion in the presentation of their case.[606] While the Senate has periodically imposed modest limits on witnesses (largely to restrict the presentation of defendants), House managers have been allowed to present their strongest case before a final vote of the Senate has occurred.[607] This creates a full (and accountable) record upon which senators may cast their votes. As noted earlier, House managers have periodically attempted to engineer abbreviated trials or to limit witnesses to avoid public scrutiny or changes in public

603. In one case, it was the Senate that appeared to want some presentation of evidence against the wishes of the House managers. In the case of Judge Claiborne, the House managers moved for a summary judgment decision based on the argument that the Judge had already been convicted. The Senate Impeachment Trial Committee balked and required presentation of evidence. This was the only such effort by House managers, and it represented a serious challenge to the dialogic use of the Senate trial for purposes other than removal. *See* S. REP. NO. 99-48, at 22.

604. The Senate has in fact demonstrated the opposite interest in judicial cases headed for conviction. In the trial of Judge Claiborne, the full Senate refused to allow the testimony of witnesses in support of the impeached judge. *See* 132 CONG. REC. S15,557 (daily ed. Oct. 8, 1986).

605. Hart and Sacks emphasized the value of proceduralism in the quality of the legislative product. *See* HART & SACKS, *supra* note 55, at 695 (explaining that the legislative procedure "ought to be an *informed process*, in the sense that key decisions are not made until relevant information has been acquired," and that "it ought to be a *deliberative process*, in the sense that key decision are not made until there has been a full interchange of view and arguments among those making the decisions").

606. Procedural conflicts with those House managers were largely due to attempts at curtailing defense presentations and abbreviated trials. *See supra* notes 417-20 and accompanying text.

607. There have been cases in which no witnesses have been presented or summary votes were sought upon referral. *See supra* notes 208, 417-29 and accompanying text. These abbreviated trials were sought by the House managers, and the Senate has in fact required witnesses where summary decisions were sought.

opinion.[608] Such efforts were made in the trial of President Johnson to limit defections that could emerge from disagreements over evidence.[609] Similarly, senatorial restrictions on the presentation of evidence by House managers can be abused. Senators intent upon acquittal can easily engineer an abbreviated trial to reduce the public backlash against their intended vote. More importantly, the full presentation of evidence and witnesses deprives the process of credibility among those citizens who remain in the minority view with respect to agreement with the verdict. As was the case in the Clinton trial, senators will often determine witnesses according to their "need" in reaching a verdict.[610] This reflects the view of the impeachment trial as a quasi-judicial process in which evidence is necessary only to the degree required for a fair verdict. Where the verdict or culpability is considered clearly known or preordained, senators have rejected the need for witnesses or evidence in the trial.[611] The exhibition of witnesses and evidence, however, is central to a legislative or political function. The presentation of the House managers creates the dialogic context of Senate trials. It is through the presentation of witnesses and evidence that legitimacy issues are resolved in a political, rather than legal, sense.

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608. *See supra* notes 439-41.

609. *See supra* note 417 and accompanying text.

610. This point was raised most directly in the Clinton trial, where the Senate debated the need for testimony of witnesses. The public had never seen the testimony of critical witnesses like Lewinsky, except, for some citizens, in excerpted transcripts available on the Internet and in government reports. This testimony, however, was not provided as part of the impeachment proceedings and was not subject to cross-examination. Yet, some senators rejected the need for testimony as unnecessary to their individual decisions as constitutional jurors. Senator Joseph Lieberman framed the question on witnesses simply: "[D]o we need live witnesses to be able to reach a judgment here?" *Stakeout with Senator Kent Conrad (D-ND), Senator Joseph Lieberman (D-CT), and Senator Frank Lautenberg (D-NJ)*, FED. NEWS SERVICE, Jan. 13, 1999.

611. *See, e.g.*, *Press Conference with Senator Ted Kennedy (D-MA)*, FED. NEWS SERVICE, Jan. 27, 1999 ("[I]f you have . . . some 44 members that want this trial to end now and don't feel the necessity for any new witnesses, then the issue of impeachment has, for all intents and purposes, ended."); *Media Stakeout with Senator Carl Levin (D-MI) Following Question and Answer Session with the Senators in Impeachment Trial of President Clinton*, FED. NEWS SERVICE, Jan. 22, 1999 (rejecting the need for any witnesses since "[t]he marginal value it might have, if any, is outweighed by the length of time it would take and the delays that would be produced"). Senator Robert Torricelli has also expressed this viewpoint, stating:

> The . . . critical moment of this case is when it is demonstrated that there are in excess of 34 members of the Senate who will vote to dismiss this case. It will then be clear that no matter what witnesses are called, even if their facts are accepted as true, people simply are not going to remove the president from office.

Stakeout Remarks by Senator Robert G. Torricelli (D-NJ), FED. NEWS SERVICE, Jan. 16, 1999.

By forcing a full presentation of evidence, the Senate allows the public to judge the legitimacy of an impeached official to continue in office. This allows factional divisions to be aired openly and fully in anticipation of a final vote. Limitations on the presentation of evidence by House managers or senators defeats the finality sought by the Framers in Senate trials. The Framers, like Franklin, were concerned about the public view of such trials as an honest alternative to more direct and dangerous methods of expression. Edmund Randolph viewed the impeachment process as a vital pressure valve when a nation was most susceptible to upheaval and executive abuse. Randolph warned:

> The Executive will have great opportunities of abusing his power; particularly in time of war when the military force, and in some respects the public money, will be in his hands. Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections.[612]

Under this view, an acquittal based on tailored evidence is as dangerous as a conviction secured on such a basis. In both circumstances, lingering factional questions will persist as to both the guilt of the impeached official and the legitimacy of the process by which he was judged. The process is remarkably demanding and at times demeaning. The process, however, is vital to the preservation of public trust.[613]

A countervailing argument stressed the destabilizing effect of impeachment on the balance of power and the specific weakening of the presidency caused by Senate trials. Professor Arthur Schlesinger, Jr.,[614] and other academics have argued that Senate trials weaken the presidency and should be avoided absent overwhelming evidence and bipartisan support. Increased use of impeachment has been criticized as introducing a form of "parliamentary" or "quasi-parliamentary" system.[615] Specifically, Professor Schlesinger maintained that even the

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612. 2 RECORDS, *supra* note 5, at 67.

613. This is often the cost of public office since, as one court noted, "those appointed to high public office hold a special public trust; they cannot properly complain if they are the objects of special scrutiny." Benoit v. Gardner, 351 F.2d 846, 849 (1st Cir. 1965).

614. *See House Hearings*, *supra* note 3, at 99 (testimony of Prof. Arthur Schlesinger, Jr.); Arthur Schlesinger, Jr., *How History Will Judge Him*, TIME, Feb. 22, 1999, at 44.

615. Professor Tribe was particularly alarmed about the prospects of a Clinton impeachment for the tripartite system. *See House Hearings*, *supra* note 3, at 224 (testimony of Prof. Laurence Tribe) ("If it is a parliamentary system people want, or something closer to such a system than we have had for two centuries, then amending the Constitution to achieve such a

attempted removal of Johnson materially changed the presidency for years:

> President Johnson was rescued in 1868, but even the failed impeachment had serious consequences for the presidency. The aftermath bound and confined the President for the rest of the century. A brilliant young political scientist at Johns Hopkins, Woodrow Wilson, concluded the Congress had become, as he said, the central and predominant power of the system, and he called his influential book of 1885 "Congressional Government."
>
> Between Lincoln and Theodore Roosevelt in 1901, no President exerted strong executive leadership.[616]

Schlesinger's argument[617] is flawed both historically and conceptually. As an initial matter, Wilson did not characterize the Johnson impeachment as inaugurating a period of congressional government. Rather, Wilson viewed the first century of American government as

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system or an approximation thereto is the only constitutionally proper course."); *id.* at 228 ("To suggest that, having deliberately rejected parliamentary supremacy at the founding of our republic, we should now embrace a theory that would make the President the most vulnerable of all federal officials to the drastic remedy of impeachment and removal—truly the political equivalent of capital punishment—is preposterous."). Professor Tribe describes impeachment as "empowering the Congress essentially to decapitate the Executive Branch in a single stroke" and constituting "the uniquely solemn act of having one branch essentially overthrow another." *Id.* Such descriptions are hardly accurate. Impeachment hardly overthrows another branch, which remains in the control of the same administration. Further, Article II, Section 1, Clause 6 of the Constitution, as well as the 25th Amendment, make hopes for decapitation a rather ephemeral objective. One of the most central differences between the American system and a parliamentary one is precisely that there is no hope of "overthrow[ing]" an administration outside the electoral process. Nevertheless, Professor Tribe was not alone in such dire warnings to Congress about the potential consequences of impeachment in the Clinton case. *See, e.g.*, *House Hearings*, *supra* note 3, at 231 (testimony of Prof. Susan Low Bloch) ("I cannot stress enough the fact . . . that if we lower the bar of what constitutes and warrants impeachment, we will be moving unconstitutionally toward a parliamentary system.").

616. *House Hearings*, *supra* note 3, at 99 (testimony of Prof. Arthur Schlesinger, Jr.).

617. Professor Bruce Ackerman also advances this argument in his testimony. Professor Ackerman opposed the impeachment of President Clinton and predicted that a strong tendency toward impeachment as a political tool would result:

> The result would be a massive shift toward a British-style system of parliamentary government. This is what happened in the aftermath of the impeachment of President Andrew Johnson in 1868. Though this impeachment effort barely failed to gain two-thirds support in the Senate, it drained effective power from the Presidency—to the point where Woodrow Wilson, writing in 1885, could describe our system as "congressional government." And it could readily happen again.

Impeachment Inquiry Pursuant to H. Res. 581: Presentation on Behalf of the President Before the House Comm. on the Judiciary, 105th Cong. 46 (1998) (testimony of Prof. Bruce Ackerman).

an example of congressional government resulting from structural flaws in the system.[618] Schlesinger's use of Wilson's academic work is rather ironic given Schlesinger's coupling of this historical account with a warning that this trend threatens a "quasi-parliamentary" system.[619] In *Congressional Government*, Wilson did not simply call for a quasi-parliamentary system; he called for an actual parliamentary system.[620] Moreover, it is difficult to find a historical basis for attributing perceived weakness in eight administrations to the Johnson trial. If these Presidents were indeed weak, the cause would more likely be found in the economic, social, and political conditions of the period. It is hard to believe that President Benjamin Harrison was materially altered in his outlook by recurring mental images of the Johnson trial. Moreover, this argument appears to suggest that there was a material change due to the trial. Yet, it is difficult to submit Martin Van Buren, John Tyler, Millard Fillmore, Franklin Piece, and James Buchanan as examples of robust executives in the pre-Johnson world. Finally, Schlesinger's historical account is supported neither by other historians nor by his own survey of historians on the relative strengths of Presidents before and after the Johnson trial. Post-Johnson and pre-Roosevelt Presidents Grover Cleveland and William McKinley were consistently rated as above-average in both Schlesinger's study and that of the Intercollegiate Studies Institute ("ISI").[621] Conversely, pre-Johnson Presidents Van Buren, Tyler, Taylor, Fillmore, Pierce, and Buchanan were listed as below-average by historians in both studies.[622] Professor Schlesinger's suggested cause and effect is simply insupportable. The strength of American Presidents may be better attributed to the growth in the American economy and greater international interests, as well as change in the role of party politics.

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618. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 48-56 (Johns Hopkins Paperbacks ed., Johns Hopkins Univ. Press 1981) (1885).

619. *See House Hearings*, *supra* note 3, at 100 (testimony of Prof. Arthur Schlesinger, Jr.).

620. *See* WILSON, *supra* note 618, *passim*.

621. Both Cleveland and McKinley were ranked as "high average" in both the Schlesinger and ISI polls. *See* James Piereson, *Historians and the Reagan Legacy*, WEEKLY STANDARD, Sept. 29, 1997, at 22 (comparing the results of the Schlesinger poll and the ISI poll).

622. President Van Buren was ranked as "low average" in both polls. Presidents Tyler and Fillmore were ranked as "below average" in both polls, while President Taylor was ranked as "below average" in the Schlesinger poll (but not ranked in the ISI poll). Presidents Pierce and Buchanan were ranked as failures in both polls. Due to their abbreviated tenures, neither William Henry Harrison nor James Garfield was ranked by either poll. *See id*.

Putting aside the factual basis of Schlesinger's historical claim, his conceptual argument that impeachment trials weaken Presidents should be addressed. As noted earlier, Framers like Madison were clearly concerned about the effect of impeachment authority on the executive branch vis-à-vis the legislative branch. Presumably, this concern contributed to the Framers' rejection of the Sherman "at-will" impeachment proposal,[623] their adoption of the standard of "high crimes and misdemeanors," and their imposition of a super-majority and other procedural requirements for removal. Even with these accommodations by the Framers, however, Schlesinger maintains that impeachments, like President Clinton's, serve to weaken the presidency. This, in turn, is based on a distinct and debatable view of presidential authority. Professor Schlesinger and others appear to fear a transfer of power to the legislative branch resulting from a chilling effect of the threat of impeachment. This comes down to a case of looking through a glass darkly. What is a chilling effect to some is a deterrent effect to others. Impeachment was often discussed by the Framers in terms of a check or a deterrent on presidential misconduct. As noted earlier, the statements of the Framers can be viewed as anticipating that impeachment would play a more active role than has been the case in our history.[624] Some of the delegates clearly shared the view of Williamson, who—when Madison argued that by trying impeachments, the Senate would threaten the President's independence—observed that "there was more danger of too much lenity than of too much rigour towards the President."[625] Likewise, Elbridge Gerry of Massachusetts "urged the necessity of impeachments" on the basis that "a good magistrate will not fear them [, but a] bad one ought to be kept in fear of them."[626] James Iredell also emphasized the deterrent value of impeachment and noted that "although *he may be a man of no principle, the very terror of punishment will perhaps deter him*."[627] Moreover, while Madison would have given the Supreme Court all or part of the function of trying impeachments, he did view impeachment as a critical counterbalance to the powers of the presidency.[628]

623. *See supra* notes 143-44 and accompanying text.

624. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 766-69.

625. 2 RECORDS, *supra* note 5, at 551.

626. *Id.* at 66.

627. 4 ELLIOT'S DEBATES, *supra* note 131, at 32.

628. *See supra* note 156 and accompanying text.

The Schlesinger argument also fails to consider the countervailing weakness of retaining, without a trial on the merits, a President who is viewed by the majority of the House as guilty of high crimes and misdemeanors. In a Senate trial, an impeached President is either removed or retained. In either case, it is not clear that the presidency is weakened as a result. When removed, a President has already lost the perceived legitimacy to govern. When retained, a President can claim a second act of consent for his continuation in office. The strength of any President, and the presidency as a whole, rests on the acceptance of his legitimacy to govern. A President must have both legal and political legitimacy to lead a democratic nation. In times of crisis, a President must have sufficient legitimacy to demand the greatest sacrifice of citizens, since a President cannot coerce a free nation. A President who is viewed as being without legitimacy suffers from a dangerous form of disability. The Framers foresaw controversies in which "an officer . . . had rendered himself justly criminal in the eyes of a majority."[629] The Framers created a process in which such questions of legitimacy could be resolved in an open and deliberative fashion. Alexander Hamilton described impeachment as "a method of NATIONAL INQUEST into the conduct of public men."[630] It is a public process to reach a public determination about the conduct of public officials.[631] As James Iredell noted, it is a proc-

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629. 1 RECORDS, *supra* note 5, at 86 (quoting James Madison and Robert Wilson).

630. THE FEDERALIST NO. 65, *supra* note 1, at 397; *see also* JOHN R. LABOVITZ, PRESIDENTIAL MISCONDUCT 199 (1978) ("The major purpose of impeachment, however, is to rid the government of a chief executive whose past misconduct demonstrates his unfitness to continue in office. Impeachment is a prospective remedy for the benefit of the people, not a retributive sanction against the offending officer."); 2 STORY, *supra* note 36, at 233-34:

> 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 misdemeanours 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.

631. This view of impeachment as addressing legitimacy issues is certainly present in modern impeachment trials, in which Congress has often sought removal based on such articles as raising "substantial doubt as to [one's] judicial integrity, undermin[ing] confidence in the integrity and impartiality of the judiciary, betray[ing] the trust of the people of the United States, disobey[ing] the laws of the United States, and bring[ing] disrepute on the Federal courts and the administration of justice by the Federal courts." ARTICLES OF IMPEACHMENT AGAINST JUDGE WALTER L. NIXON, JR., AS AMENDED, S. DOC NO. 101-17, at 23 (1987) (quoting Article III of impeachment); *see also* REPORT OF THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS, S. REP. NO. 101-156, at 2 (1989) (including Article XVII for "betray[ing] the trust of the people of the United States"); H.R. Res. 461, 99th

ess guaranteeing that "if a man be a villain, and willfully abuse his trust, he is to be held up as a public offender."[632]

"High crimes and misdemeanors" is a standard directed at conduct by a President that is so serious as to undermine his political and legal legitimacy to govern.[633] Madison noted that there are times when the public should not have to wait for the termination of a term to remove a person unfit for the office. Madison explained:

> [It is] indispensable that some provision should be made for defending the Community ag[ain]st the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. . . . In the case of the Executive Magistracy which was to be administered by a single man, loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic.[634]

While there may be a variety of disabilities that were not viewed in the 1700s as falling within "the compass of probable events," the impeachment process was available to the public to avoid the paralysis of a President with the title but not the legitimacy to govern. This public inquiry into "the conduct of public men" allows a free people to respond to questions of illegitimacy rather than leave the system paralyzed or retarded by scandal. Benjamin Franklin referred to this function in his view of the impeachment process:

> What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in [which] he was not only deprived of his life but of the opportunity of vindicating his character. It [would] be the best way therefore to provide in the Constitution for the regular punishment

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Cong. (1986) (enacted) (outlining articles of impeachment against Judge Harry E. Claiborne, including "betray[ing] the trust of the people of the United States and reduc[ing] confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts").

632. 4 ELLIOT'S DEBATES, *supra* note 131, at 126.

633. *See* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 39-40 (1974):

> I think we can say that "high Crimes and Misdemeanors," in the constitutional sense, ought to be held to be those offenses which are rather obviously wrong, whether or not "criminal," and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator.

634. 2 RECORDS, *supra* note 5, at 65-66.

> of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.[635]

Franklin's words reflect a view of impeachment that is potentially redemptive.[636] If a President stands before the Senate and answers allegations under oath, he can regain the legitimacy that he lost in the eyes of many Americans. If a President is justly accused, the Framers viewed the loss of legitimacy to be a permanent condition and specifically mandated that conviction would be accompanied with "disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States."[637] Both Franklin and Randolph emphasized the need for the public to view the process as responding to questions of fitness in order to avoid "irregular" responses.[638] The Framers created a system by which such powerful pressures could be directed to allow some release within the legislative branch, rather than resisted to the point of social explosion.

There is no more dangerous or divisive a question in a democratic system than the legitimacy of a President to govern. Perhaps for that reason, most past impeachments of judicial and presidential officers have been framed in legitimacy rather than criminality terms.[639] The test of the system was to create a process that could

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635. *Id.* at 65.

636. Franklin's linkage of impeachment and assassination was no idle comparison. In the case of the Duke of Buckingham, the decision of Charles I to disband Parliament before his impeachment left Buckingham to the devices of an assassin, who brought about a more permanent removal from office. *See supra* note 55 and accompanying text.

637. U.S. CONST. art. I, § 3, cl. 7.

638. *See* 2 RECORDS, *supra* note 5, at 67-68 (statement of Benjamin Franklin) (noting that absent a system of impeachment, citizens can resort to violent action); *id*. at 67 (statement of Edmund Randolph) ("The propriety of impeachments was a favorite principle with him; Guilt wherever found out to be punished. The Executive will have great opportunitys of abusing his power . . . . Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections.").

639. This point was made by the House Judiciary Committee in the impeachment of President Nixon:

> In drawing up articles of impeachment, the House has placed little emphasis on criminal conduct. . . .
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> . . . .
>
> Much more common in the articles are allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions. Recitals that a judge has brought his court or the judicial system into disrepute are commonplace. In the impeachment of President Johnson, nine of the articles alleged that he acted "unmindful of the high duties of his office and of his oath of office," and several specifically refer to his constitutional duty to take care that the laws be faithfully executed.

3 DESCHLER, *supra* note 37, at 723.

handle such intense pressures while protecting against majoritarian abuse. Impeachment provides a public forum to address these concerns and, when appropriate, to subject a chief executive to a new vote of legitimacy. The bicameral structure of impeachment allows for serious questions about the legitimacy of the chief executive to be raised in an open and deliberative fashion.[640] It was a process by which illegitimacy could be remedied by removal and legitimacy could be redeemed by acquittal.

Certainly not every article of impeachment in American history contained a legitimate basis for removal. In the articles of impeachment against President Richard Nixon,[641] the House tied each specific act to the charge that the President's conduct was "contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States."[642] The use of impeachment to address legitimacy issues was made by the New York bar during the Nixon hearings:

> It is our conclusion, in summary, that the grounds for impeachment are not limited to or synonymous with crimes (indeed, acts constituting a crime may not be sufficient for the impeachment of an officeholder in all circumstances). Rather, we believe that acts which undermine the integrity of government are appropriate grounds whether or not they happen to constitute offenses under the general criminal law. In our view, the essential nexus to damaging the integrity of government may be found in acts which constitute corruption in, or flagrant abuse of the powers of, official position. It may also be found in acts which, without directly affecting governmental processes, undermine that degree of public confidence in the probity of executive and judicial officers that is essential to the effectiveness of government in a free society. . . . At the heart of the matter is the determination—committed by the Constitution to the sound judgment

640. Certainly in the judicial impeachments, the notion of illegitimacy brought on by improper or offensive conduct was readily accepted under the Constitution in the 18th century. This illegitimacy basis for impeachment continued throughout our history, with judges often charged with bringing "disrepute" upon their offices. *See, e.g.*, 80 CONG. REC. 5602-08 (1936) (debate concerning impeachment of Halsted L. Ritter); *see also* Wrisley Brown, *The Impeachment of the Federal Judiciary*, 26 HARV. L. REV. 684, 692 (1913) (noting that impeachment was appropriate for "an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in its natural consequences, tends to bring an office into contempt and disrepute").

641. *See* CONG. GLOBE, 40th Cong., 2d Sess. 1613-42 (1868) (recounting the debate concerning the impeachment of President Andrew Johnson).

642. 3 DESCHLER, *supra* note 37, at 638; *see also id*. at 638-43 (outlining Articles I-III).

> of the two Houses of Congress—that the officeholder has demonstrated by his actions that he is unfit to continue in the office in question.[643]

While there is considerable debate over the relevance of judicial impeachment decisions to presidential impeachment cases,[644] one aspect of the judicial impeachments is certainly probative. After the ratification of the Constitution, judicial impeachments were commenced during the lifetime of many of the delegates. From these early cases to the present time, the House has included legitimacy articles that charged judicial officers with bringing disrepute upon their offices. There was no outcry concerning this noncriminal basis for impeachment nor the right of the public to review conduct that is so offensive as to be viewed as incompatible with an office.[645] Although legitimacy questions are more destabilizing in presidential cases, the resolution of such questions in an open process is often vital in judicial cases. The impeachment and trial of Judge Hastings is a modern case in point. Due to his acquittal at his criminal trial, Judge Hastings insisted that his impeachment and removal reflected a racist standard in the treatment of African-American judges.[646] This was an explosive charge that divided the nation and troubled some members of Congress.[647] Over the course of a long impeachment process and Senate trial, however, Congress achieved a bipartisan agreement on the need for removal, while at the same time it presented the strength of the evidence to the public. Much of the Hastings trial appeared to be a process in which the public could review the basis of the allegations and countervailing racist allegations. Ultimately, Judge Hastings was impeached by a vote of 413-3 in the House[648] and 69-26 in the Senate. The Senate vote reflected the fact that the Hastings case grew more controversial over the course of the process.[649] The Senate trial played

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643. COMMITTEE ON FEDERAL LEGISLATION OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK, THE LAW OF PRESIDENTIAL IMPEACHMENT 18-19 (1974).

644. *See supra* note 476 and accompanying text.

645. For example, recent impeachments of judicial officers include Judge Harry Claiborne (income tax evasion) and Judge Walter Nixon (perjury). *See* GERHARDT, *supra* note 243, at 4 n.11.

646. *See supra* notes 343, 347-48 and accompanying text.

647. As noted earlier, judicial impeachment cases occasionally raise such charges of political or retaliatory impeachment. Judges Nixon and Claiborne also raised such questions as to the motivation of impeachment in reference to their prior rulings against the government. *See supra* notes 360-61 and accompanying text.

648. *See* H.R. Res. 499, 100th Cong. (1988) (enacted).

649. This vote was only five votes above the required "supermajority" level. Four senators

a central role in the public dialogue over the case, and the outcome may have reflected the fact that Judge Hastings's conduct would continue to deprive him of any legitimacy as a judicial officer in criminal and civil cases. If Judge Hastings had been acquitted on a clear demonstration of proper conduct, his acquittal might have cleared away clouds of doubt by presenting the evidence in his defense. However, the fact that Judge Hastings was tried on grounds widely considered compelling (and that his alleged co-conspirator was convicted[650]) demanded a Senate trial on his retention and a second vote of consent.

When viewed as a process for dealing with factional disputes over legitimacy, the true importance of the Senate trial becomes clear. From the early use of impeachment in the English system, impeachments were quintessentially public acts.[651] When a President is accused, the Senate must resolve these questions in a trial specifically created for such review with representatives of all three branches. The President's conduct is reviewed by legislative figures designated by the Framers on account of their length of term and special institutional characteristics. If an official leaves such a body with his office intact, he can claim a form of political legitimacy that was gained by exposing himself to removal by will of the public. At the heart of this process is the element of consent; at the heart of consent is the element of full disclosure.[652]

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did not vote. Three senators recused themselves due to the fact that they had voted as House members in the impeachment of Judge Hastings before joining the Senate. One senator was in California due to an earthquake. The supermajority requirement, therefore, was 64 votes for conviction. Ultimately, the 69 votes cast for conviction would have satisfied the standard for the full Senate. *See* Baron, *supra* note 341, at 877, 901.

650. *See id.* at 902.

651. Jefferson noted that British impeachments followed the practice of swearing in witnesses in open proceedings. *See* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § L3 (2d ed. 1812), *cited in* Auslander, *supra* note 333, at 85-86 n.119.

652. There are obviously some acts that do not raise serious questions of the legitimacy of a President as a person of "good virtue" or veracity. However, there are many criminal or noncriminal acts that seriously undermine such legitimacy in a person who must "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. In a prior article, the relative significance of criminal versus noncriminal conduct was explored. *See* Turley, *Congress as Grand Jury*, *supra* note 3, at 759-62; *cf.* GERHARDT, *supra* note 243, at 88 ("The answer seems to be that someone who holds office also holds the people's trust, and an officeholder who violates that trust effectively loses the confidence of the people and, consequently, must forfeit the office.").

CONCLUSION

Articles I through III of the Constitution reflect the genius of the Madisonian democracy to direct unstable factional forces into the core of a deliberative process for resolution. Historically, some of the most dangerous and destabilizing factional conflicts have centered on the removal or retention of public officials. Impeachment was first widely used in this country as a powerful weapon of factional politics. Long ago, factional leaders learned that no political grievance was more compelling than a personified grievance. For that reason, impeachments have often risen with the tide of political discord. Passions can be equally high where the grievance can be attributed to the misconduct of the individual officer. When a constitutional officer engages in impeachable conduct, the controversy creates instability in a system based on consent rather than coercion. Rather than have such issues go unanswered, the Framers created a process by which an official would be called to defend his conduct and to submit to the will of the Senate as representatives of the citizens. This process is political and potentially redemptive. This is why it is often more important how we reach a decision in a Madisonian system than what we decide. When the Senate allows for a full presentation of evidence, factional views are given expression in the political system, and, regardless of the outcome, the verdict represents the will of a representative democracy. A retained judge or President may not regain personal respect from this process, but he can regain the political legitimacy needed to carry out constitutional functions.

The political function of impeachment is most evident in the cases of presidential impeachment. There is no greater political crisis in a democratic system than an allegation that the chief executive, sworn to enforce the law, has committed criminal acts in office. It is often stated that the crisis of presidential impeachment is due to the great harm that a President can commit and the "great injury" that can be done to the citizens. This great injury, however, is not the actual criminal acts, which may threaten few citizens or achieve little in their commission. Rather, the great injury is to the body politic: allegations that a chief executive is himself a threat to the rule of law may have traumatizing and destabilizing effects. Injury occurs also with the loss of legitimacy in a system demanding that a President have the full faith of the citizenry. The Framers understood both the danger of paralysis that can result from such allegations and the need to address any appearance that the President stands outside of the

system of laws. This was precisely the concern of Framers like George Mason when he argued for the necessity of impeachment by asking a rhetorical question: "Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?"[653] The Senate trial is a public act, a "calling . . . to account"[654] to resolve all questions as to the legitimacy of the one officer whose lawful conduct must be beyond question. The circumvention or abridgment of a Senate trial creates the appearance of special extrajudicial status in the President and undermines the legitimacy of prosecution of average citizens by the executive branch.

Therefore, the Senate trial does not weaken the presidency or the judiciary, but rather guarantees that officials govern without lingering factional doubts about their legitimacy due to the commission of alleged high crimes and misdemeanors. The Senate trial also plays a significant role for the Senate as an institution, the individual Senate members, and the public at large. For individual senators, the trial can encourage—as it has encouraged in the past—civic virtue to prevail over factional interests in final votes.[655] For the public, the Senate trial allows individual constituents to judge not only the conduct of an official but the conduct of individual senators. It is in this sense that the Senate trial is a vital vehicle of deliberative democratic process. It is through the deliberations of the Senate trial, now played out before a national audience, that a final vote of consent is established with finality and legitimacy.

The view of the Senate trial presented in this Article is heavily divorced from the simple procedural function of removal. Rather, the

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653. 2 RECORDS, *supra* note 5, at 65; *see also* 2 STORY, *supra* note 36, at 279 (noting that impeachment "holds out a deep and immediate responsibility, as a check upon arbitrary power; and compels the chief magistrate, as well as the humblest citizen, to bend to the majesty of the laws").

654. 1 ANNALS OF CONG. 572 (Joseph Gales ed., 1789). Given the President's oath to faithfully execute the laws, John Vining stressed the use of impeachment trials as a public means of addressing such allegations as distinct from a later election:

> The President. What are his duties? To see the laws faithfully executed; if he does not do this effectually, he is responsible. To whom? To the people. Have they the means of calling him to account, and punishing him for neglect? They have secured it in the Constitution, by impeachment, to be presented by their immediate representatives; if they fail here, they have another check when the time of election comes round.

Id.

655. In casting his famous dissenting vote against the conviction of President Johnson, Kansas Senator Edmund Ross was reportedly motivated by a fear of congressional autocracy that would "create partisan rule whereby a majority would brutally stifle all opposition as a matter of course." SMITH, *supra* note 391, at 279.

Senate trial has a critical political function as a measure of consent. When a President is impeached, the resulting legitimacy question is based partly on the fact that critical information about a President's conduct or character was disclosed after he was elected. Likewise, a judge accused of such conduct reveals information not known at the time of his appointment. This creates the analogy to consent based on misrepresentation. It is essential that a Senate trial result in full disclosure, regardless of the outcome. If full disclosure results in removal, the impeached President could not have continued in office with the authority needed to lead a nation. If full disclosure results in retention, the vote to retain the President is based on a second act of consent by the public through their representatives. Regardless of how citizens may view the conduct or character of the President, there is no question that the President was retained with the full consent of a democratic nation.

In a Madisonian system, it is not factional or partisan disputes that are threats to stability, but unaddressed factional or partisan disputes. Ironically, the bicameral system crafted by Madison is the most effective government system in resolving factional disputes. Yet, in the most intense and dangerous factional controversy of presidential impeachment, the value of the Madisonian process has been largely ignored. Impeachments are treated as insular and unique events, as opposed to extreme forms of factional dispute. Senate trials are viewed as potentially destructive rather than potentially transformative in the political system. As a result, the impeachment process remains the one bicameral function that is treated as exogenous to the bicameral system. Deprived of its underpinnings, impeachment is reduced to a univocal process with little purpose beyond its conclusion.

Impeachment is best understood as a legislative rather than a judicial process. When viewed as part of the legislative system for resolving factional disputes, impeachment is given a contextual and procedural meaning. It is the most extreme and rarest form of political discord left for resolution in the legislative branch. As with legislation, the validity of the final decision of the Senate depends on an informed and deliberative process.[656] When the threshold of "high crimes and misdemeanors" has been met in the House, the full presentation of evidence and debate in the Senate trial are essential to the retention of legitimacy not only by the officeholder but for the political process itself. It is the perceived legitimacy of the process,

656. HART & SACKS, *supra* note 55, at 2-4, 695.

and not the outcome of that process, that maintains the faith of the governed and ultimately the authority of the government. If a system is best understood or defined at its extremes, the final call of a Senate impeachment vote is the quintessential Madisonian moment. It is the moment in which a pluralistic nation, fractured by division, is joined by a common faith. Far from a moment of weakness, it may be our strongest moment as a people.