

An Overview of Presidential Impeachment

BY SCOTT S. BARKER



This article discusses the constitutional procedure for impeachment, with a focus on removing a U.S. President from office. It covers the development of the procedure from its roots in English law.

Impeachment is a rare event; presidential impeachment is even rarer. In the 229 years of the American republic only two Presidents, Andrew Johnson and William Jefferson (Bill) Clinton, have been impeached by the House of Representatives. Neither was convicted by the Senate. It is now nearly 20 years since the Clinton impeachment, and recent events have generated a renewed interest in the topic. This article provides a basic overview of impeachment, with a focus on the constitutional process that applies to the removal of a U.S. President from office.

Development in England

Understanding impeachment under the U.S. Constitution must begin with a survey of the doctrine under English law as it existed at the time of our Constitutional Convention in 1787. The record of the Convention reveals substantial knowledge among the delegates of impeachment as it had developed in England.¹ No less an authority than Alexander Hamilton acknowledged that the institution of impeachment in the Constitution was “borrowed” from Great Britain.²

Over the course of hundreds of years, impeachment developed as a mechanism for Parliament to remove ministers of the Crown, or others, whom it found were pursuing policies or engaging in acts offensive to the interests of the state. The king himself could not be removed, so attacks were made against agents of the Crown. Impeachment first appeared in England during the Good Parliament of 1376, when it was used as a means of initiating criminal proceedings.³ By 1399, during the reign of Henry IV, a set of procedures and precedent had been developed.⁴ Impeachment fell out of use after the mid-15th century, but was revived in the 17th century when it was used repeatedly by Parliament

to rein in Crown officials during the clash between Parliament and the Stuarts, who sought absolute power for the Crown.⁵ From 1621 to 1679, Parliament wielded impeachment against numerous high level ministers to the Crown, including the 1st Duke of Buckingham, the Earl of Stafford, Archbishop William Laud, the Earl of Clarendon, and Thomas Osborne, Earl of Danby; in the latter case it was decided that the king’s pardon could not stop the process.⁶ Use of impeachment gradually waned in the 18th century, and once it was established in the early 19th century that government was beholden to Parliament, not the Crown, impeachment was no longer necessary.

Under English procedure, the House of Commons conducted a truncated trial (the defense was not allowed to present testimony) to determine if an impeachable offense had occurred. If the answer was yes, the Commons would issue articles of impeachment and the matter was transferred to the House of Lords. Another trial was held there at which the defense also presented its case. The Lords had the power to convict and to assess punishment, which was not limited to removal from office, but could include fines, forfeiture, imprisonment, and rarely, death. All citizens, except members of the royal family, were subject to impeachment. This included members of Parliament.⁷ By 1769, it was proclaimed that impeachment was the “chief institution for the preservation of government.”⁸

Although the primary use of impeachment was to prosecute crimes against Crown ministers who were otherwise beyond the reach of the law, the grounds for impeachment in England were broad and varied, going beyond criminal behavior. The term “high crimes and misdemeanors” was first clearly applied in the 1386 trial of Michael de la Pole, Earl of Suffolk,

who was accused of a “host of impeachable offenses, including the ‘appointment of incompetent officers and advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of laws.’”⁹ Under English practice, impeachment was for political crimes that injured the state. It was injury to the state that distinguished “high crimes and misdemeanors” from an ordinary misdemeanor.¹⁰

The U.S. Constitution’s Framework

Three primary attributes of the English practice shaped the impeachment process under the U.S. Constitution: the bicameral procedure under which the House of Commons would consider evidence to determine if there were sufficient grounds for issuing articles of impeachment, after which the House of Lords would try the accused, determine guilt or innocence, and assess punishment if there was a conviction; the use of impeachment as a check on the power of the Crown when it was perceived to be abusing the interests of the king’s subjects, often as expressed in acts of Parliament;¹¹ and the categorization of impeachable offenses under the rubric of “high crimes and misdemeanors” to include both criminal and non-criminal conduct in the discharge of official duties.

Impeachment by the House and Trial by the Senate

The impeachment procedure established by the U.S. Constitution roughly mimics the respective roles of the lower and upper legislative chambers in the British process. As with the House of Commons, impeachment is committed to the assembly that is more directly tied to the people, the House of Representatives,¹² which “shall have the sole Power of Impeachment.”¹³ This is an official charge against the person

being impeached, taking the form of “articles of impeachment,” approved by a majority of the House. The Senate, like the House of Lords, then conducts the trial, with the senators under oath.¹⁴ The Constitution expressly excludes trial by jury for impeachment.¹⁵ The Senate sits as both the trier of fact and the decider of the law. When the President is being tried, the Chief Justice of the United States presides; this is the only role assigned to the judiciary in the impeachment/trial process.¹⁶ Unlike the House of Lords, where a simple majority could convict, in the Senate conviction requires a “super majority” of two-thirds of the members present.¹⁷ This requirement was included as an additional protection of the President from legislative encroachment on his executive powers.

Significantly, although there were advocates at the Constitutional Convention for involving the judiciary in impeachment, that view was rejected, and the Constitution allocates no role to the judiciary in the process. The 1993 U.S. Supreme Court decision in *Nixon v. United States*¹⁸ made this clear. The petitioner was Walter L. Nixon, a former chief judge of the U.S. District Court for the Southern District of Mississippi. He was convicted by a jury of two counts of making false statements before a grand jury impaneled as part of an investigation into reports that Nixon had accepted a gratuity from a Mississippi businessman in exchange for asking a local district attorney to halt the prosecution of the businessman’s son. He was sentenced to prison.

However, Nixon refused to resign his position as a federal judge and continued to collect his federal paycheck during his incarceration. Impeachment was necessary to terminate this unseemly use of taxpayers’ money. The House sent three articles of impeachment to the Senate, which invoked a Senate rule under which a committee of senators was appointed to receive evidence and take testimony. The Senate Committee held four days of testimony from 10 witnesses, including Nixon himself. The Committee presented to the full Senate a transcript of the proceedings before the committee and a report stating the uncontested facts and summarizing the evidence on the contested facts. Nixon and the House impeachment

managers submitted briefs to the full Senate and delivered arguments from the Senate floor during the three hours set aside for oral argument in front of that body. The full Senate voted to convict Nixon.

Nixon argued that, under the Constitution, the trial must be conducted in its entirety before the Senate sitting as a committee of the whole.¹⁹ Because that had not happened, he

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asked the trial court to rule his impeachment conviction invalid and to restore his salary and other privileges.²⁰ Both lower courts rejected this argument, as did the Supreme Court. In a deferential opinion for the court, Chief Justice Rehnquist affirmed the circuit court, concluding that there was no “textual” basis for limiting the Senate’s discretion in deciding what procedure it would use to fulfill its obligation to “try” the

official, in this case a judge, on the articles of impeachment delivered to the Senate by the House.²¹

The Chief Justice pointed out that the Framers had considered “scenarios” in which the power to try impeachments was placed in the federal judiciary, including a proposal by James Madison that the Supreme Court should have that power.²² The ultimate version gave the “sole power” to the Senate for reasons explained by Alexander Hamilton in *Federalist* 65.²³ First, according to Hamilton, the Senate was the “fit depositary for this important trust because its members are representatives of the people.”²⁴ In addition, the Supreme Court was not the proper body because the Framers “doubted whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task” or whether the Court “would possess the degree of credit and authority” to carry out its judgment if it conflicted with the accusation brought by the Legislature—the people’s representative.²⁵

The Remedy

The only remedy upon conviction for impeachment is removal from office: “Judgment in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States . . .”²⁶ However, “the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”²⁷

The President’s pardon power does not extend to persons convicted on impeachment: “[H]e shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”²⁸

Debating Presidential Impeachment

Two significant presidential impeachment issues were debated at the Constitutional Convention: (1) Was it necessary to provide for impeachment of the President? (2) If so, what were to be the grounds for impeachment?²⁹

The most extensive debate on the propriety of presidential impeachment occurred on July 20, 1787, while the delegates were still

wrangling over a number of other issues about the shape of the executive. Three positions were advanced during the debate. The day before, Gouverneur Morris, who, like Hamilton, favored an “energetic executive,” had spoken against including a power to impeach the President in the Constitution, warning that impeachment would “render the president dependent on those who are to impeach him.”³⁰ At the other extreme was Roger Sherman’s view, which received little support, that the legislature should have the unfettered power to remove the President.³¹

As the debate unfolded, it gravitated toward a middle view advocated by a number of delegates, including James Madison, who argued that it was “indispensable” to provide for presidential impeachment. Otherwise, the President might “pervert his administration into a scheme of speculation and oppression. He might betray his trust to foreign powers.”³² Benjamin Franklin noted in a morbid comment that, without impeachment, “Why recourse was had to assassination in which he [the “Magistrate”] was not only deprived of his life but of the opportunity of vindicating his character.”³³ George Mason, who played a major role in the final debate that was yet to come, stated that “[n]o point is of more importance than that the right of impeachment could be continued. Shall any man be above justice? Above all shall that man be above it, who can commit the most extensive injustice.”³⁴ Edmund Randolph favored impeachment because the executive “will have great opportunit[ie]s 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.”³⁵

Having heard these comments, Gouverneur Morris changed his position and agreed that impeachment was necessary, but urged that the “cases ought to be enumerated & defined.”³⁶ Accordingly, on July 26, the Convention reaffirmed what had been tentatively decided on July 20, that the President shall be “removed for impeachment and conviction of malpractice or neglect of duty.”³⁷ From this point forward, impeachment was included as a mechanism for removing the President. The “trend of the discussion was toward allowing a narrow

impeachment power by which the President could be removed only for gross abuses of public authority.”³⁸

Various standards for impeachment were suggested throughout the course of the Convention. They included “mal- and corrupt administration,” “misconduct in office, neglect of duty, malversation, or corruption,” and “treason, bribery or corruption.” In the face of all these suggestions, on September 4, the so-called “Committee of Eleven” proposed that removal of the President should be limited to “treason or bribery.”³⁹ This set the stage for the following brief but important exchange that occurred on Saturday, September 8, as recorded in James Madison’s notes:

Col. Mason. Why is the provision [as contained in the Committee’s report] restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. 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 more necessary to extend the power of impeachments.

He moved to add after “bribery” “or maladministration.” Mr. Gerry seconded him. Mr. Madison: So vague a term will be equivalent to a tenure during pleasure of the Senate.

Mr. Govr. Morris, it will not be put in force & can do no harm—An election every four years will prevent maladministration.

Co. Mason withdrew “maladministration” & substitutes “other high crimes & misdemeanors agst. the State.”⁴⁰

Mason’s reference to Hastings was to a celebrated English impeachment case ongoing at the time of the Convention and well-known to the delegates. Hastings, the Governor-General of India, was charged with “high crimes and misdemeanors” in the form of “maladministration, corruption in office, and cruelty toward the people of India.”⁴¹ Mason’s point was that, under English law, treason was not the only grounds on which impeachment could be based. His substitute language of “high crimes or misdemeanors” was also known to

the delegates as a term of art under English law that included a range of serious criminal and non-criminal conduct for which impeachment was available.⁴² Mason had said earlier in the Convention that the President should be punished “when great crimes were committed.”⁴³ The fact that he included the words “against the state” indicated that he understood that the impeachable conduct had to be directed at the state.

As Mason said in the exchange quoted above, bills of attainder were excluded under the Constitution.⁴⁴ A bill of attainder was a special legislative act that inflicted capital punishment upon persons supposed to be guilty of high offenses, such as treason and felony, without conviction in the ordinary course of judicial proceedings.⁴⁵

With one exception, the language that resulted from the exchange made it into the final version of the Constitution. When the “Committee on Style” produced the final document, the words “against the state” were removed.⁴⁶ This odd bit of drafting history has provided a hook for those who argue that the removal of the qualifying language reflected a decision by the Convention to open up impeachment to conduct by the President that does not relate to his official duties. (This became a significant issue in the impeachment and trial of President Clinton.)

However, that argument ignores the fact that the Committee on Style did not have the authority to change the meaning of the language of the document, because it was submitted to them for polishing up.⁴⁷ It also fails to account for the impeachment debates during the Convention and statements made during the ratification debates, described below, that clearly show the founders were concerned about significant breaches of trust by the President in the discharge of his official duties.

What Is an Impeachable Offense?

The Constitution provides that “[t]he President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”⁴⁸ Like so much else in the Constitution, there is a lot packed into the eight words defining an

impeachable offense: “treason, bribery, or other high crimes and misdemeanors.” The last four words seem especially open to interpretation, and there are different views about whether “high crimes and misdemeanors” includes non-criminal conduct. This issue is informed by the people who drafted and ratified the Constitution.

As already noted, under English law, impeachment was available to remove ministers who had engaged in non-criminal conduct. The Framers were aware of and drew upon this English law when they adopted the English term of art “high crimes and misdemeanors.” The debates on impeachment at the Constitutional Convention referred to such non-criminal conduct as “neglect,” “maladministration,” and the like when they spoke of the grounds for removing the President. The key exchange among Mason, Madison, and Gouverneur Morris on September 8, quoted above, underscores the point.

The political tracts issued and statements made at the ratification conventions further support the conclusion that the Constitution authorizes impeachment for non-criminal conduct. Hamilton’s definition of impeachment in Federalist 65 is telling. Impeachment, according to Hamilton, one of the signers of the Constitution and an active participant in promoting its ratification, “proceeds from the misconduct of public men . . . from the abuse or violation of a public trust.” The offenses that support impeachment “may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to society itself.”

The historical record also includes statements made at both the Virginia and North Carolina ratifying conventions that reveal impeachment was not limited to criminal conduct. In Virginia, James Madison, George Nicholas, John Randolph, and Edmund Randolph all stated that impeachable offenses were not limited to indictable crimes.⁴⁹ John Randolph elaborated that “[in] England, those subjects which produce impeachments are not opinions . . . It would be impossible to discover whether the error in opinion resulted from a willful mistake of the heart, or an involuntary fault of

the head,” stressing that only willful conduct, not errors of opinion, would be impeachable.⁵⁰

At the North Carolina convention, the most significant remarks on the scope of impeachable conduct were made by James Iredell, who was later appointed as an associate justice of the Supreme Court. He noted the complexity, if not the impossibility, of describing the bounds of impeachable conduct other than to acknowledge that it involves serious injuries to the federal government. He understood impeachment to be “calculated to bring [great offenders] to punishment for crime which it is not easy to describe,” although he gave the following examples: giving false information to the Senate; bribery, or, more broadly, “acting from some corrupt motive or other.”⁵¹ He also distinguished between “want of judgment” (not impeachable) and “willfully abusing[ing] his trust” (impeachable).⁵² As an example of impeachable conduct Iredell cited a situation in which “the President had received a bribe . . . from a foreign power, and, under the influence of that bribe, had address enough with the Senate, by artifices and misrepresentations, to seduce their consent to a pernicious treaty.”⁵³

One scholar has looked for but been unable to find a single example of an impeachable offense advanced in the ratification debates that did not involve the abuse of “public power.”⁵⁴ Echoing this proposition, Justice Joseph Story wrote in his 1833 *Commentaries on the Constitution of the United States* that impeachment applies to offenses of a “political character” that are so varied as to be impossible of exact definition, but that involve discharging the duties of public office.⁵⁵ Based on this record, there are two mainstream arguments that together are widely accepted. Under both views, a President may be impeached for conduct that is not indictable as a crime, but there are limits on Congress’s power to do so. The mainstream positions are book-ended by two more extreme views.

The “Originalist” View

One mainstream view, the “originalist” view, is that the meaning of the impeachment phrase must be determined by looking at what the term “high crimes and misdemeanors” meant

under English common law as understood by the Framers at the time the Constitution was drafted and ratified, as reflected in the text of the Constitution and contemporaneous statements made by the Framers and ratifiers, as well as the historical context surrounding its drafting and ratification.

The most prominent modern proponent of this view is Professor Raoul Berger. He contends that while Parliament claimed an unlimited right to define impeachable conduct, the Framers had a more limited view with respect to the American adaptation. They included a tight definition of treason in the Constitution and listed bribery along with it. To broaden the ambit of impeachable offenses, they adopted the English phrase “high crimes and misdemeanors” because they thought the words had a limited technical meaning.⁵⁶ They further conceived that the President would be impeachable not just for indictable crimes, but for other “great offenses” such as “corruption or perfidy.” For originalists, the impeachable conduct needs to be limited to a cause that would win the assent of “all right thinking men.”⁵⁷

A “Living Meaning” of Impeachable Offense

The other mainstream view begins with the same material relied upon by the originalists, but also asserts that, given the difficulties in imagining all of the complex, unpredictable situations that might justify removal, the Framers meant for the scope of impeachment to be worked out in the future on a case-by-case basis, but constrained by the principles derived from the “original materials.” Professor Michael Gerhardt is a well-regarded advocate of this view. He concludes that the Framers made a decision to loosely define “other high crimes and misdemeanors” with the content to be developed later as cases arose.⁵⁸ Professor Cass Sunstein has pointed out that the fact that the impeachment power has been so little used is itself an indication that it has been reserved by Congress for truly exceptional cases.⁵⁹

Given the fact that the historical record contains only two presidential impeachments, the differences in outcome between these two schools of thought is, at least so far, without any

real distinction. Together they stand for the proposition that a President may be removed for criminal or non-criminal conduct that amounts to a serious breach of trust causing injury to the political community, and that the Congress's ability to do so is not unlimited.

Congress Defines Impeachable Conduct

The first extreme view is the open-ended view that an impeachable offense is whatever the House and the Senate together agree is impeachable as they exercise their respective constitutional roles in the process. This view was most famously espoused by then-Congressman Gerald Ford when he proposed the impeachment of Supreme Court Justice William O. Douglas in 1970. He asserted that an impeachable offense is whatever the House of Representatives, with the requisite concurrence of the Senate, considers it to be.⁶⁰

That view ignores the clear record from the Constitutional Convention and the ratifying debates, as well as commentary from others writing in the early 19th century familiar with the founding generation, that there are limits to the scope of conduct that will support removal of the President. There was substantial concern expressed during the Convention debates that the formula could not be such as to invite the legislature to impeach the President based solely on their disagreement with his actions. In Madison's words, such a vague term as "maladministration" would be "equivalent to a tenure during the pleasure of the Senate." The Ford position is fundamentally inconsistent with this view and would, if adopted, make the President subject to "votes of no confidence" as in the British system. This would make the President completely beholden to Congress, a practice that is at odds with the separation of powers at the heart of the Constitution.

Presidents May Be Removed Only for Indictable Crimes


The second extreme view is that presidents may only be removed for indictable crimes. This argument, advanced in 1867, is based on a reading of English law that impeachment was limited to a "true crime . . . a breach of the common or statute law."⁶¹ It was picked up by

James St. Clair in a February 1974 memorandum when he was chief defense counsel for Richard Nixon, fighting to keep the impending threat of Nixon's impeachment at bay.⁶²

This position receives virtually no support from constitutional scholars.⁶³ It ignores the English practice of basing impeachment on non-criminal conduct. More importantly, it brushes aside, without explanation, the debates at the Constitutional Convention and during the ratification process that "high crimes and misdemeanors" was meant to embrace "political crimes" amounting to great breaches of trust. It would be incompatible with the intent of the Framers to provide a mechanism broad enough to maintain the integrity of constitutional government. Impeachment is a constitutional safety valve that must be sufficiently flexible to deal with circumstances that are not foreseeable.⁶⁴

Conclusion

The concept of impeachment has developed over centuries. While there is room for disagreement,

currently the substantial weight of opinion from constitutional scholars is that impeachment is properly brought when the President has engaged in criminal or non-criminal conduct undertaken in the discharge of his duties as President that results or threatens to result in significant harm to the government and/or the political system as a whole. 



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NOTES

1. See, e.g., Turley, "Senate Trials and Factional Disputes: Impeachment as a Madisonian Device," 49 *Duke L.J.* 1, 34-35 (Oct. 1999), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1059&context=dj>.
2. Hamilton, Federalist No. 65 (Mar. 7, 1788), <http://academic.brooklyn.cuny.edu/history/johnson/fedimpeachment.htm>.
3. Impeachment Law at www.britannica.com/topic/impeachment.
4. See Turley, *supra* note 1 at 11.
5. *Id.* at 12-13.
6. Berger, *Impeachment: The Constitutional Problems, Enlarged Edition* at 32-49 (Harvard University Press 1974).
7. See Turley, *supra* note 1 at 9-10. Unlike the English system, members of the U.S. Congress are not subject to impeachment.
8. Sunstein, *Impeachment: A Citizen's Guide* at 35 (Harvard University Press Oct. 2017).
9. See Turley, *supra* note 1 at 11-12.
10. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* at 103-104 (Princeton University Press 1996).
11. Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, Committee on the Judiciary, House of Representatives, Ninety-Third Congress, Second Session at 7 (U.S. Government Printing Office Feb. 1974).

12. Before the 17th Amendment was ratified in 1913, senators were elected by the state legislatures, not by popular vote.
13. U.S. Const. art. I, § 2, cl. 5.
14. U.S. Const. art. I, § 3, cl. 6.
15. U.S. Const. art. III, § 2.
16. *Id.*
17. *Id.*
18. *Nixon v. United States*, 506 U.S. 224 (1993). There have been no judicial decisions regarding presidential impeachment.
19. *Id.* at 228.
20. *Id.*
21. *Id.* at 238.
22. *Id.* at 233.
23. *Id.*
24. Federalist No. 65.
25. *Id.*
26. U.S. Const. art. I, § 3, cl. 7.
27. *Id.*
28. U.S. Const. art. II, § 2.
29. See Gerhardt, *supra* note 10 at 5-10.
30. *Id.* at 7.
31. Sunstein, "Essay: Impeaching the President," 147 *Univ. Penn. L.Rev.* 279, 286 (Dec. 1998), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3404&context=penn_law_review.

32. See Gerhardt, *supra* note 10 at 8.
 33. Farrand, ed., *The Records of the Federal Convention of 1787*, vol. II, at 65 (Yale University Press 1911).
 34. *Id.*
 35. *Id.* at 67.
 36. *Id.* at 65.
 37. *Id.* at 121.
 38. See Sunstein, *supra* note 31 at 287.
 39. See Gerhardt, *supra* note 10 at 8.
 40. See Farrand, *supra* note 33 at 550.
 41. See Constitutional Grounds for Presidential Impeachment, *supra* note 11 at 7.
 42. See Berger, *supra* note 6 at 66.
 43. *Id.* at 91, n. 158.
 44. U.S. Const. art. I, § 9.
 45. Garner, *Black's Law Dictionary* (West Publishing Co. rev. 4th ed. 1968).
 46. See Farrand, *supra* note 33 at 600.
 47. See Sunstein, *supra* note 31 at 288.
 48. U.S. Const. art. II, § 4.
 49. See Gerhardt, *supra* note 10 at 19.
 50. *Id.*
51. *Id.* at 18-19.
 52. *Id.*
 53. See Sunstein, *supra* note 31 at 289.
 54. *Id.* at 290.
 55. See Constitutional Grounds for Presidential Impeachment, *supra* note 11 at 16-17.
 56. See Berger, *supra* note 6 at 310-311.
 57. *Id.*
 58. Gerhardt, "The Presidency: Twenty-Five Years After Watergate, Putting the Law of Impeachment in Perspective," 43 *St. Louis U. L.J.* 905 (1999). See also Weeden, "The Clinton Impeachment Indicates a Presidential Impeachable Offense is Only Limited by Constitutional Process and Congress' Political Compass Directive," *Wm. Mitchell L.Rev.*, vol. 27, iss. 4, art. 7 at 2498 (2001); Gerhardt, *supra* note 10 at 103-11; Constitutional Grounds for Presidential Impeachment, *supra* note 11 at 64-79; Gerhardt, *supra* note 10 at 25.
 59. See Sunstein, *supra* note 31 at 293-98.
 60. See Berger, *supra* note 6 at 56 note 1.
 61. See *id.* at 59 (quoting an 1867 writing by Theodore Dwight).
 62. *Id.* at 331.
 63. On November 9, 1998, as part of the Clinton impeachment proceedings, 19 law professors, political scientists, and historians testified on the grounds for presidential impeachment before the House Subcommittee on the Constitution. While there was disagreement about what those grounds are, they all unanimously agreed that the President can be removed for conduct other than indictable crimes. See Impeachment of President William Jefferson Clinton, The Evidentiary Record Pursuant to S. Res. 16, Vol. XX, Hearing of the Subcommittee on the Constitution—"Background and History of Impeachment" (Nov. 9, 1998), Ser. No. 63 (U.S. Government Printing Office 1999), www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc3/pdf/GPO-CDOC-106sdoc3-20.pdf. See also Constitutional Grounds for Presidential Impeachment, *supra* note 11 at 22-25.
 64. See Constitutional Grounds for Presidential Impeachment, *supra* note 11 at 25.



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