United States House of Representatives

Committee on the Judiciary

"The Imperial Presidency of George W. Bush and Possible Legal Responses"

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My name is Stephen B. Presser, and I am the Raoul Berger Professor of Legal History at Northwestern University School of Law. I have been teaching and writing about Constitutional law and its history for thirty-one years, and I have been privileged to be an invited witness before many committees and subcommittees of both the Senate and House to testify on Constitutional matters. I appeared before a subcommittee of this committee in late 1998 to give my views on what constituted an impeachable offense, and I have been invited to this hearing to comment on whether some suggestions of misconduct by President George W. Bush are acts that might appropriately result in impeachment proceedings. These Acts, the subject of these hearings, include, to borrow from Chairman Conyers's language in announcing these hearings, "(1) improper politicization of the Justice Department and the U.S. Attorneys offices, including potential misuse of authority with regard to election and voting controversies; (2) misuse of executive branch authority and the adoption and implementation of the so-called unitary executive theory, including in the areas of presidential signing statements and regulatory authority; (3) misuse of investigatory and detention authority with regard to U.S. citizens and foreign nationals, including questions regarding the legality of the administration's surveillance, detention, interrogation, and rendition programs; (4) manipulation of intelligence and misuse of war powers, including possible misrepresentations to Congress related thereto; (5) improper retaliation against administration critics, including disclosing information concerning CIA operative Valerie Plame, and obstruction of justice related thereto; and (6) misuse of authority in denying Congress and the American people the ability to oversee and scrutinize conduct within the administration, including through the use of various asserted privileges and immunities." In what follows I will first review the meaning of the Constitutional phrase "high Crimes and Misdemeanors," in order to derive an understanding of what constitutes an impeachable offense,[1] and I will then briefly apply this understanding to the allegations made against President George W. Bush, to suggest whether he has committed any impeachable offenses. Ultimately, of course, this is not a call for a law professor to make, it rests within the discretion of the House of Representatives, but, at this time, based on the allegations that are before this committee, it does not appear that impeachment proceedings against President Bush are warranted.

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[1] This part of my testimony is taken from an article published in the George Washington Law Review which was based on the testimony I previously gave before this Committee. The Article is *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 Geo. Wash. L. Rev. 666 (1999). I have edited portions of the article for inclusion here.

I. The Constitutional Provisions

The Constitution provides in Article II, Section 4, that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[2] I believe that the proper way to interpret this provision (or any other Constitutional provision) is to ask what the words would have meant to the Constitution's Framers. In order to answer this question we need to place the impeachment remedy in the context of the Framers' assumptions about how the Constitution would work and what would make it work best.

The first important thing to understand is that the federal Constitution came about because of a belief on the part of most of the Framers that following independence, the newly created state legislatures were behaving in a manner that was inimical to the success of our Republic. These state legislatures were passing measures that interfered with preexisting contracts, both by suspending them and by allowing payments to be made in newly printed state-issued paper money. This was regarded as irresponsible action - action believed to be undertaken by unscrupulous state politicians - which cast doubt on whether the American people and their governments possessed the virtue necessary to make a republican government work. The state legislatures, in short, were encouraging dishonesty in commercial matters; suspending, in effect, the legal foundations of property and propriety, and jeopardizing the future smooth functioning of American economy and society.[3]

The hopes for future success in the new Republic rested on the integrity of the federal government and its laws; if these were subject to displacement by whim or by corruption - as it seemed the state legislatures were doing to the rule of law in the period from 1776 to 1786 - there was little hope that the new American nation could long endure. Integrity in the new national government, its judiciary, and its acts was vital if commercial prosperity was to be secured. This prosperity was deemed essential to achieve domestic tranquility and the other goals of the new federal Constitution.

The new Constitution forbade the state legislatures from interfering with contracts and from continuing to issue paper money. The new federal government was charged with establishing a foundation for continued economic and political stability. Most important for our purposes, elaborate structural safeguards were put in place in the new federal Constitution to make sure that the new federal government would behave with integrity and that its officials would display the kind of disinterested virtue necessary to make American government work.

The debates over the 1787 Constitution often focused on how virtue was to be secured in all three branches of the new government. It is in this context that impeachment must be understood. The Framers considered impeachment to be a vital device intended to guarantee that the President and other federal officials would act with integrity. Indeed, it was a device designed to ensure that the President and other federal officials would do what they were supposed to do, because they would know that they would face removal if they did not.

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[2] U.S. Const. art. II, 4.

[3] On this matter, see generally the now-classic account in Gordon S. Wood, The Creation of the American Republic 1776-1787 (1969).

II. The Federalist on Impeachment

The Federalist, the series of essays on the Constitution written by James Madison, Alexander Hamilton, and John Jay in the years immediately following the drafting of the Constitution at the Philadelphia Convention, provides another important guide, in addition to the text of the Constitution itself, to understanding the working of impeachment. The Federalist is universally acknowledged to be the most important contemporary exposition of the federal Constitution. But it is more than a powerful contemporary account. It is, in many ways, a work exploring timeless political truths. To this day, The Federalist is regarded as the most important American work in political science.[4]

Thomas Jefferson praised The Federalist as "the best commentary on the principles of government which ever was written."[5] James Madison, one of The Federalist's three authors, suggested in 1825 that The Federalist was "the most authentic exposition of the text of the federal Constitution, as understood by the Body which prepared and the authority which accepted it."[6] The fact that the third and the fourth Presidents so enthusiastically praised The Federalist suggests that they agreed with The Federalist's views of how the presidency and the impeachment process were to operate.

Federalist No. 64, one of the few numbers written by John Jay, who was to become the first Chief Justice of the United States, provides one very clear indication of what the Framers intended with regard to impeachment. Jay discussed the treaty power, and responded, in particular, to critics of the Constitution who argued that the President and the Senate were given too much discretion in committing the new Nation to treaties with other nations. Jay noted that the presidential power of making treaties - perhaps the most important foreign policy power that the President has discretion to exercise - is important because it "relates to war, peace, and commerce," and that it "should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good."[7] Jay went on to explain that the means of picking the President - indirectly through the electoral college - is calculated so that the President will be a person noted for integrity, virtue, and probity, and that the original indirect means of selecting senators - through the state legislatures - was to assure the same for the senators.[8]

Jay made plain that when a President fails to live up to the requirement of trust, honor, and virtue that is necessary to meet his treaty-making and other executive responsibilities - if, in short, he is not an honorable or virtuous person who will perform his duties in the interest of the people - impeachment is available to remove him. When Jay addressed the requisite integrity for presidents and senators, he stated:

> With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind, such as honor,

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[4] See Clinton Rossiter, Introduction to The Federalist vii (Clinton Rossiter ed., 1961) ("The Federalist is the most important work in political science that has ever been written... in the United States.")
[5] Isaac Kramnick, Introduction to The Federalist 11 (Isaac Kramnick ed., 1987)
[6] Id. at 12.
[7] The Federalist No. 64, at 390 (John Jay) (Clinton Rossiter ed., 1961).
[8] See id. at 390-91.

> oaths, reputations, conscience, the love of country, and family affections and attachments, afford security for their fidelity. In short, as the Constitution has taken [through the indirect election of senators and presidents] the utmost care that they shall be men of talents, and integrity, we have reason to be persuaded that the treaties they make will be as advantageous as, all circumstances considered, could be made; and so far as the fear of punishment and disgrace can operate, that motive to good behavior is amply afforded by the article on the subject of impeachments.[9]

Virtue, probity, and honor were so important in the Executive, as Jay's remarks indicate, that it is no surprise that the Framers assumed that the first President of the United States would have to be George Washington. He was the greatest national hero, he was given the lion's share of the responsibility for securing independence, and then as now was regarded as the father of his country. His reputation for integrity, virtue, and honor was unparalleled. George Washington, the national epitome of virtue and honor,[10] was, in short, precisely the kind of executive Federalist No. 64 contemplates.

III. Constitutional Textual Clues to the Meaning of "High Crimes andMisdemeanors"

Federalist No. 64 thus tells us about the requisite character of federal officials, and is persuasive authority for believing that when it becomes clear that the President has committed acts that raise grave doubts about his honesty, his virtue, or his honor, impeachment is available as a remedy. This conclusion is further supported by the text of the Constitution itself, which provides in Article I, Section 3, that the punishments to be imposed following impeachment by the House and conviction by the Senate are "removal from Office, and disqualification to hold and enjoy any Office of *honor, Trust* or Profit under the United States."[11] The kind of person who would be impeached was believed to be one without honor and thus one who could not be trusted. *The fear was that such a person, if allowed an office offering the opportunity to profit, would use his office for personal ends and not for the good of the people.* Impeachment, then, is all about deciding whether a particular official can be trusted to act with disinterested virtue, *or whether an official will put his own needs or desires above his constitutional duties.*

It is for this reason - that impeachment is a remedy against those who would betray their oaths to uphold the Constitution and would instead seek personal advantage - that the Framers chose to describe, although not to limit, impeachable offenses by including and using as an analogy "Treason and Bribery." "Treason" is defined in the Constitution itself as "levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."[12]

The essence of treason, then, is that it involves a betrayal of one's obligation to one's own people, by making war against them, or by adhering to their enemies. Similarly, "Bribery" involves a

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[9] Id. at 395-96.

[10] See generally Stephen B. Presser, The Restoration of George Washington, 25 Rev. in Am. Hist. 545 (1997) (discussing Washington's status as the epitome of American virtue and honor, and his continuing importance to present-day America).

[11] U.S. Const. art. I, 3 (emphasis added).

[12] Id. art. III, 3, cl. 1.

betrayal of virtue and a refusal to exercise disinterested judgment in the interests of the people in order to serve the interests of someone else - someone who wrongly and corruptly buys what should only belong to the people. In both cases the official, whether he is a traitor or a person bribed, turns from his duty *and puts his own interests ahead of his public trust.*

This suggestion that impeachment is ultimately about a fundamental betrayal of trust is further supported by the limited records that we have of the Constitutional Convention. On August 20, 1787, the Committee of Detail presented a proposal that would have made federal officers "liable to impeachment and removal from office for neglect of duty, malversation,[13] or corruption."[14] Somewhat later, however, on September 8, 1787, the Convention considered a revised text that would have limited impeachment only to those cases involving "Treason & bribery." George Mason, of Virginia, thought this too limiting, and argued:

> Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offences. [Warren] Hastings [the administrator of the East India Company and Governor-General of Bengal whom Edmund Burke led an effort to impeach for corruption] 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.[15]

Mason then moved to add after the word "bribery" the words "or maladministration."[16] James Madison, one of the authors of The Federalist, and the man most commonly described as the "Father" of the Constitution, objected on the grounds that "maladministration" was too elusive. "So vague a term," he said, "will be equivalent to a tenure during pleasure of the Senate."[17] To meet Madison's objection, and to clarify that removal would require more than senatorial whim, Mason "withdrew 'maladministration' & substituted 'other high crimes & misdemeanors,'" which the Convention then accepted and incorporated into Constitutional text we now seek to interpret.[18]

IV. Impeachment and the Preservation of the Rule of Law

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[13] Black's Law Dictionary defines "malversation" as "In French law, this word is applied to all grave and punishable faults committed in the exercise of a charge or commission (office), such as corruption, exaction, concussion, larceny." Black's Law Dictionary 865 (5th ed. 1979). "Concussion," according to Black's is "In the civil law, the unlawful forcing of another by threats of violence to give something of value." Id. at 264.

[14] 2 The Records of the Federal Convention of 1787, at 337 (Max Farrand ed., rev. ed. 1937).

[15] Id. at 550.

[16] See id.

[17] Id.

[18] Id.

The colloquy between Mason and Madison - the only evidence on the definition of impeachable offenses we have from the debates at the 1787 Constitutional Convention in Philadelphia - appears to suggest that *more* than mere maladministration, something approaching "great and dangerous offences," or an "attempt[] to subvert the Constitution" is required.[19] Those who emphasize the awful consequences of impeachment and the propriety of its use only for offenses that strike at the heart of American government can find support in Mason's words. But it must be understood what Mason and the other Framers believed the needs of the state were and what American government was all about. The essence of the new Republic was that ours was to be a "government of laws, not men," and that our laws and our legal doctrines were not to be tossed aside at whim for personal or partisan political purposes.[20] What the Madison/Mason colloquy teaches us is that impeachment should not simply be at the pleasure of the house and conviction at the pleasure of the Senate. There must be some standards, and for a President to be impeached, then, *he must have committed some grave offense that is contrary to his oath to uphold the Constitution and laws of his country; he must have put his interests above the Constitution and the laws.*

The distinction between mere "maladministration" and the betrayals of the Constitution with which impeachment was supposed to be concerned is also the subject of some rumination by another one of The Federalist's authors, Alexander Hamilton. In Federalist No. 79, Hamilton warns against using "inability," a term similar in meaning to "maladministration,"[21] as a trigger for impeachment because "an attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good."[22] *Impeachment, then, is a remedy for, and is not to be used as a tool of, personal or party ambition or enmity;* impeachment is to be used to further "justice" and "the public good." *Again, the essence of what is impeachable appears to be an unjust turning against public duties, an attempt to work an "injustice" and to betray one's duties to the public - in short, to act contrary to one's oath to uphold the Constitution and laws of the country.*[23]

The words "high Crimes or Misdemeanors" similarly suggest the anti- public, oath-abjuring characteristics of what ought to constitute an impeachable offense. A "high" crime or misdemeanor

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[19] Id.

[20] For the importance of the notion that ours was to be "a government of laws, not men," see Stephen B. Presser, Recapturing the Constitution 33-35 (1994).

[21] The meaning of "maladministration" may be somewhat elusive. According to Black's Law Dictionary, "this term is used interchangeably with misadministration, and both words mean 'wrong administration.'" Black's Law Dictionary, supra at 861. The Concise Oxford Dictionary defines "maladministration" as "Faulty administration." The Concise Oxford Dictionary of Current English 693 (H.W. Fowler & F.G. Fowler eds., 3d ed. 1944).

[22] The Federalist No. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[23] Article II, Section 1, clause 7 requires the President, before assuming office, to take the following "Oath or Affirmation": "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, 1, cl. 7. It should be noted that in Article II, Section 3, one of the duties of the President is to "take Care that the Laws be faithfully executed." Id. 3. Accordingly, part of the President's duty to "protect and defend the Constitution" is to carry out his role to see that "the Laws be faithfully executed."

is distinguishable from run-of- the-mill crimes or misdemeanors in that it requires proof of an "injury to the commonwealth - that is, to the state itself and to its constitution."[24]

V. Fixing the Meaning of "High Crimes and Misdemeanors": TheEnglishExperience

It does appear that the Framers believed that "high Crimes and Misdemeanors," if the impeachment provisions were to serve their purposes of keeping the executive and judiciary faithful to their constitutional trust, could be broadly construed. Thus, Alexander Hamilton, in The Federalist No. 65, in which he discussed the judicial function of the Senate in trials of impeachments, broadly defines impeachment as a remedy generally available to correct wrongdoing: "The subjects of [the Senate's impeachment] jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."[25]

Still, Hamilton, as did some of the other Framers noted above, supplied some limitation on the impeachment power when he wrote that impeachable offenses "relate chiefly to injuries done immediately to the society itself."[26] Hamilton even observed that when an impeachment proceeding is underway it will seldom fail to agitate the passions of the whole community, and to divide the community 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."[27]

Hamilton believed that the Senate, supposedly further removed from the people through election by state legislatures and not by the people themselves, would be better able to put raw partisan political concerns aside and make objective determinations on the guilt or innocence of one impeached. Because the Senate is no longer insulated from popular election,[28] it is doubly important that both the House and the Senate try to approach the impeachment of the President as objectively as possible.

Given the breadth of the possible definition of "high Crimes and Misdemeanors," and, as Hamilton noted, the inevitable involvement of partisan politics, it is no wonder that there is debate about what constitutes an impeachable offense. I do believe that it is possible, though, still to fix with

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[24] Arthur Bestor, Impeachment, 49 Wash. L. Rev. 255, 263 (1973) (reviewing Raoul Berger, Impeachment: The Constitutional Problems (1973)). Professor Bestor reaches his conclusion based on the English treason and impeachment cases that Berger reviewed. See id. at 264-66.

[25] The Federalist No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[26] Ibid.

[27] Id. at 396-97.

[28] See U.S. Const. amend. XVII (changing the original constitutional provision, Article I, 3, which called for election of senators by state legislatures, into one that called for election of senators "by the people" of each state).

some certainty the nature of the acts against the state and the Constitution that the Framers would have regarded as coming within the phrase "high Crimes and Misdemeanors."

At the time the Framers inserted the phrase "high Crimes and Misdemeanors" into the Constitution, they had a wealth of English experience with those words on which to draw,[29] and it appears clear that the Framers intended and understood that the phrase "high Crimes and Misdemeanors" was to be interpreted according to the meaning it was given by English common law.[30] As Justice Joseph Story later wrote, "The only safe guide in such cases must be the common law, which is the guardian at once of private rights and public liberties."[31]

Raoul Berger, in his book on impeachments, has given us a handy summary of some of the impeachment proceedings brought in England before the framing of our Constitution, proceedings described as involving all or part of the phrase "high crimes and misdemeanors." These included the proceedings brought against the Earl of Suffolk (1386), who "applied appropriated funds to purposes other than those specified"; the Duke of Suffolk (1450), who "procured offices for persons who were unfit and unworthy of them [and who] delayed justice by stopping writs of appeal (private criminal prosecutions) for the deaths of complainants' husbands"; Attorney General Yelverton (1621), who "committed persons for refusal to enter into bonds before he had authority so to require," and who also was guilty of "commencing but not prosecuting suits"; Lord Treasurer Middlesex (1624), who "allowed the office of Ordinance to go unrepaired though money was appropriated for that purpose [and who] allowed contracts for greatly needed powder to lapse for want of payment"; the Duke of Buckingham (1626), who "though young and inexperienced, procured offices for himself, thereby blocking the deserving; neglected as great admiral to safeguard the seas; [and who] procured titles of honor to his mother, brothers, kindred"; Justice Berkeley (1637), who "reviled and threatened the grand jury for presenting the removal of the communion table in All Saints Church; [and who] on the trial of an indictment,... 'did much discourage complainants' counsel' and 'did overrule the cause for matter of law'"; Sir Richard Gurney, lord mayor of London (1642), who "thwarted Parliament's order to store arms and ammunition in storehouses"; Viscount Mordaunt (1660), who "prevented Tayleur from standing for election as a burgess to serve in Parliament; [and who] caused his illegal arrest and detention"; Peter Pett, Commissioner of the Navy (1668), who was guilty of "negligent preparation for the Dutch invasion," and who was responsible for "loss of a ship through neglect to bring it to mooring"; Chief Justice North (1680), who "assisted the Attorney General in drawing a proclamation to suppress petitions to the King to call a Parliament"; Chief Justice Scroggs (1680), who "discharged [a] grand jury before they made their presentment, thereby obstructing the presentment of many Papists; [and who] arbitrarily granted general warrants in blank"; Sir Edward Seymour (1680), who "applied appropriated funds to public purposes other than those specified"; and the Duke of Leeds (1695), who "as president of [the] Privy Council accepted 5,500 guineas from the East India Company to procure a charter of confirmation."[32]

One way of characterizing all of this English experience is to say, as Joseph Story did, that "'lord chancellors and judges and other magistrates have not only been impeached for bribery, and

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[29] The first use of the phrase "high crimes and misdemeanors" was in an impeachment proceeding against the Earl of Suffolk in 1386. See Berger, supra note 24, at 62.

[30] See id. at 75, 87, 91-92 and nn. 160-161.

[31] 1 Joseph Story, Commentaries on the Constitution of the United States 797 (photo. reprint 1994) (Melville M. Bigelow ed., 1891).

[32] Berger, supra note 24, at 71-72.

acting grossly contrary to the duties of their office, but [in addition] for misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws, and introduce arbitrary power.'"[33] The English cases lend further support to the notion derived from The Federalist and the text of the Constitution that impeachable offenses, "high Crimes and Misdemeanors" if you will, are *acts that are inconsistent with the obligations and duties of office, that involve putting personal or partisan concerns ahead of the interests of the people, and that demonstrate the unfitness of the man to the office.*

The Constitution, The Federalist, and the English common law experience give a very good general idea of what was meant by the Constitution's impeachment clauses. The meaning of "high Crimes and Misdemeanors" is thus capable of being understood as it was by the Framers. Nevertheless, it is important also to understand that it is impossible to fix with certainty the complete enumeration of impeachable offenses, and it is impossible to escape the fact that the Constitution vests complete and unreviewable discretion with regard to impeachment and removal in Congress. Hamilton recognized this too:

> This [the trial of impeachments] can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors [The House of Representatives] or in the construction of it by the judges [the Senate], as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons [and so it is placed in the hands of the entire Senate].[34]

VI. **Comparing the Alleged Impeachable Offenses of President Clinton**

When I appeared before members of this Committee in 1998 to argue that it was appropriate to move forward with the impeachment of President Clinton, I did so because it appeared that the allegations made against President Clinton, if they were true, showed that over many months Mr. Clinton engaged in deception, lying under oath, concealing evidence, tampering with witnesses, and, in general, obstructing justice by seeking to prevent the proper functioning of the courts, the grand jury, and the investigation of the Office of Independent Counsel. Those offenses, if he had committed them, would undoubtedly have amounted to criminal interference with the legal process, but more to the point, they would have demonstrate that the President had failed to live up to the requirements of honesty, virtue, and honor that the Framers of the Constitution and the authors of The Federalist believed were essential for the presidency. And those offenses, if they had been committed by President Clinton, would clearly have been undertaken for personal reasons (to conceal evidence of personal misconduct) and to frustrate the workings of our system of justice.

Those purported offenses by President Clinton, if they actually occurred, would clearly resemble many of the English precedents of impeachment for interfering with orderly processes of law,

[33] Id. at 73 (quoting Justice Story).
[34] The Federalist No. 65, supra note 27, at 398.

for tampering with the grand jury, and for seeking to use one's office for personal rather than public ends. Those offenses, if true, would have shown that President Clinton engaged in a pattern of conduct that involved injury to the state and a betrayal of his constitutional duties because President Clinton would have thereby abused his office for personal gain and betrayed the ideal that ours is a government of laws and not of men.

If those allegations were true, then President Clinton, rather than carrying out his oath of office to uphold the Constitution and faithfully to execute the laws, sought instead to subvert the judicial process specified in Article III, and, in order to protect himself from an adverse judgment in the Paula Jones proceeding, sought to frustrate the laws designed to protect Ms. Jones and others like her.

Looking only to the allegations made by Independent Counsel Starr and by Chief Investigator Schippers against President Clinton, then, I believed at that time that there was more than enough to require the House of Representatives to move forward and vote on impeachment articles. Those allegations concerned conduct by the President in which he allegedly ignored his constitutional obligations to take care that the laws be faithfully executed, and instead used his august position to frustrate enforcement of the law. If those allegations were true, then President Clinton, I believed, had acted in a manner against the interests of the state and had sought to subvert the essence of our constitutional government - that ours is a government of laws and not of men. If those allegations were true, in short, then President Clinton had engaged in conduct that could only be described as corrupt, and corrupt in a manner that the impeachment process was expressly designed to correct. This was because I believed that if the allegations made against President Clinton were true, then he had abused his powers for personal purposes, and the impeachment remedy was appropriately used against him. I have reviewed the allegations made against President George W. Bush, however, and they seem different in character from those made against President Clinton.

VII. The Allegations Against President George W. Bush

1. Improper politicization of the Justice Department

Under this rubric the allegations against President Bush seem to include the dismissal of United States Attorneys purportedly for political purposes, and, in particular, because some U.S. Attorneys were insufficiently zealous in prosecuting alleged crimes committed by Democrats. Given, however, that Presidents have had complete discretion over the hiring and firing of U.S. Attorneys, and given that there is no suggestion that President Bush sought to prosecute innocent defendants, I find it difficult to believe that there are any grounds for impeachment here. Unlike the allegations against President Clinton, there does not seem to be any indication that the Justice Department was frustrated from doing its appointed tasks in order to serve the personal needs of the President. It is true that the decision whom to prosecute may have political implications, but any prosecutorial misconduct can certainly be addressed in the courts, and, again, there does not seem to be a claim that any prosecutions violated the law.

2. Implementation of the Unitary Executive Theory

I am unable to discern how the implementation of a particular view of the powers of the executive amounts to a "high Crime or Misdemeanor," or betrays the interests of the republic to serve personal partisan purposes. There is no doubt that the Constitution does give considerable discretion to each branch of the government to determine for itself the reach of its own powers, and our doctrine of separation of powers requires, to a certain extent, that each branch defer to the others in this regard. As near as I can tell, this is what is meant by the theory of the "unitary executive."[35] This doesn't mean, of course, that if one branch completely usurps the functions of another there is not a Constitutional remedy such as impeachment and removal (or a court's finding the acts of the executive or Congress to be unconstitutional). There does not seem to be any doubt, though, that in the course of fulfilling his executive responsibilities, particularly in a time of war or national crisis, the President needs the freedom to act effectively in the national interest. If a President, in good faith, seeks to act in the national interest rather than in his own, I don't believe his conduct is likely to result in the kind of impeachable offense I have discussed.

Under this second area of inquiry for the committee President Bush's practice of signing statements accompanying placing his signature on legislation has also come in for some criticism. The practice of signing statements is not unique with Mr. Bush, however, President Reagan issued 250 signing statements, and President Clinton issued more than any of the last four Presidents, 381, while President Bush had issued only 152 (as of September 17, 2007).[36] Given that this now seems to be a practice followed by several Presidents, the practice itself should probably not be construed as an impeachable offense, and hardly seems to be a "high Crime or Misdemeanor." No one seems to have suggested the practice was impeachable when done by Reagan, the first President Bush, or President Clinton. One could argue that signing statements that indicate problems with particular laws or suggest particular means of construing them could confuse courts called upon to interpret those laws, but perhaps a better solution than impeachment would be to pass legislation instructing judges to ignore signing statements when interpreting statutes. Such a solution has been proposed by Arlen Specter (R-PA).[37] The objection to President Bush's practice with regard to signing statements seems to center around his criticism of some measures touching on national security, and, in particular, his threats to ignore some legislation that he regards as unconstitutionally restricting his powers as Commander in Chief. As I indicated earlier, though, to a certain extent each branch is entitled if not required to preserve its constitutional discretion, and Bush's attempt to do so, rather than an impeachable offense seems to be what we ought to expect of a President.

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[35] For the notion that each branch has always been required to construe and implement its Constitutional prerogatives, see, e.g. Keith Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (1999). On the Unitary Executive theory, see, e.g. Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 L. Rev.1155 (1992).

[36] Presidential Signing Statements: Constitutional and Institutional Implications, Congressional Research Service, September 17, 2007. Available at http://www.fas.org/sgp/crs/natsec/RL33667pdf.

[37] S.3731 (109th Congress) - Presidential Signing Statements Act of 2006, introduced by Senator Specter, would have instructed courts to ignore signing statements.

3. Misuse of investigatory and detention authority with regard to U.S. citizens and foreign nationals

Under this rubric would appear to be acts of the administration undertaken in waging the War on Terror, and, in particular, the detaining of prisoners in Guantanamo Bay and other locations. As seems to be the case for several other allegedly questionable acts, what President Bush and his administration have done in seeking to prevent another terrorist attack on the United States seems to have been undertaken in good faith pursuant to the President's understanding of his constitutional powers, and with the close oversight of Congress, and the passage of Congressional legislation in this area. Because Congress has exercised legislative oversight and direction in connection with judicial proceedings against enemy combatants, and because the Courts have stepped in on several occasions to support or rebuff what the Executive has done, this does not seem to be an area of abuse that cries out for the impeachment remedy. Indeed, if a President, in good faith, believes that certain measures are necessary or required to meet his national security responsibilities, it is not at all clear that the threat of impeachment would be something that would operate in the best interests of the safety of the American people. Commander in Chief responsibilities in time of war are entrusted by the Constitution to the President, and Congress should probably hesitate to use the impeachment power as a means of frustrating that Constitutional allocation of power.

4. Manipulation of intelligence and misuse of war powers, including possible misrepresentations to Congress related thereto

Here the concern seems to relate to the representations of weapons of mass destruction ("WMD") purportedly possessed by Saddam Hussein which were used as a justification for starting the war in Iraq, and which later turned out not to exist in the quantities and qualities claimed, as well as the purported linkages of Saddam's regime with terrorists who may have been involved in 9/11. I claim no expertise here on either the facts regarding WMD or terrorist links, but what the Bush administration claims to have done was what was necessary in our national defense and that of our allies, such as Israel. Again, there appears to be no claim that the President abused his office for personal reasons that would call for his impeachment and removal. Indeed, the result of investigations on the administration's understanding of conditions prior to the Iraq war do seem to indicate that there were not misrepresentations of intelligence data, but that the intelligence data itself was faulty. There may well have been failures adequately to plan for the situation in Iraq following our initial toppling of Saddam, but good faith errors in the conduct of armed hostilities have never been construed to amount to impeachable offenses, and are not the kind of acts of abuse for personal gain that characterize such offenses.

5. Improper retaliation against administration critics, including disclosing information concerning CIA operative Valerie Plame, and obstruction of justice related thereto

Obstruction of justice was one of the offenses charged against President Clinton, and if a President, sworn to take care that the laws be faithfully executed, interferes with the execution of those laws for his own personal gain, there might be grounds for impeachment proceedings, just as there may have been in the case of President Clinton. One of the Vice-President's Aides, I. Lewis "Scooter" Libby was convicted of perjury and obstruction of justice in connection with U.S. Attor-

ney Patrick Fitzgerald's investigation of the Valerie Plame "outing," but Libby's conviction had to do with misrepresentations to the investigating grand jury, and not with any violations of law in connection with the revelation that Ms. Plame was a CIA operative. It is true, however, that President Bush commuted Mr. Libby's jail sentence, but I am not aware of any evidence that President Bush directed Mr. Libby to obstruct justice or to perjure himself, or that Mr. Bush was personally involved with any retaliation against Ms. Plame, or her husband, Joseph Wilson, who does appear to be a vehement critic of the Bush administration. Indeed, it seems likely that David S. Broder was correct when he wrote that the whole Libby-Wilson-Plame controversy "is a sideshow – engineered partly by the publicity-seeking former ambassador Joseph Wilson and his wife and heightened by the hunger in parts of Washington to 'get' [former Presidential Aide Karl] Rove for something or other."[38] Obstruction of justice might be an impeachable offense, but the committee might be best advised to proceed with caution here in light of Alexander Hamilton's warning that impeachment should not degenerate into a battle over politics instead of true misconduct.

6. Misuse of authority in denying Congress and the American people the ability to oversee and scrutinize conduct within the administration, including through the use of various asserted privileges and immunities.

This last is a very broad charge, and "misuse of authority," is so general a term that it brings to mind the Constitutional debate between Mason and Madison in which the framers rejected the use of the term "maladministration" as an impeachable offense. Again, impeachment is not supposed to be something that Congress can invoke any time it has political objections to the President, but perhaps there are more serious matters to be addressed here. If there are, I assume they center around the invocation of "executive privilege," by the Bush administration to forbid some White House Aides, most notably Harriett Miers and Joshua Bolton formally to appear before Congressional Committees. As you know, this has resulted in a House resolution and report that Miers and Bolton be held in contempt. If, indeed, the White House had sought, for reasons personal to Mr. Bush, to refuse to allow Congress to pursue its investigative role there might be a problem here, but the Minority has put together a convincing argument that the White House was seeking to cooperate with Congressional investigators, and that there has actually been no Presidential wrongdoing in connection with this issue.[39] Moreover, there is every reason to believe that the courts will decline to uphold the Congressional contempt citation, and "punt the executive privilege issue back to the political branches."[40] The exercise of executive privilege has been going on since the early days of the republic, and while there is no explicit Constitutional provision permitting it, it is a practice that is well-established.[41] Standing alone the assertion of executive privilege could hardly constitute an

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[38] David S. Broder, "Judge Walton's Lesson," The Washington Post, June 10, 2007, Pg. B07.

[39] See generally, Resolution Recommending That the House of Representatives Find Harriet Miers and Joshua Bolton, Chief of Staff, White House, in Contempt of Congress For Refusal to Comply with Subpoenas Duly Issued by the Committee on the Judiciary, Report of the Committee on the Judiciary, House of Representatives, together with Additional Views and Minority Views 99-155 (November 5, 2007).

[40] Id., at 150, citing United States v. House of Representatives, 556 F.Supp. 150, 153 (D.D.C. 1983), where such a result was reached.

[41] Id., at 151-154.

impeachable offense, and unless there is Presidential misconduct similar in kind to that of which President Clinton was accused, I doubt whether any impeachable offenses have been committed. Indeed, the courts should be able to resolve whether the claims of executive privilege are specious (this is doubtful), and there is every reason to believe that should the courts rule against the administration they will comply with judicial directives, as they have done in the case of the Guantanamo detainees.

Conclusion

Impeachment is a radical remedy to be used only in the case of executive misconduct that demonstrates that the official in question has abused his office for venal purposes. It is not a remedy that the framers believed was appropriate for matters arising simply out of political differences, and impeachment should not be a tool to be used to remove a President simply because a party or faction wants him out of office. Absent misconduct of a kind that I have described here, conduct which does not seem to be present, the removal of an executive should be accomplished by the constitutions two-term limit, and by the actions of the people and the electoral college.