

6-1-1999

The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies

Jonathan Turley

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Jonathan Turley, *The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999).
Available at: <http://scholarship.law.unc.edu/nclr/vol77/iss5/4>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

THE EXECUTIVE FUNCTION THEORY, THE HAMILTON AFFAIR, AND OTHER CONSTITUTIONAL MYTHOLOGIES

JONATHAN TURLEY*

The impeachment and subsequent acquittal of President William J. Clinton has rekindled debate as to the scope of the Impeachment Clause. In a recent essay in this Law Review, and again in testimony before the House Judiciary Committee, Professor Daniel H. Pollitt argued that the debates surrounding the Constitution's creation and ratification, as well as past impeachment cases, indicate that the Framers intended to limit application of the Clause to abuses of official authority and great crimes committed against the state. In this responsive article, Professor Jonathan Turley disputes the existence of intentionalist support for an "executive function" theory of impeachment, arguing that the historical record indicates that the Framers did not intend to limit application of the Clause to misconduct related to office.

I.	INTRODUCTION	1792
II.	THE EXECUTIVE FUNCTION THEORY AND THE DETERRENCE THEORY OF IMPEACHABLE OFFENSES	1797
III.	THE CONSTITUTIONAL MYTHOLOGIES OF IMPEACHMENT AND THE RECONSTRUCTION OF THE CONSTITUTIONAL CONVENTION UNDER AN EXECUTIVE FUNCTION THEORY	1802
	A. <i>The Views of the Framers and Intentionalist Support for the Executive Function Theory</i>	1803
	1. James Madison	1804
	2. George Mason	1807
	3. Alexander Hamilton	1808
	B. <i>Intentionalist Support in the Constitutional Convention and Ratification Debates</i>	1811
IV.	THE LEGAL MYTHOLOGIES OF IMPEACHMENT AND THE MEANING OF PAST IMPEACHMENT CASES	1817

* J.B. and Maurice C. Shapiro Professor of Law at George Washington University.

A. <i>Judicial and Non-Presidential Impeachments</i>	1819
1. William Blount	1819
2. John Pickering	1821
3. Samuel Chase	1822
4. James H. Peck	1824
5. West H. Humphreys	1826
6. Mark H. Delahay	1826
7. William W. Belknap	1827
8. Charles Swayne	1828
9. Robert W. Archbald	1830
10. George W. English	1831
11. Harold L. Louderback	1832
12. Halsted L. Ritter	1833
13. Harry E. Claiborne	1834
14. Alcee L. Hastings	1836
15. Walter L. Nixon, Jr.	1836
16. Terminated Judicial Cases	1837
17. Summary	1844
B. <i>Presidential Impeachments</i>	1846
1. Andrew Johnson	1847
2. Richard M. Nixon	1848
3. William J. Clinton	1850
V. THE HISTORICAL MYTHOLOGIES OF IMPEACHMENT AND THE HAMILTON AFFAIR	1855
VI. CONCLUSION	1865

"No doubt this is all a bit absurd, and yet it makes clear what I wish to show you, if I somehow can, in order to persuade you to change your position Do I in any way persuade you to change your position . . . ? Or will you not change your position any more even if I tell many other myths like . . . this?"¹

I. INTRODUCTION

It is perhaps fitting that the most modern of Plato's dialogues, the *Gorgias*, should focus on mythology and legal argument.²

1. Ernest J. Weinrib, *Law as Myth: Reflections on Plato's Gorgias*, 74 IOWA L. REV. 787, 793 (1989) (quoting PLATO, *GORGAS* 493c-d (adapting translation from 1 THE DIALOGUES OF PLATO 231, 280 (R.E. Allen trans., Yale Univ. Press 1984))).

2. The *Gorgias* explores the conflict between dialectic and rhetoric in argument. It is often viewed as the most relevant dialogue for legal argument and the art of persuasion. See James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*,

Socrates's statement to Callicles is intended to reform Callicles in his inclination to criminal and hedonistic acts through the telling of myths about the dangers of his course of action.³ It is the purest use of mythology—to lead the listener back to a point of social order or compliance.⁴ Mythology has long been identified as playing a central role in the development of cultural norms and social structures. Myths can be used to terrify or to inspire. They are, however, usually used for a purpose beyond the simple allegorical narrative. While myths often are eschewed as primitive in comparison to the objective rationality of law, the law has its share of mythologies that serve the same functions as their non-legal counterparts. Preeminent among these are constitutional mythologies. With a limited text and limited historical record of debate, the Constitution inevitably spawns mythologies around its language and meaning. Since the language is often ambiguous, interpretations are sometimes presented as reflections of underlying morals or themes, powerful but unseen in the constitutional text.

Mythology is a human response to shaping our perceived realities, "ultimately validating the way we look at the world."⁵ Myths are often methods used to create orthodoxy by "abolishing complexities and creating a 'blissful clarity.'"⁶ Such mythologies

50 U. CHI. L. REV. 849, 850 (1983) ("In the *Gorgias* Plato focuses upon two contrasting ways of speaking, of being, and of establishing community with others, both of which can be described as forms of argument: 'rhetoric,' which he attacks, and 'dialectic,' which he defends and intends to exemplify.").

3. See Weinrib, *supra* note 1, at 793-94 (noting that "myth aims at inducing others to do what the speaker wants. . . . For Socrates, no less than for his interlocutors, rhetoric is a tool of domination not generically different from outright coercion").

4. Professor James Boyd White describes Callicles, a highly regarded practitioner of the rhetorician's art, in terms that have some resonance in contemporary legal arguments: Callicles . . . rejects the very language of morality upon which Socrates' refutation depends. He seeks to avoid the traps and limits of the language of his culture by standing outside it, claiming the power to remake his language to coincide with reality as he sees it. . . . Callicles' substantive position is one of radical hedonism: according to what he calls natural justice and excellence

White, *supra* note 2, at 858 (1983).

5. Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 457 (1996).

6. In their work on mythologies and gender, Professors Judith Brown, Lucy Williams, and Phyllis Baumann note:

Myths can . . . be reductive, abolishing complexities and creating a "blissful clarity." Myths can be symbolic or distortive, positive or negative, descriptive or normative. Operating in our minds often without our being aware of them, myths can make even the most historically contingent ideas seem universal, natural, and inevitable. Thus, myths serve ideology and can perpetuate orthodoxy, legitimating a particular point of view and often relieving us of the burden of critical thinking.

were in great supply during the Clinton impeachment hearings and Senate trial. Various scholars advanced constitutional and historical claims directed at a single point: the fallacy of impeachment allegations against William Jefferson Clinton. The mythological appeared to overwhelm the constitutional in the unprecedented hearing held by the House Judiciary Committee in which nineteen witnesses⁷ testified on the history and meaning of "high Crimes and Misdemeanors."⁸ I had the privilege of testifying at that hearing with Professor Daniel Pollitt,⁹ an academic rightfully considered one of our most respected authorities on the Constitution and its history.¹⁰ Professor Pollitt's testimony closely mirrored the conclusions reached

Id. at 458 (footnotes omitted).

7. These witnesses included seventeen academics, a former U.S. Attorney General, and a former U.S. Justice Department official. They were: William Van Alstyne, Professor of Law, Duke University; Griffin B. Bell, former U.S. Attorney General; Susan Low Bloch, Professor of Law, Georgetown University; Charles J. Cooper, former U.S. Department of Justice official; Robert F. Drinan, Professor of Law, Georgetown University; Michael J. Gerhardt, Professor of Law, College of William & Mary; John C. Harrison, Associate Professor of Law, University of Virginia; Matthew Holden, Jr., Professor of Government and Foreign Affairs, University of Virginia; Forrest McDonald, Historian and Distinguished University Research Professor, University of Alabama; Gary L. McDowell, Director, Institute for United States Studies, University of London; John O. McGinnis, Professor of Law, Yeshiva University; Richard D. Parker, Williams Professor of Law, Harvard University; Daniel H. Pollitt, Graham Kenan Professor of Law Emeritus, University of North Carolina at Chapel Hill; Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University; Jack N. Rakove, Coe Professor of History and American Studies, Stanford University; Arthur M. Schlesinger, Jr., Professor of History, City University of New York; Carl R. Sunstein, Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago; Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard University; and Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University. See *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. III (Nov. 9, 1998) [hereinafter *House Hearing*].

8. U.S. CONST. art. II, § 4.

9. See *House Hearing*, *supra* note 7, at 203, 250.

10. Professor Pollitt's scholarship is too varied and too extensive to recount in full but his career has been the subject of various deserving tributes. See, e.g., Eugene Gressman, *In Appreciation: Daniel Hubbard Pollitt*, 70 N.C. L. REV. 1689 (1992); Kelvin L. Newsome, *In Appreciation: Daniel Hubbard Pollitt*, 70 N.C. L. REV. 1696 (1992); Joseph L. Rauh, Jr., *In Appreciation: Daniel Hubbard Pollitt*, 70 N.C. L. REV. 1683 (1992); Judith W. Wegner, *In Appreciation: Daniel Hubbard Pollitt*, 70 N.C. L. REV. 1692 (1992); see also Frank Thompson, Jr. & Daniel H. Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C. L. REV. 87 (1970); Daniel H. Pollitt, *The National Labor Relations Board and Race Hate Propaganda in Union Organization Drives*, 17 STAN. L. REV. 373 (1965); Joseph L. Rauh, Jr. & Daniel H. Pollitt, *Right to and Nature of Representation Before Congressional Committees*, 45 MINN. L. REV. 853 (1961); Daniel H. Pollitt, *Dime Store Demonstrations: Events and Legal Problems of the First Sixty Days*, 1960 DUKE L.J. 315; Daniel H. Pollitt, *The Fifth Amendment Plea Before Congressional Committees Investigating Subversion: Motives and Justifiable Presumptions—A Survey of 120 Witnesses*, 106 U. PA. L. REV. 1117 (1958).

in his recent article in this publication.¹¹ His views are shared by other academics who testified before Congress or signed a joint letter opposing impeachment on constitutional grounds. This article offers a sharply different view of the cases and historical sources presented in both Professor Pollitt's article and prior testimony (and, by extension, the many academics supporting his interpretation of both the Constitution and its history).¹²

The constitutional accounts advanced in the impeachment debate centered on the interpretation of "high Crimes and Misdemeanors" in Article II of the Constitution.¹³ At the time of the impeachment hearing, President Clinton stood accused of criminal acts in office designed to conceal a sexual relationship with a former White House intern, Monica Lewinsky. As later expressed in four proposed articles of impeachment, these alleged criminal acts included perjury, suborning perjury, obstruction of justice, witness tampering, abuse of power, and lying to Congress.¹⁴ As the House impeachment inquiry began, however, the White House and various law professors and historians advanced a threshold argument: Impeachment, they argued, would be improper in these circumstances because the Framers intended "high crimes and misdemeanors" to

11. See Daniel H. Pollitt, *Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259 (1998).

12. It is due to my respect for Professor Pollitt's extensive scholarship that I am confident that my criticism in this article will not be misconstrued. It is because Professor Pollitt's theories are presented in the most complete and persuasive form that a response is warranted. Rather than offer conclusory statements on the meaning of historical records, Professor Pollitt offered a comprehensive academic foundation for his views. It is this foundation that allows for the presentation of rival, but respectful, interpretations.

13. U.S. CONST. art. II, § 4 ("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.").

14. See 144 CONG. REC. H11,774 (daily ed. Dec. 18, 1998) (incorporating Article One, which alleged that the President had "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]"; *id.* at H11,774 (incorporating Article Two, which alleged that the President had "willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration, impeding the administration of justice [through his perjurious responses during the discovery phase of the Paula Jones lawsuit]"); *id.* at H11,774-75 (incorporating Article Three, which alleged that the President had "prevented, obstructed, and impeded the administration of justice . . . in a course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to [the Paula Jones lawsuit]"; *id.* at H11,775 (incorporating Article Four, which alleged that the President "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 [through false statements to Congress]").

encompass only misconduct related to official power or abuses of office.¹⁵ Specifically, this “executive function” theory excluded crimes or misconduct related to private scandals or concerns.¹⁶ At the House Judiciary Committee hearing, the nineteen academics divided on this question, with some academics—including this author—contesting the textual, historical, and functional basis for such an interpretation.¹⁷

Professor Pollitt and I can be described as polar opposites on the spectrum of debate over the meaning of impeachment. Unfortunately, the congressional debate did not permit us to engage in a dialogue to test each other’s theories and sources.¹⁸ In the wake of a political crisis, academics now will have the opportunity of reflection and academic debate. For the first time, this exchange will allow us to move beyond the rhetorical and to explore the specific points of disagreement. This Article is divided into five parts. In Part II, the Article briefly presents the theory offered by Professor Pollitt

15. See *infra* notes 27-40 and accompanying text.

16. See *infra* notes 27-40 and accompanying text.

17. See *House Hearing*, *supra* note 7, at 28-44 (testimony and prepared statement of Professor Gary McDowell); *id.* at 77-80 (testimony and prepared statement of Professor John Harrison); *id.* at 91-98 (testimony and prepared statement of Professor Richard Parker); *id.* at 103-11 (testimony and prepared statement of Professor John McGinnis); *id.* at 116-28 (testimony and prepared statement of Professor Stephen Presser); *id.* at 180-94 (testimony and prepared statement of Charles Cooper); *id.* at 194-203 (testimony and prepared statement of Griffin Bell); *id.* at 211-18 (testimony and prepared statement of Professor Forrest McDonald); *id.* at 237-42 (testimony and prepared statement of Professor William Van Alstyne); *id.* at 250-76 (testimony and prepared statement of Professor Turley); see also 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. (forthcoming 1999) (manuscript on file with author) [hereinafter Turley, *Congress as Grand Jury*] (discussing the distinct role of the House of Representatives in the impeachment process and suggesting an alternative interpretation of “high crimes and misdemeanors” to the executive function theory); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. (forthcoming Oct. 1999) (manuscript on file with author) [hereinafter Turley, *Factional Disputes*] (discussing the role of the Senate trial in impeachment as part of a Madisonian process designed to regulate and transform factional disputes in the political system).

18. The *Gorgias* is a valuable work precisely because it is a dialogue in which ideas could be explored and tested. In a telling passage of the *Gorgias*, Socrates cautions Callicles that he has little interest in oratory but desires dialogue. See PLATO, *GORGIAS* 447c, in 1 THE DIALOGUES OF PLATO, *supra* note 1, at 231. Rejecting rhetoric in favor of the dialectic, Socrates observes that a rhetorician has no need to know the truth of a matter but, rather, “need[s] only to discover some trick of persuasion, so as to appear to the unknowing to know more than those who know.” *Id.* 459c, at 244. This clearly is not the intention of Professor Pollitt, who has offered one of the most comprehensive defenses of the executive function theory and has graciously supported the idea of this exchange to advance the academic debate over the meaning and history of the impeachment standards.

of an "executive function" theory of impeachment.¹⁹ Part III reexamines the basis and sources for the executive function theory.²⁰ Part IV offers an analysis of past impeachment cases that differs sharply from the analysis supporting the executive function theory.²¹ Part V explores the remaining constitutional mythologies, including the prominent use of the Hamilton affair to support the claim that the Framers clearly rejected private conduct as a basis for impeachment.²²

II. THE EXECUTIVE FUNCTION THEORY AND THE DETERRENCE THEORY OF IMPEACHABLE OFFENSES

Mythology depends not only on "logos," a perceived accurate account, but also on "mythos," the persuasive telling of the account.²³ It requires not only a consistent account but also an account widely accepted for its intended influence on a society. Advocates for the executive function theory wasted no time in articulating the theory and then soliciting broad academic support for its telling. During the Clinton hearings, two letters were submitted to the House Judiciary Committee which were signed by more than 800 law professors and historians attesting to the theory and its accuracy.²⁴ These letters gave the theory not simply the patina of general academic acceptance but the legitimacy of a suggested constitutional pedigree found in the clear language of the Framers and the cases of impeachment.²⁵ Suddenly, the executive function theory and its supporting historical accounts had immediate credibility as a generally accepted truth, assisted by political forces intent on the theory taking hold. Like

19. See *infra* notes 23-45 and accompanying text.

20. See *infra* notes 46-119 and accompanying text.

21. See *infra* notes 120-311 and accompanying text.

22. See *infra* notes 312-362 and accompanying text.

23. See Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 115 (1997).

24. See *House Hearing*, *supra* note 7, at 334-39 (joint letter of the historians); *id.* at 374-83 (joint letter of the law professors).

25. Any citizen watching these debates and public statements would be left with little question as to the impropriety of impeaching President Clinton on such charges as perjury and obstruction of justice. When asked about academics who take an opposing view, Professor Laurence Tribe stated:

Well, I suppose you can find people to argue just about anything, but I have reviewed the 15 impeachments that the House of Representatives has voted in the 201 years, and I've looked back to the origins of the term ["high crimes and misdemeanors"] in 14th century England, and I've looked at the history how those words got into the Constitution. And I have no doubt that they were not fair to do [sic] with lies about sex whether before a grand jury or anywhere else.

Early Edition: Tribe: Clinton Follies Don't Necessitate Impeachment (CNN television broadcast, Nov. 9, 1998).

cultural mythologies, constitutional mythologies often emerge to meet the immediate needs of a social or political crisis. The executive function theory, forged in the heat of the Clinton impeachment, offered an academic explanation of how this painful crisis could be avoided because of an inherent—but largely hidden—truth in our constitutional history.

The Judiciary Committee hearing provided a relatively rare opportunity for academics from across various legal, historical, and political disciplines to debate the meaning of “high crimes and misdemeanors.” The hearing constituted the most comprehensive and varied presentation in history on this central constitutional phrase. While both sides of the question often relied on the same sparse historical statements, widely different conclusions were reached as to the scope of impeachable offenses. Even the historians and law professors who supported the executive function theory diverged on critical historical and theoretical points.²⁶

This author explored the different arguments of academics in support of the executive function theory, as well as the alternative use of a deterrent theory, in an earlier work.²⁷ A few general points about the theory, however, would be helpful in this critique. First, the executive function theory advanced by various academics was neither monolithic in its theoretical assumption nor necessarily consistent in its application. The historians’ letter offered a pure executive function theory, ruling out any application of impeachment to conduct that is not an extension of executive power or official abuse. For instance, the historians ruled out any exception for offenses like murder or rape which are unrelated to official duties or power. In support of this claim, the historians asserted to Congress that “[t]he Framers *explicitly* reserved [impeachment] for high crimes and misdemeanors *in the exercise of executive power*.”²⁸ After this letter

26. Since these theories turned on the president’s unique status in the constitutional scheme, the theory can be dubbed an “executive function” theory since no general view of judicial impeachable offenses was offered. See Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Part I.). Nevertheless, some academics (including Professor Pollitt) did extend the logic of the executive function theory to judicial cases, a type of “judicial function” variation. See, e.g., *House Hearing*, *supra* note 7, at 207-09 (prepared statement of Professor Pollitt). A strong suggestion was made that, even with judicial officers, impeachable offenses should exclude private conduct unrelated to their office. See *id.* at 207-08 (prepared statement of Professor Pollitt). This extension to judicial impeachments, however, was only sporadic among the academics supporting the narrow interpretation of the impeachment language.

27. See Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Part I.B.) (discussing the specific historical and theoretical claims made in the two joint letters).

28. *House Hearing*, *supra* note 7, at 334 (joint letter of the historians) (emphasis

was submitted to Congress, however, some of the signatories, such as Arthur Schlesinger, Jr., offered a modified view that made exception for certain "private misconduct by [P]residents" that could be defined as "monstrous crimes."²⁹ While not defining the constitutional standard for "monstrous," Schlesinger knew that it included murder and rape and, more importantly, excluded the charges against President Clinton.³⁰

Conversely, the law professors (including Professor Pollitt) sent a letter asserting an executive function theory with an express exception.³¹ Unlike the historians, the law professors did not claim "explicit" support for their interpretation in either the text or the history of the Constitution.³² The law professors acknowledged that "[n]either history nor legal definitions provide a precise list of high crimes and misdemeanors. Reasonable people have differed in interpreting these words."³³ Moreover, while arguing that impeachable offenses are largely confined to abuse of office or official misdeeds, the law professors expressly accepted that a president can be impeached for "'private'" conduct if it is deemed "heinous."³⁴ Unfortunately, like Schlesinger's "monstrous" standard, the law professors did not offer any basis for defining this conduct beyond noting that murder is included and the crimes alleged against President Clinton are excluded.³⁵ Cognizant of the obvious questions raised by such a new standard, Professor Cass Sunstein acknowledged the lingering uncertainty as to the extension of this theory beyond this case but advised Congress that we should "leave the hardest questions raised hypothetically for another and better day."³⁶ Like Justice Potter Stewart's test of pornography, impeachable offenses would remain in that category of offenses that you presumably know when you (or at least the academic signatories) see them.³⁷

added).

29. *Id.* at 101 (prepared statement of Professor Arthur Schlesinger, Jr.).

30. *See id.*

31. *See id.* at 375 (joint letter of the law professors). The law professors' letter was signed by many of the academics at the impeachment hearings, including professors Susan Bloch, Robert Drinan, Pollitt, Cass Sunstein, and Laurence Tribe. *See id.* at 376-83.

32. *See id.* at 375.

33. *Id.*

34. *Id.* Various signatories to the law professors' letter presumably have abandoned any claim that the language or history of the impeachment clauses categorically excludes private acts and must be limited to uses of executive authority.

35. *See id.*

36. *House Hearing*, *supra* note 7, at 83 (testimony of Professor Cass Sunstein).

37. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define . . . [hard-core pornography]; and perhaps I could

This testimony leaves a mythological tale that appears consciously crafted for one controversy. Both the historians and law professors testifying in support of the executive function theory asserted that impeachable offenses are restricted to official abuses or, what Professor Schlesinger called, "political offenses against the state."³⁸ Yet, there are exceptions for types of private conduct that meet an ill-defined standard of "monstrousness" or "heinousness." Why? If impeachment is only designed to address public wrongs of office, why is there any need to address wrongs linked to private misconduct rather than leave such conduct to the criminal system? The apparent answer is that some acts are so horrible that they "acquire public significance."³⁹ If this is the standard, however, some criminal acts—like obstruction of justice—clearly would satisfy the standard of "public significance" for many Americans. Ultimately, what these historians and law professors present as a bright-line rule deteriorates into a simple debate over the relative gravity of crimes or misconduct.⁴⁰ The result is the archetype of mythologies—an outcome-determinative theory that is best understood in the context in which it is told.

Along this spectrum, Professor Pollitt's views fall closest to those expressed in the historians' letter, both in their underlying historical claims and in their contemporary conclusions. Professor Pollitt signed the letter of law professors acknowledging that some "private" conduct could result in impeachable offenses and noting that the historical record was not clear on the meaning of "high crimes and misdemeanors."⁴¹ His testimony and his recent article, however, advanced a more rigid view. In his congressional testimony, Professor Pollitt asserted that, unlike the case against President Richard Nixon, the Clinton impeachment was based on a flawed understanding of the scope of impeachable offenses:

In contrast [to President Nixon], Clinton cheated on his wife, lied about it; and did his best for six months to cover it

never succeed in intelligibly doing so. But I know it when I see it . . .").

38. *House Hearing*, *supra* note 7, at 101 (prepared statement of Professor Arthur Schlesinger, Jr.).

39. *Id.* (prepared statement of Professor Arthur Schlesinger, Jr.); *see also Early Edition*, *supra* note 25 ("[T]he impeachment process was never meant to deal with anything like perjury about a personal matter even before a grand jury. . . . It was meant to protect the nation and its [C]onstitution from attempts to subvert our system of government and from gross corruption in office.").

40. *See House Hearing*, *supra* note 7, at 272-75 (prepared statement of Professor Turley); Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Part I.B.).

41. *House Hearing*, *supra* note 7, at 375 (joint letter of the law professors).

up. Certainly, as even he admits, not an honorable course of conduct. Adultery, yes, possibly even perjury. But impeachable offenses?

Not if we recall the Constitutional Convention where our forefathers authorized impeachment when "great crimes were committed against the state."

Not if we recall the Ratification Debates where impeachable crimes were described as those "which may with propriety be denominated POLITICAL."

Not unless we overlook consistent practice wherein the Senate has refused to convict absent the clearest cases of treason and bribery.

Where, as in the Nixon Impeachment, is there conduct "subversive of constitutional government?"

Impeachment of President Clinton, simply put, would turn two hundred years of constitutional history on end.⁴²

In his recent article, Professor Pollitt argued that a review of past impeachment cases supports the restriction of impeachable offenses to exclude acts or crimes related to private conduct: "In this tradition, the Senate follows the intent of those who framed our Constitution that impeachment be used sparingly, and only 'when great crimes were committed' and when there are 'attempts to subvert the Constitution.'"⁴³ As support for this view in the Clinton context, Professor Pollitt relied on his interpretation of sexual misdeeds by prior office holders—including, as he discussed in his congressional testimony, the Hamilton affair—as support for the exclusion of such conduct from impeachment inquiries.⁴⁴

Professor Pollitt made no suggestion in his testimony or writing that the impeachment language allows for exceptions for private conduct that can be deemed "heinous" or "monstrous." Like the historians, he advanced a "bright-line rule" based on the executive function theory. Moreover, in his article, Professor Pollitt appeared

42. *Id.* at 208 (prepared statement of Professor Pollitt) (quoting statements attributed to the Framers).

43. Pollitt, *supra* note 11, at 277 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65, 550 (Max Farrand ed., 1934) [hereinafter RECORDS OF THE FEDERAL CONVENTION] (statement of George Mason)).

44. See *House Hearing*, *supra* note 7, at 204 (testimony of Professor Pollitt) ("[S]exual impropriety is not an impeachable offense. We learned that very early on in the case of Alexander Hamilton."). But see *id.* at 273 n.31 (prepared statement of Professor Turley) (objecting to use of the Hamilton affair as "a sudden interest in the sexual habits of the Framers, who are now being politically exhumed and 'spinned' as part of the crisis").

to approach judicial cases with the same limiting interpretation, a variation best described as a "judicial function" theory.⁴⁵ Any critique of this argument must begin, as Professor Pollitt did, with the Constitutional Convention and the Ratification debates.

III. THE CONSTITUTIONAL MYTHOLOGIES OF IMPEACHMENT AND THE RECONSTRUCTION OF THE CONSTITUTIONAL CONVENTION UNDER AN EXECUTIVE FUNCTION THEORY

Professor Terry Eagleton once described ideology as "a kind of contemporary mythology, a realm which has purged itself of ambiguity."⁴⁶ While Professor Eagleton made this statement in the context of literary theory, constitutional theory can often evidence the same purging of ambiguity in reviewing a text. This process appeared to run its course in the Clinton hearing and trial. While many of the academics advancing an executive function theory signed the letter to Congress acknowledging that the Framers did not clearly establish the meaning of "high crimes and misdemeanors," the academics who testified at the impeachment hearing claimed to have found textual or historical evidence of such an intent. This evidence provided the foundation for an outcome-determinative theory. It also exhibited the *modus operandi* of mythology—making "even the most historically contingent ideas seem universal, natural, and inevitable."⁴⁷

To his credit, Professor Pollitt did not advance a textualist claim to support the executive function theory. Moreover, Professor Pollitt honestly noted that the Framers were divided at the Constitutional Convention along a spectrum, with some individuals favoring impeachment at will at one end and others opposing impeachment under any circumstances at the other end.⁴⁸ A compromise view ultimately prevailed with the insertion of the familiar English standard of "high crimes and misdemeanors." Nevertheless, Professor Pollitt did assert that the record clearly evidenced an intent

45. See Pollitt, *supra* note 11, at 268-77.

46. TERRY EAGLETON, *LITERARY THEORY* 117 (2d ed. 1996) (discussing the views of French critic Roland Barthes).

47. Brown et al., *supra* note 5, at 458. Professor Robert Gordon once suggested that we should review "mythic uses of the past" by lawyers not by demanding historical accuracy, but instead by judging whether the uses constitute "bad mythmaking." Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1055 (1981). This standard appeared relevant in the historical accounts defending the executive function theory.

48. See Pollitt, *supra* note 11, at 262-64.

to restrict the language under an executive function theory,⁴⁹ a position that I find unsupportable. Without repeating earlier treatments of this historical record,⁵⁰ a brief review of the sources relied upon by Professor Pollitt and other academics to support this claim of original intent is in order. As will become clear, I view the record as incapable of mandating either a narrow or broad interpretation under an intentionalist theory. Put another way, the record on the Framers' intent is so sparse that it could be used to support any of the rivaling theories with equal success. Ultimately, such a record reinforces that myth "is an exercise in persuasion—true rhetoric, but rhetoric nonetheless."⁵¹

A. *The Views of the Framers and Intentionalist Support for the Executive Function Theory*

Professor Pollitt advanced an intentionalist theory that he contended is evidenced not only in the debates of the Framers but also by past impeachment cases. He noted that the Senate has "follow[ed] the intent of those who framed our Constitution" in restricting impeachment to the exclusion of crimes related to personal conduct.⁵²

In sum, the framers of the Constitution saw the need for an Impeachment Clause "[w]hen great crimes were committed" to reach "great and dangerous offences" and to protect against "betray[al] [of] trust to foreign powers," "[a]ttempts to subvert the Constitution," and "treachery" and "other high crimes and misdemeanors" against the state.⁵³

Professor Pollitt took these limiting terms from statements made by George Mason and James Madison. He also made use of statements by Alexander Hamilton, who was perhaps the most invoked (and ill-served) Framer in the House and Senate proceedings. Throughout the Clinton impeachment debates, academics appeared on Capitol Hill with such quotes in the same way that crusaders once waved around bones of the saints.⁵⁴ On closer

49. See *id.* at 265-67.

50. See *House Hearing*, *supra* note 7, at 257-62 (prepared statement of Professor Turley); Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Parts I.A. & II.A.); Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part III.).

51. Weinrib, *supra* note 1, at 793 (referring to the "myth of judgment").

52. Pollitt, *supra* note 11, at 277.

53. *Id.* at 265 (quoting 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 65, 66, 550 (statements of James Madison and George Mason) (footnotes omitted)).

54. See Jonathan Turley, *High Crimes and Misdemeanors*, WALL ST. J., Nov. 9, 1998, at A23 [hereinafter *High Crimes and Misdemeanors*]; Jonathan Turley, *The New*

inspection, however, these historical snippets prove to be less than compelling evidence of an original intent supporting the executive function theory.⁵⁵

1. James Madison

Much has been made of Madison's role in resisting efforts to have impeachment at will and, specifically, his objection to Mason's suggested standard of "maladministration."⁵⁶ As noted by Professor Pollitt, Madison objected that "maladministration" was too vague a term for use as the constitutional standard for impeachment.⁵⁷ Advocates of the executive function theory repeatedly cited this objection during the Judiciary Committee hearing to demonstrate that Madison never would have accepted such a low standard for removal and would have restricted impeachment to "great crimes."⁵⁸ While Professor Pollitt uses this exchange in a far more limited fashion than did other academics,⁵⁹ Madison clearly did not indicate such an intention. First, as for "maladministration," Madison only objected to the use of the term in the language of the Constitution and not to its use as the basis for removal. Quite to the contrary, though never mentioned in the presentations to Congress, Madison in fact endorsed the use of maladministration as a removal offense.

Originalists, LEGAL TIMES, Oct. 19, 1998, at 27 [hereinafter *New Originalists*].

55. For example, one of the most oft-cited authorities to support the executive function theory is James Wilson. In his 1791 Lecture on Law, Wilson stated that "impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments." James Wilson, Lectures on Law (1791), in 2 THE WORKS OF JAMES WILSON 166 (1804). When viewed in context, however, Wilson simply appears to reaffirm distinguishing the American model from its historical predecessors. Immediately following this observation, Wilson noted that impeachment is (unlike the English model) restricted to political figures and that any non-political penalties are barred under this system. See 2 *id.* Wilson may have supported any number of theories of impeachment, but this source is hardly relevant, let alone supportive, of an executive function theory.

56. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 550.

57. 2 *Id.*; Pollitt, *supra* note 11, at 265.

58. See, e.g., *House Hearing*, *supra* note 7, at 100 (testimony of Professor Arthur Schlesinger, Jr.) (noting the Framers' emphasis on "great crimes" and "great and dangerous offenses"); *id.* at 206-07 (prepared statement of Professor Pollitt) (stressing same references to show the Framers' intent).

59. See, e.g., *Early Edition*, *supra* note 25 ("James Madison thought that making all cases of maladministration impeachable was just too vague.") (interview with Professor Laurence Tribe); *A Democratic Roundtable Discussion on the Impeachment Process*, Oct. 15, 1998, available in 1998 WL 726546 (F.D.C.H.) (remarks of Professor Laurence Tribe) ("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 [sic] awfully close to Roger Sherman's idea that you could remove a president at will.").

Later, as a member of Congress, Madison treated the standard of "high crimes and misdemeanors" as a requirement of good behavior touching on a variety of official acts of negligence and nonfeasance.⁶⁰ Madison not only endorsed the maladministration standard as a basis for impeachment but also gave examples of impeachable offenses, including the offense of "wanton removal of meritorious officers."⁶¹

Madison's view that "high crimes and misdemeanors" included various forms of negligence is consistent with his earlier statement in the constitutional debates that impeachment would be a protection against "the incapacity, negligence or perfidy of the chief Magistrate."⁶² That Madison's view of impeachment included "maladministration" also is consistent with the failure to use the more restrictive standard "high misdemeanors."⁶³ Blackstone defined "high misdemeanors" to include "mal-administration of such high officers, as are in public trust and employment."⁶⁴ Of course, this evidence does not mean that Madison could not be construed as viewing impeachment as largely connected to abuses of official authority, but Madison is hardly support for the view of a "great crime" standard for removal. Moreover, Madison's use of terms like "perfidy" and "incapacity" could be viewed as support for a standard extending beyond official acts to include conduct simply incompatible with the status of the chief executive.

Professor Pollitt is correct that Madison referred to "betray[al] [of] trust to foreign powers" in his discussion of impeachment in the constitutional debates.⁶⁵ This is one of Madison's most quoted statements on the subject of impeachment.⁶⁶ It was not, however,

60. See PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 118-19 (1984).

61. 1 ANNALS OF CONG. 498 (1789).

62. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 65.

63. The Framers were well-acquainted with the standard of "high misdemeanors" and debated its incorporation as part of the standard for extradition. See 2 *id.* at 174. This standard ultimately was rejected as too limited in meaning for the provision. In the impeachment context, however, "high misdemeanor" repeatedly has been cited as the basis for impeachment in various American cases. See, e.g., 5 ANNALS OF CONG. 43 (1797) (describing the allegations against Sen. William Blount as a "high misdemeanor"); 132 CONG. REC. 29,870-71 (1986) (incorporating a "high . . . misdemeanor" article against Judge Harry E. Claiborne). The House of Representatives specifically charged President Andrew Johnson with violating the Tenure of Office Act, a violation deemed a "high misdemeanor." See *infra* notes 281-84 and accompanying text.

64. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *121.

65. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 66; Pollitt, *supra* note 11, at 264.

66. See, e.g., *House Hearing*, *supra* note 7, at 67 (prepared statement of Professor Matthew Holden, Jr.); *id.* at 84 (prepared statement of Professor Cass Sunstein); 144

part of any articulation of the standard for impeachment or even the anticipated scope of impeachment. Rather, Madison was defending the concept of impeachment. Madison made this statement in the July 20, 1787, debate concerning the threshold question of whether a president should be subject to impeachment under any conditions.⁶⁷ When this quote is read in context, it is clear that Madison was referring to the variety of misdeeds that a president of diminished capacity or low integrity could produce:

Mr. <Madison>—thought it indispensable that some provision should be made for defending the Community agst 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 speculation or oppression. He might betray his trust to foreign powers.⁶⁸

The standard that Madison actually applies, if any, is “incapacity, negligence, or perfidy.” This standard is certainly not consistent with a “great crimes” theory or an executive function theory. Betrayal of trust to foreign powers is the type of conduct that Madison expected from a president guilty of such things as “perfidy.”⁶⁹ While the Framers did refer to lying to Congress as an impeachable offense,⁷⁰ there was never a suggestion that “betray[al]” of a foreign power was intended to be a defining example of the scope of impeachment.

CONG. REC. S11,333-34 (daily ed. Oct. 2, 1998) (statement of Sen. Joseph Biden).

67. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 65-66.

68. 2 *Id.* at 65.

69. Moreover, this passage was designed to show how essential it is to have a device to guarantee that the Chief Executive is not incapable, negligent, or perfidious. Madison continued:

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 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.

2 *Id.* at 66.

70. See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 127 (photo. reprint 1996) (Jonathan Elliot ed., 2d ed. 1891) [hereinafter STATE CONVENTIONS] (statement of James Iredell) (noting in the ratification debates that “giving false information to the Senate” is impeachable conduct).

Madison's stated views are not consistent with a view of impeachable offenses restricted to "great crimes." While it is certainly understandable why scholars would enlist Madison's support to advance a new theory, there is no basis for any claim that Madison's statements clearly support a specific theory on the scope of impeachable offenses.

2. George Mason

George Mason is also rightfully cited as a central figure in shaping the language for the impeachment clauses. Mason's insertion into the impeachment debate often centers on his objection to Roger Sherman's proposal for impeachment by public demand in the legislature.⁷¹ Mason opposed Sherman's proposal as diminishing the authority of the chief executive in favor of the legislature.⁷² Mason, however, clearly favored a standard far different from any "great crime" standard, as indicated in his "maladministration" proposal. There is no indication that Mason ever endorsed an executive function theory. Rather, just as Madison believed that "high crimes and misdemeanors" included maladministration, Mason's use of the English standard as alternative language cannot be read as a vital shift in his view of the basis for impeachment. Mason viewed impeachment as a guarantee that mistakes in judgment by the electorate could be corrected when warranted without waiting for the next election. He noted that "[s]ome mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen."⁷³ Mason

71. See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 85 (recording that Roger Sherman of Connecticut "contended that the National Legislature should have power to remove the Executive at pleasure"); see also 1 *id.* at 78 (recording that John Dickenson of Delaware argued that the president should be "'removable by the national legislature upon request by a majority of the legislatures of the individual States'" (quoting Dickenson's proposal)). In the English system, the Parliament had the authority to impeach "by address," which allowed the members to remove judges at its pleasure. See 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2013, at 334-35 (1907) [hereinafter HINDS' PRECEDENTS]; see also 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 428-29 (chronicling various Framers' views toward the English system of removal by address); Brendan C. Fox, Note, *The Justiciability of Challenges to the Senate Rules of Procedure for Impeachment Trials*, 60 GEO. WASH. L. REV. 1275, 1279-80 (1992) (noting that the Framers declined to adopt the English practice of removal by address out of concern for the independence of the judiciary). It is hard to believe that Mason was "shocked" by the Sherman proposal for impeachment at will, Pollitt *supra* note 11, at 263, since it was a well-known view shared by a number of delegates.

72. See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 86.

73. 1 *Id.*

considered impeachment to be a critical mechanism in a system based on equal application of the law and warned that “[n]o point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?”⁷⁴

While it is true, as noted by Professor Pollitt, that Mason referred to the use of impeachment “[w]hen great crimes were committed,”⁷⁵ Mason did not make this statement during the critical September 8, 1787, debate over the standard of impeachment. Rather, these words were attributed to Mason during the July 20, 1787, debate over the very need for impeachment.⁷⁶ Mason was responding to Gouverneur Morris’s suggestion that no impeachment should be allowed with regard to the President. Morris insisted that a president’s “[c]oadjutors” could be punished, but the president’s punishment would come with the denial of his reelection.⁷⁷ In response, Mason noted the facial inequity in a hypothetical case where “great crimes were committed” and the “[c]oadjutors” would be punished but the president would not.⁷⁸ Mason was not suggesting a standard for impeachment; he was defending the need for impeachment as a threshold matter by offering an extreme example of where its omission would yield outrageous results. Thus, neither Mason nor Madison listed great crimes exclusively in their view of impeachable offenses. Mason cannot be cited as intentionalist support for an executive function theory or any other theory. The record does not provide Mason’s clear intent on the scope of the standard.

3. Alexander Hamilton

Professor Pollitt and other academics also rely on Alexander Hamilton for the statement that impeachable offenses “are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”⁷⁹ The misuse of this statement in the Clinton impeachment and trial borders on the inspiring. Ironically, Hamilton had little to do with the language of the final impeachment

74. 2 *Id.* at 65.

75. 2 *Id.*; Pollitt, *supra* note 11, at 264.

76. See 2 RECORDS OF THE FEDERAL CONSTITUTION, *supra* note 43, at 65.

77. 2 *Id.* at 64-65.

78. 2 *Id.* at 65.

79. THE FEDERALIST NO. 65, at 334 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987); Pollitt, *supra* note 11, at 266.

provisions.⁸⁰ Nevertheless, Hamilton's statement has been used to suggest that impeachment votes should simply reflect the popularity of the president; to endorse a vote of nullification by the House to reject articles of impeachment even when supported; and finally, to support the idea that impeachable offenses must be limited to misconduct that produces "injuries done immediately to the society itself."⁸¹ My disagreement is not with the suspicion that Hamilton might support a restrictive view of impeachment; rather, my position is that this statement has been taken out of context and Hamilton's views are not clearly established in this reference or other writings.

The Hamilton quote appears not in the constitutional debates but in his later contribution, *The Federalist No. 65*.⁸² Moreover, the reference was to the Senate trial and not to the impeachment decision in the House. Hamilton was discussing the value of using the Senate for impeachment trials and why it is a superior option to using the judiciary or other body. Hamilton saw the nature of the proceedings as requiring a Senate trial:

The subjects [of Senate] jurisdiction [in an impeachment trial] are those offences 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. 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.⁸³

Hamilton's reference to "injuries done immediately to the society itself" appears in context to be part of an explanation of why

80. Gouverneur Morris, who served with Hamilton on the Committee of Style at the constitutional convention, once wrote that, "General Hamilton had little share in forming the Constitution. He disliked it, believing all Republican government to be radically defective." Letter from Gouverneur Morris to Robert Walsh (Feb. 5, 1811), in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 418.

81. THE FEDERALIST NO. 65, *supra* note 79, at 334 (Alexander Hamilton).

82. *See id.*

83. *Id.* (emphasis added).

these trials will tend to be so partisan and emotional. In trying an injury to itself, society will tend to convulse and test the tribunal, particularly because a portion of the population will perceive a president accused of impeachable offenses as having violated a sacred public trust or covenant forged at the time of his election. Accordingly, Hamilton asks: "What 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*."⁸⁴ Hamilton proceeded to explain that the Supreme Court is unlikely to be able to withstand such political pressures, "and it is still more to be doubted, whether they would possess the degree of credit and authority" needed to bring a final resolution to such a politically charged trial.⁸⁵ He viewed the underlying political dimension as requiring that impeachment trials be placed outside the judicial branch since impeachable offenses cannot be "tied down by . . . strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges."⁸⁶ Hamilton was not stating that the offenses are "public" in the sense of official acts but that, when a president commits high crimes and misdemeanors, the victim is the public and the process of adjudication becomes part of the political system in redressing that public injury.

Academics and others often invoke Hamilton's use of "public injury" for a broader meaning as limiting the scope of impeachable offenses. Yet, even taken as a substantive statement on the basis for impeachment, Hamilton's inclusion of a "violation of some public trust" and "misconduct" does not readily lend support to a "great crimes" theory. Moreover, Hamilton appeared to view impeachment as a process by which a president could be subject to prosecution for any crime. Hamilton noted that when a president stands accused of criminal acts, he can be impeached and "[h]e may be afterwards tried & punished in the ordinary course of law His impeachment shall

84. *Id.* at 335.

85. *Id.* Justice Story also noted that impeachment was left to Congress because courts were poorly suited to deal with the great variety of grounds for which an official could be removed ranging from slight guilt to major corruption: "What could be more embarrassing, than for a court of law to pronounce for a removal upon the mere ground of political usurpation, or malversation in office, admitting of endless varieties, from the slightest guilt up to the most flagrant corruption?" 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 786, at 546 (Boston, Little, Brown & Co. 1851).

86. THE FEDERALIST NO. 65, *supra* note 79, at 335 (Alexander Hamilton).

operate as a suspension from office until the determination thereof.”⁸⁷ This position would certainly not support the idea of impeachment limited to official misconduct or abuses.⁸⁸

The record of the Constitutional Convention and ratification debates reflect that the Framers were faced with widely differing views on impeachment and resolved the debate, not unlike modern legislatures, by importing familiar and largely neutral language. This result is evident from the process of drafting.

B. Intentionalist Support in the Constitutional Convention and Ratification Debates

From the wide use of statements made during the constitutional convention debates, one could conclude that the Framers did little else than debate the meaning of impeachment. In reality, the entirety of relevant statements could fit within a few pages of transcription and the most used quotes actually appear on two pages of the record. Impeachment was not a central concern of the debates, and the divisions over its use did not present a significant conflict for the Framers. Once again, this scant record leaves academics with the common task of interpretation.⁸⁹ My conclusion is that no conclusion

87. Alexander Hamilton, Speech at the Constitutional Convention (June 18, 1787), reprinted in 1 WILLIAM M. GOLDSMITH, *THE GROWTH OF PRESIDENTIAL POWER: A DOCUMENTED HISTORY* 97, 99 (1974).

88. This is not to suggest that there was no support among early commentators for a restrictive view of impeachable offenses. William Rawle rejected the concept of impeachment based on any grounds other than official acts. Rawle insisted that the intent of the standard “can only have reference to public character and official duty.” WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 215 (photo. reprint 1970) (2d ed. 1829). Rawle noted that “those offences which may be committed equally by a private person as a public officer, are not the subjects of impeachment.” *Id.* Although supportive of a restrictive interpretation of impeachable offenses, Rawle expressly rejected one of the principal elements of the position articulated by Professor Pollitt and others in the joint letter of the law professors—the use of impeachment in cases of “[m]urder, burglary, robbery, and indeed all offences not immediately connected with office.” *Id.* Thus, Rawle rejected the basis of the exception of heinous or monstrous acts advanced in the Clinton crisis.

89. When Gouverneur Morris was asked in 1814 for a recollection of the intent behind part of the Constitution, he remarked: “But, my dear Sir, what can a history of the Constitution avail towards interpreting its provisions. This must be done by comparing the plain import of the words, with the general tenor and object of the instrument.” Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in 3 *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 43, at 419-20. Morris explained that his failure to keep notes of the proceedings at the convention was due to the fact that “my mind was too much occupied by the interests of our country to keep notes of what we had done.” 3 *Id.* at 419. He stated that he had “little recollection” of the discussions on the language of particular parts of the Constitution. 3 *Id.*

is justified on this record alone.

The Framers heard widely different views on the use of impeachment with standards ranging from "malpractice or neglect of duty"⁹⁰ to impeachment at the pleasure of Congress⁹¹ to "maladministration"⁹² to "Treason & bribery."⁹³ Eventually, the decision to incorporate the known English standard appeared a simple method of resolving the language but not necessarily the meaning.⁹⁴ The Framers did not indicate an intention of importing the meaning of the English standard but rather accepted its language as a compromise position.⁹⁵ Whether the Framers' decision was the result of a simple act of compromise or an Easterbrookian "deal"⁹⁶ remains shrouded in uncertainty. A problem arises only when academics attempt to divine some supportive meaning in this process or assume facts to deny support for rivaling theories. For example, Professor Pollitt noted that the original language of the impeachment clause ended with the words "against the State."⁹⁷ The presence of such language would, of course, provide direct support for the executive function theory. The Framers, however, struck this language. Professor Pollitt, like other advocates of the executive function theory, quickly noted that this language was stricken by the Committee on Style and Arrangements, and because the Committee "had no authority to alter the substance of what the Convention had agreed upon, . . . the elimination can only mean that the Committee

90. 2 *Id.* at 64.

91. See 1 *id.* at 85; see also *supra* note 71 (discussing the English system of impeachment by address).

92. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 550 (quoting Morris's proposal).

93. 2 *Id.*

94. The English standard does not support completely either a "great crime" theory or an "executive function" theory. While impeachments primarily dealt with official acts, the English model of impeachment included offenses that were neither "great" nor "criminal" nor "official." See Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part II.A.). The English model also applied to any citizen and not just officials. See *id.*

95. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 550. Had there been an interest in importing the meaning of the English model, one would have expected some discussion as to its meaning in the debates. While there was passing reference to the English impeachment of Governor General Warren Hastings, there was no discussion of the translation of the English standard into the American system. This would have created a number of significant issues given the use of the English model against citizens, clergymen, and members of parliament. See *id.*

96. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 537-40 (1983) (describing the prevalence of hidden legislative deals or compromises in statutory language).

97. See Pollitt, *supra* note 11, at 265.

considered the words redundant, unnecessary surplusage.”⁹⁸ Rather than undermine their theory, academics—like Professor Pollitt—actually cite the elimination of these words as proof of the Framers’ intent to include the meaning of the executive function standard. Once again, the point demands too much from the record. In reality, although the Committee on Style and Arrangement did not have authority to make substantive changes—it was empowered only “to revise the stile of and arrange the articles which had been agreed to”⁹⁹—the Committee apparently exceeded its authority to some degree.¹⁰⁰ While there certainly is room for speculation, there is no basis to conclude that the Committee viewed the words “against the states” as “redundant” or “unnecessary surplusage.”¹⁰¹

98. *Id.*

99. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 553; *see also* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 422 n.1 (1928) (noting that the committee had “no authority from the Convention to make alterations of substance). The Supreme Court has relied expressly on this limitation on authority when interpreting the text of the Constitution. *See, e.g.,* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 792 n.8 (1995); Nixon v. United States, 506 U.S. 224, 231 (1993); Powell v. McCormack, 395 U.S. 486, 538-39 (1969).

100. *See House Hearing, supra* note 7, at 213 (testimony of Professor Forrest McDonald) (“We have heard several people comment that the Committee on Style would not have taken liberties with the resolutions to the Convention. They don’t understand Gouverneur Morris, who . . . took a number of liberties with the resolutions . . . and when he took too great a liberty, they checked him.”). Changes made by the Committee on Style would make significant alterations in the draft document. *See, e.g.,* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1780 (1996) (“In the Committee of Style, Gouverneur Morris—in a last-minute move that passed without debate and almost certainly without a great deal more general consideration—placed ostensible limits on the clauses vesting legislative and judicial power but left the executive Vesting Clause ostensibly open-ended.”); James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1291-92 (1998) (noting that the Committee on Style included “two ardent supporters of nationalist fiscal policy—Gouverneur Morris and Alexander Hamilton” and, ultimately, made “two important changes” in the Engagements Clause). Morris was accused of attempted substantive changes, such as the accusation of Albert Gallatin that Morris used his position on the Committee in an attempt “to throw the[] words [in the general welfare clause] into a distinct paragraph, so as to create not a limitation, but a distinct power.” 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 379; *see also* FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 264-65 (1985) (noting that Morris purposefully attempted to make the General Welfare Clause a positive grant of power through the strategic placement of a semi-colon); Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286 n.25 (1987) (discussing Max Farrand’s account of this incident and noting that, “[a]s punctuated by Morris, the clause might have implied an independent power in Congress to pursue the general welfare, thus circumventing the gaps created by the other enumerations of Article I”). *But see* David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 253-54 (1995) (contesting the account).

101. Pollitt, *supra* note 11, at 265.

Selected on September 8, 1787, the Committee on Style and Arrangement was composed of five delegates: Alexander Hamilton, William Johnson, Rufus King, James Madison, and Gouverneur Morris.¹⁰² Both Morris and King represented the original extreme wing on impeachment, opposing any impeachment for the chief executive. Morris played the most pronounced role in the four days of refining the language of the Constitution and would later write that he attempted to make subtle changes to his liking in the text.¹⁰³ It is possible that the language "against the states" appeared redundant from Morris's perspective, but his perspective on this question was hardly indicative of the general intent of the delegates. When the words were missing four days later in the Committee's final draft, it is possible that delegates took little notice or umbrage. The delegates spent a hurried week of review and debate before their final vote of approval on the draft submitted by the Committee.¹⁰⁴ It also is possible that the Committee made this change for a substantive purpose. It had made substantive changes in the past and may have done so in this matter.¹⁰⁵ Finally, in consultation with other convention delegates, the Committee members may have viewed the language "against the states" as controversial. Some delegates, such as Roger Sherman, reportedly distrusted Morris and his role on the Committee.¹⁰⁶ These delegates may have been watchful on this issue since Morris was part of the extreme opposite wing on the impeachment question. It is possible that the restrictive language was raised and Morris chose to omit it to eliminate potentially divisive issues.¹⁰⁷ None of these possibilities can be excluded or proven on this record. Thus, the suggestion that the language was necessarily stricken as "redundant" falls dramatically short of providing textual

102. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 554.

103. In discussing language relating to the judiciary, Morris wrote that "it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their selflove." Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in 3 *id.* at 420.

104. The Committee on Style and Arrangement reported its draft to the delegates on September 12, 1787, and the delegates voted to approve a final draft on September 17, 1787. See 2 *id.* at 590, 641.

105. See *supra* note 100 and accompanying text.

106. One such issue was described by Albert Gallatin, who stated that Sherman was outraged by changes made by Morris with regard to the General Welfare Clause to create "a distinct power" not supported by the Committee of the Whole. See 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 379.

107. See Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in 3 *id.* at 419-20 (noting that, in addition to rejecting "redundant and equivocal terms," at times "it became necessary to select phrases" so as to maintain support in the final vote).

support for the executive function theory.

The ratification debates are even less helpful in judging any originalist intent behind the impeachment standard. Professor Pollitt cited as supportive of the executive function theory statements made by James Iredell. Iredell is quoted as describing impeachment as protecting against “‘tyranny and oppression’”¹⁰⁸ and stating that “‘the only instances, in which the President would be liable to impeachment, would be where he had received a bribe, or had acted from some corrupt motive or other.’”¹⁰⁹ In fact, it was Joseph Taylor, not Iredell, who referred to “tyranny or oppression” in the context of impeachment.¹¹⁰ Iredell did make the second attributed statement, but his meaning appears quite different when placed into the context of the North Carolina ratification debate. Iredell was responding to an inquiry as to the relative responsibility of the Senate and the president for a “bad treaty.”¹¹¹ The North Carolina delegates were concerned that the Senate would ratify a bad treaty and then use the treaty as the basis for an impeachment despite their own responsibility. Thus, Iredell responded to an inquiry whether “it be not inconsistent that [the senators] should punish the President, whom they advised themselves to do what he is impeached for”¹¹² by stating:

According to these principles, I suppose the only instances, in which the President would be liable to impeachment, would be where he had received a bribe, or had acted from some corrupt motive or other. If the President had received a bribe, without the privity or knowledge of the Senate, *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,—if it appeared afterwards that this was the case, would not that Senate be as competent to try him as any

108. Pollitt, *supra* note 11, at 266 (attributing statement to James Iredell).

109. *Id.* (quoting 4 STATE CONVENTIONS, *supra* note 70, at 126 (statement of James Iredell)).

110. 4 STATE CONVENTIONS, *supra* note 70, at 33 (emphasis added) (statement of Joseph Taylor). It is also worth noting that Taylor was not referring to any interpretation of the impeachment standard in this reference. He was objecting to the notion of the Senate as the sole trier of impeachments when the Senate members could well be part of a “tyranny or oppression.” 4 *Id.* Taylor objected that this would allow trial “[b]y a tribunal consisting of the very men who assist in such tyranny. . . . None can impeach but the representatives; and the impeachments are to be determined by the senators, who are one of the branches of power which we dread under this Constitution.” 4 *Id.*

111. 4 *Id.* at 125 (statement of Mr. Spencer).

112. 4 *Id.* (statement of Mr. Porter).

other persons whatsoever?¹¹³

Iredell's reference to a "bribe" and lying to the Senate was simply part of this hypothetical and was not a discussion of the scope or meaning of impeachable offenses. Iredell was attempting to make clear that a bad treaty is not a matter for impeachment so long as there is not some added element such as a bribe; he was not suggesting a limitation of impeachable offenses to official acts or abuses.

Ironically, Iredell's comments on impeachment appear to weigh heavily against the executive function theory or any notion of a required "great crime." Iredell viewed impeachment as a necessary response to a president "willfully abus[ing] his trust" and for such offenses as "giving false information to the Senate."¹¹⁴ He made additional general comments that would appear to support the use of impeachment as a deterrent for presidents lacking the personal integrity to comply fully with the laws:

I beg leave to observe that, when any man is impeached, it must be for an error of the heart, and not of the head. God forbid that a man, in any country in the world, should be liable to be punished for want of judgment. This is not the case here. As to errors of the heart, there is sufficient responsibility. Should these be committed, there is a ready way to bring him to punishment. . . . Were he punishable for want of judgment, he would be continually in dread; but when he knows that nothing but real guilt can disgrace him, he may do his duty firmly, if he be an honest man; and if he be not, a just fear of disgrace may, perhaps, as to the public, have nearly the effect of an intrinsic principle of virtue.¹¹⁵

Iredell's comments are intriguing in the context of the Clinton trial. In that case, House managers argued that the underlying conduct was an error in moral judgment but not in itself impeachable. When President Clinton lied under oath,¹¹⁶ however, the affair became an impeachable matter. In the same fashion, Iredell argued

113. 4 *Id.* at 126 (emphasis added) (statement of James Iredell).

114. 4 *Id.* at 127.

115. 4 *Id.* at 125-26.

116. On April 12, 1999, Chief Judge Susan Webber Wright held President Clinton in civil contempt for lying under oath and obstructing the court's proceedings. See *Jones v. Clinton*, No. LR-C-94-290, 1999 WL 202909, at *11 (E.D. Ark. Apr. 12, 1999). The court stated that it had "no doubt that the President violated this Court's discovery Orders regarding disclosure of information deemed by this Court to be relevant to [the Paula Jones] lawsuit." *Id.* This violation included "willful" and "intentionally false" testimony. *Id.*; see also Jonathan Turley, *What's Wrong with Wright*, WALL ST. J., Apr. 19, 1999, at A23 (discussing the court's findings and their relevance to the Clinton impeachment).

that, while some errors of judgment—such as making a bad treaty—are not impeachable, the conduct becomes impeachable when an additional criminal element is added or where a president lies to Congress in the proceedings.

As in the Constitutional Convention, the impeachment standard was not a significant issue in dispute in the state ratification debates. After the Constitutional Convention, some commentators endorsed a narrow view of the scope of impeachable offenses,¹¹⁷ while others insisted on a broader view.¹¹⁸ The record simply does not answer the contemporary question. Use of such a “legislative” record by academics fulfills every nightmare of Justice Antonin Scalia. This is not simply an act of using speeches given on the floor of Congress by individual members to suggest an interpretative conclusion as to the intent of the entire body. Rather, academics such as Professor Pollitt have relied on statements made in debates unrelated to the immediate issue under review—the standard of impeachment—to suggest a general intent of the Framers. This is the very thing that mythologies are made of: the placement of sporadic and seemingly unrelated comments into a consistent mosaic. It is no longer an act of interpretation but an allegorical tale that becomes “true history.”¹¹⁹ This creative mythological exercise is particularly evident in the review of actual impeachment cases and their underlying meaning.

IV. THE LEGAL MYTHOLOGIES OF IMPEACHMENT AND THE MEANING OF PAST IMPEACHMENT CASES

Mythology is powerful because it is built in part on known facts or familiar images that are then formed into a single compelling

117. See, e.g., RAWLE, *supra* note 88, at 215.

118. Without expressing his own view, Justice Story described the broad view of impeachment which was articulated during the first impeachment trial. Story noted that “it was pressed with great earnestness, that there is not a syllable in the [C]onstitution, which confines impeachments to official acts, and it is against the plainest dictates of common sense, that such restraint should be imposed upon it.” 1 STORY, *supra* note 85, § 804, at 559. Story posed a series of hypotheticals in support of such a theory:

Suppose a judge should countenance, or aid insurgents in a meditated conspiracy or insurrection against the government. . . . Suppose a judge or other officer [were] to receive a bribe not connected with his judicial office Would not these reasons for his removal be just as strong, as if it were a case of an official bribe?

1 *Id.*

119. MIRCEA ELIADE, *MYTH AND REALITY* 6 (Willard R. Trask trans., 1963) (“[T]he myth is regarded as a sacred story, and hence a ‘true history,’ because it always deals with realities.”).

story.¹²⁰ In constitutional mythology, it is often necessary to tell a story in the voice of a Framers or, alternatively, through the images of past cases. The executive function theory is based on both accounts. After presenting the theory in the voice of such Framers as Madison, Hamilton, and Mason, advocates proceed to show that the theory was passed down to successive Congresses which carried out the Framers' intent. Thus, while only fully articulated in the Clinton crisis, this theory in fact dictated the results of past impeachment cases—presumably through a kind of constitutional oral history. Advocates of the theory argue that past cases conform with the alleged view of the Framers that officials, including judges, should be impeached only for conduct related to official duties or abuses of authority.¹²¹

Professor Pollitt's presentation of past impeachment cases suffered from three failings. First, the specific cases can be interpreted as refuting the theory advanced by Professor Pollitt. Second, his review of cases relied on Senate trials to explore the meaning of "high crimes and misdemeanors," when House impeachments appear to provide the most relevant point of comparison in determining the meaning of this standard.¹²² Third, Professor Pollitt's review was incomplete because he failed to consider cases that were terminated before impeachment or a Senate trial because of resignations or other reasons. Many inquiries have been terminated due to resignations despite clear support for impeachment in the House.¹²³

120. This often requires that a figure or image or statement be magnified to downplay rivaling figures or images or statements: "[M]yth . . . is not an explanation in satisfaction of a scientific interest[.] . . . it expresses, enhances, and codifies belief . . ." *Id.* (quoting BRONISLAW MALINOWSKI, MYTH IN PRIMITIVE PSYCHOLOGY 19 (1926)).

121. See *House Hearing*, *supra* note 7, at 112, 115 (testimony and prepared statement of Professor Robert Drinan); *id.* at 207-08 (prepared statement of Professor Pollitt); see also *Early Edition*, *supra* note 25 (interview with Professor Laurence Tribe) (arguing that past impeachment cases demonstrate that perjury concerning personal matters is not an impeachable offense).

122. Academics often emphasize the Senate trials in exploring the meaning of this phrase. See Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Part III.B.). The House, however, appears a more reliable point of comparison for determining the meaning given impeachable, as opposed to removal, offenses. Senators can vote for acquittal or conviction based on a variety of issues other than guilty, a point expressly made by past Senators before their votes. In the Senate, impeachment is less of a punishment than a remedy for misconduct in office. There may be circumstances where the remedy of removal would aggravate rather than alleviate the injury from the view of the Senate.

123. Although officials remain subject to impeachment following departure from office, Congress has largely treated resignations as terminating impeachment proceedings. See *infra* notes 231-65 and accompanying text. If the focus of a review of past impeachment cases is a review of conduct considered impeachable in the House, these

A. Judicial and Non-Presidential Impeachments

Professor Pollitt's review of past impeachment cases identifies a pattern supporting the executive function theory advanced by himself and others during the House impeachment hearing.¹²⁴ Professor Pollitt concludes (as have other academics) that these cases "follow[] the intent of those who framed our Constitution" by limiting impeachable offenses to acts of official abuse or violation of public duties.¹²⁵ The individual case review offered by Professor Pollitt contains interpretive differences in some but not all of the cases. Given the significance of this record, each case warrants a brief review.

1. William Blount (1798-99)

The impeachment of Senator William Blount of Tennessee may have been the most interesting both factually and legally.¹²⁶ Factually, Blount stood accused of a conspiracy with Great Britain to take over territory in Florida and Louisiana (where Blount owned considerable property). The conspiracy was revealed in a hand-written letter in Blount's hand.¹²⁷ Despite the fact that the Senate had expelled Blount from its membership, the senators believed that a former officer could be impeached; however, the Senate did not believe that a senator, or any legislative officer, was a "civil officer" for the purposes of impeachment. Accordingly, the Senate dismissed the case on jurisdictional grounds.¹²⁸ Notably, while clearly dismissing on

terminated cases expand the relatively limited evidence of congressional views of impeachable conduct. As will be shown, the cases that continued to trial in the Senate may not reflect the past view of impeachable offenses since a type of self-elimination appears to have occurred in impeachment cases involving personal misconduct. When all serious impeachment cases are considered, it appears that officials charged with personal misconduct were significantly more likely to terminate proceedings through resignation than officials charged with official abuses. See *infra* notes 231-65 and accompanying text.

124. With judicial officers, this theory is more appropriately denominated a "judicial function theory." Two of the fifteen non-presidential impeachments involved executive, as opposed to judicial, officers: William Blount and William Belknap. Congress, however, has considered impeachment of other executive officers, such as the Consul-General and Vice-Consul-General of Shanghai, see 3 HINDS' PRECEDENTS, *supra* note 71, §§ 2514-15, at 1023-26, and the Consul of Dublin, see 3 *id.* § 2502, at 1007.

125. Pollitt, *supra* note 11, at 277.

126. This case, and other impeachment cases, are discussed in Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.).

127. See *id.* (manuscript at Part IV.A.1.).

128. See *id.* While Professor Pollitt indicates that these charges were "possibly" dismissed on jurisdictional grounds, Pollitt, *supra* note 11, at 268, the record indicates that jurisdictional grounds were clearly the basis of the decision. On this point, academics appear fairly uniform. See, e.g., RAOUL BERGER, IMPEACHMENT: THE

the exclusion of legislative officers from impeachment procedures,¹²⁹ the Senate did not question seriously that the underlying conduct would have been worthy of impeachment despite the fact that the conduct was not viewed as violating any senatorial duty or criminal law.¹³⁰ Professors Hoffer and Hull note in their review of this case that "Blount was not accused of any recognized crime or any violation of the law. His misdemeanor was to mis-demean himself; to misuse his office for his own speculative ends."¹³¹ Blount was never charged criminally for any act connected to the conspiracy and he was never accused of any misuse of his office.

CONSTITUTIONAL PROBLEMS 214-15 (1973); Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framers' Intent*, 52 MD. L. REV. 437, 444 n.55 (1993).

129. The jurisdictional vote fell a few votes short of a majority for the inclusion of senators under the rubric of "civil officers." The critical motion to that effect failed 11 to 14, with seven Federalists defecting to vote against jurisdiction. See BUCKNER F. MELTON, JR., *THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT* 231 (1998). This vote reflected a long-standing view of many senators that legislative officers fall outside the impeachment process. While the vote on the final motion was ambiguous as to the specific jurisdictional barrier, see *id.* at 232, it is doubtful that it was due to Blount's resignation from the Senate as opposed to his prior legislative status. Historically, impeachment was used against retired officers. See Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Introduction) (discussing the impeachment of Warren Hastings). This practice would be continued in the United States in both the Blount and Belknap cases. The amenability of a legislative officer (current or former) to impeachment was a primary focus of debate in the Blount case. See MELTON, *supra* at 183-84.

130. Justice Story emphasized this issue in his celebrated lectures on the Constitution:

In the case of William Blount, the plea of the defendant . . . alleg[ed], that, at the time of the impeachment, he, Blount, was not a senator, (though he was at the time of the charges laid against him,) and that he was not charged by the articles of impeachment with having committed any crime, or misdemeanor, in the execution of any civil office held under the United States; nor with any malconduct in a civil office, or abuse of any public trust in the execution thereof. The decision, however, turned upon another point, viz., that a senator was not an impeachable officer.

1 STORY, *supra* note 85, § 802, at 558 (footnote omitted).

131. HOFFER & HULL, *supra* note 60, at 153. In fairness to Professor Pollitt, some individuals suggested at the time that Blount may have violated the Neutrality Act, Act of June 5, 1794, ch. 50, § 5, 1 Stat. 381, 384 and Act of March 2, 1797, ch. 5, 1 Stat. 497 (codified as amended at 18 U.S.C. § 960 (1994)). The articles against Blount referred to "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 (Comm. Print 1973) [hereinafter *SELECTED IMPEACHMENT MATERIALS*] (quoting the first article of impeachment); see also Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.A.1.) (discussing the Blount case). Yet, the Senate trial did not emphasize such alleged criminal acts as opposed to the view that the conduct was simply contemptible and outrageous for any public figure.

2. John Pickering (1803-04)

Judge John Pickering has the ignoble distinction as the first judge removed by the Senate. Professor Pollitt properly noted that Pickering's impeachment occurred under extremely partisan conditions in which Jeffersonians looked to impeachment as a way of ridding the federal courts of Federalist appointees.¹³² While there was a sense of "payback time," as Professor Pollitt referred to it,¹³³ a review of impeachments of this period suggests defensible articles of impeachment. This is not to deny a political motivation but rather to acknowledge that the Jeffersonians selected their targets wisely. Professor Pollitt noted that Pickering became controversial "when continued drunkenness led to mental deterioration and erratic behavior."¹³⁴ In fact, Pickering came to the federal bench in this condition. Before his federal appointment, Pickering was the Chief Justice of the New Hampshire courts until the state legislature sought to remove him because of his mental instability and abusive conduct.¹³⁵ While Pickering was clearly unbalanced, the Federalists saved him from state removal by placing him on the federal bench. Notably, the basis for the impeachment included Pickering's personal conduct as well as his judicial failings. 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; yet 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 and for the district of New Hampshire, did appear on the bench of the 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 the 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

132. See Pollitt, *supra* note 11, at 268-71. See generally Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485 (1949) (discussing the facts of the Pickering case).

133. Pollitt, *supra* note 11, at 269.

134. *Id.* at 270.

135. See HOFFER & HULL, *supra* note 60, at 207.

United States.”¹³⁶

Pickering's defenders actually argued a type of insanity defense. Pickering's son, Jacob, raised this defense in a letter in which he noted that, at the time of the specific instances of misconduct,¹³⁷ his father was “altogether incapable of transacting any kind of business which requires the exercise of judgment, or the faculties of reason, and therefore, . . . John Pickering is incapable of corruption or judgement, no subject of impeachment, or amenable to any tribunal for his actions.”¹³⁸ The final impeachment vote was along party lines with Federalists supporting their appointee. This result was not surprising since, at the time of his appointment, the Federalists were presumably aware that the New Hampshire legislature, which had impeached Pickering, considered him mentally unstable. While partisan, Pickering's conviction was clearly well founded on objective grounds.

3. Samuel Chase (1804-05)

The trial of Samuel Chase has received the most academic attention of all of the past impeachments. Chase's is the only trial of a member of the U.S. Supreme Court, and the trial occurred under the same partisan conditions as the Pickering trial.¹³⁹ The Jeffersonians truly detested Chase—and not without cause. Chase was partisan and abusive in his judicial conduct.¹⁴⁰ He used every

136. 13 ANNALS OF CONG. 353 (1804) (quoting the fourth article of impeachment).

137. The most specific instance involved the case of *United States v. The 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. John Quincy Adams and other Federalists insisted that Pickering was insane at the time and that such insanity prevented him from defending himself as well as negated guilt. See ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 48-49 (1992); HOFFER & HULL, *supra* note 60, at 213-15.

138. HOFFER & HULL, *supra* note 60, at 214.

139. The House actually approved an impeachment inquiry into the conduct of an unnamed Supreme Court Justice in 1868 on the basis of a newspaper article which reported:

“At a private gathering of gentlemen of both political parties, one of the justices of the Supreme Court spoke very freely concerning the reconstruction measures of Congress, and declared in the most positive terms that all these laws were unconstitutional, and that the court would be sure to pronounce them so. Some of his friends near him suggested that it was quite indiscreet to speak so positively, when he at once repeated the views in a more emphatic manner.”

3 HINDS' PRECEDENTS, *supra* note 71, § 2503, at 1008 (quoting an article appearing in the EVENING EXPRESS (Washington, D.C.), Jan. 29, 1868). The House voted 97 to 57 in favor of an impeachment inquiry, in what may be the only anonymous impeachment inquiry in history. See 3 *id.*

140. See HOFFER & HULL, *supra* note 60, at 229.

degree of his judicial authority to pursue or retaliate against critics of the Federalists, including the abusive use of grand juries against journalists.¹⁴¹ His articles of impeachment included pursuit of a journalist named James Callender on criminal charges after Callender criticized President Adams and the Federalists, grand jury abuses, and conduct “highly disgraceful to the character of a judge.”¹⁴² Professor Pollitt concluded that the Senate acquitted Chase because of its acceptance of the “theory that an official was impeachable only if he committed a criminal act.”¹⁴³ The record, however, does not support such a conclusion. First, it is unlikely that the same senators who removed Pickering for non-criminal offenses would suddenly adopt the inverse threshold determination. In their extraordinary study of early American impeachments, professors Hoffer and Hull specifically rejected the notion that the Chase acquittal established any precedent for “limit[ing] impeachable offenses to crimes [since] [t]hat had never been the boundary of impeachment in America.”¹⁴⁴ Second, Professor Pollitt is simply mistaken in his view that these Pickering and Chase cases were “almost identical.”¹⁴⁵ Pickering was largely, if not completely, insane. Moreover, other differences in Chase’s case have been credited with swaying the handful of Republican defectors. Before the Senate, Chase appeared to accept some responsibility and “[h]is contribution to the winning of independence, added to the humiliation of the impeachment, might have seemed arguments against his removal.”¹⁴⁶ Chase also was assisted by a prosecution that some senators viewed as over-bearing and self-defeating.¹⁴⁷

A critical distinction is that the House impeached Pickering largely because of his personal conduct on the bench and mental instability. Chase was also abusive on the bench, but he had demonstrated the inclination to moderate this conduct.¹⁴⁸ Moreover, in his open partisanship, Chase was not entirely at odds with the standard of the period. While the Chase trial represented an early

141. *See id.*

142. *Id.* at 236.

143. Pollitt, *supra* note 11, at 271.

144. HOFFER & HULL, *supra* note 60, at 255.

145. Pollitt, *supra* note 11, at 271 n.99.

146. HOFFER & HULL, *supra* note 60, at 253 (“Undoubtedly a destitute, infirm, and bowed Chase was a more sympathetic figure than a Chase in full cry on the bench.”).

147. *See id.* (“According to John Quincy Adams, [House manager] Randolph had alienated many Republican senators by his bluster and incompetence. Coke told Adams that Randolph cost the cause votes (though not [Coke’s]).”).

148. *See id.*

debate of judicial ethics and professionalism, judges were still composed of individuals with little legal training or temperament by modern standards and with varying views on judicial neutrality.¹⁴⁹ Yet, if a modern judge were to engage in such open partisan conduct and grand jury abuses, it is unlikely that Congress would be reluctant or slow to act. Chase's acquittal—secured despite majority votes on three articles—does not provide evidence supporting Professor Pollitt's assertion that "the Senate accepted the theory that an official was impeachable only if he committed a criminal act."¹⁵⁰

4. James H. Peck (1826-31)

Judge James Peck of the District Court of Missouri represented the lingering presence of judges on the federal bench with highly personal views of judicial authority. Peck did not hesitate to use such authority to punish his critics. Such was the case when an attorney named Luke Lawless wrote an anonymous letter to a newspaper responding to an opinion authored by Peck. Peck had published the opinion in another newspaper explaining his decision in a case in which Lawless was counsel.¹⁵¹ Lawless's letter was quite mild on the surface¹⁵² and put forward an account of the case intended to show that "the judge's recollection of the argument of the counsel for the petitioner, as delivered at the bar, differs materially from what I can remember."¹⁵³ Signed "A Citizen," it did not take much imagination to guess the identity of the letter's author. Peck ordered the arrest and incarceration of Lawless and ordered that the attorney be suspended from practice before the court.

149. Even one of Chase's supporters described Chase as "guilty of intemperate feelings and language, and of imprudence not becoming the character of a judge." BUSHNELL, *supra* note 137, at 58 (quoting Sen. William Plumer, a Federalist from New Hampshire); see also HOFFER & HULL, *supra* note 60, at 254 ("Although Chase was something of a throwback in his view of the judiciary, he was not unique in his manners."). Judge John Pickering is another case in point. Even though Pickering served as a state attorney general, Chief Judge of the New Hampshire Supreme Court, and a federal district court judge, his formal training at Harvard was for the ministry, not the law. See *id.* at 207.

150. Pollitt, *supra* note 11, at 271.

151. See SELECTED IMPEACHMENT MATERIALS, *supra* note 131, at 137-38 (incorporating the article of impeachment).

152. There is some basis to suggest that Judge Peck's anger was understandable while his actions were clearly improper. It has been noted that "[t]his 'concise statement' was as unfair as can be imagined. . . . Its effect was of a *reductio ad absurdum* of Judge Peck's opinion." Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 428 (1928) (quoting Lawless's letter).

153. SELECTED IMPEACHMENT MATERIALS, *supra* note 131, at 138 (quoting the article of impeachment (quoting Lawless's letter)).

Represented by Daniel Webster, Peck put on an aggressive defense before the Senate in the face of accusations that he acted "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."¹⁵⁴ Peck was acquitted by a vote of twenty-one for conviction to twenty-two for acquittal.¹⁵⁵ Professor Pollitt concluded that "the Senate voted not to convict because criminal intent had neither been charged nor proved."¹⁵⁶ Once again, Professor Pollitt's analysis appears to be an example of "abolishing complexities and creating a 'blissful clarity.'" ¹⁵⁷ As with Chase, the historical record does not support such a conclusion. Contemporary legal accounts isolate a more complex legal issue—the proper use of contempt.¹⁵⁸

Peck's impeachment was framed as a question of whether his "[t]yrannous treatment of counsel" deprived him of fitness to serve.¹⁵⁹ Before the Peck trial, there was considerable disagreement as to the power of contempt and its use.¹⁶⁰ Peck relied heavily on this controversy to argue that, if he had erred, he did so "in company with judicial characters with whom any judge may be proud to associate."¹⁶¹ Peck argued that his action was needed given thirty-seven pending claims, including cases in which Lawless was counsel. With some support from later disinterested reviewers, Peck insisted that he concluded that Lawless's article "could have no end except to subject the court to contumely and promote sympathy with the land claimants, making fair juries unobtainable in their cases."¹⁶² Thus, the Senate was primarily divided on whether Peck's act was clearly an abuse of power under contemporary standards, not on the need for alleged or proven acts of criminality. The day after the acquittal,

154. *Id.* (quoting the article of impeachment).

155. See BUSHNELL, *supra* note 137, at 111 (providing composite portraits of senators voting for or against conviction).

156. Pollitt, *supra* note 11, at 271-72.

157. See Brown et al., *supra* note 5, at 457.

158. See BUSHNELL, *supra* note 137, at 113 ("Judge Peck's trial is valuable for its lengthy review of contempt and for bringing about an act of Congress that remains in force."); Nelles & King, *supra* note 152, at 430 ("Clear as it was that if Judge Peck had erred, he had erred 'in company with judicial characters with whom any judge may be proud to associate,' the result was close.") (footnote omitted) (quoting Peck's defense counsel, William Wirt).

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

160. See Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1034 n.32 (1993).

161. ARTHUR J. STANSBURY, *REPORT OF THE TRIAL OF JAMES H. PECK* 45 (Boston, Hilliard, Gray and Co. 1833).

162. Nelles & King, *supra* note 152, at 428.

Congress immediately moved to resolve the legal ambiguity with a formal statute on contempt.¹⁶³ There is no indication that the majority of senators doubted that the conduct was abusive or that non-criminal conduct could lead to removal. It is more likely that the legal basis for Peck's actions was sufficiently controversial to convince a simple majority of senators to vote in favor of acquittal.

5. West H. Humphreys (1862)

Judge West Humphreys was one of a number of federal judges caught in the division of the Civil War. A judge on the District Court of Tennessee, Humphreys actively supported the Confederacy, advocated succession, and immediately converted his court into the "district court of the Confederate States of America."¹⁶⁴ In this capacity, he ordered the arrest of Perez Dickinson, placed him under bond until he swore allegiance to the Confederacy, and further ordered the confiscation of property of various citizens.¹⁶⁵ The impeachment and conviction of Humphreys is perhaps the most defensible and understandable decision by the Senate in any impeachment cases. Whatever interpretation of "high crimes and misdemeanors" is adopted, the use of official authority in support of a successionist government should suffice as impeachable conduct for any academic.

6. Mark H. Delahay (1872)

The impeachment of Judge Mark H. Delahay of the District Court of Kansas is not included in Professor Pollitt's review and is often left out of academic studies of impeachment because, while impeached, Delahay resigned shortly before his Senate trial.

163. See Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1027 (1924). The Peck case did not simply prompt action on the federal level: "So deeply did the Peck case stir the country that State after State copied the new Federal law." *Id.*

The relationship between judicial scandal and legal reform is well established. See, e.g., George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291, 313 (1998) (discussing the significance of the 1921 case of Judge Kenesaw Mountain Landis of the Northern District of Illinois, who accepted a salaried position as National Commissioner of Baseball while remaining on the bench, to the development of judicial conflicts rules).

164. SELECTED IMPEACHMENT MATERIALS, *supra* note 131, at 141 (quoting the sixth article of impeachment against Judge Humphreys).

165. The seized property included that of future President (and impeachment defendant) Andrew Johnson. See *id.*

Nevertheless, Delahay is one of the few judges the House has found to have committed “high crimes and misdemeanors.” Delahay was accused of being of low character¹⁶⁶ and commonly “‘intoxicated off the bench as well as on the bench.’”¹⁶⁷ This conduct appeared to include, but was not limited to, official misconduct such as “sentenc[ing] prisoners when intoxicated, to the great detriment of judicial dignity.”¹⁶⁸ The House Judiciary Committee reported that “‘there is enough in his personal habits to found a charge upon, and that is all there is in this resolution.’”¹⁶⁹ Upon this basis alone, “[t]he resolution of impeachment was . . . agreed to without division.”¹⁷⁰ On March 3, 1872, the House managers met with the Senate, which notified the House that “‘[t]he Senate [was] ready to receive articles of impeachment against Mark H. Delahay.’”¹⁷¹ Delahay resigned, however, before the Senate trial commenced.¹⁷²

7. William W. Belknap (1876)

The impeachment of former Secretary of War William Belknap represents a critical case in the congressional view of the scope and meaning of impeachment. Since Belknap was no longer in office at the time of his trial, the Belknap case indicates that resignation from office does not prevent trial on articles of impeachment. In this case, there was no need to impeach to protect the public from any additional harm or to assure the proper functioning of government. There was no “threat” to the system in keeping an official in office, as advocates of the executive function theory often emphasize. Instead, the House impeached and the Senate tried Belknap as a political response to a political injury, a corrective measure that helped the system regain legitimacy.¹⁷³

Belknap was charged with accepting bribes for contracts associated with the Indian territory.¹⁷⁴ The House managers charged

166. See 3 HINDS' PRECEDENTS, *supra* note 71, § 2504, at 1008.

167. 3 *Id.* § 2505, at 1009 (quoting Rep. Benjamin F. Butler of Massachusetts, a member of the House Judiciary Committee).

168. 3 *Id.*

169. 3 *Id.* at 1010 (quoting Rep. Butler).

170. 3 *Id.*

171. 3 *Id.* (quoting message of the Senate to the House).

172. See Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949, 957 n.22 (1995); Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 *U. PA. L. REV.* 333, 336 n.14 (1993).

173. For a full discussion of this particular role of the Senate trial and, specifically, the Belknap case, see Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.A.2.).

174. These bribes included a \$6000 per year payment and \$1500 for other appointments. See *SELECTED IMPEACHMENT MATERIALS*, *supra* note 131, at 145-47;

that Belknap had " 'disregard[ed] his duty as Secretary of War, and basely prostitut[ed] his high office to his lust for private gain.' " ¹⁷⁵ Belknap first raised the jurisdictional argument that impeachment did not extend to former or retired "civil officers." The Senate voted on this threshold jurisdictional question and reaffirmed that it had jurisdiction over former officers by a vote of thirty-seven to twenty-nine. ¹⁷⁶ Professor Pollitt correctly noted, however, that many senators continued to question jurisdiction and apparently voted for acquittal on this basis. ¹⁷⁷ There was little question of guilt, especially in light of the fact that Belknap refused to answer the articles of impeachment. ¹⁷⁸ Ultimately, only three senators believed Belknap was innocent, but twenty-two senators had doubts on the jurisdictional issue. ¹⁷⁹ The final vote on the closest article was thirty-seven to twenty-five in favor of impeachment. ¹⁸⁰ This vote, however, was only four votes short of the number needed for conviction. ¹⁸¹ Since only three senators cast their votes based on lingering doubts of guilt on the merits, Belknap's acquittal can be attributed to one senator who questioned jurisdiction.

8. Charles Swayne (1903-05)

The impeachment of Judge Charles Swayne was the most partisan twentieth century case. Swayne was charged with a variety

IRVING BRANT, IMPEACHMENT TRIALS AND ERRORS 155 (1972).

175. STAFF OF HOUSE COMM. ON THE JUDICIARY, 93RD CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 49-50 (Comm. Print 1974) [hereinafter CONSTITUTIONAL GROUNDS] (quoting the third article of impeachment).

176. House managers have since reaffirmed the position that resignations do not necessarily terminate impeachment proceedings. In the case of Judge George English, House managers accepted English's resignation during his Senate trial; however, the managers stressed for the record that "[we] are of the opinion that the resignation of Judge English in no way affects the right of the Senate, sitting as a court of impeachment, to hear and determine said impeachment charges." 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 547, at 785 (1935) [hereinafter CANNON'S PRECEDENTS] (quoting report of the House managers); see also Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.B.) (discussing the English case).

177. See Pollitt, *supra* note 11, at 272.

178. See John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 37 (1970).

179. See MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 52 (1996). Only one senator failed to give his reason for voting against conviction. See BRANT, *supra* note 174, at 160.

180. There were majority votes in favor of conviction on all five articles, ranging from 35 to 37. See 3 HINDS' PRECEDENTS, *supra* note 71, § 2467, at 945.

181. With 62 voting senators, the House managers needed 41 votes for conviction. The 22 senators voting for acquittal on jurisdictional grounds proved just enough for Belknap to avoid conviction.

of offenses ranging from residency violations to corruption to simple incompetence.¹⁸² Florida Democrats despised Swayne and asked for the initiation of impeachment proceedings.¹⁸³ House and Senate Democrats were perfectly happy to take up the case against Swayne.¹⁸⁴ The Swayne trial involved one of the most thorough reviews of the Framers' intent as well as English and American cases.¹⁸⁵ Swayne advanced an originalist argument that none of these allegations rose to the level of impeachable offenses. He insisted that the Framers intended the standard of "high crimes and misdemeanors" to be limited to proven criminal acts and that the allegations against him involved lesser offenses which fell short of "any misdeeds meeting historical or constitutional descriptions of impeachable conduct."¹⁸⁶ The House managers expressly opposed this restrictive view of the scope of impeachable offenses:

"[The contention is that] however serious the crime, the misdemeanor, or misbehavior of the judge may be, if it can be said to be extrajudicial, he cannot be impeached. To illustrate this contention, the judge may have committed murder or burglary and be confined under a sentence in a penitentiary for any period of time, however long, but because he has not committed the murder or burglary in his capacity as judge he cannot be impeached. That contention, carried out logically, might lead to the very defeat of the performance of the function confided to the judicial branch of the government."¹⁸⁷

Both the House and a majority of the Senate rejected Swayne's argument. Ultimately, however, Swayne prevailed in a partisan final

182. See 3 *id.* § 2469, at 949.

183. See 3 *id.* § 2469, at 948-49; BUSHNELL, *supra* note 137, at 192 (quoting another judge as describing Swayne as "persona non grata with the Democrats in Florida").

184. One of the most interesting aspects of the Swayne case was that the House of Representative voted twice to impeach Swayne. After the first impeachment, the House again took up the case but, after further debate, the second decision to impeach was closer than the first. See BUSHNELL, *supra* note 137, at 193 (noting that, in comparison to its first decision to impeach by a vote of 198 to 61, on the second occasion the House voted 165 to 160 in favor of impeachment for filing false expense accounts, 162 to 138 for impeachment for improper use of a private railroad car, 159 to 136 in favor of impeachment for living outside his judicial district, and, without voting, "also agreed . . . to impeach Swayne for imposing unlawful sentences for contempt of court").

185. See *id.* at 201.

186. *Id.*

187. STAFF OF HOUSE COMM. ON THE JUDICIARY, 105th CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS 7 (Comm. Print 1998) [hereinafter MODERN PRECEDENTS] (quoting statement of Rep. Clayton during the Swayne case).

vote. The thirty-four day Senate trial ended in acquittal with the majority of Republicans voting to acquit and the majority of Democrats voting to convict.

9. Robert W. Archbald (1912-13)

The case against Judge Robert Archbald of the U.S. Court of Appeals for the Third Circuit contained charges similar to those against Judge Swayne only ten years before.¹⁸⁸ Most of the conduct detailed by the House of Representatives occurred while Archbald was a judge for the U.S. District Court for the Middle District of Pennsylvania. Archbald was serving a four-year appointment to sit by designation on the U.S. Commerce Court with responsibility over the Interstate Commerce Commission and railroads. Like Swayne, Archbald was charged with a variety of misdeeds ranging from corrupt influence over litigants to acceptance of free trips from a railroad. Unfortunately for Archbald, however, the political environmental had changed. In a non-partisan vote, Archbald was convicted and removed from judicial office. The Archbald case was built squarely on judicial misconduct in the acceptance of loans from individuals appearing before his court and using his position to obtain coal leases.¹⁸⁹

During the debate over impeachment, Archbald argued that some of the allegations concerned actions he took as a citizen and were not any abuse of a judicial function. The House Judiciary Committee rejected this argument, citing Judge West Humphreys's case for precedent: "The evidence clearly showed that [Humphreys] was in no wise acting in a judicial capacity, yet he was convicted" ¹⁹⁰ While Archbald's articles of impeachment in fact did focus on judicial improprieties, the Judiciary Committee expressly rejected a judicial function theory which would confine impeachment to conduct related to the misuse of office or authority:

"Any conduct on the part of a judge which reflects on his integrity as a man or his fitness to perform the judicial

188. For a detailed account of the facts of the Archbald case, see BUSHNELL, *supra* note 137, at 217-42.

189. See BORKIN, *supra* note 159, 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 137, at 221.

190. SELECTED IMPEACHMENT MATERIALS, *supra* note 131, at 174 (quoting the House Judiciary Committee report). Importantly, the House did not view such a nexus as critical; however, since Humphreys was acting as a judge for a rebel nation, the choice of historical examples was questionable.

functions should be sufficient to sustain his impeachment. It would be both absurd and monstrous to hold that an impeachable offense must needs be [sic] committed in an official capacity. If such an atrocious doctrine should receive the sanction of the congressional authority, there is no limit to the variety and the viciousness of the offenses which a Federal judge might commit with perfect immunity from effective impeachment."¹⁹¹

In the Archbald case, the House managers stressed the right to remove a judge who "degraded his high office and has destroyed the confidence of the public in his judicial integrity."¹⁹² Archbald's conviction was almost unanimous, with only five votes to acquit out of seventy senators, who were divided almost equally between the parties.

10. George W. English (1926)

Professor Pollitt also omits the case of Judge George W. English of the U.S. District Court for the District of Illinois in his case-by-case review of impeached judges. Like Judge Delahay, Judge English should be included in the list of impeached officials, though he was not tried to verdict. English was charged with favoritism and improper loan arrangements and other personal transactions with parties before his court. By an overwhelming vote of 306 to 62, the House impeached English on April 1, 1926.¹⁹³ What is most interesting about the English case was the standard for impeachment articulated by the House Judiciary Committee:

"Although frequently debated, and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, but also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also, for abuses or betrayal of

191. *Id.* (quoting the House Judiciary Committee report).

192. 3 PROCEEDINGS OF 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).

193. See 6 CANNON'S PRECEDENTS, *supra* note 176, § 545, at 779-80.

trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or, as one writer puts it, for a 'breach of official duty by malfeasance or misfeasance, *including conduct such as drunkenness when habitual*, or in the performance of . . . an official function, which tends to bring the office into disrepute, or for an abuse or reckless exercise of discretionary power as well as the breach of an official duty imposed by statute or common law.' ”¹⁹⁴

The trial was commenced on April 22, 1926.¹⁹⁵ On November 10, 1926, a letter from Judge English to President Calvin Coolidge extending English's resignation was read to the Senate.¹⁹⁶ On December 11, 1926, the House (with twenty-three votes in opposition) asked the Senate to proceed no further with the matter given Judge English's resignation.¹⁹⁷ On December 13, 1926, the Senate agreed (with nine votes in opposition) to drop any further proceedings with regard to the former judge.¹⁹⁸

11. Harold L. Louderback (1932-33)

Judge Harold Louderback of the U.S. District Court for the Northern District of California was impeached on five articles alleging "tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in said district in the court of which he is a judge into disrepute, and by his conduct is guilty of misbehavior."¹⁹⁹ The specific charges included a residency charge (similar to the charges against Judge Swayne),²⁰⁰ "partiality and favoritism" in cases,²⁰¹ and the improper appointment of bankruptcy receivers.²⁰² The Louderback case reflected a trend of the House in investigating or impeaching officials for any conduct—official or unofficial—viewed as bringing an office "into disrepute" or raising

194. 6 *Id.* § 545, at 779-80 (quoting report of the House Judiciary Committee) (emphasis added).

195. *See* 6 *id.* § 546, at 781.

196. *See* 6 *id.* § 547, at 784 (incorporating the November 4, 1926, letter from Judge English to President Coolidge, which read in part, "I have come to the conclusion on account of the impeachment proceedings instituted against me, regardless of the final result thereof, that my usefulness as a judge has been seriously impaired").

197. *See* 6 *id.* § 547, at 785.

198. *See* 6 *id.*

199. SELECTED IMPEACHMENT MATERIALS, *supra* note 131, at 184-85 (quoting the first article of impeachment against Judge Louderback).

200. *See id.* at 185 (first article of impeachment).

201. *Id.* (quoting the second article of impeachment).

202. *See id.* (fifth article of impeachment).

compelling questions of legitimacy.²⁰³ Lasting seventy-six days, the case against Louderback was presented with considerable detail, as was the case for the defense.²⁰⁴ In a bipartisan decision, the Senate found the charges against Louderback to be wanting and acquitted him by a wide margin.²⁰⁵

12. Halsted L. Ritter (1936)

The House impeached Judge Halsted L. Ritter of the U.S. District Court for the Southern District of Florida on charges ranging from favoritism to kickbacks to income tax evasion.²⁰⁶ Some of the charges presented rather circuitous routes of enrichment such as favoritism to a receiver who proceeded to appoint Mrs. G.M. Wickard, Ritter's sister-in-law, "who had had no previous hotel-management experience, to be manager of the Julia Tuttle Hotel and Apartment Building."²⁰⁷ Such evidence was controversial in both houses as the basis for removal of a federal judge.²⁰⁸ Ritter's case would contradict one of the principle arguments used in the Clinton case against the articles of impeachment: the suggested invalidity of

203. Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.B.).

204. See PROCEEDINGS OF THE UNITED STATES SENATE IN THE TRIAL OF IMPEACHMENT OF HAROLD LOUDERBACK, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA, S. DOC. NO. 73-73 (1933).

205. The House managers were only able to secure a majority on one article. See BUSHNELL, *supra* note 137, at 263. The strongest article proved to be the final article, which as amended alleged that Louderback's actions "create[d] a general condition of widespread fear and distrust and disbelief in the fairness and disinterestedness" of his rulings and that the "general and aggregate result" was to destroy confidence in the court. CONSTITUTIONAL GROUNDS, *supra* note 175, at 55 (quoting the fifth article of impeachment). The article concluded that "for a Federal judge to destroy [such confidence] is a crime and misdemeanor of the highest order." *Id.* (same).

206. See SELECTED IMPEACHMENT MATERIALS, *supra* note 131, at 198-202.

207. *Id.* at 201 (quoting the seventh article of impeachment).

208. Ritter's case followed a curious path reminiscent of the double impeachment of Judge Swayne. After its first inquiry into the case, the House Judiciary Committee resolved not to impeach. The House, however, returned to the impeachment question and ultimately voted to impeach, despite the fact that almost three years had passed since the investigation had begun. See BUSHNELL, *supra* note 137, at 270. Judge Ritter later challenged his impeachment, but the Court of Federal Claims held that the suit was non-justiciable. See *Ritter v. United States*, 84 Ct. Cl. 293, 296-300 (1936). 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. In fact, due in part to the encouragement of Senator Sam Houston, the House voted four times to secure votes for impeachment but failed each time. See Van Tassel, *supra* note 172, at 377 (discussing case). See generally WALLACE HAWKINS, *THE CASE OF JOHN C. WATROUS, UNITED STATES JUDGE FOR TEXAS: A POLITICAL STORY OF HIGH CRIMES AND MISDEMEANORS* (1950) (providing a detailed history of these events).

an article of impeachment that contained multiple grounds for impeachment.²⁰⁹ The Senate acquitted Ritter on all articles of impeachment except the final article, which was an omnibus charge containing the allegations of the prior rejected articles.²¹⁰ Not only did the final article support the future use of general articles, but it included impeachable acts, such as tax evasion, which were unrelated to any judicial function.

13. Harry E. Claiborne (1986)

After a fifty-year hiatus of impeachment activity, in 1986 the House voted to impeach and the Senate voted to convict Judge Harry Claiborne of the U.S. District Court for the District of Nevada.²¹¹ Professor Pollitt described Claiborne as a judge convicted in federal court of "tax evasion—he neglected to report some bribes."²¹² Based on this understanding of the case, Professor Pollitt included Claiborne in a list of judges removed from office "for accepting bribes or lying about accepting bribes—all various forms of bribery."²¹³ Claiborne, however, was never convicted in court of bribery or tax evasion related to bribes, but simply tax evasion. The point is not as minor as it may appear since it has considerable relevance to the definition of impeachable offenses. It is true that there was at one time a bribery charge pending against Claiborne in the criminal trial. Claiborne was originally tried on four counts, including one count of bribery, "two counts of tax evasion unrelated to the alleged bribes, and one count of filing a false financial statement with a Judicial Ethics Committee."²¹⁴ After the jury failed to reach a verdict in the first trial,²¹⁵ the bribery charge was dropped in favor of the charges of tax evasion and filing of a false financial statement. Claiborne was re-tried and a jury convicted him on tax evasion charges unrelated to bribery.²¹⁶

209. See 145 CONG. REC. S63 (daily ed. Jan. 14, 1999) (quoting President Clinton's affirmative defense that "Article II is constitutionally defective because it charges multiple instances of alleged acts of obstruction in one article, which makes it impossible for the Senate to comply with the Constitutional mandates that any conviction be by the concurrence of the two-thirds of the members").

210. See 80 CONG. REC. 3066-92 (1936).

211. See S. DOC. NO. 99-48, at 11 (1986).

212. Pollitt, *supra* note 11, at 275.

213. *Id.* at 276-77.

214. See *United States v. Claiborne*, 781 F.2d 1327, 1327 (9th Cir. 1986) (Reinhardt, C.J., dissenting).

215. In his first trial, Claiborne was not convicted due to a hung jury. See *id.* at 1327 (Reinhardt, C.J., dissenting).

216. See *United States v. Claiborne*, 870 F.2d 1463, 1464 (9th Cir. 1989). The House

As part of his defense before the Senate, Judge Claiborne advanced the same basic theory as executive function advocates. Claiborne's defense counsel insisted that the articles of impeachment were facially invalid because "there is no allegation . . . that the behavior of Judge Claiborne in any way was related to misbehavior in his official function as a judge; it was private misbehavior."²¹⁷ The House managers vigorously opposed this position,²¹⁸ and the Senate, through its vote to convict, reaffirmed House Manager Hamilton Fish's basic argument: "Impeachable conduct does not have to occur in the course of the performance of an officer's official duties. Evidence of misconduct, misbehavior, high crimes, and misdemeanors can be justified upon one's private dealings as well as one's exercise of public office."²¹⁹

The Claiborne case is obvious precedent to refute an executive function theory or judicial function theory.²²⁰ Claiborne was removed

voted to impeach Claiborne on four articles of impeachment, all of which concerned the criminal act of such filing false income tax returns. There was no direct connection between Claiborne's criminal acts and any judicial function. Ultimately, the Senate voted to convict Claiborne on three of the four articles and removed him from office. See 132 CONG. REC. 29,870-72 (1986).

217. MODERN PRECEDENTS, *supra* note 187, at 6 (statement of Judge Claiborne's defense counsel, Oscar Goodman).

218. One House Manager, Rep. Robert Kastenmeier, raised the same objection to the judicial function theory that would be leveled at the executive function theory: "[I]t would be absurd to conclude that a judge who had committed murder, mayhem, rape, or perhaps espionage in his private life, could not be removed from office by the U.S. Senate." *Id.* (quoting Rep. Kastenmeier). This position was shared by a member of the Senate who spoke out against such a limitation:

"There is neither historical nor logical reason to believe that the Framers of the Constitution sought to prohibit the House from impeaching . . . an officer of the United States who had committed treason or bribery or any other high crime or misdemeanor which is a serious offense against the government of the United States and which indicates that the official is unfit to exercise public responsibilities, but which is an offense which is technically unrelated to the officer's particular job responsibilities."

Id. at 7 (quoting statement of Sen. Charles Mathias, Jr., during the trial of Judge Claiborne).

219. 132 CONG. REC. 17,297 (1986) (statement of Rep. Fish). One other House Manager rejecting Claiborne's argument was future House Judiciary Chairman—and House Manager in the Clinton trial—Henry Hyde, who stated that "the decision to impeach and convict . . . stands as an admonition to others in public life. It is an opportunity for Congress to restate and reemphasize the standards of both personal and professional conduct expected of those holding high Federal office." *Id.* at 17,300 (statement of Rep. Hyde).

220. The House Managers emphasized the Claiborne case in response to the executive function theory presented in defense of President Clinton. See 145 CONG. REC. S76 (daily ed. Jan. 19, 1999) ("Judge Harry E. Claiborne was impeached, convicted, and removed from office for . . . misconduct [that] had nothing to do with his official responsibilities") (incorporating statement of the House Managers).

for conduct incompatible with his station or status.²²¹ The act of perjury about tax evasion was not the violation of a judicial function. It was, however, an impeachable and removable offense.

14. Alcee L. Hastings (1988-89)

The impeachment of Judge Alcee Hastings of the U.S. District Court of the Southern District of Florida illustrates the modern trend of impeaching judges after criminal trials.²²² Hastings was acquitted in a criminal trial of charges of conspiracy and bribery.²²³ The House voted almost unanimously to refer seventeen articles of impeachment to the Senate,²²⁴ and the Senate voted to convict Hastings on eight of these articles.²²⁵ The final vote may reflect a conscious view that, even if the evidence did not meet a standard of "beyond a reasonable doubt" for a jury, each senator may apply her own standard in judging such conduct.²²⁶ Despite his acquittal at trial, Hastings falls squarely into a judicial function model.

15. Walter L. Nixon, Jr. (1988-89)

Judge Walter L. Nixon, Jr., of the U.S. District Court for the Southern District of Mississippi was the last federal judge tried in the

221. The House voted to impeach Claiborne on four articles, all of which concerned the criminal act of tax evasion unrelated to bribery and the filing of a false financial statement. There was no direct connection between Claiborne's criminal acts and any judicial function. Ultimately, the Senate voted to convict Claiborne on three of the four articles. The basis for removal was most evident in the fourth article. See H.R. Res. 461, 99th Cong., 2d Sess. (1986); S. DOC. NO. 99-48, at 3, 41-42 (1986).

222. See S. REP. NO. 101-156, at 1-3 (1989); H. REP. NO. 100-810, at 1-5 (1988).

223. See *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 95 (D.C. Cir. 1987); *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1096-97 (D.C. Cir. 1985).

224. See H.R. Res. 499, 100th Cong., 2d Sess., 134 CONG. REC. 20,211-22 (1988) (recording a vote of 413 to 3 in favor of impeachment). Like Swayne, the Hastings impeachment was the result of a referral from the Judicial Conference of the United States, which conducted its own investigation into the criminal charges of which Hastings was acquitted. See REPORT OF THE INVESTIGATING COMMITTEE TO THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT 338-39 (1986); see also Alan I. Baron, *The Curious Case of Alcee Hastings*, 19 NOVA L. REV. 873, 874 (1995) (noting that the Judicial Investigating Committee reviewed "approximately 2800 exhibits . . . [and] issued 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").

225. See 135 CONG. REC. 25,329-35 (1989).

226. Hastings ultimately would produce the strangest aftermath of any impeachment case by first winning a seat to the House of Representatives and then sharing his unique view of impeachment in the Clinton proceedings. See 144 CONG. REC. H11,774, H11,823 (daily ed. Dec. 18, 1998) (statement of Rep. Hastings) ("This House can work its will on censure and anything else. I was removed from office after being found not guilty, and here we are talking we cannot censure.").

Senate. By the time of this Senate trial, Nixon already had been convicted in a criminal trial on two counts of making false statements to a grand jury which was investigating bribery allegations against him.²²⁷ Nixon arrived at the Senate with the ignoble distinction of a unanimous House impeachment vote, 417 to 0.²²⁸ The Senate did not, however, convict Judge Nixon on the basis of the bribery allegations. Instead, it removed the judge for the crime of lying under oath to a federal grand jury, the same charge later leveled against President Clinton.²²⁹ Nixon's case stemmed from a drug prosecution of Drew Fairchild, who was a business partner of Judge Nixon. Since the prosecution was a state case, Nixon was not directly involved or capable of direct intervention; however, Nixon spoke to the state's prosecutor, an acquaintance of Nixon, who agreed to drop the case. The House did not view this as impeachable conduct. The impeachable conduct occurred when Nixon first denied any involvement to the FBI and then to a federal grand jury. Nixon's intervention for a personal friend, therefore, was not treated as the basis for a "high crime or misdemeanor." It was Nixon's illegal effort to conceal such conduct that proved his undoing. This was not a violation of a judicial function or use of office. It was, however, sufficient misconduct for his impeachment and removal.²³⁰

16. Terminated Judicial Cases

Academic studies of impeachment cases often conflate questions of conduct that is impeachable and conduct that is not impeachable. The roles of the House and the Senate are often treated as redundant despite the historical and textual support for distinct roles. In determining the scope of impeachable offenses, the House provides the most direct evidence, not the Senate. The Senate may choose to retain a judge or president despite evidence of guilt based on a variety of considerations. The role of the House is to determine if the conduct is an impeachable offense. This author previously defended the "grand jury" model in another article, a model which the House

227. See Judge Walter L. Nixon, Jr., *Impeachment Inquiry: Hearings on H. Res. 407 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 2 (1988).

228. See 135 CONG. REC. 8823-24 (1989).

229. Judge 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 S. REP. NO. 101-164, at 1-3 (1989); H.R. REP. NO. 101-36, at 15-16 (1989); 135 CONG. REC. 27,101-06 (1989).

230. See S. REP. NO. 101-164, at 1-3.

managers adopted in the Clinton trial.²³¹

If the House is the focus of a study of impeachable conduct, academics must look not only to individuals who were tried by the Senate but also to individuals who faced likely impeachment in the House. Many judges have resigned shortly before or after commencement of impeachment proceedings.²³² These cases are revealing because a number of them involve charges based on personal misconduct. The judicial cases evidence some degree of self-selection in the cases going before the Senate. Judges faced with charges of personal misconduct (and the threat of a public trial) appear more likely to resign than do judges accused of violations of judicial duties.²³³ By not considering these cases as part of the relevant historical record, advocates of the executive function theory ignore an entire set of cases revealing congressional views of potentially impeachable conduct—views largely at odds with their restrictive interpretation of the impeachment standard.

The House has pursued vigorously a variety of charges against judges who resigned at the beginning of an inquiry,²³⁴ during an

231. See *House Hearing*, *supra* note 7, at 262-66 (prepared statement of Professor Turley); Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Part III.).

232. At least 24 judges have left the bench under allegations of wrongdoing or misconduct. These judges include: William Stephens (1818), District Court Judge of the District of Florida; Matthias B. Tallmadge (1818), District Court Judge of the District of New York; Thomas Irwin (1859), District Court Judge of the Western District of Pennsylvania; Charles Sherman (1873), District Court Judge of the Northern District of Ohio; Richard Busteed (1874), District Court Judge of the Middle District of Alabama; Edward H. Durrell (1874), District Court Judge of the Eastern District of Louisiana; William Story (1875), District Court Judge for the Western District of Arkansas; Peter S. Grosscup (1911), Court of Appeals Judge for the Seventh Circuit; Cornelius H. Hanford (1912), District Court Judge of the Western District for the District of Washington; Daniel T. Wright (1914), District Court Judge for the District of the District of Columbia; John A. Marshall (1915), District Court Judge of the District of Utah; Kenesaw M. Landis (1922), District Court Judge of the Northern District of Illinois; Francis A. Winslow (1929), District Court Judge of the Southern District of New York; Joseph Buffington (1938), Court of Appeals Judge of the Third Circuit; Martin T. Manton (1939), Court of Appeals Judge of the Second Circuit; Edwin S. Thomas (1939), District Court Judge of the District of Connecticut; Warren Davis (1941) of Court of Appeals Judge of the Third Circuit; Albert W. Johnson (1945), District Court Judge of the Middle District of Pennsylvania; Abe Fortas (1969), Associate Justice of the U.S. Supreme Court; Otto Kerner (1974), Court of Appeals Judge of the Seventh Circuit; Herbert A. Fogel (1978), District Court Judge of the Eastern District of Pennsylvania; Robert Collins (1993), U.S. District Court Judge of the Eastern District of Louisiana; and Robert Aguilar (1996), District Court Judge of the Northern District of California. As noted above, two judges, Mark H. Delahay (1872) and George W. English (1926), resigned after impeachment.

233. See *infra* notes 243-55 and accompanying text.

234. This occurred in the case of Judge Francis Winslow (1929) of the U.S. District Court for the Southern District of New York. Winslow was accused of conduct "so bad that it has shocked both the bench and the bar; so bad that it is reflecting on the integrity

investigation by the House Judiciary Committee,²³⁵ after submission of a report to the floor,²³⁶ or even after their case was submitted to the Senate.²³⁷ Other judges resigned after indictment²³⁸ or conviction,²³⁹

of that court; and unless we have an investigation either to ascertain the truth of these charges or otherwise, the people of that district will lose confidence in that court." 70 CONG. REC. 3334 (1929) (statement of Rep. Fiorello LaGuardia of New York). The accusations included harassment of attorneys, intimidation of witnesses, favoritism in appointments for a friend, Marcus Helfand, and consistently ruling in favor of litigants represented by Mr. Helfand. See 70 CONG. REC. 3334-35 (1929). On the day of the formal inquiry by the House, Winslow resigned and, through counsel, stated that "the prestige of the court would be impaired should he return to it, and this he could not for himself endure, nor could he allow it to continue as an embarrassment to the other judges." 6 CANNON'S PRECEDENTS, *supra* note 176, § 550 at 792-93 (quoting Judge Winslow's letter of resignation).

235. This occurred in the case of Judge William Story of the Western District of Arkansas, who appeared before a House investigating committee in 1874 on charges of questionable court expenditures and improper bail judgments. After his testimony, described by the committee as "lame, disconnected and unsatisfactory," Story resigned. Van Tassel, *supra* note 172, at 368 (quoting *The Daily Gazette*, ARK. GAZETTE, June 9, 1874).

236. For example, Judge E. H. Durell of the U.S. District Court for the Southern District of Louisiana was charged in 1874 with a variety of offenses ranging from drunkenness to more serious bankruptcy improprieties with an individual named E.E. Norton. The House Judiciary Committee noted that "[t]he most intimate social relations existed between Judge Durell and Norton They traveled North together in the summer and spent much of their time together." 3 HINDS' PRECEDENTS, *supra* note 71, § 2508, at 1013 (quoting the majority report of the House Judiciary Committee). After the Judiciary Committee recommended impeachment, Durell resigned. See 3 *id.* §§ 2508-09, at 1014-15.

237. Judge Mark W. Delahay of the U.S. District of Kansas resigned after impeachment but before his Senate trial. See *supra* notes 172 and accompanying text. Likewise, George English resigned after the formal commencement of his Senate trial. See *supra* notes 196-98 and accompanying text.

238. These judges include Judge Martin T. Manton of the U.S. Court of Appeals for the Second Circuit and Judge Albert W. Johnson of the U.S. District Court for the Middle District of Pennsylvania, who resigned in 1939 and 1945, respectively, in the aftermath of criminal indictments. See Van Tassel, *supra* note 172, at 390 n.262, app. tbl.1 at 415, 416.

239. For example, Judge Robert Collins of the U.S. District Court for the Eastern District of Louisiana resigned when the House indicated that impeachment proceedings would begin after his conviction appeal was denied in *United States v. Collins*, 972 F.2d 1385, 1415 (5th Cir. 1992). Collins was accused of granting a low sentence for a drug smuggler in exchange for \$100,000. Through the cooperation of a co-conspirator, the federal investigators not only taped Collins in meetings with the defendant but also found marked bribery money in his pockets and in his office credenza. See Victor Williams, *Third Branch Independence and Integrity Threatened by Political Branch Irresponsibility: Reviewing the Report of the National Commission on Judicial Discipline and Removal*, 5 SETON HALL CONST. L.J. 851, 911-12 (1995) (noting that Collins had \$180 in marked bills in his pockets when searched by the FBI and \$16,000 in the credenza). Similarly, Judge Robert Aguilar of the U.S. District Court for Northern California resigned after completion of a criminal case in which he ultimately was acquitted—but remained under lingering suspicions of guilt. Judge Aguilar was accused of various types of criminal conduct, including racketeering, disclosure of wiretap evidence, and attempting to

but before almost certain impeachment inquiry.²⁴⁰ These cases support a broad definition of impeachable offenses which encompasses any act—including non-criminal conduct—that would bring disrepute upon the office.²⁴¹ While the announcement of an impeachment inquiry does not establish a clear congressional view of the scope of impeachable offenses, these cases often indicate that a majority of the voting members of the House believed the alleged conduct could warrant impeachment, and that, for the targeted judges, some charges were too embarrassing or costly to contest in the impeachment process. These cases admittedly are of a lesser order than the precedent of actual impeachments, but they are part of the relevant historical record.

Resignation was the course of choice for judges who were unwilling to weather a full trial or the possibility of losing a judicial pension.²⁴² Some of these resignations followed sexual scandals. For

influence a criminal proceeding for a former union official. See *United States v. Aguilar*, 515 U.S. 593, 595-97 (1995); *United States v. Aguilar*, 21 F.3d 1475, 1477 (9th Cir. 1994). 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. See *Aguilar*, 21 F.3d at 1478. The U.S. Court of Appeals for the Ninth Circuit overturned the conviction on the basis of a jury instruction violation. See *id.* at 1487. When both House and Senate members advocated impeachment hearings, Judge Aguilar resigned in 1996. The Justice Department agreed to drop further prosecutorial efforts due to the resignation. See Lionel Van Deerlin, *A Plea-Bargain Nightmare: The Case of Officially Sanctioned Obstruction of Justice*, SAN DIEGO UNION-TRIB., Sept. 4, 1996, at B5.

240. The Justice Department investigated Judge Albert W. Johnson of the U.S. District Court for the Middle District of Pennsylvania following accusations that he was using his court as a "medium in the formation and operation of an unconscionable, a despicable, and a degrading conspiracy against the administration of justice." H.R. REP. NO. 79-1639, at 44 (1946). This alleged conduct included favoritism, corruption, coercion of federal employees to rent apartments in buildings owned by him (at higher rents than other tenants), and other abuses. See *id.* at 43-44. Johnson succeeded in halting the House impeachment inquiry by resigning on July 3, 1945, but he could not avoid indictment by a grand jury on September 11, 1945. See BORKIN, *supra* note 159, at 182-83.

241. This is not to suggest that personal misconduct played a more significant role in these cases than official misconduct. Many of the reported cases do involve forms of official misconduct. In 1941, one of the most outrageous cases resulted in two resignations. Judge Warren Davis of the U.S. Court of Appeals for the Third Circuit was accused of writing and selling decisions under the name of another judge, Senior Judge Joseph Buffington, who was described as "aging, deaf, and nearly blind," Van Tassel, *supra* note 172, at 369, and "helpless and senile," BORKIN, *supra* note 159, at 101. After a jury was unable to reach a verdict in Davis's criminal trial, the Justice Department asked Congress to impeach the judge, but Davis agreed to resign to forestall impeachment. The hapless Judge Buffington also resigned. For a discussion of this case, see BORKIN, *supra* note 159, at 101-37.

242. This appeared to be the case with Judge Robert Aguilar of the District Court of the Northern District of California. Consistent with the Hastings case, Congress indicated that it would commence impeachment proceedings despite the reversal of Aguilar's conviction for various acts of criminal conduct, but Judge Aguilar resigned in 1996. Both

example, Judge John Marshall of the U.S. District Court for Utah resigned in 1915 after he “became enmeshed in a scandal involving the cleaning woman of his courtroom.”²⁴³ Likewise, some judges faced impeachment over either personal misconduct or conduct preceding their service on the bench.²⁴⁴ Judge Delahay of the District of Kansas chose to resign rather than face a Senate trial over “personal habits.”²⁴⁵ Judge Herbert Fogel of the U.S. District Court for 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.²⁴⁶ Judge Fogel was accused of criminal conduct unrelated to his judicial office.²⁴⁷ Circuit Judge Cornelius Hanford of the U.S. District Court for the Western District of Washington faced imminent impeachment when he resigned under allegations that included “‘being an habitual drunkard’” and “‘being morally and temperamentally unfit to hold a judicial position.’”²⁴⁸ His lawyer

Congress and the Justice Department considered a full impeachment inquiry to be unnecessary after Aguilar’s resignation. *See supra* note 239. Resignation may be an acceptable resolution for Congress since, as a former House Judiciary Committee chairman once explained, “[w]hy kick at the place where the fellow used to be?” BORKIN, *supra* note 159, at 28 (quoting Rep. Hatton Sumners, Chairman of the House Judiciary Committee).

243. CLIFFORD L. ASHTON, HISTORY OF TERRITORIAL FEDERAL JUDGES FOR THE TERRITORY OF UTAH 1848-1896 AND UNITED STATES DISTRICT JUDGES FOR THE DISTRICT OF UTAH 1896-1978, at 57-58 (1988). While such grounds would not be grounds for impeachment absent some aggravating element or criminality, the element of personal scandal predictably would increase the likelihood of a resignation in a judicial controversy.

244. Judge Peter Grosscup of the U.S. Court of Appeals for the Seventh Circuit resigned in 1911, allegedly because of an impending magazine article which reportedly would offer scandalous information. *See* Van Tassel, *supra* note 172, at 387. Grosscup resigned before possible impeachment in the face of “‘allegations of malfeasance never having been formally made or proven—yet not disproven.’” *Id.* (quoting RAYMAN L. SOLOMON, HISTORY OF THE SEVENTH CIRCUIT, 1891-1941, at 88 (1981)).

245. *See supra* note 172 and accompanying text. The resignation technically terminated the case in the Senate, not the House.

246. *See* Van Tassel, *supra* note 172, at 385.

247. Fogel was accused of securing a federal contract for a building (that he owned with then Sen. Hugh Scott) with falsified or fraudulent documents. Even though there were lower bids, Fogel’s Gateway Center won the federal contract because of the discrepancies, which were uncovered by the Justice Department. *See* Ronald Kessler, *GSA Favored Senator’s Friend in Lease*, WASH. POST., Oct. 1, 1978, at A1. As with Judge Aguilar, the Justice Department agreed to drop any criminal prosecution in exchange for Fogel’s resignation. *See* Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1218 & n.53 (1991).

248. 6 CANNON’S PRECEDENTS, *supra* note 176, § 526, at 746 (quoting statement of Rep. Berger); *see also* H. REP. NO. 62-1152, 48 CONG. REC. 10,307-08 (1912) (incorporating report of the House Judiciary Committee regarding the impeachment

appeared before the investigating subcommittee to announce that Judge Hanford had decided to resign, which successfully terminated the proceedings.²⁴⁹ Judge Daniel Thew Wright, Associate Justice of the Supreme Court of the District of Columbia, resigned after the commencement of a formal impeachment inquiry.²⁵⁰ Wright's charges included " 'being guilty of various . . . acts of personal and judicial misconduct;' " and " 'being morally and temperamentally unfit to hold judicial office.' " ²⁵¹

Two judges resigned under allegations of bribery unrelated to judicial office. Judge Charles T. Sherman of the U.S. District Court for the Northern District of Ohio was accused of " 'propos[ing] to corruptly control legislation for money, to be paid to him by the stock exchange of New York, and subsequently insisted on such payment on the ground of such control, and threatened adverse legislation if the same was not paid.' " ²⁵² A House resolution proposed a finding that " 'his said pretenses of power to control legislation and his said assertions of services he had rendered in this respect were false.' " ²⁵³ Sherman resigned and soon thereafter died, terminating any further impeachment proceedings.²⁵⁴ Judge Otto Kerner, Jr., of the U.S. Court of Appeals for the Seventh Circuit also resigned after he was convicted for conduct preceding his service. Kerner was charged with bribery, fraud, and tax evasion during his term as Governor of Illinois.²⁵⁵

Professor Pollitt noted two judges who were reprimanded for private conduct as an alternative to impeachment.²⁵⁶ Yet, these cases do not appear to support his intended point—that impeachment has been routinely confined to public misdeeds to the exclusion of private misdeeds. The first judge, Judge Peter B. Bruin, presiding judge of the Mississippi Territory, was investigated by the House at the request of the territorial legislature for " 'neglect of duty and

resolution for Judge Hanford).

249. 6 CANNON'S PRECEDENTS, *supra* note 176, § 526, at 747-48 (incorporating report of the House Judiciary Committee).

250. *See* 6 *id.*, § 528, at 752-54.

251. 6 *Id.* § 528, at 752 (quoting statement of Rep. Frank Park of Georgia). These charges also included official misdeeds and, rather ominously, " 'bearing deadly weapons in violation of law.' " 6 *Id.* (quoting Rep. Park).

252. 3 HINDS' PRECEDENTS, *supra* note 71, § 2511, at 1019 (quoting resolution proposed by Rep. Clarkson N. Potter of New York).

253. 3 *Id.* § 2511, at 1020 (quoting resolution of Rep. Potter).

254. *See* 3 *id.*

255. *See* United States v. Isaacs, 493 F.2d 1124, 1131 (7th Cir. 1973).

256. *See* Pollitt, *supra* note 11, at 267.

drunkenness on the bench.’ ”²⁵⁷ Congress did not believe that such conduct was unimpeachable, as Professor Pollitt has suggested. Rather, an investigation was delayed because Congress questioned the logistics of impeaching territorial officers and further questioned the value of evidence submitted by a territorial legislature.²⁵⁸ The House Judiciary Committee resolved that it could investigate the matter and further resolved that a deposition be taken with Bruin’s invited participation.²⁵⁹ The resolution calling for Bruin’s appearance was agreed to on April 21, 1808, but House records then indicate that the proceedings were terminated because of “the death or resignation of Judge Bruin.”²⁶⁰

The second judge noted by Professor Pollitt as a “West Virginia [judge] accused of being drunk on duty”²⁶¹ is an apparent reference to William E. Baker, U.S. District Judge for the Northern District of West Virginia. Little is known about Judge Baker except that he was accused of drunkenness, with the primary charge alleging that he had used his office to obtain confiscated liquor.²⁶² The House Judiciary Committee investigated Baker but ultimately found insufficient basis for impeachment.²⁶³ Nevertheless, as noted earlier, the House routinely defined impeachable offenses as including “ ‘conduct such as drunkenness when habitual.’ ” ”²⁶⁴ Habitual drunkenness is one of

257. 3 HINDS’ PRECEDENTS, *supra* note 71, § 2487, at 983 (quoting resolution of the Mississippi territorial legislature).

258. See 3 *id.* § 2487, at 984 (noting that there was some question whether the House should act on the authority of a state or territorial legislature as well as doubt as to the evidentiary value of a territorial resolution). This question was first raised in the requested impeachment of Judge George Turner, a territorial judge in Northern Ohio, in 1796. Turner was accused of a variety of injudicious acts ranging from holding court “ ‘unknown to and contrary to the laws of the Territory’ at a remote and inconvenient place” to his denial of constitutional rights to people based on their “use of the French language.” 3 *Id.* § 2486, at 982 (quoting petition from the territorial legislature). The House chose not to proceed to impeachment when the Attorney General Charles Lee communicated to the House that he was “ ‘of opinion that it will be more advisable, on account of the expense, the delay, the certain difficulty, if not impossibility, of obtaining the attendance here of the witnesses who reside in the Territory northwest of the Ohio, about the distance of 1,500 miles, that the prosecution should not be carried on by impeachment, but by information on indictment before the supreme court of that Territory.’ ” 3 *Id.* § 2486, at 982-83 (quoting letter from Charles Lee, U.S. Attorney General).

259. See 3 *id.* § 2487, at 984.

260. 3 *Id.*

261. Pollitt, *supra* note 11, at 267.

262. See BORKIN, *supra* note 159, at 222.

263. See 6 CANNON’S PRECEDENTS, *supra* note 176, § 543, at 778.

264. 6 *Id.* § 545, at 780 (quoting House Judiciary Committee report concerning Judge George W. English (quoting an unnamed writer)).

the first bases for impeachment articulated by Congress²⁶⁵ and is consistent with later articles of impeachment intended to protect the perceived integrity and legitimacy of the courts.

17. Summary

The terminated impeachment cases support the conclusions derived from the fifteen judicial impeachment cases. Together, they establish that Congress always has followed a broad definition of impeachment that includes non-criminal conduct and not simply abuse of judicial authority. This does not mean that official misconduct was not the primary concern of past impeachments. Instead, the impeachment and terminated judicial cases demonstrate a much broader view of impeachable offenses than that suggested by advocates of the executive function theory or the judicial function theory. While Professor Pollitt referred to impeachable "crimes," the actual cases show that impeachable offenses include non-criminal acts under the intended meaning of "misdemeanors" as misdeeds. As noted above, Congress has repeatedly rejected the view that impeachment of judicial officers is limited to actions taken "in a judicial capacity."²⁶⁶ The appropriate question is not whether officials can be removed for non-criminal conduct, but rather what is the scope of non-criminal conduct for which they can be removed. The most common impeachment allegation, "tyrannical" or abusive use of judicial authority, is not a crime but is impeachable. Likewise, alcoholism and abusive personal conduct have been cited repeatedly as impeachable if proven. Congress has recognized in these cases that the judicial system rests in no small part on the perceived legitimacy of the judicial officers in ruling on conflicts. The House Judiciary Committee made this point in the case of Judge English:

"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. When the Constitution says a judge shall hold office during good behavior it means that he shall not hold it

265. See *supra* note 194 and accompanying text.

266. SELECTED IMPEACHMENT MATERIALS, *supra* note 131, at 174 (statement from impeachment of Judge Robert Archbald with reference to the same argument raised and rejected in the case of Judge West Humphreys).

when his behavior ceases to be good behavior.”²⁶⁷

A misdemeanor for the purpose of impeachment has always included misconduct, even personal misconduct, that robs a judge of the authority required for his position. In the same fashion, these judicial cases demonstrate that any criminal conduct can be grounds for impeachment and not simply criminal conduct related to office or “great crimes.” It is not the subject of the criminal conduct but the criminal conduct itself that members of Congress often cite in pursuing impeachment and removal.²⁶⁸ For example, it would be curious for Congress to forego impeachment of a judge convicted of molestation or tax evasion. Even if the judge is not incarcerated, the status of the judicial office requires that the judge be faithful to the laws that he is enforcing. Consider the case of Sol Wachtler, former Chief Judge of the New York Court of Appeals. Wachtler admitted to a pattern of stalking and harassment directed against his former girlfriend, Joy Silverman.²⁶⁹ Wachtler was arrested and pleaded guilty. Had Wachtler been on the federal court and received probation, would there be any question that his conduct warranted removal, despite the fact that it was not related to a judicial function? If Wachtler had only committed a civil violation in harassing a child, would the conduct be insufficient for removal? Congress has never adopted such a position, as was most evident in the impeachments of judges Claiborne and Delahay. Nonetheless, Professor Pollitt went to considerable lengths to show that past impeachments were based solely on judicial misdeeds. Professor Pollitt’s vision of a judicial function theory simply would not work given the host of criminal and personal misdeeds that a judge may commit outside of his official duties.

In another work, I present an alternative to the executive function theory and its public/private distinction. This alternative theory suggests a criminal/noncriminal distinction in structuring

267. 6 CANNON’S PRECEDENTS, *supra* note 176, § 545, at 780 (quoting report of the House Judiciary Committee).

268. This point was made by Senator George Mitchell in justifying his vote to remove Judge Claiborne, who was charged with conduct unrelated to his office: “A convicted felon simply cannot sit as a Federal Judge. I repeat that, a convicted felon cannot be permitted to sit as a Federal judge. It would totally undermine respect for law and authority in our country.” S. DOC. NO. 99-48, at 339 (1986) (prepared statement of Sen. Mitchell).

269. Among other acts, Wachtler sent graphic sexual messages and a condom to Silverman’s 14-year-old daughter. See John J. Goldman, *Ex-N.Y. Judge Gets 15 Months for Threats*, L.A. TIMES, Sept. 10, 1993, at A4; *Judge Who Harassed Lover Gets 15 Months in Prison*, CHI. TRIB., Sept. 10, 1993, at A14.

impeachment decisions by the House.²⁷⁰ As an initial matter, Congress should take note of any criminal element to the alleged conduct. In cases of alleged criminal misconduct, the House should apply a presumption that the conduct should be referred to the Senate for trial. This presumption may be rebutted in cases of minor criminal acts such as drunk driving, but the burden will be on the subject officer. Conversely, in allegations of non-criminal conduct, the presumption should be against referral to the Senate. Some acts of non-criminal conduct would still warrant impeachment. For example, if the judge engaged in a pattern of virulent racist, sexist, or other forms of discriminatory conduct, Congress should seriously consider impeachment; however, if the judge engaged in personal misconduct, such as sexual misconduct that did not involve violations of federal law, there should be a heavy presumption against impeachment. The judicial impeachment cases appear to reflect such a distinction. In cases of personal misconduct due to alcoholism, the House often demanded evidence of habitual intoxication that affected the judge's perceived ability to carry out his duties.²⁷¹ The House, however, has the power to decide what conduct is so incompatible or inimical to judicial office to warrant impeachment. The Framers made this decision unreviewable precisely because it is a decision heavily imbued with political judgment. It is a legitimacy question framed by one house and resolved by the other.²⁷² In this system, the broad definition of impeachment is essential to raise questions of judicial legitimacy rather than allow them to fester below the surface to the detriment of both the judge and the judicial system.

B. *Presidential Impeachments*

The presidential impeachment cases reveal the prophetic character of Alexander Hamilton's prediction that impeachment will generally "agitate the passions of the whole community, and to divide

270. See Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Part I.C.).

271. See *supra* notes 136, 167-68, 194 and accompanying text.

272. By impeaching, the House raises and defines a question of legitimacy for the Senate to resolve. This question of legitimacy may be due to personal or criminal conduct. Ultimately, however, it is the expectations of the office that will dictate the continued viability of the judicial officer to continue in office through a vote of retention by the Senate. This second vote of the Senate to retain an impeached judge is a vote of consent that returns an element of legitimacy to a judicial officer. Like the first vote to appoint a judge, the Senate's vote of acquittal establishes not only that the judge is not guilty of the allegations but that the judge continues to have the authority to rule on the cases of their constituents.

it into parties, more or less friendly, or inimical, to the accused."²⁷³ Professor Pollitt reviews three such cases involving President Johnson, President Nixon, and President Clinton. As with Professor Pollitt's review, there is no need to present the cases in detail. The cases are most relevant in determining whether evidence exists to support an executive function theory. These three cases constitute the most important, but not the only, cases in which impeachment was sought. Presidents John Tyler,²⁷⁴ Grover Cleveland,²⁷⁵ Herbert Hoover,²⁷⁶ Harry Truman,²⁷⁷ Ronald Reagan,²⁷⁸ and George Bush²⁷⁹ were also subject to impeachment allegations but not formal inquiries. These terminated presidential cases tended to be raw political gestures and offer little for an academic review.²⁸⁰ Nevertheless, the three cases identified by Professor Pollitt are clearly the most significant and relevant to this review.

1. Andrew Johnson (1868)

The articles of impeachment against Andrew Johnson offer little to resolve the question of the basis for an executive function theory. Johnson was impeached on unfounded grounds involving his constitutional right to remove a cabinet member, Secretary of War Edwin Stanton.²⁸¹ Ironically, the problem with the Johnson impeachment is that the Radical Republicans simply picked the wrong grounds for impeachment. The final impeachment language

273. THE FEDERALIST NO. 65, *supra* note 79, at 334 (Alexander Hamilton).

274. See Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.C.); see also STEPHEN W. STATHIS & DAVID C. HUCKABEE, CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL RESOLUTIONS ON PRESIDENTIAL IMPEACHMENT: A HISTORICAL OVERVIEW 2-3 (1998).

275. See Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.C.); see also STATHIS & HUCKABEE, *supra* note 274, at 7-8 (identifying impeachment allegations).

276. See Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.C.); see also STATHIS & HUCKABEE, *supra* note 274, at 8-9 (identifying impeachment allegations).

277. See Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.C.); see also STATHIS & HUCKABEE, *supra* note 274, at 9-11 (identifying impeachment allegations).

278. See Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.C.); see also STATHIS & HUCKABEE, *supra* note 274, at 18-19 (identifying impeachment allegations).

279. See Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.C.); see also STATHIS & HUCKABEE, *supra* note 274, at 20-21 (identifying impeachment allegations).

280. In another work, however, I suggest that impeachment may have been underutilized in presidential cases. See Turley, *Factional Disputes*, *supra* note 17 (manuscript at Part IV.C.).

281. See generally MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1973) (discussing in detail the facts of the Johnson case); MILTON LOMASK, ANDREW JOHNSON: PRESIDENT ON TRIAL (1973) (same); GENE SMITH, HIGH CRIMES & MISDEMEANORS: THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON (1977) (same).

was only the last in a series of impeachment attempts arising from Johnson's refusal to carry out federal laws benefiting African-Americans.²⁸² He was a virulent racist who refused to assist freed slaves and condemned their participation in government as a threat to civilization.²⁸³ Johnson strongly suggested that, if Congress persisted in such efforts, he considered it worthy ground for a second Civil War.²⁸⁴

The Johnson case raises an interesting contemporary question. What if a modern President took an overtly racist position, refused to hire or assist African-Americans, and spoke against blacks as an inferior race? The First Amendment clearly protects such speech, but impeachment should protect the office and the public from such injurious conduct. The President's refusals to carry out federal laws protecting African-Americans could be made the subject of court orders and contempt sanctions. If, however, the President continued to refuse to obey the court orders, there would be ample basis for impeachment. Such a refusal to comply with judicial orders (once appeals are exhausted) threatens the core guarantees of separation of powers in the tripartite system. Even putting aside possible violations of civil rights laws in hiring practices, the President's campaign against the rights of millions of Americans would raise a basis for impeachment. Johnson certainly can claim to be more "sinned against than sinner" in his impeachment trial; however, had the Radical Republicans pushed Johnson into court over his efforts to obstruct federal laws, a highly defensible case for impeachment could have been presented.

2. Richard M. Nixon (1974)

Impeachment proceedings against President Nixon were suspended due to the resignation of the President after the House Judiciary Committee approved articles of impeachment. Nevertheless, the case has been woven into the account supporting an executive function theory. According to Professor Pollitt and other academics, the Nixon articles of impeachment reflected the view that

282. See LES BENEDICT, *supra* note 281, at 44; James N. Turman, *Public Keeps Raising Bar for Ousting Clinton*, CHRISTIAN SCI. MONITOR, Dec. 24, 1998, at 1 (noting support of minority groups and women's groups in the impeachment crisis).

283. See *Factional Disputes*, *supra* note 17 (manuscript at IV.C.1.) (discussing Johnson's hostility to legislation assisting freed blacks); see also LES BENEDICT, *supra* note 281, at 75 (describing Johnson's views toward African-Americans). But see LOMASK, *supra* note 281, at 143 (characterizing Johnson's attitude toward African-Americans not as racist but as one of Southern "paternalism").

284. See *Factional Disputes*, *supra* note 17 (manuscript at IV.C.1.).

impeachable offenses are those confined to official abuses. Professor Pollitt emphasized provisions in three articles alleging "abuse of powers."²⁸⁵ The three articles of impeachment approved by the House Judiciary Committee actually alleged obstruction of justice,²⁸⁶ abuse of power,²⁸⁷ and defiance of committee subpoenas.²⁸⁸ Article I alleged violations of federal law very similar to the conduct alleged against President Clinton. President Nixon was accused of seeking " 'to delay, impede and obstruct the investigation of' " the June 17, 1972, break-in of the Democratic National Committee headquarters and attempting " 'to cover-up, conceal and protect those responsible' " as well as trying " 'to conceal the existence and scope of other unlawful covert activities.' " ²⁸⁹ Nixon's impeachable conduct also included " 'approving, condoning, acquiescing in, and counseling witnesses . . . [to give] false or misleading statements' " ²⁹⁰ and various abusive uses of federal agencies.²⁹¹ An influential report published by the New York Bar Association during the Nixon hearings addressed directly the scope of impeachable offenses:

It is our conclusion . . . 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 of the two Houses of Congress—that the officeholder has demonstrated by his actions that he is unfit

285. Pollitt, *supra* note 11, at 279.

286. See 3 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, ch. 14, § 15.13, at 639-40 (1974) (incorporating the first article of impeachment).

287. See 3 *id.* at 640-41 (incorporating the second article of impeachment).

288. See 3 *id.* at 641 (incorporating the third article of impeachment).

289. 3 *Id.* at 639 (quoting the first article of impeachment).

290. 3 *Id.* (quoting the first article of impeachment).

291. See 3 *id.* at 640-41 (incorporating the second article of impeachment).

to continue in the office in question.²⁹²

Advocates of the executive function theory find the Nixon case appealing because it involves conduct that appears of a higher order of crime, such as breaking into the offices of political opponents. Yet, ultimately this judgment is highly subjective. In the Clinton case, many academics viewed obstruction of justice in a civil rights case, after a unanimous Supreme Court decision, to be a criminal act of the highest order. Likewise, perjury before a federal judge and later before a federal grand jury easily would meet the standard of some academics. The difference is that obstruction in the Nixon case occurred in a political context as opposed to a personal context. Both acts, however, involved the same crime and the same intent to cover-up facts and to frustrate the operations of another independent branch.

3. William J. Clinton (1999)

In reviewing the Clinton case, I have Professor Pollitt at a disadvantage since he completed his article before President Clinton's impeachment.²⁹³ Ultimately, the House demonstrated the same split on the meaning of "high crimes and misdemeanors" that was evident among the nineteen academics who testified before the Judiciary Committee. The Republicans and the few Democrats who voted in favor of two of the articles of impeachment concluded that, while sexual misconduct itself is not impeachable, such private conduct becomes impeachable when a president engages in perjury or obstruction of justice in response to an inquiry. The focus of this article is not to reargue the facts of the Clinton case but to explore the constitutional claims advanced in support of an executive function theory. This theory developed in its full form as part of the opposition to the impeachment of President Clinton, and appeared outcome-determinative in that case. Yet, to support such a threshold claim, academics struggled to make the constitutional and historical records consistent—the most basic requirement of constitutional mythology.

In discussing the Clinton case, Professor Pollitt cited the prior judicial and presidential cases to support his conclusion that an impeachment of Clinton "would be the first time in our history of

292. COMMITTEE ON FEDERAL LEGISLATION OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK, *THE LAW OF PRESIDENTIAL IMPEACHMENT* 18-19 (1974).

293. See Pollitt, *supra* note 11, at 261 ("[I]t is unlikely that impeachment would ultimately succeed in the House, if the House members respond to public sentiment.").

over two hundred years that a federal officer is charged with misconduct unrelated to the discharge of the duties of his office.”²⁹⁴ While advanced by other academics, this claim is demonstrably incorrect. Various judges were accused of misconduct that was not related to the discharge of their offices, including Judge Claiborne, who was removed for tax evasion unrelated to any allegation of bribery.²⁹⁵ Nevertheless, Professor Pollitt asked a series of questions which deserve answers:

[I]n a larger sense, the allegations against Clinton do not fit the language, spirit, or history of our Impeachment Clause. Where are the great and dangerous offenses “against the state” demanded by the framers of our Constitution? Where, as in the Andrew Johnson impeachment, is the failure “to take care that the laws be faithfully executed?” Where, as in the Richard Nixon impeachment, are the “[a]ttempts to subvert the Constitution?”²⁹⁶

Professor Pollitt’s first question was answered in the earlier discussion of the views of the framers—specifically George Mason. The Framers did not articulate a standard of offenses “against the state.”²⁹⁷ This argument is more of a mythological than a constitutional “demand.” Professor Pollitt’s second question is curious. Various House members specifically based their decision to vote in favor of impeachment on the Take Care Clause.²⁹⁸ It is difficult to see how a president can fulfill his oath to “take care that the laws be faithfully executed” when he is actively violating those laws.²⁹⁹ President Clinton stood accused of obstruction of justice for

294. *Id.* at 280.

295. *See supra* notes 211-21 and accompanying text.

296. Pollitt, *supra* note 11, at 280 (citations omitted).

297. *See supra* notes 52-119 and accompanying text.

298. *See* U.S. CONST. art. II, § 3, cl. 4 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

299. From the outset, professors testifying against impeachment stressed, as Professor Pollitt did, that “[o]rdinarily, prosecutors do not investigate perjury in a civil action.” Pollitt, *supra* note 11, at 279. Even though President Clinton stood accused of obstruction of justice, this argument was central to his defense. In reality, however, individuals are routinely prosecuted for perjury, and such prosecutions occur in both criminal and civil cases. *See* Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Part I.B.2.). While Former Counsel Lawrence Walsh insisted that “in sixty years of practice, I have never known this to happen,” Lawrence E. Walsh, *Kenneth Starr and the Independent Counsel Act*, N.Y. REV. OF BOOKS, Mar. 5, 1998, at A4, this statement reflects an obvious failure of even cursory research, not an absence of such cases. Actually, the Clinton administration rejected arguments that prosecution of perjury in a dismissed civil case involving sexual conduct is abusive, as have other administrations. *See* Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Part I.B.2.) (discussing cases of Barbara Battalino and other individuals convicted of perjury and obstruction of justice).

frustrating discovery in a civil rights case after the Supreme Court held unanimously that he could be sued in a civil action. Obstruction of justice and perjury are violations directed as much against the judicial process as they are against a particular litigant—a point reaffirmed by the contempt order issued against President Clinton by the federal judge overseeing the Paula Jones case.³⁰⁰ The difference with Andrew Johnson is that Johnson was demonstrably innocent of the alleged offense. Johnson could claim a compelling constitutional interpretation of his authority in the matter of dismissing cabinet officers. Clinton never claimed that he had the right to commit crimes in office, only that he did not do so.

Professor Pollitt's final question assumed that an impeachable offense must be based on an "attempt[] to subvert the Constitution."³⁰¹ This question also assumed that subversion was the only basis for the Nixon impeachment, which it was not; however, even if subversion was the standard for impeachable offenses, it could be argued that any president who obstructs justice subverts the Constitution. Professor Pollitt noted that a vast majority of Americans did not want President Clinton removed from office.³⁰² This observation is correct. A more relevant series of polls, however, showed that more than seventy percent of the public believed that President Clinton committed crimes in office in response to the threatened disclosure of his misconduct.³⁰³ The House was faced with the question of whether there are circumstances in which a president can commit crimes of perjury or obstruction without facing trial in the Senate. Various academics even argued that, if high crimes and misdemeanors were found, the House should not impeach in a kind of congressional nullification.³⁰⁴ The House wisely rejected such arguments. While President Clinton could rebut evidence that he

300. See *supra* note 116 (discussing the contempt order issued against President Clinton).

301. Pollitt, *supra* note 11, at 280 (quoting 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 43, at 550 (statement of George Mason)).

302. See *id.* at 261.

303. See Richard Benedetto, *Most in Poll Stand by Their President*, USA TODAY, Jan. 12, 1999, at 5A (reporting 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 and a majority of 53% agree he obstructed justice in the Paula Jones lawsuit").

304. See, e.g., *House Hearing*, *supra* note 7, at 233 (testimony of Professor Susan 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.").

committed the crimes of perjury and obstruction, these were alleged criminal acts that warranted Senate trial. Ultimately, the Senate voted primarily along party lines, with fifty senators voting to convict on the closest article.³⁰⁵

There is unlikely to be agreement on the underlying facts of the Clinton case. The point of this rebuttal is not to defend the accuser³⁰⁶ or attack the accused.³⁰⁷ However, there was a pronounced tendency

305. The closest vote occurred on Article II, which alleged obstruction of justice, with 50 senators voting to convict and 50 senators voting to acquit. See 145 CONG. REC. S1459 (daily ed. Feb. 12, 1999). On Article I, which alleged perjury before a federal grand jury, 45 senators voted to convict and 55 senators voted to acquit. See *id.* at S1458.

306. All great mythologies have great monstrous mythological figures. The constitutional mythology advanced in the Clinton case required a relentless villain and pursued innocents. Academics such as Professor Pollitt reserved the villain role for Judge Kenneth Starr. Professor Pollitt referred to "Starr's victims," such as Sidney Blumenthal, who was asked about spreading stories about prosecutors' actions before the grand jury. Pollitt, *supra* note 11, at 281 n.184. In reality, the grand jury itself accused Blumenthal of misrepresenting prosecutors' questions. See, e.g., Thomas Sowell, *Week of Reckoning for the President*, WASH. TIMES, Dec. 14, 1998, at A16 ("After Sidney Blumenthal stood outside the federal courthouse and declared to the television cameras that the special prosecutor had asked him improper questions—which in fact he had never been asked—a grand jury foreman took the unusual step of rebuking Mr. Blumenthal when he appeared in court again."). Moreover, Blumenthal was later alleged to have committed perjury before the Senate after his testimony was specifically contradicted by the affidavits of three individuals. See, e.g., Michael Dorman, *More Controversy Over Blumenthal*, NEWSDAY, Feb. 17, 1999, at A4 (noting that three individuals had signed affidavits contradicting Blumenthal's sworn statements in the Senate trial concerning his role in spreading false stories as part of a White House smear campaign).

307. Professor Pollitt raises Judge Starr's allegedly abusive demand that "a top-to-bottom search" be conducted at the White House for the First Lady's billing records related to the Whitewater investigation. Pollitt, *supra* note 11, at 281 n.184; see also *Nightline* (ABC television broadcast, Mar. 3, 1998), available in 1998 WL 5372995 ("The first lady's billing records for legal work done on an allegedly illegal land deal relating to Whitewater mysteriously turned up in the private residence of the White House nearly two years after they had been subpoenaed."). Professor Pollitt does not mention that this search followed a prior, unsuccessful search by White House attorneys for billing records under subpoena. The White House attorneys declared that no billing records were located on the premises, but two years later the critical records were discovered in the private residence outside the First Lady's private office. See Naftali Bendavid, *Starr Nearing Indictment Decision on First Lady*, CHI. TRIB., Apr. 27, 1998, at A1; David Willman & Tom Schultz, *Two Clinton Aides Testify Before Grand Jury*, L.A. TIMES, Mar. 27, 1998, at A20.

Professor Pollitt also detailed the abusive treatment of Susan McDougal in refusing, in her words, "to lie about the President." Pollitt, *supra* note 11, at 281 n.184 (quoting Russell Baker, *For Whom the Chains Clank: Kenneth Starr's Deep Game*, N.Y. TIMES, May 8, 1998, at A23). Yet, McDougal did not simply refuse to testify falsely—she also refused to testify truthfully. See, e.g., Tom Squitieri, *Trial May End, But the Tribulations Continue*, USA TODAY, Feb. 12, 1999, at 5A (describing McDougal's refusal to testify before two grand juries). McDougal refused to testify at all because she claimed that she did not approve of Judge Starr or his office. No prosecutors or court would fail to find such conduct in contempt. Had McDougal testified truthfully and faced retribution for an

to yield to a mythological demand for clear characters and answers to contemporary controversies. Little clarity can be found in the Clinton impeachment, perhaps a reflection on our times. The Clinton impeachment left most of the issues debated by the academics at the House hearing unresolved. President Clinton was impeached by Democrats and Republicans who believed that he committed crimes in office to conceal embarrassing personal misconduct. In this sense, the House rejected the executive function theory. President Clinton was acquitted, however, by Democrats and Republicans who gave various explanations for their votes. Some found the charges credible and sufficient to justify removal but did not believe that the House managers had proven their case.³⁰⁸ Others found the charges proven and sufficient to justify removal but found acquittal to be in the public interest.³⁰⁹ Others found the charges insufficient to justify removal even if proven.³¹⁰ Half of the Senate voted to remove the President on the basis that one count was both proven and sufficient for removal.³¹¹ As the personalities and passions of the crisis faded from

account favorable to the President, this abusive tale would be more compelling. These accounts are the very heart of constitutional mythology: the need to present clarity in cases with more complex and mixed messages. Abusers and the abused are often central to mythological tales, but they are rarely so evident in actual constitutional cases.

308. See, e.g., John Bresnahan & Amy Keller, *Senate Acquits President*, ROLL CALL, Feb. 15, 1999, at 1 (quoting Republican Sen. Richard Shelby of Alabama, who voted against conviction for perjury, as saying "I've always said it ought to be beyond a reasonable doubt, and I don't think they met it"). The most curious example of this view was Republican Sen. Arlen Specter of Pennsylvania, who borrowed the Scottish standard of "not proven" and refused to vote either guilty or not guilty. See Frank Bruni, *The President's Trial: The Renegades*, N.Y. TIMES, Feb. 12, 1999, at A23 (discussing Specter's vote).

309. Democrat Sen. Robert C. Byrd of West Virginia stated that, while he believed the president was guilty of removable offenses, he chose to acquit in the interests of the country. See Mary McGrory, *Relief and Long Faces*, WASH. POST, Feb. 14, 1999, at B1 (discussing Byrd's vote); cf. Wendy Koch et al., *Supporting Cast Stands Out*, USA TODAY, Feb. 15, 1999, at 10A (noting the efforts of Republican Sen. Susan Collins of Maine to pass a censure resolution "that would have declared the president guilty of perjury and obstruction of justice but stopped short of removing him").

310. See Richard Whittle, *Three Republicans Oppose Conviction*, DALLAS MORNING NEWS, Feb. 11, 1999, at A32 (noting that Republican Sen. Jim Jeffords of Vermont voted against conviction for perjury and obstruction of justice because he believed the President's actions did not rise to the level of removable offenses); see also *id.* (quoting Republican Sen. Slade Gorton of Washington as voting against conviction for perjury on the grounds that, although proven, the perjury did not "rise to a level requiring removal"); Bresnahan & Keller, *supra* note 308, at 1 (quoting Republican Sen. Fred Thompson of Tennessee as voting against conviction for perjury because "[a]s bad and as tacky as some of those things were, they probably were not the stuff that the Founding Fathers were talking about").

311. See 146 CONG. REC. S1459 (daily ed. Feb. 12, 1999) (incorporating the vote count for the second article of impeachment).

memory, these varied justifications may be the most that academics can assume from this record.

V. THE HISTORICAL MYTHOLOGIES OF IMPEACHMENT AND THE HAMILTON AFFAIR

As Professor Paul Cohen has noted, “[t]he mythologized past need not be historically accurate . . . to be effective in persuading or mobilizing people in the present,” rather it only need be “bound by at least a loose conception of ‘truthfulness.’”³¹² The advancement of an executive function theory necessarily raises the question why such a theory should develop at this relatively late date in our constitutional history. The explanation provided by its advocates is that the theory was so deeply ingrained and understood by the Framers that they did bother to state the obvious. Similarly, the advocates suggest that this theory was always in the minds, but not the words or deeds, of past representatives when pursuing impeachments. Support for this theory, however, requires some evidence that the Framers were not concerned with misdeeds or even crimes associated with private as opposed to public affairs. This requires a historical exhumation and a degree of contemporary spinning. The unfortunate victim was Alexander Hamilton. The use of his affair with Maria Reynolds confirmed Professor Cohen’s observation that “mythologizers of the past . . . are *uninterested* in knowing the past as its makers have experienced it.”³¹³

From the outset of the Clinton crisis, adultery was rejected as a basis for impeachment by both political parties. The question was solely whether President Clinton committed criminal acts in his effort to cover-up his affair with Ms. Lewinsky.³¹⁴ At the House Judiciary Committee impeachment hearing, Professor Pollitt³¹⁵ and other academics³¹⁶ used the Hamilton affair to support the notion that

312. PAUL A. COHEN, *HISTORY IN THREE KEYS: THE BOXERS AS EVENT, EXPERIENCE, AND MYTH* 214 (1997).

313. *Id.* at xiv.

314. It is ironic that the Hamilton affair would be used by the Clinton White House and the Democratic members of Congress. After Hamilton had been cleared, this accusation was used by Jeffersonian Republicans against Hamilton for political purposes. After the administration of Andrew Jackson, the Republican Party of Jefferson became known by its modern title, the Democratic Party. Thus, the use of this scandal represents a degree of recidivism in the Democratic ranks.

315. See *House Hearing*, *supra* note 7, at 208-09 (prepared statement of Professor Pollitt).

316. See *id.* at 56 n.54 (prepared statement of Professor Michael Gerhardt) (arguing that the distinction between public and private conduct explains “why Alexander Hamilton was never subjected to impeachment for having engaged (by his own admission)

"[t]he Framers of our Constitution . . . did not consider illicit sex, or even lying about it, an impeachable offense."³¹⁷ Professor Pollitt's account is certainly more measured than other accounts asserting that Hamilton was found to have committed criminal acts or that he lied about his affair.³¹⁸ Professor Pollitt recounted before Congress the Hamilton affair in detail, as well as similar affairs of Thomas Jefferson and others.³¹⁹ Professor Pollitt notes that "a muckraking journalist" named James Callender³²⁰ suggested a "darker entanglement" that went beyond Hamilton's affair with a married woman.³²¹ The record of this controversy deserves a brief review. While I will not attempt to relate all of the details of this scandal, the historical record contradicts rather than supports the executive function theory. An investigation of Hamilton found only a sexual scandal without any credible allegation of criminal conduct.³²² The conclusion to be drawn is that private conduct could be impeachable only if there was evidence of some impeachable act beyond a personal affair. Hamilton showed that there was no collateral crime or public misdeed and, therefore, no impeachable offense.

The Hamilton affair began in July 1791 with a visit by Maria Reynolds to Hamilton's U.S. Treasury Department office. Maria Reynolds was from a respectable family in New York,³²³ but she

in an adulterous affair with a married woman (whose husband then blackmailed Hamilton to keep the liaison secret)." During my testimony, I contested the accounts of this affair and its alleged support for an executive function theory. *See id.* at 273 n.31 (prepared statement of Professor Turley). The suggestion that the public/private distinction is the basis for this result is misplaced. As will be shown, the inquiry was directed at whether criminality occurred regardless of the nature of the conduct. I present this criminal/noncriminal distinction as an alternative view in Turley, *Congress as Grand Jury*, *supra* note 17 (manuscript at Part I.C.), and *New Originalists*, *supra* note 54, at 27.

317. *House Hearing*, *supra* note 7, at 208 (prepared statement of Professor Pollitt).

318. One example of the public presentation of the Hamilton affair was an ABC News report asserting that Hamilton was guilty of paying "illegal bribes" to keep his affair quiet but was not impeached. *Good Morning America: Life After Impeachment* (ABC television broadcast, Feb. 14, 1999), available in 1999 WL 10472910. This view apparently was a direct result of the ubiquitous use of the affair by academics who supported President Clinton's position. In fact, there is no evidence that paying money to a husband was illegal in any fashion at the time. There was no criminality found in the affair, which is the reason no impeachment developed.

319. *See House Hearing*, *supra* note 7, at 208-09 (prepared statement of Professor Pollitt).

320. James Callender was the same journalist involved in the Chase impeachment. Callender was a loathsome figure who has been described as "a little reptile." J. MILLER, *CRISIS IN FREEDOM: THE ALIEN SEDITION ACTS* 211-20 (1951).

321. *House Hearing*, *supra* note 7, at 208 (prepared statement of Professor Pollitt).

322. *See infra* notes 340-41 and accompanying text.

323. Ms. Reynolds was the sister-in-law of Gilbert Livingston. *See* NOEMIE EMERY, *ALEXANDER HAMILTON: AN INTIMATE PORTRAIT* 153 (1982); BROADUS MITCHELL,

married into a less reputable family.³²⁴ Her husband, James Reynolds, was a criminal and ne'er-do-well.³²⁵ When Maria married into this family at the age of fifteen, James Reynolds's father, a commissary in the Revolutionary Army, was in jail and James had largely abandoned her.³²⁶ Witnesses would later recount that, according to Maria, James Reynolds "frequently enjoined and insisted she should insinuate herself on certain high and influential characters—endeavour to make assignations with them, and actually prostitute herself to gull money from them."³²⁷ Maria Reynolds and Hamilton did "make assignations," and James Reynolds suddenly appeared to ask for a position of a clerk at the Treasury Department, which Hamilton refused.³²⁸ James Reynolds then returned weeks later feigning outrage as a cuckold.³²⁹ Soon, however, he offered a simple business proposition, writing to Hamilton: "[G]ive me the Sum of thousand dollars and I will leve the town and take my daughter with me and go where my Friend Shant here from me and leve her to Yourself to do for her as you thing proper."³³⁰ Reynolds repeatedly demanded money from Hamilton, who usually consented to the demands.³³¹ Reynolds, however, soon found himself in jail for fraud in an unrelated matter with an equally seedy cohort, Jacob

ALEXANDER HAMILTON: A CONCISE BIOGRAPHY 318 (1976).

324. See EMERY, *supra* note 323, at 153-54.

325. See *id.*

326. See *id.*

327. *Id.* at 154 (quoting letter from James Folwell to Edward Jones (Aug. 12, 1797)).

328. See *id.* at 155. Reynolds told Hamilton that he could prove that William Duer at the Treasury Department had given him a list of claims against the government as the basis for speculation. In return for accusing Duer of wrongdoing, Reynolds hoped to secure a job—a pattern of accusation for advancement or benefit that he would later repeat with Hamilton's foes. See MITCHELL, *supra* note 323, at 319. This information, however, was worthless and could have been picked up on the street since Duer had been forced from office 18 months earlier. See EMERY, *supra* note 323, at 155.

329. James Reynolds wrote an initial letter to Hamilton that both witnesses and his own later letter contradicted and demonstrated to be facially insincere:

"[Y]ou took the advantage [of] a poor Broken harted woman. instead of being a Friend. you have acted the part of the most Cruelist man in existence. You have made a whole family miserable. She ses there is no other man that she Care for in this world. now Sir you have bin the Case of Cooling her affections for me. She was a woman. I should as suspect [as] an angel from heven. and one where all my happiness was depending. . . . But now I am determined to have satisfaction. It shat be onely one family thats miserable."

JACOB ERNEST COOKE, ALEXANDER HAMILTON 177 (1982) (quoting letter from James Reynolds to Alexander Hamilton (Dec. 15, 1791)).

330. ROBERT A. HENDRICKSON, THE RISE AND FALL OF ALEXANDER HAMILTON 334 (1981) (quoting Dec. 19, 1791, letter from James Reynolds to Alexander Hamilton).

331. See EMERY, *supra* note 323, at 155-57.

Clingman.³³² Clingman was a former clerk to Pennsylvania Congressman (and former Speaker of the House) A.C. Muhlenberg.³³³ Reynolds and Clingman conveyed to Muhlenberg from prison that Reynolds could "make disclosures injurious to the character of some head of a Department."³³⁴ In return for restitution and the information, Reynolds and Clingman wanted a dismissal of the charges and release. This offer was conveyed to both Oliver Wolcott, Comptroller of the Treasury (who informed Hamilton), as well as to Muhlenberg.³³⁵ Reynolds and Clingman knew the value of such accusations during this period of intense political rivalry.³³⁶ While a sexual scandal would offer little given Hamilton's reputation for philandering, the anti-federalists loathed Hamilton, and three ardent anti-federalists quickly responded to Reynolds and Clingman. Muhlenberg, Representative Abraham B. Venable, and Senator (and future President) James Monroe interviewed Reynolds, who accused Hamilton of "improper pecuniary speculations" with him.³³⁷ Reynolds claimed in jail that he received the money from Hamilton, not to extort but to engage in a conspiracy of speculation with the Treasury Secretary. Reynolds's strategy succeeded: He was released and then disappeared from the pages of history. The three men then proceeded to interview Maria Reynolds, who denied any sexual relationship with Hamilton and suggested that the affair was a cover for business arrangements between her husband and Hamilton. While it was understandable why the woman of a good family was eager to refute allegations that her husband effectively prostituted her to another man, Maria Reynolds's denial of a sexual relationship

332. Reynolds and Clingman were prosecuted for suborning perjury after they attempted "to obtain letters of administration upon the estate of a claimant against the United States who was still living" to collect a fraudulent payment. MITCHELL, *supra* note 323, at 320-21; *see also* COOKE, *supra* note 329, at 178 (describing the prosecution of Reynolds and Clingman). This illegal transaction required the perjury of a third party, John Delabar, so that Reynolds and Clingman could pose as executors of the estate. *See* MARIE B. HECHT, *ODD DESTINY: THE LIFE OF ALEXANDER HAMILTON* 331 (1982).

333. *See* COOKE, *supra* note 329, at 178.

334. HECHT, *supra* note 332, at 331.

335. *See id.*

336. Hamilton's political enemies actively spread the allegations of unlawful activities. James Madison was particularly active in spreading the allegations. *See id.* at 338. John Adams was less active in spreading the rumors as he was in denouncing Hamilton's personal conduct. *See id.* at 344 (objecting to "the profligacy of his life; his fornications, adulteries and his incests"; claiming that Hamilton suffered from "a superabundance of secretions"; and concluding that he "could not find whores enough to draw off").

337. COOKE, *supra* note 329, at 179 (quoting letter from Hamilton to George Washington (Mar. 7, 1796)); *accord* HENDRICKSON, *supra* note 330, at 369.

was conclusively refuted by a series of letters in her hand³³⁸ and statements of individuals corroborating Hamilton's account.³³⁹

When the three members confronted Hamilton with the allegations, they were surprised by his response. Hamilton immediately confessed to the sexual affair and produced letters and documents proving that an affair did occur between him and Maria Reynolds. The response from Hamilton was so complete and detailed that Venable actually asked Hamilton to stop presenting evidence of his innocence when it was so clearly established,³⁴⁰ and Muhlenberg expressed shame to a friend of Hamilton in forcing the disclosures.³⁴¹ Hamilton turned over all of his documents to the three men—a vital mistake. Monroe would take the only proof in Hamilton's possession, and Hamilton would later be unable to retrieve them. Some of these letters ended up in the hands of Hamilton's foe, Thomas Jefferson.³⁴² The letters also found their way to John Beckley, the clerk of the House of Representatives, who has been described as "an inveterate Hamilton baiter."³⁴³

Five years after the meeting exonerating Hamilton, the scandal was publicly released through Callender's *History of the United States for 1796*.³⁴⁴ Callender reported that he had not only reviewed Hamilton's letters but also had found that the three congressmen

338. See, e.g., MITCHELL, *supra* note 323, at 320 (quoting a letter from Maria Reynolds to Hamilton, which stated: "I have kept my Bed those tow dayes and now rise from my pillow which your Neglect has filled with the sharpest thorns . . . I feel as If I should not contennue long and all the wish I have Is to see you once more . . ."). Hamilton produced Maria Reynolds's landlady and other evidence to prove that the letter was in Maria's handwriting. See *id.* at 329 (noting "the sworn deposition of Mary Williams, a Philadelphia boarding house keeper, that she was familiar with Maria Reynolds's handwriting and that she endorsed as genuine the letters which Hamilton had shown her and afterward had printed"). With one notable exception, virtually all of the historians writing on this affair have concluded that Maria was lying. The editor of Jefferson's papers, Julian Boyd, alleged that Hamilton may have forged the letters with intentional misspellings to manufacture evidence of the affair. See HECHT, *supra* note 332, at 345.

339. One such witness, who had no connection to Hamilton, was a printer named Richard Folwell, who knew Maria Reynolds well. Folwell stated that Maria was in the habit of writing false letters of claimed innocence or hardship that "would move any one almost to serve her, that was not perfectly acquainted with her Character." MITCHELL, *supra* note 323, at 329.

340. See HECHT, *supra* note 332, at 334.

341. See EMERY, *supra* note 323, at 159 ("So grueling did Muhlenberg find the experience that he later stopped [Oliver] Wolcott repeatedly on the sidewalk to express his own embarrassment and his wish that he had not been present, and to insist that though he disagreed with Hamilton on politics, he admired and liked him as a man.").

342. See EMERY, *supra* note 323, at 160 (noting that Jefferson took papers from Monroe to his home in Virginia "where he kept them under seal").

343. COOKE, *supra* note 329, at 179.

344. See *id.* at 180.

were unconvinced by Hamilton's explanation.³⁴⁵ Callender, known as a vindictive and vile muckraker, adopted Reynolds' account of a faked sexual relationship to hide speculation. The release of the letters coincided with a period of intense political discord in which Hamilton was viewed as a threat by both Federalists like John Adams as well as the Jeffersonian Republicans.³⁴⁶ Hamilton was incensed because Monroe had promised to keep the documents under lock, and the three members had sworn to keep the matter private.³⁴⁷ Ultimately, the three congressmen publicly supported Hamilton's account that he had been exonerated and that there was no evidence of any illegality.³⁴⁸ Monroe was more guarded and clearly harbored considerable dislike for Hamilton.³⁴⁹ In response, Hamilton took an extraordinary step. He published a long detailed account of his affair

345. See HECHT, *supra* note 332, at 336.

346. Hamilton remained popular in Congress and played a significant role in the 1796 elections against both Adams and Jefferson. See *id.* at 173-76; HENDRICKSON, *supra* note 330, at 454-55. During this period, Jefferson attempted to widen the rift between Adams and Hamilton—though it hardly required the effort. See HENDRICKSON, *supra* note 330, at 455. Jefferson's obvious efforts to undermine Hamilton led to a letter of mild rebuke from Madison (his fellow Republican), who warned that Adams might suspect Jefferson of "a wish to make [Adams's] resentment [of Hamilton] an instrument for avenging that of others." *Id.* (quoting letter from Madison to Jefferson). It was during this period of intense political machinations that someone sent James Callender, the journalist, Hamilton's letters proving the affair. Since Callender had previously baited Federalists such as Adams (as detailed in the impeachment of Samuel Chase), he most likely received the material from a Republican such as Monroe or one of Monroe's associates.

347. See MITCHELL, *supra* note 323, at 325 ("Monroe vouchsafed that he had 'sealed up his copy of the papers . . . and . . . delivered them to his friend in Virginia—he . . . knew nothing of their publication until he arrived at Philada from Europe and was sorry to find they were published.'"). Hamilton was not convinced and Monroe did appear active in fueling the rumors. For that reason, Hamilton demanded satisfaction in a duel, which was avoided only by the ironic intervention of Aaron Burr. See HECHT, *supra* note 332, at 341.

348. See HENDRICKSON, *supra* note 330, at 476 (noting that the congressmen agreed that Hamilton's explanations "'removed the suspicions we had before entertained of your being connected with [Reynolds] in speculation'" (quoting joint statement of Monroe and Muhlenberg)).

349. See MITCHELL, *supra* note 323, at 326-27. Monroe's dislike would only grow with time. Not only did Monroe share the intense hostility of Republicans of the time, but he also blamed Hamilton for a variety of difficulties. This list of particulars included Jay's Treaty, which Monroe had to defend as Ambassador to France and which he viewed as an "'evil'" creation of Hamilton. HENDRICKSON, *supra* note 330, at 456 (quoting Monroe). It is interesting that, during this period, John Quincy Adams reported that Monroe was spreading a scandalous rumor among local media that Jay also was guilty of corruption. See *id.* (noting that Monroe actively spread rumors that Jay "had been taking bribes in London and that the House of Representatives had also been bribed to give its final three-vote margin of funding approval to the treaty"). While Monroe would disavow knowledge of the release of Hamilton's letters and the scandalous account reported by Callender, his involvement would have been consistent with his attacks on Hamilton during this period. See *id.* (noting Monroe's criticisms of Hamilton because of the Jay Treaty).

with Maria Reynolds that was excruciating in its detail and self-condemnation.³⁵⁰

The scandal ended badly for everyone involved. Hamilton died at the hands of Aaron Burr a few years later.³⁵¹ Maria Reynolds would later marry her husband's co-conspirator, Jacob Clingman.³⁵² Monroe was shunned for his conduct by some, including Hamilton's wife, even after his presidency.³⁵³ The only tangible benefit to the scandal was not realized until 208 years later, when a president facing impeachment needed a historical context for a mythological tale.

Both politicians³⁵⁴ and academics³⁵⁵ who opposed impeachment

350. See Alexander Hamilton, *Observations on Certain Documents* (The Reynolds Pamphlet), in 7 THE WORKS OF ALEXANDER HAMILTON 369 (Henry Cabot Lodge ed. 1903) [hereinafter WORKS OF ALEXANDER HAMILTON].

351. Burr would kill Hamilton in a duel at Weehawken, New Jersey. Interestingly, Burr was a figure on the edges of the Hamilton affair. Hamilton and Monroe were set to duel over their disagreement and Monroe selected Burr as his second. See HECHT, *supra* note 332, at 341. Burr proceeded to convince both men not to duel, thereby possibly saving Monroe for the presidency and saving Hamilton for himself only a few years later. When Mary Reynolds sought a divorce from her husband to marry Jacob Clingman, Burr served as her lawyer. See EMERY, *supra* note 323, at 160.

352. Roughly a year after the scandal, Mrs. Reynolds was living in Maryland as Mrs. Clingman. See HECHT, *supra* note 332, at 340. She asked a prior acquaintance, printer Richard Folwell, for a letter of "clear character" but was refused: "Folwell answered the notorious Mrs. Reynolds by telling her that her character was not even worse because Mr. Reynolds was alive in New York." *Id.* Maria Reynolds insisted that "her only fault was that she had married Clingman one half hour before she obtained her divorce, but Folwell [still] refused to give her good character." *Id.*

353. Monroe called upon Mrs. Hamilton after his term in office to ask forgiveness, but Mrs. Hamilton replied: "Mr. Monroe, if you have come to tell me that you repent, that you are sorry, very sorry, for . . . the slanders . . . you circulated against my dear husband . . . I understand it. But, otherwise, no lapse of time, no nearness to the grave, makes nay difference." MITCHELL, *supra* note 323, at 420 (quoting a third party account of the meeting between Madison and Mrs. Hamilton).

354. See, e.g., 144 CONG. REC. H9209-10 (daily ed. Oct. 1, 1998) (statement of Rep. Maurice Hinchey, Democrat from New York, relying on the Hamilton affair to support his opposition to impeachment); Dennis Camire, *La.'s Senators Vote to Acquit Clinton*, GANNETT NEWS SERVICE, Feb. 13, 1999, available in 1999 WL 6962259 (noting that Sen. John Brueaux, Democrat from Louisiana, relied on Hamilton's affair as evidence that concealing an affair is not impeachable).

355. See, e.g., *Rivera Live: Judiciary Committee Hears Testimony in the House from Scholars Regarding the Definition of an Impeachable Offense* (CNBC television broadcast, Nov. 9, 1998), available in 1998 WL 5034517 (remarks of Professor Paul Rothstein). One of the signatories of the law professors' letter, Professor Rothstein noted Geraldo Rivera's statement to the effect that the Founding Fathers "didn't contemplate that a cover-up of a . . . sexual affair would be an impeachable offense" and stated:

[L]o and behold, there is a historical event that corroborates just what you've said. Alexander Hamilton, when he was secretary of George Washington's Treasury, was engaged in an extramarital affair, and he was paying off the husband to keep it quiet. And Congress, with all these Founding Fathers sitting in Congress who had written the Constitution, they thought that Alexander

or removal of President Clinton used the Hamilton affair as partial justification for their positions. During the impeachment debate in the House, one Democratic member inserted into the record the account of the affair presented by historian Richard Rosenfeld, a proponent of the executive function theory:

"[O]n the day the founders defined an impeachable offense, they declared their unanimous intention to limit high crimes and misdemeanors to be actions against the United States. Not private misconduct, unrelated to the operation of government, not sexual misconduct or even lies to cover it up.

... Hamilton was forced to admit the payments, but explained them as hush money to avoid public disclosure of adultery he had been committing with James Reynolds' wife. ... Hamilton got Mrs. Reynolds to burn some incriminating letters and he offered to pay travel expenses if Reynolds would get out of town."³⁵⁶

This account ignores the fact that the purpose of the investigation into the affair was to determine if criminal acts occurred regardless of the nature of the conduct.³⁵⁷ Moreover, Hamilton

Hamilton was involved in a bribery episode where people were buying government favors. But when they opened it up and found out it was just covering up a sexual affair, they all said, "No, no impeachment, no impeachment," and Hamilton went on to ever greater glory.

Id. In reality, it does not appear that other members of Congress knew of this issue beyond the three anti-federalists, although a few may have heard from later accounts. Once again, the use of the affair appears to suggest that acts taken in the course of a cover-up of a sexual affair are not relevant to impeachment. No such determination was ever made; rather, if anyone ever said "no, no impeachment," it was because of the absence of criminal acts. Similarly, no one ever suggested that President Clinton should be impeached for the mere fact of adultery, but rather for criminal acts to cover-up his adulterous affair.

356. 144 CONG. REC. H9209 (daily ed. Oct. 1, 1998) (inserting into the record the transcript of an interview with historian Richard Rosenfeld on National Public Radio ("NPR")).

357. The reference to the burning of the letters may also be misleading. It was standard in that age for writers to burn personal letters. Such actions seem more sinister today. While formal letters were often written with remarkable prose and care, every day correspondence often amounted to mere passing (and often unguarded) notes, as the preserved correspondence in the Hamilton affair demonstrates. Other leaders of that time asked that letters be routinely destroyed, including Aaron Burr who before his duel with Hamilton instructed his daughter to burn his correspondence with female acquaintances. See HECHT, *supra* note 332, at 417. This is not to disregard any destruction of letters as relevant to a review of Hamilton's conduct; it is only to suggest that such destruction of letters is consistent with the time and Hamilton's stated purpose in avoiding public embarrassment. When confronted, however, Hamilton gave a full and detailed account. See *supra* notes 340-41 and accompanying text.

immediately admitted the relationship, and it was Reynolds—not Hamilton—who made passing reference to leaving town with the money from Hamilton.³⁵⁸

When the actual (rather than the mythological) account is considered, the comparison works to the detriment of President Clinton. When first confronted about the Reynolds affair, Hamilton immediately admitted the affair and gave so many damaging personal details that his interlocutors begged him to stop. When first confronted with the Lewinsky affair, Clinton went on national television to deny publicly the relationship; told his staffers that Lewinsky was a stalker; and spent seven months orchestrating a campaign of deception. President Clinton's specific public explanation was: "I never had a sexual relationship with that woman, Ms. Lewinsky."³⁵⁹ When Hamilton's affair was first raised, he immediately turned over all of his documents to three anti-federalists in addition to speaking openly for hours about the affair. When the affair was made public, he published a 28,000-word account of his affair to his considerable personal and professional detriment. His response, with attached exhibits and letters, was overwhelming evidence, as was his open admission of infidelity. Hamilton stated:

This confession is not made without a blush. I cannot be the apologist of any vice because the ardor of passion may have made it mine. I can never cease to condemn myself The necessity of it to my defence against a more heinous charge could alone have extorted from me so painful an indecorum.

....

... No man not indelicately unprincipled, with the state of

358. Richard Rosenfeld concluded his NPR interview with the baffling statement that "the founding fathers saw a big difference between public service and private conduct, and on the question of impeachment they warned Congress to do the same." 144 CONG. REC. H9210 (daily ed. Oct. 1, 1998) (incorporating transcript of the NPR interview). There is little question that the Framers saw the difference between public and private conduct, but they certainly did not warn anyone about its use in impeachment. As the Hamilton affair demonstrates, the operative question is criminality in the conduct and not its motive or context.

359. President Clinton's famous finger-waving denial of any sexual relationship with Ms. Lewinsky was unequivocal and false:

But I want to say one thing to the American people. I want you to listen to me. I'm going to say this again. I did not have sexual relations with that woman, Ms. Lewinsky. I never told anybody to lie, not a single time, never. These allegations are false, and I need to go back to work for the American people. Thank you.

145 CONG. REC. S1290 (daily ed. Feb. 6, 1999) (incorporating President Clinton's statement).

manners in this country, would be willing to have a conjugal infidelity fixed upon him with positive certainty. He would know that it would justly injure him with a considerable and respectable portion of the society; and especially no man, tender of the happiness of an excellent wife, could, without extreme pain, look forward to the affliction which she might endure from the disclosure, especially a *public disclosure* of the fact. Those best acquainted with the interior of my domestic life will best appreciate the force of such a consideration upon me.

The truth was, that in both relations, and especially the last, I dreaded extremely a disclosure—and was willing to make large sacrifices to avoid it.

....

Thus has my desire to destroy this slander completely led me to a more copious and particular examination of it, than I am sure was necessary.³⁶⁰

There is no evidence or indication that Hamilton ever lied in private interviews or public accounts concerning the relations. While it is not legally possible to defame the dead, the comparison of Hamilton's actions to the Clinton case borders on the defamatory. Rather than debate "what the meaning of the word 'is' is,"³⁶¹ Hamilton left virtually no detail to the imagination in his effort to put any questions to rest.

The Hamilton affair, therefore, contradicts its mythological use. The investigation of Hamilton ended when the three investigators determined that there was no evidence of criminal conduct but only a sordid affair. The investigation demonstrated that sexual affairs could become impeachable offenses only if collateral acts of criminality developed in the course of the scandal. If Hamilton had engaged in speculation or any other criminal act, it is doubtful that these three anti-federalists would have hesitated to bring charges. The record is abundantly clear on one point: There was never any suggestion that Hamilton could be impeached or punished for the affair. The investigators followed the same presumptions as the House managers in the Clinton trial—Hamilton's sexual affair would only be an impeachable subject only if Hamilton engaged in unlawful

360. WORKS OF ALEXANDER HAMILTON, *supra* note 350, at 378-79, 407, 411.

361. APPENDICES TO THE REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 595(c) SUBMITTED BY THE OFFICE OF INDEPENDENT COUNSEL, H.R. DOC. NO. 105-311, at 510 (transcript of Aug. 17, 1998, grand jury testimony of President William J. Clinton).

activity. Unlike the Clinton case, there was no such evidence of criminality by Alexander Hamilton. The most generous view of its use in the Clinton impeachment debates is that it is an example of what Professor Gordon referred to as "bad mythmaking."³⁶²

VI. CONCLUSION

All mythologies, constitutional or literary, have an underlying purpose or theme. Presented with complex facts or realities, mythology offers a consistent account to an audience eager for clarity. At a time of national crisis, the desire for a clear basis of resolution is almost overwhelming. In such times, we often look to the Framers to compel a course of action. This desire for a dead-hand control over contemporary problems is understandable but not always supportable. Ironically, the only clear intent of the Framers on some questions was to leave the resolution of conflicts to each generation. The Framers often were more concerned with how we would conclude conflicts than the conclusions themselves. This appears to have been the resolution over the impeachment language. Faced with various views of the basis for impeachment, the Framers focused on where and how impeachment would occur. The evolutionary standard of impeachment, "high crimes and misdemeanors," would necessarily change with society, but the static procedural conditions would remain constant. Thus, society may come to view certain acts of misconduct as impeachable that were not even viewed as objectionable—let alone actionable—in the 1700s. This places a heavy burden on each generation to define their expectations of a president—a burden that would be lightened considerably by a theory of original intent.

The executive function theory advances a view of the presidency that truly is suited for our time. The theory reflects a social and political shift in how we view the presidency. While the Framers referred to the president as the "Chief Magistrate," the modern tendency is to view the president as the chief executive officer of a public company.³⁶³ We may abhor the chief executive officer's personal conduct and yet consider the conduct irrelevant to the corporation's performance. This may be the emerging view of voters in the twenty-first century. It is not, however, a view that fairly can be attributed to the Framers in the Eighteenth Century. It is, instead, an

362. Gordon, *supra* note 47, at 1055.

363. Jonathan Turley, *You Don't Impeach a Chief Executive Officer . . .*, NAT'L L.J., Mar. 1, 1999, at A22.

idea to fit our time. It should be defended with our own voice and not that of the Framers.³⁶⁴ In this sense, the executive function theory and its supporting historical accounts lead to a question once asked about “mythistory”: “Does it dream to life the kind of past we require to guarantee the kind of future we seek?”³⁶⁵

364. See *High Crimes and Misdemeanors*, *supra* note 54, at A23; *New Originalists*, *supra* note 54, at 27.

365. Paul Horwitz, *The Past Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 506 (1997) (book review).