Reflections on Murder, Misdemeanors, and Madison

Jonathan Turley
REFLECTIONS ON MURDER, MISDEMEANORS, AND MADISON

Jonathan Turley*

I. INTRODUCTION

Few crimes seem to concentrate the mind more than simple murder. Certainly, murder was on the minds of many of the academics testifying in the Clinton impeachment hearing. While this offense was never seriously alleged during the scandal, it was very much a concern for academics advocating the "executive function theory." Under this theory, a President could only be impeached for acts related to his office, as opposed to purely personal acts. Since the impeachment of President Clinton raised matters arguably related to his personal misconduct, various academics insisted that the allegations fell outside of

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1. See Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 28-314 (1998) [hereinafter House Hearing]. Nineteen constitutional experts testified during this hearing on the history and meaning of "high crimes and misdemeanors." See id. The experts were divided between majority and minority witnesses with the latter largely favoring the executive function theory. See id. The Author testified at the hearing as a majority witness. See id. at 250.

2. In earlier work, the Author used this term, "executive function theory," as most descriptive of the theory advanced by academics in opposition to the impeachment. This term, however, should not obscure the fact that prior judicial cases advanced a close variation in which it was argued that judges could only be impeached for acts related to judicial office or judicial functions. See Jonathan Turley, Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President, 67 GEO. WASH. L. REV. 735, 746-47 (1999) [hereinafter Turley, Congress As Grand Jury]; Jonathan Turley, The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies, 77 N.C. L. REV. 1791, 1795-96 (1999) [hereinafter Turley, Constitutional Mythologies]; Jonathan Turley, "From Pillar to Post": The Prosecution of American Presidents, 37 AM. CRIM. L. REV. (forthcoming 2000) [hereinafter Turley, "From Pillar to Post"]; Jonathan Turley, Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, 49 DUKE L.J. 1, 100 (1999) [hereinafter Turley, Senate Trials].

3. See Turley, Congress As Grand Jury, supra note 2, at 746-47; Turley, Constitutional Mythologies, supra note 2, at 1798.
the definition of “high crimes and misdemeanors,” as envisioned by the Framers. This position was maintained even if the President committed such alleged crimes as perjury or obstruction of justice. This theory, however, created one anomalous circumstance that concerned its supporters: a murderer in the White House. While some academics remained faithful to a bright-line rule restricting impeachment to executive functions, a number of academics placed a critical caveat on the theory with the exception of murder and other “heinous” offenses. Under this exception, a murder may arise from personal circumstances or motivations, but it is still viewed as meeting the definition of “high crimes and misdemeanors.”

In testimony before Congress and in various writings, the Author has criticized the executive function theory as a type of “constitutional mythology” with more political than historical support. The executive


5. See infra Appendix A. The White House introduced two letters signed by hundreds of historians and law professors in opposition to the President's impeachment. The historian's letter to Congress adopted the absolute rule, though some signatories like Arthur Schlesinger, Jr. would later change their position in the hearing to add exceptions. See Turley, Congress As Grand Jury, supra note 2, at 747-59 (discussing the two letters and their exceptions). These letters are attached to this Article so that excerpted statements can be read in context. See infra Appendices A & B.


7. See id. at 754. It is difficult to accurately describe the place of crimes like murder in the executive function theory. While clearly these private crimes are not consistent with the underlying theory and therefore appear like exceptions, these professors presumably are arguing that such crimes satisfy the definition of "high crimes and misdemeanors." It is, therefore, an “exception” in terms of the underlying theory as opposed to the standard itself.

8. See House Hearing, supra note 1, at 250-314 (testimony of Professor Jonathan Turley). The Senate also held a hearing on a related subject: The indictment of a sitting President. See Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process? Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 105th Cong. 197-205 (1998) [hereinafter Senate Hearing]. The Author argued that a President guilty of murder or any criminal act could be indicted before impeachment. See id. at 203-05; see also “From Pillar to Post”, supra note 2. But see Senate Hearing, supra at 185, 205-06 (testimony of Professors Akhil Reed Amar and Susan Low Bloch) (arguing that a sitting President cannot be criminally prosecuted).

9. See Senate Hearing, supra note 8, at 200-05 (prepared statement of Jonathan Turley); Turley, Congress As Grand Jury, supra note 2, at 737; Turley, Constitutional Mythologies, supra note 2, at 1797-98.
function theory was ultimately rejected by the House of Representatives in its impeachment of President Clinton as were earlier attempts at a "judicial function theory." While this academic debate is likely to continue until the next presidential impeachment, the purpose of this Article is not to revisit the general theory, but its notable exception. This Article looks at the reason for the inclination of academics to abandon an absolute theory in order to include "heinous offenses" like murder. While criminal acts are not required to satisfy the standard for impeachment, most serious impeachment allegations concern criminal acts rather than extreme civil misconduct. Without disregarding the possibility of a President being impeached for noncriminal conduct, this Article looks at the range of possible criminal acts that could warrant impeachment but arise out of private or nonofficial conduct.

In Section II, this Article addresses the exception as stated during the Clinton crisis and the justifications offered for the exception. The exception was only partially explained by its supporters and these explanations only raise more questions about the viability of the general theory. In Section III, this Article addresses possible rationales for allowing impeachment for criminal acts under the executive function theory. It is argued that the exception reveals the inherent weakness of this theory in its focus on a nexus to executive functions rather than the content of the criminal conduct. In Section IV, this Article suggests that a variety of crimes must be considered impeachable because they raise questions of legitimacy of a President to govern—regardless of their connection to his office.

The Madisonian democracy is designed to force destabilizing factional disputes into a process for resolution. Although a President may not ultimately be removed in the Senate, impeachment forces a President to account before the Senate with his presidency in the balance. This open and deliberative process may not personally satisfy citizens in its outcome, but serves a vital function in addressing political questions.

10. See Turley, Constitutional Mythologies, supra note 2, at 1844, 1854.
11. See id. at 1844-45.
12. In fact, noncriminal allegations were part of the impeachment hearings in all three presidential impeachment inquiries of Presidents Johnson, Nixon, and Clinton, particularly allegations of abuse of office. See Frank O. Bowman III & Stephen L. Sepinuck, "High Crimes and Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment, 72 S. CAL. L. REV. 1517, 1526-27, 1539-40 (1999); Congress As Grand Jury, supra note 2, at 761.
over legitimacy. Criminal acts inevitably raise legitimacy questions that create a disability for Presidents that can only be removed in a political vote of retention. If this disability is sufficiently great, a vote of removal is warranted. In either case, the most fundamental question of any impeachment is not an abuse of power but the lack of capacity of a President to lead. This is why certain crimes seem to invite impeachment, even among advocates of the Executive Function theory. It is not that murder is unique as a crime, but that it is the most obvious example of an act that robs a President of legitimacy to govern. It is, however, not the only such act. The Framers did not attempt the impossible task of defining each such act; rather they attempted to design a standard that would allow each generation to judge the conduct of its President by its own values. What the Framers supplied was a process, not an answer, for contemporary problems of legitimacy.

II. THE QUESTION OF MURDER AND OTHER "HEINOUS" ACTS

When the House of Representatives began impeachment proceedings against President Clinton, a large-scale effort was made to register the views of both historians and law professors opposing impeachment. This effort eventually took the form of two remarkable letters from groups of historians and law professors, respectively. These letters advanced a similar, though not identical, executive function theory in opposition to the impeachment of President Clinton. For their part, the historians advanced an absolute executive function theory without any exceptions for criminal acts unrelated to a President's official acts or duties. Thus, according to the historians, "[t]he Framers explicitly reserved [impeachment] for high crimes and misdemeanors in the exercise of executive power." The suggestion of an explicit intent of the

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16. See id.
17. See id.
18. See infra Appendices A & B.
20. See infra Appendix A.
21. Id. One of the central academics behind this letter later appeared to reaffirm his rejection of any exception to this theory. See Sean Wilentz, It Depends on How You Define 'Murder', SUN-SENTINEL, Dec. 16, 1998, at 31A. Professor Wilentz wrote an opinion editorial questioning whether murder or rape could be grounds for impeachment. While Professor Wilentz stressed that
Framers significantly reduced the credibility of the historians' letter to Congress. However, putting this obvious overstatement aside, the historians advanced a plausible theory that the Framers could have intended an impeachment process solely designed for misconduct related exclusively to the use of official title or authority. 23 Regardless of the alleged criminal act or its heinous aspects, the historians' position would confine impeachment only to acts tied to abuses of office. 24 At

"[n]o one apart from a few conspiracy nuts, has accused Clinton of murder," he conspicuously omits the fact that this question is not so "academic" on the subject of rape. See Turley "From Pillar to Post", supra note 2 (discussing the rape allegations of Juanita Broaddrick); see also infra notes 56, 99-104 and accompanying text. Nevertheless, Wilentz notes that Aaron Burr was not impeached after killing Alexander Hamilton in a duel, suggesting that "[i]ncredibly, the Constitution's framers may well have thought that an executive charged with murder could escape impeachment." Wilentz, supra at 31A. There are, however, various reasons for the failure to impeach Burr. First, at that time, Congress was in the control of the Jeffersonians who hated Hamilton as the personification of the Federalist cause. See JONATHAN DANIELS, ORDEAL OF AMBITION: JEFFERSON, HAMILTON, BURR 303 (1970). Second, even Federalists like John Adams disliked Hamilton as a past foe. See id. at 214-15. Third, dueling was not viewed as murder by many men of that period. See HOMES ALEXANDER, AARON BURR, THE PROUD PRETENDER 216 (Greenwood Press 1973) (1937). To the contrary, duelists like Andrew Jackson would later take office as the very symbol of manhood due to such exhibitions. See HAMILTON COCHRAN, NOTED AMERICAN DUELS AND HOSTILE ENCOUNTERS 190 (1963). Dueling was illegal in New York but regularly circumvented by gentlemen of the time. See ALEXANDER, supra at 211. Thus, there was nothing monstrous or heinous or even objectionable to this act. See id. at 216. However, if Burr laid in wait for Hamilton, it is unlikely that many Jeffersonians would have voiced opposition to immediate impeachment. Finally, Burr returned in the midst of the highly controversial impeachment of Samuel Chase, an unlikely time for a new call of impeachment. See id. at 226-27. Burr could not have picked a better time for a murderous duel. This is not unlike the circumstance of the Clinton impeachment where most members agreed that rape was an impeachable offense. See, e.g., 145 CONG. REC. S290 (daily ed. Jan. 16, 1999) (statement of Lindsey Graham, House Manager); id. at S291 (statement of Charles Canady, House Manager); Stephen B. Presser, After Broaddrick, What Do We Do Now?, Chi. Trib., Mar. 1, 1999, at 13 (explaining that most people agree that rape is an impeachable offense). However, when evidence was disclosed at the end of the crisis that President Clinton may have raped a woman in Arkansas, neither Republicans nor Democrats wanted to begin a new impeachment inquiry. See Presser, supra at 13. Likewise, few members wanted to open a new impeachment inquiry over Burr's duel after the long impeachment struggle over Chase. See Wilentz, supra at 31A.


24. See id. Professor Wilentz has stressed that "the grounds for impeaching a president and a vice president are identical." Wilentz, supra note 21, at 31A. While Wilentz challenges the notion of murder being viewed as impeachable conduct with the Burr case, he fails to address the problem that this standard is also the same for judges who have been impeached for crimes unrelated to their office. See id. These crimes are far more mundane than murder, including tax evasion. See generally Turley, Constitutional Mythologies, supra note 2, at 1844-45 (discussing noncriminal, nonofficial impeachable acts).
the hearing, however, Professor Arthur Schlesinger, Jr., a signatory to
the letter, abandoned the absolute theory and suggested a qualified the-
ory. Specifically, Professor Schlesinger allowed impeachment for cer-
tain "private misconduct by Presidents" that could be defined as
"[m]onstrous crimes."\textsuperscript{25} Professor Schlesinger specifically included
murder and rape as facially monstrous crimes that meet the definition of
"high crime and misdemeanor."\textsuperscript{26}

The law professors' letter advanced a qualified executive function
theory from the outset. The law professors expressly allowed for im-
peachment based on "private" conduct but limited this conduct to
"heinous" acts.\textsuperscript{27} Once again, murder was the favorite example for a
sufficiently heinous act to trigger a President's impeachment.\textsuperscript{28} The ex-
ception for heinous offenses was endorsed by hundreds of law profes-
sors, including Professors Susan Low Bloch, Robert Drinan, Daniel
Pollitt, Cass Sunstein, and Laurence Tribe, all of whom testified at the
House impeachment hearing.\textsuperscript{29} The standard for monstrous or heinous
offenses, however, was left undefined with the exception of the illustra-
tive examples of murder or rape. Congress, in fact, was advised to reject
the impeachment of President Clinton and simply "leave the hardest
questions raised hypothetically for another and better day."\textsuperscript{30}

With the exception of a passing comment by Professor Bloch, there
is no indication from any of the other advocates of the executive func-
tion theory as to the underlying rationale for the exception for murder.
For example, after offering a staunch and detailed defense of the theory
in his testimony, Professor Tribe simply stated as an aside: "I will con-
cede private offenses like murder would make continuation in office
unthinkable for any official." Professor Tribe does not make any further comment as to why it is "unthinkable," particularly given the position of the historians in favor of an absolute theory. Presumably, Professor Tribe is not suggesting a straight political judgment as to the "unthinkable" since, if simple political will is the basis for the exception, it would swallow the rule. If Professor Tribe is referring to some crimes that are manifestly at odds with a President's legitimate claim to authority, the executive function theory is reduced to a mere presumption: Congress should presume criminal acts are not impeachable if they are unrelated to the office unless the nature of the criminal act can overwhelm the presumption. Professor Tribe was clearly describing something more than a presumption in both his testimony and his support of the law professors' letter. Likewise, he was clearly not suggesting that the exception was based on an evolving view of what criminal acts would be considered "unthinkable." Almost half of the constitutional experts testifying in the hearing found the concept of a perjurer and obstructer of justice continuing in the presidency to be "unthinkable." Professor Tribe clearly has a different view of what crimes are manifestly "unthinkable" but offers no basis to distinguish

31. House Hearing, supra note 1, at 220 (testimony of Professor Laurence H. Tribe).
32. See id. In one curious passage, Professor Tribe appears to argue that the failure to resign in the face of some crimes would be the requisite abuse of office needed for impeachment:

There may well be room to argue that the very continuation in office of a president who has committed a crime as heinous as murder, and who under widely accepted practice is deemed immune to criminal prosecution and incarceration as long as he holds that office, would itself so gravely injure the nation and its government that such a president's decision not to resign under the circumstances amounts to a culpable omission and thus an abuse of power and that, in any event, the fact that such a president's continuation in office was itself gravely injurious to the nation would transform his remaining in office, if not the murder he committed, into an impeachable offense.

Id. at 227. The suggestion that the failure to resign can be viewed as the impeachable offense only highlights the absence of a coherent theory as to the meaning of high crimes and misdemeanors. Under Professor Tribe's view, a President's failure to resign due to an allegation of a private crime would constitute a "high crime and misdemeanor" due to the public injury. See id. If this is the case, a host of crimes and non-crimes could produce such public injury. For example, a sexual harasser at the head of a government dedicated to eliminating sexual harassment could be viewed as such an injury. Moreover, what if the President insisted that he is innocent, would his failure to resign still be impeachable? Presumably, a President is entitled to a Senate trial rather than face impeachment over his failure to resign, but Professor Tribe suggests that this itself could be viewed as a "culpable omission." Id. Once again, if the test is one of public injury, the executive function theory is a mere presumption and the primary question becomes one of gravity.

33. See id. at 29 (testimony of Professor Gary L. McDowell); id. at 77 (testimony of Professor John C. Harrison); id. at 93 (testimony of Professor Richard D. Parker); id. at 104 (testimony of Professor John O. McGinnis); id. at 117-18 (testimony of Professor Stephen B. Presser); id. at 182 (testimony of Charles J. Cooper, Esq.); id. at 195 (testimony of Griffin B. Bell, Esq.); id. at 237 (testimony of Professor William Van Alstyre); id. at 253 (testimony of Professor Jonathan Turley).
such crimes. In addition, Professor Tribe does not explain why the gravity of the offense should overwhelm the underlying theory that impeachment solely concerns matters of executive function.

Professor Sunstein also relies on the exception without explaining its basis. Sunstein first notes that the text and historical sources of the Constitution are critically important, particularly in the absence of other identified crimes beyond treason and bribery:

[T]here is no explicit suggestion that the President could not be impeached for misconduct that did not involve an abuse of office. In the framing of ratification debates, I have been unable to find any discussion of murder, rape, or assault, as grounds for impeachment. Although silence on this point is not decisive, it is highly revealing. Whether or not it resolves some barely imaginable cases, it suggests that the key cases, from which any analysis must start, involve close analogies to treason and bribery.34

Professor Sunstein’s textual point is a bit elusive given his endorsement of the exception for murder. Clearly, while the analysis begins with close analogies to treason and bribery, it does not end there in the case of murder or heinous crimes. However, even in the case of the expressed criminal acts, it is not clear how “bribery” assists advocates of the executive function theory. If the Framers were intent on the establishment of a nexus to executive functions, bribery should have been restricted in the text to bribes in office, as opposed to the President bribing another individual. Obviously, there are a variety of cases in which a President may be the bribing, as opposed to the bribed, individual. Professor Sunstein resolves this question by concluding that not all bribery is in fact impeachable despite the express reference and the absence of any qualifying language.35 Yet, Professor Sunstein would limit the express reference to one crime because of the lack of a nexus to executive functions, while accepting that unstated crimes like murder, which lack the same nexus, would be included in the standard.36

34. Sunstein, supra note 30, at 293.
35. See id. at 285 n.20 (“I do not believe that all briberies are impeachable offenses; a president who paid an athlete to lose a basketball game would not have committed an act of ‘bribery’ within the meaning of the Impeachment Clause.”).
36. Professor Sunstein finds the absence of other mentioned crimes in the Constitution to be “highly revealing” and suggestive of a standard restricting impeachment to executive functions. See id. at 293, 305. The absence of such references, however, may not be as “revealing” as it appears on first blush. First, treason and bribery were two offenses of particular concern for the Framers since such allegations were made against prior English kings. See id. at 285-88. There is no reason to suggest that the express reference to these well-known categories of crimes was evidence of a restrictive intent as to other crimes. Second, the reason that no other crimes are men-
Unfortunately, while stressing the absence of other crimes like murder in the text and history, Professor Sunstein does not attempt to explain how he comes to the exception for acts unrelated to any abuse of office such as murder. Professor Sunstein simply concludes:

Both the original understanding and historical practice converge on a simple principle: The principle purpose of the impeachment provision is to allow the House of Representatives to impeach the President of the United States for egregious misconduct that amounts to the abusive misuse of the authority of his office. This principle does not exclude the possibility that a president would be impeachable for an extremely heinous "private" crime, such as murder or rape. But it suggests that outside of such extraordinary (and unprecedented) cases, impeachment is unacceptable. 37

Once again, the analysis of this exception simply ends on a conclusory note. Why doesn’t "the principle... exclude the possibility" 38 of an impeachment for murder or rape? Professor Sunstein does not offer any historical practice to support the exception nor any textual rationale why the Framers intended an executive function theory but also intended an exception for unstated heinous offenses. If impeachment is so clearly intended to address abuses of office, the inclusion of private crimes in the definition of "high crimes and misdemeanors" would significantly undermine its function. Either the "high crimes and misdemeanors" standard is defined in terms of official misconduct or it refers to conduct—private or public—incompatible with the office. Despite the inherent contradiction, the historical and textual support is simply claimed by fiat. In this way, the theory is left with an undefined exception that is only known fully by its creators.

The only advocate of the executive function theory to even hint at a basis for the exception was Professor Bloch. Professor Bloch asserted that:

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37. Sunstein, supra note 30, at 305 (emphasis omitted).
38. Id.
Notwithstanding my understanding that the remedy of impeachment was designed principally to deal with serious abuses of office, I believe that very serious personal misconduct such as murder can also be grounds for impeachment. If the crime is so heinous that a person cannot be allowed to walk the streets, we do not have to wait until the next election to make him leave the White House.\(^39\)

Obviously, one must extrapolate from this cursory statement a rationale for the exception. Such offenses would theoretically include any crimes that are "so heinous that [we would not let him] walk the streets."\(^40\) Consequently, Professor Bloch appears to suggest a potentially broader category for excepted private offenses. This theory will be considered below. However, Professor Bloch also raises a more fundamental issue in her statement by suggesting that any private criminal act warranting impeachment would fall under "high crime" as opposed to "misdemeanors."\(^41\) While Professor Bloch is clearly correct in her view that the word "misdemeanors" was not meant to denote minor crimes, it is not evident that criminal acts (other than high crimes) could not serve as the basis for "misdemeanors." Obviously, the latter phrase allows for the impeachment of a President for conduct that is not criminal. It must also be true that a President can be impeached for conduct which may be criminal but not viewed as a "high crime."

On the surface, this would lead to the obvious retort that the impeachment standard would become circular: expressly reserving impeachment for high crimes only to then allow impeachment for lesser crimes. However, the emphasis is misplaced. "Other high crimes" can be easily read to insure that crimes other than the enumerated treason and bribery would be subject to impeachment. Misdemeanors appears to be a catch-all that allows Congress to review conduct incompatible with the office of President. It is the underlying conduct, not the categorization of the criminal act, that justifies removal. Thus, a President en-

\(^39\) House Hearing, supra note 1, at 235 (testimony of Professor Susan Low Bloch). The published summary of Professor Bloch also emphasized this point:

[T]he term "misdemeanors" clearly does not mean what it means today, a minor offense. Impeachment was not designed to be used for minor offenses even if they are in fact criminal offenses. The only exception to this is that if the President commits a crime, such as murder, so heinous that we would not let him remain on the streets, I believe such misconduct could constitute a "high crime" and allow us to remove such a person from the White House.


\(^40\) Id.

\(^41\) See id. at 235.
gaged in a hate crime would not necessarily meet traditional definitions of a "high crime," but the underlying conduct would warrant impeachment and removal. If the standard must be parsed, crimes other than murder or rape may be construed as meeting either the standard of "high crimes" or "misdemeanors."

We are left with remarkably little guidance from advocates of the theory as to the basis for the exception. It is difficult to see how the executive function theory can strive to define "high crimes and misdemeanors" in terms of official misconduct but then concede that the private crimes with sufficient gravity would also meet that definition. In order to accomplish this result, these academics must be able to establish that nonexecutive acts, or private crimes, are part of the same standard that was allegedly limited to executive functions, or official crimes, by the Framers. Both abuse of office and a private murder are supposedly "high crimes and misdemeanors," but there is no suggestion how this is accomplished on a theoretical level. Some speculation, therefore, is inevitable as to a basis for the exception that would be consistent with the general theory. Such justifications could be based on (1) a protective rationale; (2) a type of malum in se rationale; or (3) an incapacity rationale. The first two rationales will be addressed below. The incapacity rationale will be considered in the next Section as consistent with an evolutionary (and not an executive function) theory of the meaning of "high crimes and misdemeanors."

A. The Protective Rationale

In the absence of a retributive rationale, which is left to the criminal justice system, an alternative rationale could be a protective theory. Professor Bloch notes that it is appropriate for Congress to impeach a President for any crime so heinous that we would not let him remain on

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42. There is no indication in the record that the Framers envisioned the standard as a type of constitutional criminal code with individual categories of impeachable offenses. The standard was treated as a whole rather than two categories. Thus, "high crimes" and "misdemeanors" are linked by "and" rather than "or" in the text. Since misdemeanors had a broad meaning of misconduct, there was little reason to sharply define "high crimes." The standard as a whole created the basis for a political judgment on misconduct sufficient to warrant a trial.

43. One traditional rationale, retributive justice, is a concern for the criminal system and not the impeachment process. The latter is a political judgment on the legitimacy of an individual to hold public office, not an act of retribution. See Turley, "From Pillar to Post", supra note 2.

44. On this point, there appears to be general agreement that impeachment was not designed to be used as punishment or as an alternative to criminal prosecution. See, e.g., House Hearing, supra note 1, at 235 (testimony of Professor Susan Low Bloch).
the streets. This may refer to either the danger of the individual to society or, as considered below in the malum in se rationale, a reference to the perceived gravity of the offense. The first possibility suggests a protective rationale. Under both rationales, however, there is obviously an element of public judgment, as reflected in the need to remove certain criminal actors from society. This element is inherently at odds with the premise of the executive function theory since, under either rationale, there are a host of crimes for which an individual is viewed as too dangerous to allow him “to walk the streets.” The effort to graft a “heinousness” standard on the impeachment clause inevitably returns to a public judgment on gravity, adding little more than an additional rhetorical level to the analysis.

Under a protective rationale, a murderer in the White House must be removed to protect citizens from such further harm. Notably, the academic suggesting this basis for the exception, Professor Bloch, is also an advocate of the sequential theory, requiring removal before any indictment of a President. Certainly, the protective rationale is strengthened if one accepts that a sitting President cannot be indicted while in office. The Author has previously argued against this sequential theory in both testimony and writings as unsupported in either the textual or historical sources. Nevertheless, if one believes that a President is immune from compulsory criminal process, a murder would certainly represent a terrifying prospect. If so inclined, a murderous President could be unleashed on an unprotected populace. If a President were not subject to the exception (as in the absolute executive theory of the historians) and could not be indicted in office under a sequential theory, he could make Caligula look like a petty criminal.

Of course, this nightmare scenario is based on the acceptance of the sequential theory, which remains a deep controversy among academ-

45. See id.
46. In fairness to Professor Bloch, her testimony did not purport to offer a full articulation of the basis for the exception. Rather, unlike other academics who failed entirely to address this important point, Professor Bloch attempted to offer a brief explanation for the exception in the course of her testimony. She did not clearly endorse either a protective or a malum in se rationale.
47. See id.
48. See Senate Hearing, supra note 8, at 210 (statement of Professor Susan Low Bloch). The Senate hearing was entirely dedicated to this question with Professors Akhil Reed Amar and Susan Low Bloch advocating a sequential theory and Professors Eric M. Freedman and Jonathan Turley arguing that a sitting President could be indicted before impeachment and removal. See id. at 24, 185, 198, 210 (testimony of Professors Amar, Bloch, Freedman, and Turley); Turley, “From Pillar to Post,” supra note 2.
49. See Senate Hearing, supra note 8, at 198 (testimony of Professor Jonathan Turley).
ics. Putting aside the validity of this theory, however, the protective rationale does not offer significant support for the exception. The primary difficulties lay, once again, in the distinction from other crimes equally worthy of such protective responses. Any violent offense would presumably warrant such attention. Certainly, violent crimes of impulse, like molestation, would raise an immediate need for removal and incarceration.\textsuperscript{51} Likewise, it is not clear why physical injury is the only concern for a protective rationale. While a President may have difficulty in evading attention to carry out murders or rapes, he is more capable of achieving thousands of economic injuries through fraud or widespread extortion. Assuming the threats are not based on his executive authority, racketeering and extortion would not be viewed as impeachable unless deemed "heinous." Yet, hundreds of people could be ruined while the President enjoyed effective immunity during his term.

The protective rationale presumably should also be influenced by the victim's characteristics. If a President routinely engaged in sadistic and abusive communications with children, the temporary immunity afforded by the executive function theory would allow for continued victimization, and possibly, a heightened level of satisfaction for such a criminal actor. Before such a hypothetical is discarded as unrealistic, it is important to realize that such conduct led to the incarceration of a well-respected judge.\textsuperscript{52} Likewise, an analogous case involved a nation-

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51. The immediate inclusion of rape with murder, before Congress, ignored the fact that rape is rarely treated the same as murder in terms of sentencing, absent aggravated circumstances. Simple murder will secure a life incarceration much more often than rape or sexual assault. See Jodi M. Brown et al., Bureau of Justice Statistics Bulletin, U.S. Dep't of Justice, Felony Sentences in State Courts, 1996 4 (May 1999). The latest criminal justice statistics show that the median sentence for murder in this country was 288 months while the median for rape was 60 months. See Sourcebook: Bureau of Justice Statistics of Criminal Justice Statistics—1998 433 (Kathleen Maguire & Ann L. Pastore eds., 1999). The average sentence for that period was 249 months for murder versus 98 months for rape. Id. Other offenses are treated as severely in sentencing as rape in the criminal justice system, including robbery which receives the same median sentence and roughly the same average sentence. Id. (listing robbery as a category which received the median sentence of 60 months and the average sentence of 87 months).

52. Sol Wachtler, former Chief Judge of the New York Court of Appeals, pleaded guilty to charges involving a long pattern of harassment against a former lover and her 14-year-old child that included obscene telephone calls and postcards, threats of kidnapping, threatening letters, and a campaign of intimidation. This pattern included the creation of false characters and intricate plots as well as a postcard to the child containing a condom and abusive sexual remarks. See Maureen Dowd, Descent From the Bench: The Jekyll-and-Hyde Story of How Sol Wachtler, High-Ranking Judge, Became Sol Wachtler, Convicted Criminal, N.Y. Times, Aug. 28, 1994, § 7, at 5 (reviewing Linda Wolfe, Double Life: The Shattering Affair Between Chief Judge Sol Wachtler and Socialite Joy Silverman (1994)). Chief Judge Wachtler continued in this bizarre conduct despite warnings that he was suspected to be the source of the anonymous communications and false letters. See id. Wachtler later confessed to the conduct, which he insisted was
ally known university president who was forced to resign following revelations that he routinely called child care workers with highly disturbed messages concerning children. These cases demonstrated the compulsive behavior of such actors who continued their behavior while carrying out high profile activities in academia and the media. The thrust of such cases is that neither position, nor public standing, distinguishes between actors in some categories of misconduct. Rather than being "barely imaginable," these cases show that the most public figures can risk discovery and ruin in yielding to compulsive behavior.

due to mental illness. See Diana Jean Schema, A Prison Term of 15 Months for Wachtler: Ex-Judge Apologizes for Acts of Harassment, N.Y. TIMES, Sept. 10, 1993, at B1. Experts in the case noted that this type of conduct is routinely found in individuals, like CEOs, who hold powerful positions. See Ruth S. Hochberger & Gary Spencer, Sol Wachtler Tells Story of Drug Use, Nat’L L.J., Aug. 2, 1993, at 8. There is no reason to believe that a President, as opposed to a chief judge, could not be found to have such a compulsion.

53. Richard Berendzen was president of American University in Washington, D.C. and one of the nation’s most visible and prominent academics. Berendzen pleaded guilty to obscene telephone calls and was forced to resign from his office. See Peter Carlson, ‘It All Adds Up To a Lot of Pain’, WASH. POST, Sept. 23, 1990, (Magazine) at 12. The Berendzen case demonstrated the ability of a highly public individual to have two personas:

The man in the resume, the public Richard Berendzen, was a brilliant teacher, a tireless administrator, an inspiring orator, a hard-driving crusader for educational reform. But there was another Richard Berendzen, as yet unknown to anyone, a tormented man with a secret he never told a soul, a man driven to telephone people who advertised that they provided child care in their homes, to lead them into detailed discussion of incest and child abuse and grotesque fantasies of the fictitious sex slave he claimed he kept caged in his basement.

Id. at 14. Berendzen was diagnosed as having a pronounced sexual disorder due to childhood abuse and he was given a suspended jail sentence on the basis of his seeking continued counseling. See id. at 36; Lori K. Weinraub, Berendzen Pleads Guilty to Making Obscene Calls, UPI, May 23, 1990.

54. Such conduct as Berendzen’s sexually explicit telephone calls is only “one of about 40 types of what psychiatrists call ‘atypical paraphilias,’” or “bizarre sexual behaviors in which a person has little or no control over his actions and is often only dimly aware of the psychological factors driving him to commit the acts.” Judith E. Randal, When People Make Obscene Calls, NEWSDAY, May 1, 1990, § 3, at 9.

55. See Sunstein, supra note 30, at 293.

56. President Clinton was repeatedly accused of compulsive sexual behavior, including a desire for telephone sex with Ms. Lewinsky, a rape allegation by Ms. Broadrick, and molestation charges by Ms. Jones, Ms. Willey, and Ms. Steele. See Nancy Gibbs, Outrageous Fortune, TIME, March 30, 1998, at 20 (discussing Kathleen Willey’s allegations that she was groped by President Clinton against her will after she came to speak with him concerning employment); Dateline NBC: Jane Doe #5: Juanita Broaddrick Tells Her Story in Which She Claims to Have Been Raped by Bill Clinton in 1978 (NBC television broadcast, Feb. 24, 1999) (transcript on file with the Hofstra Law Review) (detailing the story of Broadrick and witnesses of the alleged rape that occurred in Little Rock, Arkansas in April 1978); One Year Ago Today . . ., WASH. POST, Jan. 30, 1999, at A10 (stating that Ms. Lewinsky had 20 phone sex conversations with President Clinton); Jeffrey S. Klein & Nicholas J. Pappas, 'Jones v. Clinton': An Emerging Trend in Title VII Law, N.Y. L.J., June 1, 1998, at 3 (describing Ms. Jones’ charge of molestation by President Clinton); Peter Baker,
The protective rationale does little to advance the exception for murder and rape. If protection is the motivating purpose of the exception, a host of abuses and crimes would necessarily fall within this category. Moreover, any acceptance of the sequential theory would militate even farther in the direction of inclusion rather than exclusion of offenses. If a President cannot be indicted during his term and impeachment is limited to executive functions, an exception based on public safety would need to include a variety of criminal acts. This, of course, would threaten to expand the exception to the point of swallowing the rule. A protective rationale, therefore, leads inevitably to the undoing of the executive function theory. Any viable exception must be justified on some characteristic of the underlying conduct to distinguish criminal acts for the purpose of impeachment.

B. The Malum in Se Rationale

An alternative rationale for the heinous and monstrous exceptions can be based on their inherent evilness or immorality. Essentially, this rationale would place certain crimes at the extreme end of a spectrum of criminal offenses. Thus, murder and rape are viewed as so inherently monstrous as to require exceptions under the definition of "high crimes and misdemeanors." While not offered by any of the advocates of the theory, one possible basis for an exception for certain heinous crimes can be found in the traditional distinction between conduct that is malum in se and malum prohibitum. A malum in se offense is defined as "[a] wrong in itself; [a]n act [that] is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences." Such offenses are viewed as immoral regardless of whether they are punished by the law of the state. In contrast, malum prohibitum offenses "derived their wrongfulness from being prohibited by civil authorities, such as the king, or more generally, by the positive law."

Willey Describes Clinton Advance, WASH. POST, Mar. 16, 1998, at A1 (explaining that Ms. Steele had once corroborated Ms. Willey’s story of molestation by President Clinton, but later recanted it). While these were only allegations, there was never any interest in reviewing the evidence that supported the allegation that the President raped a woman while he served as Arkansas Attorney General, including various contemporary witnesses. See Turley, "From Pillar to Post", supra note 2; Stephen B. Presser, After Broaddrick, What Do We Do Now?, CHI. TRIB. Mar. 1, 1999, at 13; Lois Romano & Peter Baker, ‘Jane Doe No. 5’ Goes Public with Allegation, WASH. POST, Feb. 20, 1999, at A1.

58. See id.
The impeachment of an American President for *malum in se* crimes would be consistent with the history of the division between the two categories of criminal conduct. Originating in the 1400s, the distinction was based in part on the authority of the King.60 A King could grant leave to commit crimes that were *malum prohibitum*.61 However, since the prohibition of *malum in se* crimes were viewed as based on a higher authority, the King could not approve the commission of *malum in se* offenses.62 On its surface, this distinction would have some resonance for impeachment since, just as *malum in se* offenses could not be approved by a King, the commission of such offenses by the King would appear of a different order. As one commentator noted, the commission of *malum in se* acts constitutes the very rejection of social order and obligations:

Whether any Offence can be pardoned before it is committed: It seems agreed, That the King can by no previous License, Pardon, or Dispensation whatsoever, make an Offence dispunishable which is *malum in se*, i.e. unlawful in itself, as being either against the law of Nature, or so far against the Public Good, as to be indictable at Common Law. For a Grant of this Kind tending to encourage the Doing of Evil, which it is the Chief End of Government to prevent, is plainly against Reason, and the Common Good, and therefore void.63

In this way, it could be said that the common law has always distinguished between criminal acts. Murder has always been viewed as a *malum in se* offense.64 Just as a priest could be defrocked for the commission of a *malum in se* act (but not a *malum prohibitum* act),65 it could be argued that a President must commit the "higher order" crimes to be impeached.66

60. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 32 n.22 (2d ed. 1986).
61. See id.
62. See id.
64. See LAFAVE & SCOTT, supra note 60, at 32 n.22.
66. The distinction between *malum in se* and *malum prohibitum* can be suggested for other legal distinctions such as the validity or use of mistake of law defenses. See Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 129-30 (1997) (noting the implications of the use of the distinction raises questions under Holmesian and anti-Holmesian views).
The problems with a strict malum in se approach are two-fold. First, the distinction between malum in se and malum prohibitum offenses is not always easy to discern. Second, and more importantly, the list of malum in se offenses is likely to be too long for advocates of the executive function theory. Such offenses as theft are viewed as malum in se. With greater relevance to the Clinton impeachment, perjury, false statements, and obstruction of justice are viewed as malum in se offenses.

Assuming that a malum in se distinction is not acceptable, advocates of the qualified executive function theory offer little beyond a couple of concrete offenses, murder and rape, for analogous treatment. This lack of an underlying rationale inevitably leads to two obvious and related questions. First, how does Congress determine what offenses qualify as heinous or monstrous? Second, if murder and rape are so clearly heinous or monstrous, what other offenses could meet this facial test?

67. See Fried, supra note 65, at 451 n.31 ("[I]t is difficult to ascribe any fixed meaning to the term malum in se and to the often contrasted term malum prohibitum for any historical period, and for centuries the best authorities have deplored the use of the two terms."); Green, supra note 59, at 1577 ("[T]he most persistent criticism of the malum in se/malum prohibitum distinction has been that it is notoriously difficult to determine the category into which many crimes fit."); Kahan, supra note 66, at 151 ("It goes without saying that the line between prohibitum and in se will often be blurry."). Perjury, for example, is both malum in se and malum prohibitum. See Ex parte Chin Chan On, 32 F.2d 828, 829 (W.D. Wash. 1929); Green, supra note 59, at 1612.

68. See Green, supra note 59, at 1571.

69. See Fargo v. Glaser, 244 N.W. 905, 911 (N.D. 1932) (noting malum in se crimes include "rape, burglary, arson, larceny, perjury" (quoting State v. Charles, 16 Minn. 426, 428 (Minn. 1870))); Green, supra note 59, at 1612 (noting that perjury, false statements, and obstruction of justice are viewed as both malum in se and malum prohibitum). The view of perjury as a malum in se offense can be found in some of the earliest federal cases. For example, in In re Spenser, 22 F. Cas. 921, 922 (C.C.D. Or. 1878) (No. 13,234), the district court considered whether an admission of an alien should be barred due to the crime of perjury. The court distinguished between acts that are malum in se and acts that are malum prohibitum:

[P]erjury is not only malum prohibitum, but malum in se.... [I]t was, at common law, deemed infamous, and the person committing it held incompetent as a witness and unworthy of credit.

... [I]t may be said that an alien who has otherwise behaved as a man of good moral character... ought not to be denied admission to citizenship on account of the commission in that time of a single illegal or immoral act... But [the criminality of such crimes as gaming violations] consists in their being prohibited and not because they are deemed to be intrinsically wrong—malum in se.... [I]n the case of murder, robbery, theft, bribery, or perjury, it seems to me that a single instance of the commission of either of them is enough to prevent the admission.

Id. at 922 (citation omitted); see also Ex parte Chin Chan On, 32 F.2d at 829 ("Perjury is malum in se and malum prohibitum."); Anonymous, 1 F. Cas. 1032, 1034 (C.C.D. Penn. 1804) (No. 475) ("Perjury is said to be malum in se.").
Once the advocates of the executive function theory adopted the exception for some private crimes, the theory lost a significant degree of consistency and vitality as an alternative interpretation of "high crimes and misdemeanors." Ultimately, Congress must decide what criminal acts are heinous or monstrous. Since the advocates failed to define the parameters of this exception, Congress is left with a vague notion that criminal acts committed outside the President's official authority must be very serious, hardly a meaningful improvement from the textual language. It is clear that the advocates want to exclude most crimes in favor of a "high order" of crime. However, this ambiguous test does more violence to the text of the Constitution than any of the other interpretations. There is no suggestion in any debate that Congress should engage in such a threshold ranking of criminal acts. If the text and intent of the Framers has any relevance, it would appear likely that the Framers envisioned either a complete bar to nonofficial criminal acts or a complete inclusion of such acts in possible impeachable offenses. If there was any general intent of distinguishing between orders of crime, there certainly would have been a modicum of evidence in the records of the Federal Convention or the state ratifying conventions. There is no such evidence.

The second question is even more difficult to overcome. Advocates of this theory appear to view murder and rape as facially impeachable offenses.\(^7^0\) Assuming rape was not emphasized for purely political purposes, rape was included as only one of two facially impeachable offenses due to something inherent in the offense.\(^7^1\) This is not an offense treated with the same severity in terms of sentencing, but it is a crime that reflects an evil state of mind. If this is due to the inherent scienter factor or a view to its inherent evil, attempted murder and attempted rape should also be included. Inchoate crimes are generally treated as serious as completed crimes.\(^7^2\) The mere fortuity of failure should not afford a President a political benefit in impeachment, since the inherent immorality and "monstrousness" remain the same. Likewise, conspiracy to commit these acts would appear to have the same evil intent with even greater intent aforethought. It would appear that all of these offenses would meet the implied test for the exception.

\(^7^0\) See House Hearing, supra note 1, at 101 (prepared statement of Professor Arthur M. Schlesinger, Jr.); Turley, Constitutional Mythologies, supra note 2, at 1798-99.

\(^7^1\) See supra note 25-30 and accompanying text.

Once one moves beyond the immediate variations of murder and rape, one must face other crimes such as child molestation. Certainly the sexual abuse of a child merits the same level of outrage as a heinous offense such as rape. Likewise, attempts or conspiracies to achieve such acts would appear equally heinous. Other violent attacks on individuals would also appear heinous. The extended range of this analysis leads through a long line of criminal acts, including physical assaults of different kinds. These are crimes that can “shock the conscience” either due to their injuries or their victims.

Once the violent crimes on individuals are exhausted, Congress would be left with other criminal acts in which death or serious bodily injury was likely to result from knowing acts. Congress would be faced with the question of whether the “heinous” category also depends on the number of injured parties or injuries. Thus, a President could be responsible for the release of fatal poisons or hazardous substances from a business enterprise into surface water. Under environmental laws, such crimes are called knowing endangerment offenses and could affect hundreds of individuals. It would appear just as heinous to release blistering agents into the waters of a community, injuring hundreds, as to attempt to murder a single person. Studies of public views of the seriousness of particular criminal acts have ranked environmental crimes that lead to deaths as more serious than fatal stabbings.\(^7\)

Congress would also have to consider criminal acts that are viewed as heinous despite the lack of physical injury. These include hate crimes in which people are tormented or harassed due to their racial, ethnic, or religious background. A President participating in hate crimes against particular groups would appear heinous. Certainly, the public has registered how heinous such acts are through heightened penalties.\(^4\) Likewise, some crimes, such as lying under oath, are viewed as not only violations of a criminal law, but a fundamental act of immorality. Like the desecration of a church, many citizens view an oath to God as the most significant moral act of an individual. For many, intentional lying after taking an oath to God is the very essence of heinous or monstrous conduct.\(^5\)

Every individual will come to the task of defining the essence of heinousness or monstrousness differently. Some will emphasize the scienter element while others may look at the injuries or the victims to

\(^7\) See Green, supra note 59, at 1564-66 (discussing MARVIN WOLFGANG ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NAT’L SURVEY OF CRIME SEVERITY vi (1985)).


\(^5\) See Green, supra note 59, at 1552, 1597-98.
meet the standard. One objective approach is to look to the level of punishment as a demonstration of the perceived heinousness of the act. This is unlikely to appeal to advocates of the executive function theory since a vast array of crimes are punished with lengthy jail terms. The *malum in se* rationale, therefore, leads to largely rhetorical rather than actual changes in the process of finding impeachable offenses. This approach certainly adds a level of defense for an accused President that is not found in either the constitutional text or the historical sources. It does nothing, however, to advance a coherent constitutional theory in a predictable or meaningful way.

III. THE INCAPACITY RATIONALE AND “HIGH CRIMES AND MISDEMEANORS” AS AN EVOLUTIONARY STANDARD

The emergence of the question of murder was inevitable in the face of any impeachment theory resting on purely official acts. The recognition of the need for an exception may reflect a common view that some acts are so serious that they make a continuation in office untenable. Once academics cross the Rubicon on this exception, however, the debate simply becomes one of degree of seriousness, heinousness, or monstrousness. A more viable theory can be found in the place of impeachment with the Madisonian system.

The incapacity rationale suggests that a President’s criminal or noncriminal misconduct can create a disabling question of legitimacy to govern. A President must have the legal and political capacity to lead a nation and, in moments of crisis, even demand the ultimate sacrifice from its citizens. A President continuing under allegations of criminal acts is particularly disabled in carrying out his duties of office and creates a fundamental instability in the system. These allegations will often trigger factional disputes over the President’s character and continuation in office. In an earlier work, the Author described the role of the impeachment process in forcing factional views on removal into an

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76. Ironically, while not tied to the *malum in se* rationale, another common method of judging the severity or gravity of a crime is to look at the actor rather than the victim. Courts routinely judge criminal acts by government officials, members of the bar, and other individuals of authority as more serious or heinous than the same act committed by average citizens. See Gloria Borger, *It’s the Law, Not the Lawyers*, U.S. News & World Rep., Mar. 27, 1995, at 33.

77. See *House Hearing*, supra note 1, at 273-75 (testimony of Professor Jonathan Turley).


79. See *Turley, A Little Bit Impeached*, supra note 14, at 25.
open and deliberative process. The genius of Madison was in his understanding of how factions had historically undermined prior systems of government and why addressing factions must be the "principal task" of the new government. That "principal task" fell most heavily on Congress which was designed to transform such factional interests into majoritarian compromises. While impeachments were not the focus of Madison's factional theories, they constitute the type of intense factional disputes that are best suited for adjudication in the bicameral legislature system. A Madisonian system allows potentially explosive factional views to be defused in a type of implosion directed to the core of the legislative process. Once in this process, such factional legislative interests evolve under the pressures of debate and deliberation. The impeachment process serves this same function by funneling serious questions of presidential misconduct through the House to the Senate for a trial and a vote of retention or removal. The House regulates this process by its interpretation of "high crimes and misdemeanors." If the House adopts too narrow a definition, it allows questions over presidential legitimacy to fester and possibly explode. If the House adopts too broad a definition, it risks a loss of executive independence and effective governance.

Allegations of criminal acts by a President constitute the most serious threat to the perceived legitimacy of a President to govern. As the Chief Executive committed by oath to the full and faithful execution of federal law, credible allegations that a President is a lawbreaker has

80. See Turley, Senate Trials, supra note 2, at 4, 119.
81. See The Federalist No. 10, at 59 (James Madison) (Jacob E. Cooke, 1961). These views are best known for their presentation in The Federalist Number 10, though Madison also expounded on these theories during the Constitutional Convention. There is renewed debate as to the importance of these views on other Framers, however. As this Article was going to print, an article on Madison was published by Professor Larry Kramer. See Larry Kramer, Madison's Audience, 112 HARV. L. REV. 611 (1999). Professor Kramer's article raised significant questions over the influence of Madison's theories contained in The Federalist Number 10. This article does not allow a full response but I wanted to acknowledge this major new work. I have some question as to the significance placed on the denial of such Madisonian concepts as the negative over state legislation in judging the influence of Madison's factional theories on the Convention. Id. at 649. Nevertheless, Professor Kramer has succeeded in triggering a long overdue debate over the contemporary as opposed to the historical influence of Madison's factional theories.
82. See Turley, Senate Trials, supra note 2.
84. See generally Turley, Congress As Grand Jury, supra note 2, at 781 (stating that the House of Representatives performs a vital role in presenting allegations of impeachment to the Senate).
85. See Turley, A Little Bit Impeached, supra note 14, at 25.
deep and negative consequences for the entire Executive Branch.\textsuperscript{66} It is not the President but the faith in the system of laws that sustains a Madisonian Democracy. The view of a lawbreaker imposing legal penalties on other citizens is a fundamental affront to those values. Such allegations tend to corrode and ultimately explode within a political system if left unaddressed. Impeachment is the political process by which those questions can be heard and resolved.

The general impeachment standard reflects the need to allow each generation to define and defend values of conduct in its officials. The Framers could have easily defined a more concrete impeachment standard or simply excluded some areas from its scope, including nonofficial acts. Instead, the Framers detailed aspects of the process of impeachment while leaving the standard itself relatively vague. Assuming that this was not a simple act of negligence or legislative convenience, the omission of a more specific standard could be easily justified. The Framers must have been aware that there are countless acts that could lead to impeachment hearings. More importantly, each generation faces new challenges and new realities. The impeachment standard, therefore, must be evolutionary. In the Eighteenth Century, the rape of a nonprivileged or noble woman was not given the same priority in prosecution as it is today. Nevertheless, the advocates of the executive function theory correctly view rape as facially heinous for the purposes of impeachment. Each generation will view things differently in terms of gravity or immorality, often in stark contrast to the contemporary views of the Framers. Congress serves as a cipher for public norms on the seriousness of crimes or misconduct.\textsuperscript{67} In this way, a President openly engaging in hate crimes would not have been an impeachable offense in the view

\textsuperscript{66} The allegations of rape will forever be a matter of speculation and caused an immediate political response. See Larry King Live: Rape Accusation Launches Debate on President Clinton's Morality (CNN television broadcast Feb. 25, 1999) (transcript on file with the Hofstra Law Review) (showing tape of a large number of protesters chanting: “Two, four, six, eight, how many women has he raped?” in response to the Broaddrick allegation).

of most Framers in the Eighteenth Century but, hopefully, it would be viewed as impeachable today.

For the House of Representatives, the question of impeachment should be informed by the status of the underlying conduct as criminal, regardless of its connection to official duties. If the conduct is viewed as sufficiently serious to deprive average citizens of their liberty, the commission of such conduct by the Chief Executive should normally trigger impeachment proceedings. It is not the executive functions but the executive capacity that is at issue in an impeachment. A President must be perceived to have the legal and moral capacity to lead a nation of laws. If the President is a presumed lawbreaker, he continues in office with a dangerous disability that can only be removed by a vote of retention by the Senate.

The Author has suggested a simple presumption in determining whether conduct amounts to high crimes or misdemeanors. In cases of noncriminal conduct, there should be a presumption against impeachment that can be overcome if the conduct is so egregious as to warrant a trial. Thus, adultery would not be an adequate ground for impeachment nor embarrassing licentiousness in a President. However, a pronounced pattern of public racism or anti-Semitic conduct could rebut this presumption. Conversely, in cases of criminal conduct, there should be a presumption in favor of impeachment that can be overcome if the crime is viewed as minor. Thus, while drunk driving is a crime, it would not be viewed as adequate in itself to justify impeachment. In this way, a President can rebut the presumption by showing that, even if proven true in a court of law, the criminal act is viewed by society as being of a lesser order.


89. See Turley, Congress As Grand Jury, supra note 2, at 759.

90. The difference between this "egregious" element and the "heinous" exception is the underlying context for the decision. The objection to the executive function theory is not that there is a discretionary element to the decision to impeach. The use of an egregious standard for noncriminal cases is merely to allow for the possibility of impeachment where no criminal conduct is found by Congress. There will always be debate over what constitutes impeachable acts but the executive function theory would create a presumption against impeachment for the vast majority of criminal acts. The Author has suggested that the presumption in cases involving criminal acts should be in favor of referral, the inverse of the executive function theory. See id. at 760-61.

91. See id. at 761.

92. During the hearing, Professor Tribe chose to rebut a theory, attributed to the Author, that was both extreme and absurd. See House Hearing, supra note 1, at 282. Specifically, Professor Tribe objected to the argument, made by none of the witnesses including the Author, that the President is automatically impeachable for committing a crime. See id. at 283. Such an argument was specifically refuted in the Author's testimony and writing. See id. at 300; Turley, Congress As
Obviously, there remains a discretionary element in this distinction, but these presumptions reflect a preference to submit serious questions of criminality to a political vote in the Senate. Senate trials are often misconstrued as a process of removal. They are in fact a process of removal or retention. They address corrosive questions of legitimacy by a vote of the public through their elected representatives. For this process to work, the House of Representatives must submit all substantive questions of criminality that are not viewed as inherently minor. This obviously is quite different from the role of the exception in the executive function theory. The exception was viewed as barring most referrals of private crimes to the Senate. Under the presumptions, any serious criminal conduct should be submitted to the Senate for a political adjudication.

While such cases are dismissed as "barely imaginable," the allegations surrounding President Clinton offer an obvious point of analysis. Most advocates of the executive function theory appear to accept that rape would be an offense sufficiently heinous to qualify as a "high

Grand Jury, supra note 2, at 737. Rather, the argument raised in the hearing was that criminal acts by a President should trigger a formal inquiry by the House, not an automatic impeachment. See House Hearing, supra note 1, at 267-68. The Author repeatedly emphasized this point to clearly distinguish between criminal acts and to avoid this obvious strawman argument:

[T]here are criminal acts which may not be viewed as sufficient to warrant submission to the Senate. A President may commit some crimes, like drunk driving, for which impeachment is not appropriate. The House does have a discretionary role in defining high crimes and misdemeanors to exclude minor criminal infractions which do not raise legitimacy concerns.

Id. at 268 (testimony of Professor Turley). While Professor Tribe certainly succeeded in defeating the bizarre argument that a President should be impeached automatically for any crime, it was not an argument offered by any academic in the crisis and would not be an argument advanced by a serious academic in the field.

93. See Turley, Senate Trials, supra note 2, at 4.

94. See House Hearing, supra note 1, at 253 ("[T]he Senate is the place in which a President cannot just simply be removed, but regain legitimacy."); Turley, Senate Trials, supra note 2, at 143.

95. This is a role that Senators historically do not relish since the public must judge both their conduct as jurors as well as the conduct of the accused. See Turley, Presidential Defendant, supra note 13, at 39; Jonathan Turley, Senators Prefer Politics to Their Role as Jurors, Nat'L J., Jan. 25, 1999, at A27.

96. There is a common misconception that, where there is no likelihood of conviction, the point of impeachment is lost. See Turley, Congress As Grand Jury, supra note 2, at 780-81. However, the trial has a political value distinct from removal. See Turley, Senate Trials, supra note 2, at 108. Otherwise, impeachment only becomes a process for Presidents who are both guilty and unpopular. See Jonathan Turley, Is He Too Popular to Impeach?, L.A. TIMES, Dec. 9, 1998, at A15.

97. See Sunstein, supra note 30, at 293.
crime and misdemeanor" despite a lack of nexus to official conduct. Presi-
dent Clinton was accused of a rape after his acquittal in the Sen-
ate. Despite the fact that the statute of limitations had run, there is no
reason why the impossibility of a criminal penalty should alter the po-
litical question for impeachment. If a President is viewed to be a rapist
on the available evidence, he would presumably be subject to removal
even under the qualified executive function theory. In reality, President
Clinton was accused of a wide range of seemingly compulsive sexual
behaviors from telephone sex with interns to sexual harassment of sub-
ordinate employees to physical assault. Such conduct, if supported by
evidence, could reveal a type of "atypical paraphilia" or compulsion.
As Professor Stephen Presser has noted, these allegations and support-
ing witnesses should force the public to "face the possibility that the
president is a serial sexual predator . . . [with] a pattern of sexual ag-
gressiveness toward women." Professor Presser's point is compelling:
If proven to the satisfaction of the Senate, this pattern should easily war-
rant removal under any interpretation of "high crimes and misde-
meanors." Yet, despite witnesses who alleged that they saw one alleged vic-
tim bruised and frantic after a sexual assault, the House made no move
to investigate, nor did advocates of the executive function theory call
for an inquiry based on a cognizable impeachable allegation. These

98. See Turley, Congress As Grand Jury, supra note 2, at 754.
99. See Turley, "From Pillar to Post", supra note 2; Presser, supra note 21, at 13.
100. Professor Susan Estrich disagrees with this point. Estrich has noted that she "believe[s]
that rape is a serious crime . . . [b]ut I don't think we should be convicting the president 21 years
after the fact." Meet the Press (NBC television broadcast, Feb. 28, 1999) (transcript on file with
the Hofstra Law Review) [hereinafter Meet the Press] (statement of Professor Susan Estrich). It
remains unclear why it would matter how long ago a President raped a woman if the evidence of
the crime was viewed as compelling. The point of impeachment is to determine the strength of the
evidence. Presumably, Professor Estrich is not suggesting that a President can claim the status of a
"reformed rapist" by the simple passage of time. If so, Congress should decide the credibility of
the claim. Otherwise, the only objection is a question of evidence due to the delay. Broaddrick,
however, came forward with a case not dissimilar from rape cases tried to verdict in this country.
See Turley, "From Pillar to Post", supra note 2.

101. See supra note 56.
102. See supra notes 52-54, 56 and accompanying text.
103. Presser, supra note 21, at 13.
104. See Turley, "From Pillar to Post", supra note 2 (describing witnesses supporting the
allegations of Juanita Broaddrick that she was raped by then Arkansas Attorney General Bill
Clinton).
105. The case of "Jane Doe Number 5" was viewed as extrinsic to the specific allegations
made by Independent Counsel Kenneth Starr in his referral to Congress. Marianne Means, A Scan-
dal Not at the Point of Critical Mass, BALT. SUN, Feb. 25, 1999, at 17A; Romano & Baker, supra
note 56, at A1; The Case of Jane Doe, NEWSDAY, Feb. 26, 1999, at A46. But see Meet the Press,
supra note 100 (statement of Patricia Ireland, president of the National Organization for Women)
(insisting that the public has a right to hear Broaddrick and the other women making allegations as
allegations, supported by witnesses and circumstantial evidence of hotel records and other sources, deserved an inquiry, at a minimum, by the House.106

The rape allegation against President Clinton highlights the need for impeachment to reach nonofficial acts. The inclusion of rape as an impeachable offense by executive function theorists ties the impeachment analysis to the nature of the conduct itself, not its connection to any official conduct. While misconduct in executive functions may be more threatening in some respects to the general population, the reason for the exception of murder and rape is the realization that private conduct can deprive a President of legitimacy to govern. No one would suggest that a rapist or serial abuser should hold the highest office in the land. Faced with credible allegations of such conduct, a Senate trial is the appropriate forum to review and to resolve such questions. Obviously, many people would not be satisfied with acquittal or conviction. However, the mere vote of renewal or removal constitutes a vertical political response to factional views of the public. If a President is retained in the face of such evidence, he regains a political legitimacy lost in the controversy. Regardless of the view of any individual citizen, the President was retained despite the allegations in a vote of the people through their elected representatives.

IV. CONCLUSION

Any legal theory is often defined or tested at its extremes. This may explain the need for advocates of the executive function theory to accommodate murder in fashioning a definition of "high crimes and misdemeanors." In this process, however, the law professors advanced a qualified executive function theory that was inherently unstable. Any part of an impeachment process).

106. Congress was supported in its decision not to investigate the account of Juanita Broaddrick by the decision of the Independent Counsel not to include this allegation as part of the possible basis for impeachment in his referred charges. The FBI had found the evidence to be "inconclusive" and Starr included the allegations and FBI material as part of the sealed record. See Howard Kurtz, Clinton Accuser Says She Thought No One Would Believe Her Account, WASH. POST, Feb. 25, 1999, at A15; Amy Goldstein, Democrats, GOP Clash Over FBI Documents, WASH. POST, Dec. 19, 1998, at A36. Congress was free to expand its investigation despite the scope of the referral but the House Judiciary Committee chose not to investigate. Nevertheless, Broaddrick's allegations remained part of the sealed record as "Jane Doe Number 5" that went to the full House for the impeachment decision. See Goldstein, supra, at A36. The allegations were viewed as influential for some of the members in voting to impeach. See Christopher Matthews, Late-Night Session on 'Jane Doe No. 5' Sealed Impeachment, SEATTLE POST-INTELLIGENCER, Feb. 25, 1999 ("Participants on both sides agree it was the vivid account of Broaddrick's allegations . . . that turned enough minds to make a difference.").
basis for the exception of murder or rape reduced the executive function factor to a mere presumption that could be overcome by the gravity of the private crime. While the exception offered obvious political advantages in addressing issues of murder or rape, this political advantage was gained at a prohibitive cost for the consistency and viability of the theory.

The impeachment standard is about conduct and not categories of conduct. Impeachment allows the nation to resolve lingering questions of legitimacy created by credible allegations of crime and other serious misconduct in a President. This process necessarily requires a social judgment on the relevance of the conduct to the legitimacy of the Chief Executive. However, the categorical division of conduct into public or private areas is a mere artificiality in a process designed to deal with the perceived legitimacy of a President to govern. Citizens question this authority when conduct—public or private—suggests that a President is a threat or abuser of the system of laws that he must enforce and, in the best of times, personify.

The great irony of this debate over “heinous” acts is that it was concluded in Congress shortly before a serious rape allegation was raised against President Clinton. Neither party had the stomach for a second impeachment fight even though rape was universally embraced as a clearly impeachable act. Congress was aware that a woman had come forward with contemporary witnesses but chose not to inquire into the allegations to determine if there was evidence that the President of the United States is a rapist.\footnote{See Turley, “From Pillar to Post”, supra note 2 (noting that the evidence in the Broadrick incident was comparatively stronger than many rape cases routinely tried in the state system).} Only silence remained—and lingering questions.
APPENDIX A

HISTORIANS IN DEFENSE OF THE CONSTITUTION

As historians as well as citizens, we deplore the present drive to impeach the president. We believe that this drive, if successful, will have the most serious implications for our constitutional order.

Under our Constitution, impeachment of the President is a grave and momentous step. The Framers explicitly reserved that step for high crimes and misdemeanors in the exercise of executive power. Impeachment for anything else would, according to James Madison, leave the President to serve "during pleasure of the Senate," thereby mangling the system of checks and balances that is our chief safeguard against abuses of public power.

Although we do not condone President Clinton's private behavior or his subsequent attempts to deceive, the current charges against him depart from what the Framers saw as grounds for impeachment. The vote of the House of Representatives to conduct an open-ended inquiry creates a novel, all-purpose search for any offense by which to remove a President from office.

The theory of impeachment underlying these efforts is unprecedented in our history. The new processes are extremely ominous for the future of our political institutions. If carried forward, they will leave the Presidency permanently disfigured and diminished, at the mercy as never before of the caprices of any Congress. The Presidency, historically the center of leadership during our great national ordeals, will be crippled in meeting the inevitable challenges of the future.

We face a choice between preserving or undermining our Constitution. Do we want to establish a precedent for the future harassment of presidents and to tie up our government with a protracted national agony of search and accusation? Or do we want to protect the Constitution and get back to the public business?

We urge you, whether you are a Republican, a Democrat, or an Independent, to oppose the dangerous new theory of impeachment, and to demand the restoration of the normal operations of our federal government.

The following historians signed a statement deploring the House's decision to conduct an impeachment inquiry.

Co-Sponsors: Arthur M. Schlesinger Jr., City University of New York
Sean Wilentz, Princeton University
C. Vann Woodward, Yale University
October 16, 1998

The Honorable Newt Gingrich
Speaker
United States House of Representatives

Dear Mr. Speaker:

Did President Clinton commit "high Crimes and Misdemeanors" warranting impeachment under the Constitution? We, the undersigned professors of law, believe that the misconduct alleged in the report of the Independent Counsel, and in the statement of Investigative Counsel David Schippers, does not cross that threshold.

We write neither as Democrats nor as Republicans. Some of us believe that the President has acted disgracefully, some that the Independent Counsel has. This letter has nothing to do with any such judgments. Rather, it expresses the one judgment on which we all agree: that the allegations detailed in the Independent Counsel’s referral and summarized in Counsel Schippers’s statement do not justify presidential impeachment under the Constitution.

No existing judicial precedents bind Congress’s determination of the meaning of “high Crimes and Misdemeanors.” But it is clear that Members of Congress would violate their constitutional responsibilities if they sought to impeach and remove the President for misconduct, even criminal misconduct, that fell short of the high constitutional standard required for impeachment.

The President’s independence from Congress is fundamental to the American structure of government. It is essential to the separation of powers. It is essential to the President’s ability to discharge such constitutional duties as vetoing legislation that he considers contrary to the nation’s interests. And it is essential to governance whenever the White House belongs to a party different from that which controls the Capitol.

The lower the threshold for impeachment, the weaker the President. If the President could be removed for any conduct of which Congress disapproved, this fundamental element of our democracy—the President’s independence from Congress—would be destroyed. It is not enough, therefore, that Congress strongly disapprove of the President’s conduct. Under the Constitution, the President cannot be impeached unless he has committed “Treason, Bribery, or other high Crimes and Misdemeanors.”

Some of the charges raised against the President fall so far short of this high standard that they strain good sense: for example, the charge that the President repeatedly declined to testify voluntarily or pressed a debatable privilege claim that was later judicially rejected. Such litigation “offenses” are not remotely impeachable. With respect, however, to other allegations, careful consideration must be given to the kind of misconduct that renders a President constitutionally unfit to remain in office.

Neither history nor legal definitions provide a precise list of high crimes and misdemeanors. Reasonable people have differed in interpreting these words. We believe that the proper interpretation of the Impeachment Clause must begin by recognizing treason and bribery as core or paradigmatic instances, from which the meaning of “other high Crimes and Misdemeanors” is to be extrapolated. The constitutional standard for impeachment would be very different if different offenses had been specified. The clause does not read, “Treason, Felony, or other Crime” (as does Article IV, Section 2 of the Constitution), so that any violation of a criminal statute would be impeachable. Nor does it read, “Arson, Larceny, or other high Crimes and Misdemeanors,” implying that any serious crime, of whatever nature, would be impeachable. Nor does it read, “Adultery, Fornication, or other high Crimes and Misdemeanors,” implying that any conduct deemed to reveal serious moral lapses might be an impeachable offense.

When a President commits treason, he exercises his executive powers, or uses information obtained by virtue of his executive powers, deliberately to aid an enemy. When a President is bribed, he exercises or offers to exercise his executive powers in exchange for corrupt gain. Both acts involve the criminal exercise of presidential powers, converting those awful powers into an instrument either of enemy interests or of purely personal gain. We believe that the critical, distinctive feature of treason and bribery is grossly derelict exercise of official power (or, in the case of bribery to obtain or retain office, gross criminality in the
pursuit of official power). Non-indictable conduct might rise to this level.

For example, a President might be properly impeached if, as a result of drunkenness, he recklessly and repeatedly misused executive authority. Much of the misconduct of which the President is accused does not involve the exercise of executive powers at all. If the President committed perjury regarding his sexual conduct, this perjury involved no exercise of presidential power as such. If he concealed evidence, this misdeed too involved no exercise of executive authority. By contrast, if he sought wrongfully to place someone in a job at the Pentagon, or lied to subordinates hoping they would repeat his false statements, these acts could have involved a wrongful use of presidential influence, but we cannot believe that the President's alleged conduct of this nature amounts to the grossly derelict exercise of executive power sufficient for impeachment.

Perjury and obstructing justice can without doubt be impeachable offenses. A President who corruptly used the Federal Bureau of Investigation to obstruct an investigation would have criminally exercised his presidential powers. Moreover, covering up a crime furthers or aids the underlying crime. Thus a President who committed perjury to cover up his subordinates' criminal exercise of executive authority would also have committed an impeachable offense. But making false statements about sexual improprieties is not a sufficient constitutional basis to justify the trial and removal from office of the President of the United States. It goes without saying that lying under oath is a very serious offense. But even if the House of Representatives had the constitutional authority to impeach for any instance of perjury or obstruction of justice, a responsible House would not exercise this awesome power on the facts alleged in this case. The House's power to impeach, like a prosecutor's power to indict, is discretionary. This power must be exercised not for partisan advantage, but only when circumstances genuinely justify the enormous price the nation will pay in governance and stature if its President is put through a long, public, voyeuristic trial. The American people understand this price. They demonstrate the political wisdom that has held the Constitution in place for two centuries when, even after the publication of Mr. Starr's report, with all its extraordinary revelations, they oppose impeachment for the offenses alleged therein.

We do not say that a "private" crime could never be so heinous as to warrant impeachment. Congress might responsibly take the position that an individual who by the law of the land cannot be permitted to remain at large, need not be permitted to remain President. But if certain
crimes such as murder warrant removal of a President from office because of their unspeakable heinousness, the offenses alleged in the Independent Counsel’s report or the Investigative Counsel’s statement are not among them. Short of heinous criminality, impeachment demands convincing evidence of grossly derelict exercise of official authority. In our judgment, Mr. Starr’s report contains no such evidence.