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## THE BACKGROUND AND HISTORY OF IMPEACHMENT

I thank the Committee for the opportunity to set forth my understanding as an American historian of the nature and role of impeachment under the American Constitution. The idea of impeachment is part of our legal inheritance from Great Britain, where it had been used to remove public officials at least since the year 1386. Adapting what Alexander Hamilton called the British "model", the Framers of the Constitution designated as grounds for removal from office "Treason, Bribery, or other high Crimes and Misdemeanors."

This formulation suggests that the "other high crimes and misdemeanors" must be on the same level and of the same quality as treason and bribery. They must, as George Mason said in the Constitutional Convention, be "great crimes," "great and dangerous offenses," "attempts to subvert the Constitution." They must, said Hamilton in the 65th Federalist, be offenses that proceed

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 society itself.

Making impeachment too easy, said James Madison, would be to make the Presidential term "equivalent to a tenure during the pleasure of the Senate" and would therefore undermine the separation of powers. According to James Wilson, the co-father with Madison of the Constitution, "Impeachments are confined to political characters, to

political crimes and misdemeanors." According to Justice Story, impeachment was intended "to secure the state against gross official misdemeanors." The term "high misdemeanor," inherited from the British tradition of impeachment, referred to such offenses as treason; it is not to be confused with "misdemeanor" in its present-day usage as a petty offense. The evidence is conclusive that the Founding Fathers saw impeachment as a remedy for grave and momentous offenses against the Constitution, for "great injuries" to the state, for formidable abuses of official authority.

The question we confront today is whether it is a good idea to lower the bar to impeachment. The charges levied against the President by the Independent Counsel plainly do not rise to the level of treason and bribery. They do not apply to acts committed by a President in his role of public official. They arise from instances of private misbehavior. All the Independent Counsel's charges thus far derive entirely from a President's lies about his own sex life. His attempts to hide personal misbehavior are certainly disgraceful; but if they are to be deemed impeachable, then we reject the standards laid down by the Framers in the Constitution and trivialize the process of impeachment.

Lying to the public is not an unknown practice for Presidents. Recall President Reagan's lies during the Iran-contra imbroglio. On 6 November 1986 President Reagan said that the story about trading arms for hostages "has no foundation." A week later he called the story "utterly false" and added, "We did not -- repeat -- did not trade weapons or anything else for hostages." President Reagan's falsehoods had to do with his official duties, not with his private behavior,

and were a gross dereliction of his executive responsibility. But I recall no congressional cry for impeachment.

Lies about private behavior told under oath, even in a civil case subsequently dismissed, certainly heighten the Presidential offense. But they are not political offenses against the state. Thus in 1974 the House Judiciary Committee, confronted by convincing evidence that President Nixon had connived at the backdating of documents in the interests of tax fraud, dropped the charge on the ground that such personal misconduct did not involve official actions or abuse of executive power and thus was not an impeachable offense.

As Professor Charles Black of the Yale Law School asked in his book Impeachment: suppose a President violated the Mann Act by transporting a woman across a state line for, in the words of the act, an "immoral purpose,"

Would it not be preposterous to think that any of this is what the Framers meant when they referred to "Treason, Bribery, and other high Crimes and Misdemeanors," or that any sensible constitutional plan would make a president removable on such grounds?

This is not to say that all instances of private misconduct by Presidents may not rise to the constitutional level. If a President were to engage in murder, in rape, in child molestation, that would, as Professor Black suggests, "so stain a president as to make his continuance in office dangerous to public order." Monstrous crimes acquire public significance. But lying about one's sex life is not a monstrous crime. Most people have lied about their sex lives at one time or another. We lie to protect ourselves, our spouses, our children, our lovers. Gentlemen always lie about their sex lives.

Only a cad tells the truth about his love affairs. Many people feel that questions no one has a right to ask do not call for truthful answers.

The Framers further believed that, if the impeachment process is to acquire popular legitimacy, the bill of particulars must be seen as impeachable by broad sections of the electorate. The charges must be so grave and the evidence for them so weighty that they persuade members of both parties that removal must be considered. The Framers were deeply fearful of partisan manipulation of the impeachment process. They abhorred what Hamilton called "the demon of faction." Charles Pinckney in the Constitutional Convention even questioned the proposal of the Senate as the court of impeachment, warning that Congress might "under the influence of heat and faction, throw him [the President] out of office." The domination of the impeachment process by "faction" would in the view of the Framers deny the process legitimacy.

The current impeachment proceedings, judging by the strictly partisan vote in the House of Representatives, fails the legitimacy test. The results of last Tuesday's midterm election confirm the drastic failure of the impeachment drive in its quest for popular legitimacy.

One hesitates to speculate about the reasons for this rebuff to impeachment. Voters may perhaps have a visceral understanding that the lowering of the bar to impeachment creates a novel, indeed revolutionary, theory of impeachment -- a theory that would send us on an adventure with ominous implications for the separation of

powers that the Constitution established as the basis of our political order.

Let us recall the impeachment of President Andrew Johnson. The basic cause was disagreement over the policies of Reconstruction. On this question scholars today would generally say that Johnson was wrong and his Radical Republican opponents were right. But the constitutional question was whether the House could impeach a President for honest disagreements over policy. When Johnson fired his Secretary of War in violation of a Tenure of Office Act passed by Congress (later to be declared unconstitutional by the Supreme Court), the House seized on this as a pretext for impeachment. Congress acted with impressive haste. The House voted impeachment on 3 March 1868 and sent the articles of impeachment to the Senate on 5 March. The court of impeachment was convened on 13 March. The trial began on 30 March. Eighty-one days after the House voted to impeach, the Senate acquitted Andrew Johnson by a single vote.

The President may have been rescued in 1868, but even the failed impeachment had serious consequences for the Presidency. As Senator James Dixon of Connecticut put it,

Whether Andrew Johnson should be removed from office, justly or unjustly, was comparatively of little consequence -- but whether our government should be Mexicanized, and an example sent which would surely, in the end, utterly overthrow our institutions, was a matter of vast consequence.

Senator Dixon had a point. The aftermath bound and confined the Presidency for the rest of the century. A brilliant young political scientist at Johns Hopkins, Woodrow Wilson, concluded that Congress had become "the central and predominant power of the system" and

called his influential book of 1885 Congressional Government.

Had the impeachment drive succeeded, the constitutional separation of powers would have been radically altered, and the alteration would have been protected and maintained by the lowered threshold of impeachment. The presidential system might have become a quasi-parliamentary regime, in which the impeachment process would have served as the American equivalent of the vote of confidence. The Presidency would have been permanently weakened and our polity permanently changed.

James G Blaine, a formidable Republican leader who in 1869 became Speaker of the House, voted in 1868 for impeachment; but, reflecting twenty years after, Blaine wrote that the success of the impeachment drive "would have resulted in greater injury to free institutions than Andrew Johnson in his utmost endeavor was able to inflict." Johnson's acquittal made it more certain than ever that, as the Framers had wished, impeachment would be used against Presidents only in the case of major offenses against the state and as a weapon of last resort. It is this theory of impeachment that is under challenge today by those who want to make it easy for Congress to get rid of Presidents.

The republic could afford a period of congressional government in the 19th century when the United States was a marginal actor on the world stage. Today the United States is the world's only superpower. The American government is irrevocably involved in international affairs. It plays an essential role in the search for peace in Ireland, in the former Yugoslavia, in the Middle East, in South Asia.

It seeks to contain the consequences of economic collapse in East Asia, seeks to prevent the dissemination and testing of nuclear weapons, seeks to stop the plagues of terrorism, drugs, poverty and disease. In such a time we cannot afford the enfeebled and intimidated Presidency the revolutionary theory of impeachment would inevitably produce.

The question remains whether there is not some way by which the feeling of national regret and disapproval over a President's personal behavior can be registered. Such proposals as fining a President or requiring him to appear on the floor of the House for a public (verbal) stoning are ludicrous ideas that would make our great republic the world's laughing stock. You might as well demand that the President wear a scarlet letter.

A resolution of censure is a more plausible suggestion. As a practical way to terminate this wretched affair, censure, divested of any hint of a bill of attainder, has evident appeal. It may be the best way out of a national embarrassment. But I would caution against any tendency to make censure a precedent or to regard it as a routine congressional weapon.

Censure has been used against Presidents once before. On 28 March 1834 the Senate voted to censure President Andrew Jackson on the ground that, in withdrawing federal funds from the Bank of the United States, he had "assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both."

Jackson responded on 15 April with a celebrated "Protest to the Senate." If the Senate really believed he had committed "the high

crime of violating the laws and Constitution of my country," then, Jackson said, the proper remedy was impeachment. Senatorial censure was "wholly unauthorized by the Constitution, and in derogation of its entire spirit.... In no part of that instrument is any such power conferred on either branch of the Legislature." Jackson emphasized "the pernicious consequences which would inevitably flow from ... the practice by the Senate of the unconstitutional power of arraigning and censuring the official conduct of the Executive." He rejected censure "as unauthorized by the Constitution, contrary to its spirit and to several of its express provisions, subversive of that distribution of powers of government which it has ordained and established." The basic problem with the proposal of a plea bargain in the form of a negotiated censure resolution is that Presidential acceptance of censure would hand one or both houses of Congress a new weapon to threaten and intimidate Presidents.

One must hope that any President guilty of personal misconduct falling below the level of impeachable offenses will so rebuke and castigate himself, and feel such shame in the eyes of his family, in the eyes of his friends and supporters and in the eyes of history, that he will punish himself for his own self-indulgence, callousness and stupidity.

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