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ON IMPEACHING PRESIDENTS

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The constitutional tragedy—or was it farce?—that the nation went through at the end of the millennium was literally unprecedented. Never before had a duly elected President been impeached by the House and tried by the Senate. (Andrew Johnson, it must be recalled, became President by dint of one man's bullet, rather than all men's ballots.) These momentous events raised profound constitutional questions for politicians, journalists, and, ultimately, ordinary Americans in whose name our government governs.

As a student of the Constitution, I had views about many of the most interesting constitutional questions facing the republic. In various places, I tried to make those views known. What follows are slightly revised versions of pop essays that I penned and a public lecture that I gave as events were unfolding. To remind readers that these remarks were offered in real time—before and during the hurly-burly, and not after all the dust had settled—I have chosen to retain present verb tenses wherever appropriate.

In general, the material below attempts to address the following questions. First, what was the Framers' general framework for presidential impeachment? Second, and relatedly, how did the independent

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counsel statute mesh with, or gum up, the Framers' impeachment machinery? Third, exactly how should modern Americans understand the freighted phrase, "high crimes and misdemeanors?" In particular, should this phrase be applied to Presidents in exactly the same way that it should be applied to, say, judges or cabinet officers? Fourth, what role should public opinion play in the impeachment process? Finally, how should some of impeachment's more technical procedural issues be handled?

I. THE GENERAL IMPEACHMENT FRAMEWORK¹

America delights in her inventions. From bifocals at the Founding to light bulbs, flying machines, and computers in the modern era, we constantly quest for the holy grail of the better mousetrap. America's constitutional lawyers over the centuries have also proved remarkably inventive, crafting clever legal contraptions to solve recurring problems. Since Watergate, the problem of wayward Presidents has grabbed our imagination, and creative constitutional lawyers have responded with a new invention: an independent counsel, appointed by judges and insulated from executive branch supervision. But the theoretical possibility of a President gone bad did not suddenly arise with the reelection of Richard Nixon. Our inventive Founders foresaw the problem, and forged their own clever machinery to solve it: impeachment. And this machinery, I suggest, is a better mousetrap. Once we understand how it was engineered to work, we will see more clearly some of the design flaws of the modern independent counsel statute.

Presidential impeachment features a brilliant mix of temporary immunity and ultimate accountability. A sitting President is immune from ordinary criminal prosecution, but once impeached by the House and convicted by the Senate, or otherwise out of office, he may be punished just like everyone else. Granted, the Constitution does not say this in so many words, and all other impeachable officers—from Vice-Presidents and cabinet secretaries to judges and justices—may be indicted, tried, convicted and imprisoned while still in office. But history and structure make clear what the constitutional text leaves open. In two different Federalist Papers (Numbers 69 and 77), Publius suggested that criminal prosecution of the President could not occur until *after* he left office, a point stressed in the First Congress by Senator (and later Chief Justice) Oliver Ellsworth and Vice-President (and later President) John

1. This section derives from an essay published in the September, 1998 issue of *The American Lawyer*. See Akhil Reed Amar, *In Praise of Impeachment*, AM. LAW., Sept. 1998, at 92.

Adams. Structurally, this makes good sense. Unlike other national officers, the President is vested with the power of an entire branch of government. He is not fungible in the way that judges and cabinet officers are, and his duties are far more continuous and weighty than those of the Vice-President. Suppose a President is actually innocent of wrongdoing, and a given criminal prosecution is simply designed to stop him from doing what he was elected to do. Such a prosecution, even if unsuccessful, could effectively (and perhaps literally, given pretrial detention) incapacitate him and thereby nullify a national election—it is a kind of temporary assassination, a hijacking and kidnapping of the President. Could some clever state prosecutor from South Carolina have indicted Abraham Lincoln in the spring of 1861, demanding that he stand trial in Charleston on some trumped-up charge? Surely not. Thus, a sitting President may not be trifled with in this way—but *Congress* may boot him out if *they* decide that he has indeed committed offenses that make him unfit to govern. After he leaves office, whether via impeachment, resignation, or the natural expiration of his term, he can be tried like any other citizen. If the charges are sound, he will be held to account: no man is above the law. If the charges are instead trumped up, they can be quashed beforehand or overturned afterwards by judges (as is true for all other citizens). The ex-President would be inconvenienced by all of this, but he could be compensated by Congress. Most important, the American people would not be denied one millisecond of his tenure in office unless and until Congress made that awesome decision, via the impeachment process.²

2. The 1997 Supreme Court ruling in the Paula Jones case might seem to squint against this reading of the Constitution's structure and history: the *Jones* Court denied that a sitting President should enjoy temporary immunity from a civil lawsuit. But criminal prosecution is hugely different, constitutionally. The *Jones* Court stressed the lack of historical support for civil immunity, but there is clear historical support for temporary immunity from criminal prosecution. In *Jones*, no question arose about who could initiate the lawsuit—in America, any plaintiff can sue any defendant. But not every citizen can indict; who can indict the President and oblige him to stand trial? A county or state prosecutor? Even in civil cases, *Jones* refused to rule on whether a sitting President could be made to answer in state court, emphasizing that the case at hand would be carefully managed by a federal Article III judge nominated by the nation's President and confirmed by the nation's Senate. If state prosecution is impermissible—recall Lincoln in 1861—how about federal prosecution? Here the problem is not one of federalism but of separation of powers. How can an “inferior” executive officer—independent counsel Kenneth Starr, who was neither appointed by the President, nor confirmed by the Senate—undermine and overrule his constitutional superior, the *chief* executive? (This issue did not arise in the 1988 *Morrison v. Olson* case upholding the independent counsel statute, since the investigation in that case targeted a lower level official, not the President himself.) Doesn't even a federal grand jury pose some of the same risks as a state prosecution, given that any given grand jury will come from a single city or county—the “part” and not the “whole” in the language of *McCulloch v. Maryland*? Unlike Jones' civil case, no fed-

Here, then, are a few of the most impressive features of the Framers' mousetrap. First, impeachment is *national*. The President uniquely represents the entire American people, and the decision to arrest his performance in office can only be made by representatives of the country as a whole. A President may need to pursue policies that are nationally sound, but regionally unpopular. Thus, the true grand and petit juries eligible to judge a sitting President must come not from one city or county but from all cities and counties. That grand jury is the House of Representatives, and the formal name of its bill of indictment is a bill of impeachment. That petit jury is the Senate, and in impeachment it sits as a great national court, representing the vast geographic diversity of America. A related advantage is that it sits in the capital, thus minimizing any geographic inconvenience to a sitting President. To allow regular federal grand juries into this picture, whether in Charleston or Little Rock, would in the words of President Thomas Jefferson "bandy [the President] from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties."³

Next, impeachment is *public and accountable*. Ordinary grand juries are subject to strict secrecy rules, but these may tend to break down where something as awesome and interesting as an investigation of the President is afoot. The impeachment process is more flexible—presumptively done in public, as is the rest of congressional business, but allowing secrecy where appropriate. If independent counsels or ordinary grand juries are too hard on Presidents—or too soft—there is no recourse for the American people. But if Congress is too hard or soft, they will pay at election time.

A related point: impeachment is sensibly *political as well as legal*. Politicians judge other politicians and impose political punishments—removal from office and disqualification from future office-holding. The standard of conduct is not narrowly legal but also political: what counts as a "high crime and misdemeanor" cannot be decided simply by

eral judge representing the people of the nation monitors grand jury proceedings day by day and in person. Consider next issues of enforcement and remedy. Had President Clinton refused to participate in *Jones*—saying that he was elected to do the people's business, and could not be distracted—a simple default judgment could have been entered. With a push of a button, funds could be transferred from his bank account to the plaintiff's. But if the President were to refuse to acknowledge the legitimacy of a criminal proceeding—claiming that the only criminal court with compulsory jurisdiction over him was the High Court of Impeachment—what are courts to do? Put him in leg irons? Order his imprisonment?

3. Letter from Thomas Jefferson to George Hay (May 20, 1807), reprinted in DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 275 (1994).

parsing criminal law statutes. A statute-book offense is not necessary for impeachment: a President might be unfit to govern even if his misconduct was not an ordinary crime. (Imagine a President who simply runs off on vacation in the middle of a crisis.) Conversely, not every technical offense in statute books—especially offenses that are not ordinarily prosecuted—should count as the kind of *high* misconduct that unfits a man to be President after his fellow citizens have chosen him. Indeed, what counts as sufficiently high misconduct may be different for judges or cabinet officers—who lack a personal mandate from the electorate—than for a President who enjoys such a mandate. An offense that was made known to electors, or that could have been foreseen by them, may differ from an offense carefully hidden from them. (On this view, lying to the American people—even if not under oath and not technically criminal—might be more serious than technical perjury in a civil deposition.) All these distinctions have little place in our formal criminal law, but they are precisely the sorts of factors statesmen may sensibly consider in the impeachment process. And such statesmen have strong incentives to set the bar of acceptable conduct neither too high (for they and their friends will have to live under these rules) nor too low (lest they disgust ordinary voters appalled by backscratching and self-dealing).

Impeachment is also nicely *nonpartisan*. In the endgame, a President will be ousted only if fair-minded members of his own party condemn him; anything less than a two-thirds vote of conviction is an acquittal. Though the Framers did not envision the emergence of two permanent parties that would alternate in the presidency, they did expect Congress at any given time to be divided between the President's allies and his enemies; and they devised a beautiful system giving the balance of power to Senators who could be expected to give the President the benefit of the doubt in close cases. Talk of "vast conspiracies" could be easily laughed off, given the structural safeguards built into the system. And by keeping judges out of the process of appointing independent counsels and trying sitting Presidents—actions inevitably tinged with politics—the impeachment model keeps judges above the fray of partisan politics.

Impeachment is also beautifully *final*. No appeal lies from the judgment of an impeachment court. By contrast imagine the chaos that might be created by ordinary prosecution and conviction of a sitting President. Could he run the country from a jail cell? This seems outlandish. If, instead, we treated imprisonment as a "disability" triggering vice-presidential succession under the Twenty-Fifth Amendment, how

will we all feel if a later court invalidates the President's conviction on appeal?

Finally, impeachment is—or should be made—*regularized and routine*. An ad hoc independent counsel must build an organization from scratch, and those who volunteer may have an ax to grind, since the target is known in advance. Institutional routines to guard against leaks and other unprofessional conduct may be harder to develop and implement in an ad hoc enterprise. But Congress can and should create a standing committee on impeachment and oversight. The committee could have permanent staff, and be insulated by House tradition from partisanship. Over time, the committee could develop policies, procedures, protocols and precedents that can be applied consistently regardless of which party controls the House, and which party occupies the Oval Office. Other high constitutional functions of Congress have been routinized—appropriations, discipline of errant legislators, foreign affairs, and so on. Why not impeachment? If we want the Framers' mousetrap to work, we must keep it well oiled.

II. IMPEACHMENT AND THE STARR REPORT⁴

Like many adults, I am dreading the inevitable moment when my kids ask me to explain the Starr report to them. Not because of the sex—the “kids” I am worried about are my first-year students at Yale Law School, and I assume they know about sex. What they do not (yet) know, and are endlessly curious about, is how the Constitution works, or at least how it was designed to work. If they look to the report for constitutional theory, they may get perverse ideas.

“Professor,” I can hear them saying, “you said that the Constitution carefully separates the three branches of government. So how can judicial branch officers pick an independent counsel who wields executive branch powers yet reports to the legislative branch? If the Framers scrupulously excluded ordinary judges from the impeachment process, why were three judges allowed to pick the man who now acts as Congress's designated impeachment adviser? If federal prosecutors are constitutionally confined to punishing violations of federal criminal statutes, then why does this prosecutor's report contain all sorts of material ranging beyond statute-book offenses—charges of lying to the American people and the cabinet, for example?”

4. This section derives from an article published in the September 20, 1998 edition of the *Washington Post* in its *Sunday Outlook* Section. See Akhil Reed Amar, *Now Playing . . . A Constitutional Nightmare*, WASH. POST, Sept. 20, 1998, at C1.

I have no good answers. For the truth is that the statute that created the independent counsel—vesting his appointment in judges, arming him with awesome inquisitorial powers and instructing him to hand over all his findings to Congress—cannot be squared with the Constitution designed by the Founders. If this fact was not clear to all before the report, it should be clear now.

For the unconstitutional mess we find ourselves in I blame not Kenneth Starr but the independent counsel statute (first signed into law in 1978 and reauthorized by President Clinton in 1994). Indeed, I have been a critic of this law and its predecessors for a good decade. Starr is just doing what the law allows and indeed tells him to do. He did not seek out this dirty job—he was chosen, and simply answered when his country called.

But how was he picked, and by whom? Behind closed doors, by three judges. This is bad business. In our constitutional tradition, judges typically act after open argument in open court. By contrast, the independent counsel statute permits ordinarily taboo *ex parte* (secret) communications under the following logic. Because the statute tells judges not to decide a legal case but to answer an inherently political and policy question—who should investigate the administration?—then judges may act politically rather than judicially, and may consult Senators or anyone else they choose, in whatever manner they choose, as they decide who is best for the job. But this logic only raises the question of why Congress would give judges such a political and potentially partisan task—especially when the investigation is of the President himself. The Constitution says that the House shall prosecute impeachments and the Senate shall try them. This system insulates Senators from the prosecution business, so that they may be impartial triers of law and fact. But under the statute, various Senators may end up sitting in judgment on a report from a prosecutor they helped pick in secret conversations with lower court judges (who are supposed to have no role whatsoever in impeachment). Whether any Senators in fact helped pick Starr is less important than the fact that the statute allowed them to do so.

The Constitution also says that when a President is impeached, the Chief Justice shall preside over his trial in the Senate. The idea here was to have a presiding officer utterly free from even the appearance of conflict of interest. (Ordinarily, the presiding officer of the Senate is the Vice-President, and it would be unseemly for him to preside over a trial that could vault him into the presidency.) But Chief Justice William Rehnquist is the very man who hand-picked the three judges who hand-picked Starr. The independent counsel statute says that the three judges

who pick a special prosecutor should never preside over trials initiated by that prosecutor—lest defendants and the public think that the fix is in, and that the judges will be tempted to make their choice look good. But now, if a trial in the Senate were to materialize, the Chief Justice can be seen to be linked to one side. If Starr is not quite the chief's man, he is the man picked by the chief's men.

Consider next a more literal violation of the Constitution made visible by the Starr report. Why in the world are judges ever allowed to pick prosecutors? Judges are members of the judicial branch, and prosecutors wield executive power, which our Constitution vests in the President, not the judiciary. (Remember that, preceding the independent counsel statute, Watergate special prosecutors Archibald Cox and Leon Jaworski were technically appointed by the White House.) Having judges pick prosecutors is as inapt as having them pick generals or diplomats. The Constitution does say that the law may vest judges with unilateral power to pick "inferior" officers, but the obvious idea here is inferior *judicial* officers—magistrates and special masters. However, the Supreme Court rejected this logic a decade ago, in the *Morrison v. Olson*⁵ decision upholding an early version of the independent counsel statute. In 1997, in the obscure case of *Edmond v. United States*,⁶ the Court seemed to repudiate its *Morrison* analysis by insisting that every "inferior" officer must have a clear "superior" with broad power to monitor and countermand his decisions. Under this test, Starr could not be called "inferior" because Attorney General Janet Reno lacks broad power to control him—but it is unclear whether the Court would now be willing to use *Edmond* to openly overrule *Morrison* and apply its new test to Starr.

Where ordinary special prosecutors are involved, perhaps we could say that they are in some sense "inferior." These prosecutors are targeting officials other than the President, and if the President dislikes what a prosecutor is doing, he may always pardon the targets—even pretrial—and in effect make the prosecutor go away. (This is what President Bush did to Iran-Contra independent counsel Lawrence Walsh by pardoning Walsh's target, Caspar Weinberger.) Through the pardon, the President maintains ultimate control over prosecutions, and can, at least arguably, keep special prosecutors in line as his "inferiors."

But when the President is himself the target of the special prosecutor—as was not the case in *Morrison*—he cannot in any conceivable

5. 487 U.S. 654 (1988).

6. 520 U.S. 651 (1997).

way control the prosecutor because he cannot constitutionally pardon himself. Nor can he exempt himself from the impeachment process. Thus, when Starr issues a report calling for the President's impeachment, he is clearly acting not as some inferior officer who can be countermanded by the chief executive. Rather, he is acting as one of the largest legal and political actors on our national stage. If we are to create so powerful a figure, the Constitution requires that such a grand officer be appointed by the President and confirmed by the Senate, receiving a personal vote of confidence from both political branches.

It is tempting to respond that Starr's report has no automatic legal significance it is as if any private citizen "reported" to Congress and called for the President's impeachment. But this is laughable in fact and unsupportable in law. No private citizen is given the government funds and government power that Starr has been given. No private citizen is directed by law to give Congress impeachment reports.

There is a dangerous dance here. Starr does the dirty work and hands his report to Congress, which then publicizes it and even releases evidence gathered under grand jury secrecy. But neither takes full responsibility for this joint product. If Americans think Starr pushed too hard or was unfair, Congress can say "Blame him not us—it is his investigation and his report." And if Americans think that the report—and the videotape due out soon—should not have been publicized in the way it was, Starr can say "Blame Congress, not me—they are the ones dumping all this stuff on the Internet." The proper lines of constitutional accountability are being blurred.

So are the lines between criminal law and high politics. Impeachment is not a technical issue of statute-book offenses—otherwise, it would have been given to judges, not politicians. The question of "high crimes and misdemeanors" is whether a President has engaged in such grave misconduct (whether or not technically criminal) that he is no longer fit to lead a great and free nation—whether, in other words, the votes of millions should be undone because of his gross misbehavior. And so Starr's inclusion of non-criminal matter is fitting in an impeachment report—but unfitting given that Starr is otherwise supposed to be a prosecutor, not an impeachment adviser. Ordinary prosecutors who uncover gross misbehavior that does not constitute a statute-book offense keep this to themselves. The proceedings of ordinary grand juries are secret. Ordinary prosecutors report to the Justice Department, not Congress. The report is a kind of hybrid monster—half-indictment, half-impeachment—the likes of which America has never seen.

Now that this beast roams among us, what are we to do? There is, alas, no easy way for Congress to cage what it has unleashed. After the havoc, Congress can say "never again!" by allowing the independent counsel statute to die when it lapses by its own terms next year. But I am afraid we are in for dark and unpredictable days ahead, in which the only advice I could offer Congress would be to approach every issue in the most bipartisan manner possible. But that has not happened thus far, and is unlikely to happen in an election year.

And what shall I tell my students when they ask me to make constitutional sense of this report? It will be painful to tell them that a statute they were told was such a wonderful post-Watergate reform is, in fact, a constitutional abomination.

III. THE MEANING OF "HIGH CRIMES AND MISDEMEANORS"⁷

The biggest linguistic question confronting America is not what the meaning of "is" is—or what the words "sexual relations," "Oval Office," and "alone" mean. It is how to construe the phrase "high crimes and misdemeanors." Our legal tradition gives us simple but powerful tools to extract meaning from the Constitution. With these tools in hand, we can test whether the Starr report justifies ousting a duly elected President.

Begin with the hardboiled legal realist claim that the Article II, Section 4 phrase means whatever the Congress wants it to mean—it is all politics. But it is not. The Constitution does not say that a President may be ousted whenever half of the House and two-thirds of the Senate want him out. The supreme law of the land prescribes a substantive standard—high misconduct—as well as a procedural voting rule, and conscientious legislators cannot ignore this standard. Even if we view the matter from a purely political perspective—taking hardboiled realism on its own terms—a Senator must say more than "I vote against Bill because I prefer Al (and I vote against Al because I prefer Newt)." Politically as well as constitutionally, lawmakers cannot credibly attack Clinton for playing fast and loose with words while doing the same thing themselves. They cannot wax sanctimonious about oaths while ignoring their own oaths to uphold the Constitution.

7. This section derives from a public lecture delivered to the Federalist Society in Washington, D.C., on November 11, 1998. Portions of this lecture later appeared in an essay published in the January 18, 1999 issue of *The New Republic*. See Akhil Reed Amar, *Trial and Tribulation*, NEW REPUBLIC, Jan. 18, 1999, at 17.

But here is the kernel of truth in the realist claim: the House and Senate will be the last word on impeachment. No Article III court (or state court for that matter) will review their interpretation of the key phrase. Impeachment is, technically, what judges call a “political question” that ordinary courts will not touch. This is not an exception to the basic constitutional principle of judicial review, but a special case of it. There is indeed “judicial” review of impeachment issues, but this review occurs in the Senate itself, which sits as a high *court* of impeachment. Its impeachment verdict conclusively binds other courts because this special tribunal has exclusive jurisdiction, and its rulings on fact and law are what lawyers call *res judicata*—final judgments. Over and over, the Constitution describes the Senate in impeachment as a court—with the power to “try” “cases,” render “judgment,” and impose “conviction” on the defendant. In presidential impeachments, this judicial character is reinforced by a constitutional rule that the Chief Justice shall preside over the High Court of the Senate. These judicial trappings are further evidence that, contrary to hardboiled realism, it is not all politics—it is also a judicial trial under the law designed to impose punishment for “high crimes.”

If the Senate must act as a court, with a duty to properly construe “high crimes and misdemeanors,” how should it go about this task? Ordinary courts often look first to judicial precedent, but this interpretive tool is of little help here. The Supreme Court has never defined “high crimes and misdemeanors”—even if it did, the Senate should feel free to ignore such inappropriate intermeddling—and the precedents in the Senate itself shed little light. In a dozen cases over the last two centuries, the Senate has tried impeachments of judges and cabinet officers, but how much (if any) weight should these precedents carry in a *presidential* impeachment? The only Senate precedents that could definitively clarify the standards for presidential impeachment would themselves be presidential impeachments. But we have only one of these on the books, and that impeachment—of Andrew Johnson in 1868—resulted in an acquittal, leaving us precisely zero square senatorial precedents telling us what misconduct is enough to oust a President.

Some scholars have suggested that we look to history for answers. But which history? The phrase took root in fourteenth century England. Surely this is not the right time and place to search for answers. Practices that may have made sense in a monarchy or in a parliamentary government have no place in a modern constitutional democracy committed to separation of powers. The history of the 1787 Philadelphia convention helps clarify what was in the minds of the drafters when

they inserted the “high crimes” phraseology and rejected the looser idea that Presidents could be impeached merely for “maladministration.” But these convention conversations occurred behind closed doors. The American people were asked to ratify a public text, not secret intentions. What’s more, our constitutional system for selecting Presidents differs from the system in place in 1787. Aided by a formal constitutional amendment (the Twelfth) that paved the way for presidential parties to emerge, modern America has committed itself to a kind of national populist Presidency that differs from what the Philadelphia draftsmen had in mind.

What, then, is the best way to make sense of our Constitution on the key question of the day? I suggest that we carefully examine the Constitution’s text, and attend to its overarching structure. Begin with the obvious tool of textual analysis. The key phrase, in its entirety, says that the President may be impeached for “Treason, Bribery, or other high Crimes and Misdemeanors.” Presumably, the word “high” here means something, suggesting that not all crimes (or other forms of misconduct) justify impeachment. If we seek to discover how “high” a crime must be, the text itself gives us two specific examples to anchor the inquiry—treason and bribery. Both are “high” crimes indeed. Treason involves waging war against America, betraying one’s country to an enemy power. Bribery—secretly bending laws to favor the rich and powerful—involves official corruption of a highly malignant sort, threatening the very soul of a democracy committed to equality under the law. And in the case of a President who does not take bribes but gives them—paying people to vote for him—the bribery undermines the very legitimacy of the election that brought him to office. Few crimes are as deadly to a democratic republic—as high—as treason and bribery.

Those who argue that any presidential failure to obey the law constitutes a failure to “take care that the laws be faithfully executed,” and that all such failures are impeachable, have simply read the word “high” out of the Constitution. On their theory, any crime, high or low, would be impeachable. Consider, in this regard, the words of the Article I, Section 6 Arrest Clause and the Article IV, Section 2 Extradition Clause. Like the Impeachment Clause, these clauses also speak of treason and other crimes. But they do so in markedly different language—“Treason, Felony, and Breach of the Peace” in the Arrest Clause, and “Treason, Felony, or other Crime” in the Extradition Clause. These clauses do encompass virtually all crimes, high and low. And they strongly suggest that the word “high” in the Impeachment Clause must

be taken seriously. When the Framers meant all crimes, high and low, they knew the words—and the words are markedly different from those of the Impeachment Clause.

So much for text. Consider now how the text must be read in light of larger constitutional principles defining the Constitution's overall architecture—its structure. The Constitution's text does not use the words "federalism," or "separation of powers," or "judicial review," but these principles can be discerned from the document's structural blueprint. The first insight generated by structural analysis is that the meaning of a single constitutional phrase sometimes varies, as that phrase interacts with other parts of the document: the words "high crimes" might, in application, mean something somewhat different when applied to Presidents than when applied to other impeachable officers.

A blinkered textualist might deny this, pointing to Article II, Section 4, in its entirety: "The President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." This clause lumps together presidential impeachments with all others (of Vice-Presidents, judges, justices, cabinet officers, inferior officers) and uses the same linguistic standard (high crimes) across the board.

At first this seems a strong argument. But it crumbles on closer inspection—and every Senator should intuitively understand why. Consider another patch of constitutional text familiar to every Senator and implicating Senate oversight of the President. According to Article II, Section 2, "by and with the Advice and Consent of the Senate . . . [the President] shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." If we applied the same blinkered textualism to this clause, we would say that the Senate must give the exact same deference to a President's choice for Supreme Court Justice that it would give to a President's choice for his cabinet, and that the Senate should never apply a stricter standard when considering a nomination to the Supreme Court than to a district court. After all, this clause lumps together all officers, high and low, executive and judicial, and uses the same linguistic standard (advice and consent) across the board.

But this has never been the Senate's view of the matter—and rightly so. The Senate has rejected blinkered textualism in favor of a more structural and holistic approach that ponders all the texts of the Constitution and considers their interrelation. Other parts of the Constitution establish important differences between, say, cabinet officers and

judges. Cabinet officers are part of the President's executive branch team under Article II. They answer to him (quite literally, in the Article II, Section 2 Opinions Clause) and will leave when he leaves. Federal judges are not part of the President's team in the same sense. They will not leave when he leaves. Indeed, their independence is secured by life tenure under Article III—a separate article for a separate branch. In light of these important constitutional differences, the Senate has always given the President far more leeway in naming his own executive team than in proposing judicial nominees. And, even within a single branch, the Senate scrutinizes a nominee to the Supreme Court more intensely than a nominee to some lower court. Just ask Robert Bork.

Now apply these structural insights to the “high crimes” clause, and count the ways in which presidential impeachments are qualitatively different from all others. When Senators remove one of a thousand federal judges (or even one of nine justices), they are not transforming an entire branch of government. But that is exactly what happens when they oust America's one and only President, in whom all executive power is vested by the first sentence of Article II. In the case of a judge, a long and grueling impeachment trial itself inflicts no great trauma on the nation—but, again, the case of a President is very different. (And do not forget the disruption of the Chief Justice's schedule, and the commandeering of the entire Senate; only in presidential impeachments must the Chief Justice preside, and this special rule makes it virtually impossible for the Senate to shunt off important presidential impeachment decisions to smaller committees, as is the current practice for nonpresidential impeachments.) Presidential impeachments involve high statecraft and international affairs—the entire world is watching—in a manner wholly unlike other impeachments.

Most important, when Senators oust a judge, they undo their own prior vote (via advice and consent to judicial nominees). When they remove a duly elected President, they undo the votes of millions of ordinary Americans on Election Day. This is not something that Senators should do lightly, lest we slide toward a kind of parliamentary government that our entire structure of government was designed to repudiate. Although the Philadelphia Framers may not have anticipated the rise of a populist Presidency, later generations of Americans restructured the Philadelphians' electoral college, via the Twelfth Amendment and other election reforms, precisely to facilitate such a Presidency. Narrow arguments from the high crimes clause in isolation fail to see how holistic constitutional analysis must take account of post-Founding constitutional developments.

To recast these points about constitutional structure into the language of policy, even if the Senate decides that all perjury—of any sort, by any officer—is an impeachable high crime, Senators must further decide whether a given perjury warrants removal as a matter of sound judgment and statesmanship. In making this decision, they must be sensitive to the ways in which the Presidency is a very different office from a federal district judgeship. Where extremely “high crimes” are implicated—treason or tyranny—Senators should probably be quicker to pull the trigger on a bad President, whose office enables him unilaterally to do many dangerous things. (A single bad judge, by contrast, is hemmed in by colleagues and higher courts.) But where borderline or low “high crimes” are involved, the Senate would be wise to spare the people’s President—especially if his crimes reflect character flaws that the people duly considered before voting for him, or if the people continue to support him even after the facts come to light. If we absolutely insist on *textual* (as opposed to structural) evidence supporting our distinction between presidential and judicial impeachments, we can find it in Article I, Section 3, which tells us that only in presidential impeachments does the Chief Justice preside. There are several good reasons for this rule, and one of them is to hammer home the constitutional uniqueness of presidential impeachments.

With the lessons of text and structure in mind, we can now profitably revisit precedent and history. Those who point to a trio of judicial impeachments in the late 1980s as support for a low impeachment threshold have precisely missed the point: we must look to presidential history and precedent for guidance. To counterbalance the 1980s trio of judicial impeachments, let’s look at a trio of Presidents over the centuries who had their own troubles with Congress. Begin with Andrew Jackson, who killed a man in a duel before he was elected President. Technically, this was a crime—although rarely prosecuted. Should Congress have impeached and removed Jackson—even if the people who elected him knew about his crime, and elected him anyway? The duel Jackson fought concerned his wife’s honor and chastity. Suppose Jackson had lied under oath to protect his wife’s honor. Again, suppose the people knew all this when they voted for him. Should Congress have undone the people’s votes, on a theory that all crime is high crime, and that all perjury is the same? Now consider the next Presidential Andrew—Johnson, that is. Given our structural analysis, it seems relevant that Johnson was never elected President in his own right, and that he was in fact trying to undo the policies of the man the people had elected, Abraham Lincoln. If ever our structural argument cautioning restraint in

ousting an elected President were weak, it was here, since Johnson lacked a genuine electoral mandate. And his policies towards the defeated rebels could indeed have been viewed as akin to treason, giving considerable aid and comfort to those rebels who were—not to mince words—traitors. And yet even here—an unelected President cozying up to actual traitors—the Senate acquitted. Finally, consider President Nixon, whose extremely high crimes and gross abuses of official power did indeed pose a threat to our basic constitutional system, a threat as high as treason and bribery. Although Nixon was elected by the people, his own unprecedented use of political espionage and sabotage tainted his mandate, in the same way that bribing electors would have. When all the facts were brought to light and the tapes came out, the people did indeed turn against him, prompting leaders of both parties to conclude that the time had come for him to go.

William Jefferson Clinton is not above the law. But the law that the Congress must apply is the law applicable to Presidents, not the law applicable to district judges. In trying a man whose name has eerily intertwined with that of Nixon again and again, Congress must remember that Bill Clinton is best judged in light of the case of President Richard Nixon, not the case of Judge Walter Nixon.

Using standard tools of constitutional analysis, then, here are the questions conscientious Congressmen should ask themselves as they ponder the Starr report: Are the alleged misdeeds truly as malignant and threatening to democratic government as are treason and bribery? Do they justify putting the nation and the world through the obvious trauma that an impeachment trial itself—whatever its outcome—would involve? Do the misdeeds justify nullifying the votes of millions of Americans, on the assumption that they would never have voted for Bill Clinton had they suspected he was capable of doing what the report alleges? Would virtually all past Presidents—none of whom has been removed, and only one of whom was even impeached—have easily passed the standard being proposed by those who argue for Clinton's impeachment?

How high is high enough? The Constitution cannot answer that question for us, but it can give us the right questions to ask.

IV. THE PEOPLE'S COURT: THE ROLE OF PUBLIC OPINION IN IMPEACHMENT⁸

Who rules America—the people or the law? Henry Hyde and his fellow House Managers have wrapped themselves in “the rule of law”—the polls be damned. But under our Constitution, We the People ordained and established the law, and the law itself often encourages Senators to defer to the people’s verdict.

Sometimes, the rule of law does require a Senator to damn the polls. If in her heart a Senator thinks the President is innocent in fact (he actually did not do it) or in law (even if he did it, it is not a “high crime or misdemeanor”), then she *must* vote not guilty—even if she thereby offends her constituents, who want the man’s head. She has taken a solemn oath to do justice, and she would violate that oath if she voted to convict a man she believed innocent. Impeachment is a quasi-criminal affair, in which the Senate, sitting as a court, is asked to convict the defendant of high criminality or gross misbehavior in a trial designed not merely to remove but also to stigmatize the offending officeholder. No Senator may properly vote to convict Bill Clinton, merely because, say, her constituents prefer Al Gore.

But none of this helps Henry Hyde and company, who are of course the ones seeking Clinton’s head. Impeachment rules are not symmetric between conviction and acquittal. It takes 67 votes to convict, but only 34 to acquit; the House must prove the President guilty, but the President need not prove anything. Similarly, although no Senator may vote to convict a man she deems innocent, any Senator may vote to acquit a man he deems guilty. Like any ordinary criminal juror, each Senator is free to be merciful for a wide variety of reasons—because she thinks the defendant has suffered enough, or because the punishment does not fit the crime, or because punishing the defendant would impose unacceptable costs on innocent third parties.

In pondering mercy, ordinary jurors search their souls as the conscience of the community, and Senators are free to do the same. But unlike ordinary jurors, Senators are elected, and thus they are also free to consult their constituents. Sometimes, deferring to “the masses” might be irresponsible—for example, if the citizenry were ignorant of the facts or incapable of thinking through the complicated legal question at hand.

8. This section derives from an essay that initially appeared in January, 1999 in *The American Lawyer Media On-line*. See Akhil Reed Amar, *A Convict-in-Chief?—The Logical Conclusion of the Conviction-Without-Removal Thesis is that We’re all Impeachable* <<http://www.lawnewsnetwork.com/opencourt/backlog/c020499a.html>>.

Under these circumstances, Hyde might be right to urge Senators to look only to their souls and not to the polls. But is the Clinton case one where the people are ignorant, or simply one where Hyde refuses to heed their judgment?

Again and again, the House Managers have invoked “the Founders.” But fidelity to the Founders and fidelity to the Constitution are very different things. Since the Founding, We the People have amended our supreme law in many ways designed to make it more democratic than the musty eighteenth-century parchment that the Managers wrongly equate with “the Constitution.” Consider for example the impeachment court itself. In the Founders’ Constitution, the Senate was elected by state legislators, rather than by the people themselves. But the Seventeenth Amendment, adopted in 1913, brought the Senate closer to the people by mandating direct election—and thereby importantly, if implicitly, modified the basic structure of impeachment. Likewise, the Presidency created at Philadelphia was vastly different from the one We the People claim for ourselves today. Political parties did not exist, and Presidents were not picked by the direct votes of millions of citizens. (Much of the change towards a more populist and party-based Presidency occurred as a result of the Twelfth Amendment, which radically revised the electoral college system forged in Philadelphia.) In 1789, many state legislatures opted to pick presidential electors themselves, and thereby excluded ordinary voters from directly participating in the process of presidential selection; in 1999, it would be unthinkable for any state to revert to this practice. In the Founders’ world, Presidents were picked without regard to the preferences of blacks and women.

In fact, the Philadelphia Framers designed their original electoral college precisely to make it easy for states to disenfranchise blacks and women. A given state—say, Virginia—would receive a fixed number of electoral votes, regardless of whether the state let blacks or women vote. (Under direct national election, by contrast, Virginia would automatically double its clout if—God forbid!—it extended the franchise to women.) But later generations of Americans amended the document to make clear that black and female votes must be counted: that is the basic meaning of the Fifteenth and Nineteenth Amendments.

None of the House Managers is black, and none is a woman. Yet they seek to undo the election of a man who was voted for (and who continues to be supported) by large numbers of blacks and women. None of the Managers is a member of the Democratic Party. And yet they seek to unseat a duly elected Democratic President. And they con-

tinue to insist, woodenly, that removing a man voted for by millions of ordinary people is, under our Constitution, exactly the same as removing any one of a thousand federal judges that none of us ever voted for.

On the merits of the case, maybe the Managers are right, and the people are wrong. Maybe Clinton is unfit to lead a great and free people. But as every first-year law student learns, the basic question in constitutional law is often “who decides?” To succeed, the House Managers must persuade the people, not ignore them.

V. ASSORTED PROCEDURAL ISSUES⁹

A. *Lame Duck Impeachment*

Some have argued that the bill of impeachment, like all other pending business in the outgoing 105th House, dies when the old House dies on January 3, and must be passed again by the incoming House of the 106th Congress. This is the rule for legislative bills: bicameralism requires that both House and Senate agree within a single term of Congress. But impeachment practice is different. Even after a grand jury has closed shop, its indictments remain valid, and the same has historically been true of House impeachments. But in impeachment the House plays the role not only of grand jury, but also of prosecutor: It must appoint Managers to physically prosecute the case in the Senate. And given that the trial will take place in the new Senate, the House that must pick the slate of Managers is obviously the new House. (Any Managers picked by the old House should lose their commissions when the old House dies). This new House is five seats less Republican than the old, and features forty new faces—far more than the narrow margin by which impeachment squeaked through in December.

Thus it is possible that the new House majority may actually oppose impeachment. And there is a clean way for them to do so: Just say no. In other words, when a slate of Managers is proposed by pro-impeachment leaders in the new House, anti-impeachment representatives can and should vote down the slate, and vote down all substitute slates. This, in effect, would be the impeachment equivalent of a *nolle prosequi* or *non prosequitur*.

9. This section blends together material that initially appeared in January, 1999 in *The American Lawyer Media On-line*, see *supra* note 8, and in the January 18, 1999 edition of *The New Republic*, see *supra* note 7.

B. Prosecutorial Discretion and "The Rule of Law"

In response, some will say that the House must proceed, it has no constitutional choice, and the rule of law demands prosecution. This is nonsense. Article I, Section 2, of the Constitution gives the House the "power" to impeach, but imposes no duty to impeach. The Framers knew how to use the word "duty"—indeed they used it twice in Article II—and so there is no ambiguity here. House impeachment is about power, not duty—about choices, not obligations. Impeachment is never reducible to one question: Is the conduct in question impeachable? Instead it always also implicates a second question: Is it worth it? Just as a grand jury can legitimately decline to indict and a prosecutor may legitimately decline to prosecute as a matter of discretion—fairness concerns, resource constraints, bigger fish to fry, avoidance of undue harm to third parties—so too the new House may decide that the President and, more importantly, the nation have suffered enough. The House's inherent power of mercy is all the more vital given that the ordinary locus of pretrial mercy in our constitutional system—the President's pardon power—is inapplicable. Under Article II, Section 2, a President may ordinarily pardon at any time and for any reason (recall Gerald Ford's pretrial pardon of Nixon and George Bush's pretrial pardon of Caspar Weinberger), but not "in cases of impeachment." Thus, in impeachment prosecutions, the Framers took the power of executive clemency away from the President and gave it to the House. The new House must be free to use this power as it sees fit. It is not a potted plant, and indeed enjoys greater democratic legitimacy than the lame-duck House that voted to impeach, contrary to the spirit of the people's verdict in the November congressional election.

Again and again, House Managers have said: "Don't blame us—the rule of law made us do it." But the rule of law does not demand that everyone who can be prosecuted must be prosecuted. Nor does the rule of law require that if someone, somewhere, somehow has been prosecuted for lying about sex, then it follows that the President must be impeached by the House and convicted by the Senate for lying about sex. One sensible understanding of the rule of law does require that like things should be treated alike, but ordinary criminal prosecutions and presidential impeachments are *unlike* things—with different legal triggers, different legal tribunals, different legal procedures, and different legal punishments.

C. *The Senate's Role*

Like trial jurors, Senators have the inherent power to acquit against the evidence—to decide, as the conscience of the community, that even if the charges are true, they do not warrant a conviction. Just as a trial jury may spare a guilty defendant even though a grand jury has properly indicted, so the Senate has the inherent power to be merciful even if a House majority seeks its pound of flesh. But the Senators are not merely jurors; they are also judges as well (mirroring the twin roles of House members as both grand jurors and prosecutors). Thus Senators are no more bound by the House's judgment about what qualifies as a "high crime or misdemeanor" than ordinary judges are bound by ordinary prosecutors' (sometimes overly zealous) interpretations of ordinary criminal laws. If a majority of Senators believe that the conduct in question is simply not impeachable, or does not warrant undoing a national election, they can and should simply dismiss the charges up front in a kind of Senate summary judgment.

Once again, it will be argued that the Senate has a legal and constitutional duty to put the country through a grueling, expensive, disruptive, and salacious trial, if this is what a House majority demands. And once again, this view reflects constitutional confusion. Article I, Section 3 gives the Senate the "Power to try all Impeachments" but says nothing about the duty to do so. Procedurally, the Senate may vote to end proceedings at any time if a majority of Senators agree to a motion to adjourn the trial.

This prospect in turn raises the specter of plea bargaining and settlement. Leading Senators are free to tell the President that if he does x, y, and z, they and a majority of their colleagues will vote to adjourn. (House members may of course do likewise, promising to vote down impeachment Managers, and thus avoid a trial altogether, if Clinton agrees to their conditions.)

D. *The Chief Justice's Role*

Under Article I, Section 3, the Chief Justice of the United States presides at presidential impeachments. The reason for this, however, has little to do with any distinctive judicial expertise he might bring. Impeachment trials of all other officers—judges, justices, cabinet officers, Vice-Presidents—are judicial proceedings, and yet the Chief Justice plays no role in any of these Senate trials. The Constitution calls for the Chief Justice to preside at presidential impeachments—and only these impeachments—for two reasons. One is symbolic, to mark these im-

peachments as hugely distinct from all others, calling for special solemnity. The second reason is to avoid the obvious conflict of interest that would exist if the Senate's regular presiding officer—the Vice-President—sat in the chair. No man should be a judge (or even a non-voting presiding officer) in his own case, and the Vice-President should play no part in a trial that could put him in the Oval Office. This mandatory recusal rule made even more sense at the Founding, when Presidents did not hand-pick their Vice-Presidents, who were more likely to be rivals than partners.

As presiding officer, the Chief Justice should remember that the Senators are not merely jurors, but judges, too—and thus they are the ones, not he, who should ultimately decide important legal questions of substance and procedure. Though the Chief Justice might make preliminary rulings on evidentiary and other procedural issues, the Senators must be the final authority on these questions. And of course on the final vote of guilty or not guilty, only “members” of the Senate may vote under Article I, Section 3. The Chief Justice is not a “member,” and will not be called on to break a tie, since conviction requires a two-thirds vote.

History confirms the wisdom of judicial modesty. The Framers intentionally removed impeachment from ordinary judges precisely to keep the judiciary out of this politically charged and potentially partisan business. In the 1868 trial of Andrew Johnson, Chief Justice Salmon Chase claimed broad powers for himself; but Chief Justice William Rehnquist should beware following in these footsteps. Chase's critics suspected that his trial conduct was politically motivated, and that he was using the spotlight to promote his own presidential candidacy in the upcoming 1868 election. Indeed, Rehnquist has already played an unfortunately large and awkward role in the case against Clinton. It was he, after all, who hand-picked the judges of the special division, which, in turn, hand-picked independent counsel Kenneth Starr to investigate President Clinton. And now he is set to preside over a prosecution that was, of course, triggered by Starr. This coziness between judge and prosecutor is uncomfortably close to the kind of appearance of impropriety that the Framers meant to avoid when they displaced the Vice-President from the chair. And the appearance of impropriety is worsened when we recall that the independent counsel statute itself, despite its many unconstitutional features, was upheld by the Supreme Court in an opinion authored by none other than Chief Justice Rehnquist.

E. President-Senate Relations

The explicit role of the Chief Justice has profound implications for the proper ethical relations between Senators and the President. Suppose a sudden illness were to require the Chief Justice to resign. Although the senior associate justice might presumably fill in temporarily, at some point a new Chief Justice would need to be installed, and Article II, Section 2 tells us how this would happen. The President would appoint, with the advice and consent of the Senate, a new Chief Justice. In other words, even in the middle of a trial, the judges and the judged might need to confer and collaborate to pick the permanent presiding officer. Stranger things have happened.

The point is that, even during the pendency of an impeachment trial, the Senate and the President must work together to do the people's business. Vacant appointments must be filled, treaties considered, laws enacted, budgets approved, foreign policy—even war—conducted. Even as Senators sit as detached judges and jurors over defendant Bill Clinton every afternoon (bound by an oath of impartiality as prescribed under Article I, Section 3), they must as legislators work closely with fellow lawmaker Bill Clinton every morning. All this is different from impeachments of, say, federal district judges. In these low-level impeachments, Senators may be free to shun all contact with the defendant, analogizing such meetings to “jury tampering.” But this finicky standard of legal ethics makes no constitutional sense when the man in the dock is the President, with whom parliament must parley.

F. A Public Trial?

The Senate, in impeachment, sits as a court, and for the Framers, the word “court” implied openness—as opposed to “chambers” (like the Star Chamber they despised), where important decisions were made behind closed doors. The Sixth Amendment gives the “accused” an explicit right to demand a “public trial” in ordinary federal prosecutions; but undergirding this clause is a larger, structural right of the public itself to public trials. The spirit of all this applies with special force to impeachment trials. The people are entitled to see their business being done; and no business is of greater legitimate interest and importance to them than a presidential impeachment trial. The tawdriness of the facts may tempt us to try to avoid hanging all the dirty laundry—literally, in the case of the dress—out for all to see, but an impeachment process shielded from public scrutiny would lack legitimacy. If the President is ultimately ousted and the votes of millions set at naught, it

must not look like a secret coup d'état; and if he is ultimately acquitted, We the People are entitled to see why. Unless the proceedings are televised, the only "public" who will have access are those who live within commuting distance of the Capitol.

G. *The Oath, and the Role of Political Parties*

The Constitution requires that when Senators sit as judges and jurors in a high court of impeachment, they must "be on Oath or Affirmation." Last week, each Senator took such a special oath, swearing under God to do "impartial justice." Immediately thereafter, the Senators—all of them—engaged in conduct that arguably betrayed the letter and spirit of that oath.

Exactly what are the Senators supposed to be impartial between? Truth and falsity? Surely not—they should be partial to the truth and set against falsity. The prosecution and the defense? Perhaps, but in key ways the system is designed to be asymmetric. Sixty-seven Senators must vote to convict whereas a mere thirty-four Senators will suffice to acquit; this is a *partial* rule, tilted towards the defendant. So is the notion that evidence of Clinton's guilt must be proved beyond a reasonable doubt, or at least by clear and convincing evidence. Some forms of partiality towards the defendant are proper and even mandatory.

Given that justice need not be impartial between the prosecutor and the defendant, the better idea is that it should be impartial across potential defendants. A given Senator should treat Clinton no differently than she would treat any other defendant President. It should not matter whether she is a friend or an enemy of Bill—she should treat him the same way.

But this logic has radical implications, which the Senators have failed to heed. To be truly, deeply, really, *impartial*, each Senator must be *im-party-al*. That is, each Senator should try to wholly blot out of her legal decision-making all issues concerning political party. Impartial justice must be the same for Republican and Democratic Presidents alike. One way to implement this ideal is to imagine that the defendant on trial is not Bill Clinton, but is instead a Republican President who did the same thing. Another way to do this is for a Senator to imagine that she were actually a member of the other political party. But both of these imaginative exercises are psychologically hard to do—akin to writing sci-fi scripts involving parallel universes.

There is, however, one thing that a truly conscientious Senator can easily do: shun any "party" caucus discussing impeachment issues. Senators must be free to talk informally amongst themselves and in

small groups—but party affiliation should play no role whatsoever. Any Democrat who wants to listen in on a “Republican” caucus should be allowed to do so—and vice versa. Ordinary judges, when they deliberate, never break up into Democratic and Republican caucuses, and neither do ordinary jurors. Thus, when Senators last week took their oaths and then immediately proceeded to “party” caucuses, they betrayed the deep aspiration implicit in their oath of impartiality—of impartialism. Although they eventually came together and agreed on a unanimous proposal, none of the Senators has said that party caucuses in impeachment are improper, and none has promised to boycott all such caucuses in the future.

It cannot be said that party caucuses are simply unavoidable. The eventual agreement that emerged last week came from a caucus that included all and excluded none, giving us a genuine model of what workable impartialism can look like. Party caucuses are a staple of legislative sausage-making, but an impeachment trial is not legislative business as usual. Impeachment is in important ways a judicial act, governed by a special ethos. Indeed, the impeachment oath was designed to remind Senators (and the rest of us) of the special rules and roles required.

Oaths are serious business. President Clinton is where he is today—in the dock—because of claims that he did not take his various oaths (of marriage, of office, in the *Jones* case, and before the grand jury) seriously enough. Senators who sit in judgment over him—especially those who may be tempted to condemn him—should take a close look at their own oaths and deeds.

H. Evidentiary Issues

In two of the three district judge impeachments during the 1980s, Senate trials occurred after the judges had been tried and convicted of statutory crimes in ordinary courts. The Constitution does not require this sequence, but the Framers expected that it would often make sense. District judges would be scattered across the continent, as would the evidence and witnesses to their wrongdoing. Congress, by contrast, would sit in the capital, weeks away from the most remote hinterlands. Given this geography, the Founders anticipated that the easiest venue to gather all the evidence and witnesses would often be in a trial held in the judge’s home district. After such a trial, the Senate’s job in impeachment would be much easier—Senators could simply take as given the facts duly found beyond reasonable doubt in an ordinary court fol-

lowing strict evidentiary rules and affording procedural rights and other safeguards to the defendant.

But this system generally will not work in presidential impeachments because it is doubtful under Article II that a sitting President may be forced to stand trial in an ordinary criminal court. Note the huge complications all this will raise concerning issues of evidentiary procedure and proof. In an actual trial of Bill Clinton, the Senate will not be able to simply point to an earlier judicial proceeding that clearly established the relevant facts beyond reasonable doubt. The Senate will be obliged to find the facts for itself. But how? What precisely will the rules of evidence be? Will the federal hearsay rule—and its countless exceptions—be enforced? Even if Senators try to dodge the unseemly business of fact finding in this particular case by using Kenneth Starr's grand jury transcripts and the like as "evidence," what will happen if the President's lawyers insist—as fairness surely entitles them to do—on cross-examining every relevant witness? Given that the Senate is not accustomed to trying cases—and neither is William Rehnquist, for that matter—the evidentiary problems that could arise are truly mammoth, unlike any the Senate has seen in the modern era. Indeed, one of the tools that the Senate used in the 1980s impeachment cases to cut the evidentiary monster down to size—delegating fact-gathering to a committee—is politically unimaginable, and perhaps unconstitutional, in presidential impeachments. (Could such a committee meet without the presence of the Chief Justice as a presiding officer? On the other hand, could the Chief Justice ever preside over such a rump?)

And so we are sailing into turbulent and uncharted waters. Hang on to your hats.

APPENDIX

A CONSTITUTIONAL CONVERSATION

In this Appendix Professor Amar debates many of the key issues surrounding the impeachment of President Clinton in an email conversation with Stuart Taylor Jr., a senior writer with the National Journal magazine and a contributing editor at Newsweek. This email exchange first appeared in February, 1999 on the American Lawyer Media On-line website, and is being reprinted with the express permission of the American Lawyer, Mr. Taylor and Professor Amar. In the interests of authenticity, the editors of the Hofstra Law Review have chosen to re-print this conversation verbatim, and have refrained from conforming any of the exchange to the dictates of the Bluebook. The email conversation begins with a piece written by Mr. Taylor that was posted to the American Lawyer Media On-line website on February 3, 1999.

I. PUBLIUS UNBOUND—THE CONSTITUTION ALLOWS THE SENATE TO CONVICT THE PRESIDENT WITHOUT REMOVING HIM¹⁰

by Stuart Taylor Jr.

I have good news for the Senate. And for the House. And even for those who (unlike me) want President Clinton censured rather than removed from office.

The news is that a reinterpretation of the Constitution, based on a close textual inspection, shows clearly that even if two-thirds of the senators vote to convict Clinton of perjury or obstruction of justice, they will still have the option of letting him finish his term and (if they wish) censuring him. While Rep. Lindsey Graham (R-S.C.) has publicly so hinted, this view flies in the face of the conventional wisdom, which is that Senate conviction of an impeached president automatically removes him from office.

But the conventional wisdom is dead wrong. And so is the related notion—almost universally espoused in academia, in journalistic writings (including my own, until now), and in the legal briefs of both the

10. This section was first posted in *The American Lawyer Media On-line* on February 3, 1999. See Stuart Taylor Jr., *Publius Unbound—The Constitution Allows the Senate to Convict the President Without Removing Him*¹⁰ <<http://www.lawnewsnetwork.com/opencourt/backlog/c020399a.html>>.

president and the House managers—that a president can be impeached, convicted, and removed only for “Treason, Bribery, or other high Crimes and Misdemeanors.”

Have I gone nuts? A fair question. But I’ll bet that you will be driven toward the same conclusion if you study the relevant text of the Constitution (quoted below), and especially if you go on to read a path-breaking but largely unnoticed scholarly paper by a law professor named Joseph Isenbergh at the University of Chicago. His reinterpretation unlinks conviction from removal, and unlinks impeachment from “high” crimes as well.

First, however, clear from your mind the fog of academic and journalistic commentaries, the out-of-context fragments of the Framers’ debates that pervade such commentaries, and the litter of confusing precedents that accompany them. Instead, focus like a laser on the bare, unadorned words of the Constitution’s most relevant impeachment clauses, reading them anew in the sequence in which they appear.

Article I, which enumerates both the powers of the legislative branch and the limitations on those powers, has this to say about impeachment:

“The House . . . shall have the sole Power of Impeachment . . .

. . . .

“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”

Note, please, that Article I neither defines the grounds for impeachment nor imposes any limitation whatever on the category of offenses for which a president may be impeached. Nor does it require the Senate to remove an impeached official upon conviction.

By this silence, Article I suggests that the House could impeach a president and the Senate could convict him—and then hold a separate vote on whether to remove him—for any crime, no matter how low or high, or perhaps even for having too many drinks or for vetoing a popular bill. This is consistent with English and colonial law, under

which impeachment was used to punish both “high Crimes and Misdemeanors” and a wide range of lesser crimes.

Article I does depart from English law, quite explicitly, by limiting the penalties (“judgment”) that the Senate can impose. These cannot extend “further than to” removal and disqualification. This language also suggests that the Senate has discretion to impose a judgment less severe than removal—such as censure, recognized in English impeachment law.

Now let’s turn to the far-better-known impeachment provision of Article II, Section 4: “The President, Vice President and all Civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”

This provision has long been read as meaning something it clearly does not say: that the listed offenses are the only ones for which the House may impeach and the Senate may convict. From this mistaken premise has followed a mistaken conclusion: that conviction of an impeached official must lead to removal.

But Article II, Section 4 does not impose any limitation at all on the grounds for impeachment. It is essentially a mandatory-sentencing provision, which requires removal if, and only if, the grounds for the impeachment and conviction are “high Crimes and Misdemeanors.”

Another problem with the conventional wisdom is the logical contradiction between the notion that presidents are impeachable only for high crimes and misdemeanors, and the undisputed axiom that they are also impeachable for crimes such as murder and rape. Such “private” crimes were clearly not considered high crimes and misdemeanors under English and colonial law as of 1787 because they were not directed specifically against the state. Nor can the impeachability of murder and rape be logically reconciled with President Clinton’s claims that he can be impeached only for grave abuses of his executive powers.

These logical contradictions disappear once it is understood that—both in the English tradition that the Framers adapted and in the words of the Constitution that they so carefully drafted—murder and rape need not be high crimes and misdemeanors to be impeachable.

The above analysis is derived in large part from the scholarship of Professor Isenbergh, who specializes in international taxation while dabbling (brilliantly) in constitutional excavation. He first propounded his theory in 1975 in a student note in the *Yale Law Journal*, where he was an editor. Last fall, he prepared an updated and expanded version,

titled "Impeachment and Presidential Immunity From Judicial Process." It can be found on his law school's Web site (www.law.uchicago.edu).

My brief summary can hardly do justice to Isenbergh's powerfully reasoned exposition of the language and history of the impeachment clauses.

In any event, the Isenbergh reinterpretation obviously does not resolve the Clinton case. But it does provide a road map for amending the Senate's rules to escape the straitjacket of equating conviction of an impeached president with removal. This would enable senators in either party who end up convinced that the president committed crimes to vote their consciences both on the question of guilt and on the question of removal.

The conventional view that conviction necessitates removal puts unhealthy pressure on both anti-removal and pro-removal senators, tempting the former to acquit Clinton regardless of the evidence and the latter to classify Clinton's crimes as "high" even if that seems a stretch.

The Isenbergh reinterpretation, by contrast, means that senators who believe that removing Clinton would be bad for the country could nonetheless convict him, and could then vote against removal on the grounds that his crimes were not "high" and that the remedy should be censure.

It also means that senators who believe that the country would be better off without Clinton would be free to vote for that result on either of two rationales: Those who doubt that Clinton's conduct should be classified as high crimes—perhaps out of reluctance to lower the bar for automatic removal of future presidents—could convict Clinton of low crimes, and then vote for removal as a discretionary remedy. Those who consider him guilty of high crimes could simply vote for conviction and then vote for removal.

The bad news, it may be argued, is that the Constitution as I read it means that a president could theoretically be impeached and removed (though not automatically) even for offenses far pettier than Clinton's. Might not Congress abuse such an unlimited power?

I see little risk of that. The real safeguard against unwarranted impeachments has always been the requirement of a two-thirds Senate vote to convict. It has never been the conventional misreading of the phrase "high Crimes and Misdemeanors"—which ultimately means whatever Congress says it means—as a limitation on the impeachment power.

If Isenbergh is right, then how could so many others have been so wrong over the past 200 years, both in reading the plain language of the

Constitution and in construing the comments of James Madison and others at the Convention?

That's a long story. Isenbergh's article offers a cogent explanation. Every senator who takes the Constitution seriously should read it. This may be an idea whose time has come.

II. A CONVICT-IN-CHIEF?—THE LOGICAL CONCLUSION OF THE
CONVICTION-WITHOUT-REMOVAL THESIS IS THAT WE'RE ALL
IMPEACHABLE¹¹

by Akhil Reed Amar

Can the Senate decide to convict Bill Clinton by a two-thirds vote, yet allow him to remain president? No, says our constitutional tradition and a vast chorus of distinguished constitutional scholars, right, left and center. Yes, says tax law professor Joseph Isenbergh and legal commentator Stuart Taylor in recent media pronouncements. Who's right?

The relevant constitutional texts are as follows. Under Article I, Section 2, the House "shall have the sole Power of Impeachment." Under Article I, Section 3, the Senate "shall have the sole power to try all Impeachments [and] no person shall be convicted without the Concurrence of two-thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." Finally, Article II, Section 4 provides that "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Under the mainstream reading of the Constitution, all these impeachment clauses must be read together, and when they are, the rules are clear and sensible. Only civil officers—presidents, VPs, cabinet heads, judges and so on—may be impeached. And they may be impeached only for treason, bribery, or other high crimes and misdemeanors. Once convicted by the Senate for these crimes (by a two-thirds vote), they must be removed from office. The Senate, however, has discretion whether to impose the additional sentence of disqualification from future office-holding.

11. This section was first posted in *The American Lawyer Media On-line* on February 4, 1999. See Amar, *supra* note 8.

Not so, say Isenbergh and Taylor. On their revisionist view, these clauses should not be read together, but in divide-and-conquer fashion. Thus, Article I, Section 2 confers a free-standing impeachment power not limited by the high-crimes language of Article II, Section 4. In other words, the House may impeach a president for low crimes or no crime—for jaywalking or vetoing a porked-up bill. And the Senate under Article I, Section 3 would be free to convict, remove, and even disqualify, a president for these low or nonexistent crimes. According to Isenbergh and Taylor, the Article II high-crimes clause is simply a mandatory sentence rule that if a president (or other civil officer) is convicted of a high crime, he must be removed. But Congress, under its free-standing Article I power, can impeach and convict for a non-high crime, in which case the impeachment defendant may but need not be removed.

Textually, each reading squares—literally. On the mainstream view, Article II sets the standard defining what a person may be impeached for under Article I—high crimes and only high crimes. We must read Articles I and II together (call this the one-two punch) just as John Marshall in *Marbury v. Madison* deduced judicial review by reading Article III's grant of judicial power to interlock with the Article VI supremacy clause (call this the three-six punch). In the impeachment context, the purpose of the one-two punch is to protect officers against a parliamentary-style regime in which Congress could oust a duly elected president or a federal judge for any reason or no reason. Under American-style separation of powers, a key concern of the Founding Fathers was to limit legislative encroachment on the executive and judicial branches.

On the revisionist view, however, the words of Article II merely specify a mandatory sentence. But why would a mandatory sentence rule have been sensible in 1787, given that Congress could always evade this mandate simply by calling a high crime a low one, and giving a lower sentence than removal whenever it wanted to? Isenbergh and Taylor have yet to point to a single Founder who claimed that this was indeed the purpose of Article II, Section 4, and their thesis is radically at odds with abundant historical evidence that the Framers were trying to protect the president (not to mention judges) from being removed for mere policy or partisan disagreement.

But forget about the president and judges for a moment. Under the revisionists' logic, Congress would have plenary power to impeach private citizens!

If, as they claim, Article I confers a free-standing impeachment power unlimited by Article II, then Congress could decide to impeach anyone, and disqualify that person from ever holding office in the future. The only thing in the Constitution that limits this power is Article II—which speaks only of officers. And under the mainstream view, Article II does indeed limit Article I, by saying who may be impeached (only officers) and for what (only high crimes). But this is precisely the one-two punch that revisionists reject.

So if revisionists are right, you, dear reader, could be impeached—for lying about your sex life, or for supporting a president who lies about his, or for jaywalking, for that matter. Once convicted by the Senate, you could be forever barred from holding federal office. And not even presidential mercy could save you, because Article II, Section 2 denies the president pardon power in cases of impeachment. On this view, Congress would have been free in, say, 1850 to permanently ban all abolitionists (then a small minority, but growing fast) from future office-holding. In the New Deal, when Democrats held huge congressional majorities, they could have rendered all registered Republicans permanently ineligible to hold office. Thus we see how revisionism threatens not only American-style separation of powers, but also basic civil liberties. This is a dangerous thesis.

And not just dangerous—but also historically implausible. Revisionists point to no one at the Founding who admitted that private citizens were impeachable. Had this been the original understanding, the opponents of the Constitution would have had a rhetorical field day. But it was not the original understanding. The Aug. 6 draft Constitution at the Philadelphia Convention made clear that impeachment would be limited to officers—but it made this clear in language outside Article I—in an early version of the one-two punch. In the *Federalist* Number 65, Alexander Hamilton took pains to stress that “jurisdiction” in impeachment was limited to “public men”—pointedly excluding private citizens. In the very first impeachment case that reached the Senate, in the 1790s, that body decided that Sen. William Blount could not be impeached because, technically, he was not an executive or judicial “officer” within the meaning of Article II, Section 4. In other words, the Senate read Articles I and II together—the one-two punch.

Thus, revisionism turns out to be structurally unsound, dangerous to liberty, historically lame, and in deep tension with important precedents and traditional understandings. It is also—when promoted as a legitimate option in February 1999—wholly unfair. This odd theory was not the basis for the House impeachment in December, and so it should

not be the basis for Senate action now. Elementary notions of notice and fair play preclude a kind of bait-and-switch, whereby the basic rules of the impeachment game are suddenly changed at the end of the trial because one side seems to be winning.

III. GUIDED MISSIVES: TAYLOR RESPONDS TO AMAR—READING THE CONSTITUTION’S IMPEACHMENT CLAUSES TOGETHER IS RIGHT—IT’S YOUR CONCLUSION THAT’S WRONG¹²

by Stuart Taylor Jr.

Dear Akhil,

Let me begin with two concessions and one clarification.

I concede your point that the reinterpretation of the Constitution proposed by Professor Isenbergh (and me) should not—and surely will not—be adopted as part of the Senate’s process in the almost completed trial of President Clinton. Not one senator has warmed to the idea, and it is now too late to try to sell it in this context.

I also concede that my column was a bit overly strong—in what I’d call the pardonable sin of columnist’s license—in pronouncing the conventional interpretation “dead wrong.”

The clarification is that even if everything you’ve written is true, there should be no doubt that the Constitution permits the pending (albeit politically wounded) proposal by Senate Republicans to adopt “findings of fact” before voting on whether to convict the president.

That said, nothing in your argument shakes my strong sense that the conventional wisdom is, well, wrong (although very much alive) and that the Isenbergh thesis is strongly supported by a careful reading of the text and structure of the Constitution; is more consistent with the history of the framing than the conventional (or “mainstream,” if you prefer) wisdom; and is barely dented by the overwrought policy concerns and feverishly imaginative, horrible hypotheticals on which you so heavily rely—perhaps with a view to scaring all us jaywalkers (and any still-extant 180-year-old abolitionists who hanker for public office) away from Isenbergh.

12. This section was first posted in *The American Lawyer Media On-line* on February 5, 1999. See Stuart Taylor Jr., *Guided Missives: Taylor Responds to Amar—Reading the Constitution’s Impeachment Clauses Together is Right—It’s Your Conclusion That’s Wrong* <<http://www.lawnewsnetwork.com/stories/A72-1999Feb5.html>>.

I also am toying with an as-yet-unresearched theory as to why the conventional wisdom has become so firmly entrenched. (Hint: How would senators like the idea of being impeachable by the House?)

A sort of point-by-point response follows.

As to the text, you dutifully quote it and rush on without noting how powerfully it—read as a whole, and in light of the Constitution’s structure—favors the Isenbergh thesis over the conventional wisdom.

First, the fact that the vast majority of limitations on the legislative power are specified in Article I suggests that this is the most logical place to look for limitations on the impeachment power. And, in fact, Article I does impose limitations: the sole power of the House to impeach, and of the Senate to “try”; the requirement of a two-thirds Senate vote to convict; the limitation of penalties to removal from office and disqualification (a conspicuous departure from English law) from future office-holding.

But Article I imposes no limitations on the *grounds* for impeachment. (Isenbergh suggests the Framers implicitly adopted English law limiting impeachments to crimes; I’m not so sure, in part because of statements like James Madison’s, at the Convention of 1787, that impeachment was “indispensable” to deal with “the incapacity, negligence or perfidy of the chief Magistrate.”)

Does Article II spell out *further* limitations on the impeachment power, as the conventional wisdom holds? I don’t think so. Article II is, of course, about the executive branch. This structural fact, together with the text of Article II, Section 4, suggests to me that the conventional wisdom is wrong in reading in that section an exhaustive listing both of grounds for impeachment and of persons subject to impeachment.

Section 4 does not say “*may* be removed.” It does not say “shall *only* be removed.” It says “shall be removed” on conviction of “high crimes and misdemeanors.”

By its terms, it’s a mandatory sentencing provision for a subset (“high crimes and misdemeanors”) of a broader, undefined category of impeachable offenses. Similarly, “civil officers” is most naturally (and structurally) read as a limitation of this mandatory sentencing provision to executive branch officials. I therefore doubt the correctness of the conventional wisdom that the words “civil officers” were stuck into Article II, Section 4 to denote a grab-bag category of all impeachable persons—a grab-bag that somehow has been read for 200 years or so to include Article III judges, but not Article I senators!

You assert that “all these impeachment clauses must be read together.” Granted. But, as illustrated above, reading them together severely undercuts your argument.

IV. GUIDED MISSIVES: AMAR RESPONDS TO TAYLOR—WHO’S CALLING WHOM ‘OVERWROUGHT’?¹³

by Akhil Reed Amar

Dear Stuart,

Like you, I begin with a concession. I concede you are a hugely talented journalist, with a way with words. So when you say that my refutation of your thesis is “overwrought” and “feverishly imaginative,” many readers might think that mine was the outlandish view, when in fact it represents the consensus of virtually all serious constitutional scholars who have written on the issue.

Many of us have studied the Constitution and its history for years—week in, week out. Can you (a great journalist) or Joseph (a distinguished tax lawyer) claim the same? If not, please pause before making sweeping assertions that all experts are “wrong” because your view is “more consistent with the history of the framing.” Those who study history as our daily job know that this assertion is highly dubious—Joseph’s pamphlet simply misses or mishandles much of the contrary historical evidence.

You find me “overwrought” and “feverish.” Let’s review things coolly, point by point.

1. I claim the text makes little sense as a mandatory-sentencing rule because it can so obviously be evaded at will by calling a high crime a low one. Your response?

2. I ask whether any Founder ever explicitly said that the text was simply a mandatory-sentencing rule. Your answer?

3. You claim that limits on impeachment power more naturally belong in Article I than II. On this logic, judicial review is unconstitutional because the idea is not spelled out explicitly in Article III. Rather, judicial review derives from the interplay of Articles III and VI—a three-six punch just like the one-two punch in impeachment. There are countless other examples I could produce if you insist on pushing this

13. This section was first posted in *The American Lawyer Media On-line* on February 8, 1999. See Akhil Reed Amar, *Guided Missives: Amar Responds to Taylor—Who’s Calling Whom ‘Overwrought’?* <<http://www.lawnewsnetwork.com/opencourt/backlog/c020899b.html>>.

weak point. The more constitutional law you know, the weaker this point is.

4. You note that the Constitution doesn't explicitly say that *only* officers may be impeached and *only* for high crimes. It also doesn't say that federal courts have power *only* over the cases specified in Article III. Often, sensible readers infer an *only* under the basic legal maxim of *expressio unius*.

5. I claim your thesis is wildly at odds with one of the Federalists' main structural goals—to shield the executive and judiciary from English-style parliamentarianism. The more history you know, the stronger this point is.

6. I claim your logic renders all private persons impeachable—and for jaywalking. You find this “feverish” and “overwrought,” but these are precisely words that describe Anti-Federalists. Had anyone at the Founding thought that private persons were impeachable, these feverish folk would have made a ruckus. The fact that they did not is dramatic historical evidence against you—as is *The Federalist* No. 65, and the Blount verdict.

Now let me propose a graceful exit strategy. If you want to keep fighting for your outlandish thesis, throwing good money after bad, fine. But if you prefer, let's talk about another point where we disagree, where your views are much more plausible. You think that impeachment standards should be identical for judges and presidents—I don't. Thoughtful scholars are not of one mind on this point—this is a fair fight. So feel free to change the subject.

Best,
Akhil

V. GUIDED MISSIVES: TAYLOR RESPONDS TO AMAR—I MAY BE A JOURNALIST, BUT I CAN READ¹⁴

by Stuart Taylor Jr.

Dear Akhil,

Thanks for the reminder that mere journalists and tax professors are unqualified to dispute the views of full-time professors of constitutional law on their own turf. Would it follow that you should defer to

14. This section was first posted in *The American Lawyer Media On-line* on February 9, 1999. See Stuart Taylor Jr., *Guided Missives: Taylor Responds to Amar—I May be a Journalist, But I Can Read* <<http://www.lawnewsnetwork.com/opencourt/backlog/c020999b.html>>.

my view—based on almost-full-time study over the past year of the detailed evidence—that the president has clearly committed both perjury and obstruction of justice?

To be clear, I did not and would not call your basic position either “overwrought” or “feverish.” Those were my words for (respectively) your policy concerns and your “they-could-impeach-any-of-us-for-jaywalking” hypothetical.

I will now take your six most recent points in rough numerical order. Since I think our exchanges to date establish that the Constitution’s structure and text (which even a journalist can read all the way through) favor my side of the argument, not yours, I stress here the policy and historical arguments. And since I expect that you do know the history better than I do, I look forward to being educated on what makes you so confident that it supports your side.

Nos. 1 and 5. Sure, the Senate could evade Article II, Section 4’s mandatory removal for “high crimes and misdemeanors” by calling a “high crime” a low one. Guess what? They are doing that right now, under the conventional interpretation. In this regard, the Isenbergh thesis is utterly indistinguishable from the conventional wisdom. So your first point adds nothing at all to your argument.

This leads me to your point No. 5: the overwrought policy concern that to deem less than “high” crimes to be grounds for (discretionary) impeachment and removal would make those steps too easy, moving us toward the horrible black hole of parliamentarianism.

Inherently manipulable and often manipulated formulas of words like “high crimes and misdemeanors”—and like “regulate commerce,” and “the freedom of speech,” and “due process,” and “equal protection”—are not our Constitution’s most sturdy safeguards against bad outcomes. Structural safeguards—such as enforcement of the Bill of Rights by life-tenured judges—have far more bite than parchment barriers.

So it is that our essential safeguard against unwarranted impeachments is the requirement of a 2/3 Senate vote to remove—not the dubious conventional wisdom that we can only impeach for “high crimes.” Those words have meant a dazzling array of things over the centuries to senators, scholars and others, whose interpretations have had an uncanny pattern of lining up with their immediate partisan goals.

President Andrew Johnson escaped removal by one vote in 1868 for conduct that few today characterize as “high crimes.” Judges have been impeached and removed for the “high crimes” of drunkenness (in 1803), lying on tax returns (in 1986), and grand jury perjury to cover up

noncriminal, nonofficial misconduct (in 1989). And although the 1974 impeachment interruptus of President Nixon is in many ways distinguishable from the current matter, the main thrust of the scholarly writings I have seen from around then through 1997—including the 1974 *Impeachment* handbook by the great Yale law professor Charles L. Black Jr., which was recently reissued with a foreword by you, and the impeachment books by John Labovitz, Michael Gerhardt and the late Raoul Berger (not to mention Arthur Schlesinger Jr.'s not-so-scholarly *The Imperial Presidency* in 1973)—strongly support the view that Clinton's perjuries and obstructions of justice are "high crimes," as Sen. (and former Senate Democratic Leader) Robert Byrd has said. Then in 1998, for some reason, many full-time constitutional scholars and historians—in some cases contradicting their own prior writings—came suddenly to the previously invisible but amazingly confident consensus that perjury and obstruction are not "high crimes." Not when committed by this president, at least.

No. 2. I have seen no explicit statement by any Founder specifying either that Article II, Section 4 was—or that it was not—simply a mandatory-sentencing rule. Have you?

Absent clearly contrary history, text trumps. But in any event, the history of the Founding as I see it strongly supports my reading of the text, by suggesting that many of the Founders understood that presidents could be impeached not only for "high crimes and misdemeanors," but also for mere misdemeanors. To cite just one of many possible illustrations:

Guess what James Madison said on Sept. 8, 1787, just after the famous exchange that began (according to Madison's notes) with an objection by Madison to the inclusion in what was to become Article II, Section 4, after "treason and bribery," of the words "or maladministration"? It's well known that Madison complained that "so vague a term will be equivalent to a tenure during pleasure of the Senate." It's also well known that "other high crimes and misdemeanors" was then substituted and adopted on the motion of George Mason. What's less known is what happened next: "Mr. Madison, objected to a trial of *the president* by the Senate, especially as he *was to be impeached . . . for any act which might be called a misdemeanor.*" (Emphasis added).

How can that—and similar statements by Madison, James Iredell, and others later, during the ratification debates and the First Congress—be reconciled with the conventional wisdom? The conventional view not only reads "other high" as modifying "misdemeanors" along with "crimes," which seems manifestly correct; it also reads "high crimes

and misdemeanors” as the *only* grounds for impeachment, which (I argue here) seems incorrect, but also (contrary to Madison) reads “other high” as modifying “misdemeanors” along with “crimes.” And after Clinton got caught perjuring and obstructing, the conventional wisdom stretched still further, to read the clause as barring impeachment even for proven felonies, unless they also amount to uniquely dangerous direct assaults on the entire system of government, or something like that.

Madison’s statement about “any . . . misdemeanor” being impeachable simply cannot be reconciled with the conventional wisdom—which, let’s remember, itself relies heavily on the same Madison’s notes recounting what was said (by Madison) at the same convention, and on the same day. But Madison’s “misdemeanor” statement computes very well if one reads Madison’s notes of the discussions of Sept. 8, together with other discussions earlier in the convention (and in the ensuing few months and years), as reflecting an understanding by Madison and others that Article II, Section 4 had by Sept. 8 become a mandatory-sentencing provision, not an exhaustive listing of impeachable offenses.

Why, you may ask, was this not spelled out more clearly by the Founders? Actually, it *was* spelled out pretty clearly, in the text of the Constitution. And for all we know, it may have been spelled out even more clearly during the convention: We don’t have anything approaching a complete record of what was said there because we have little to go on but Madison’s handwritten notes. They do not purport to be a verbatim transcript or even a complete account of all discussions. They do, of course, seem a pretty good guide to what was said by James Madison.

No. 3. I said that Article I is the most logical place in which to look for limitations on the impeachment power. I did not say that this alone settles the whole argument, as you seem to assume in resorting to wildly inapposite numerological mysteries understood only by full-time constitutionalists.

No. 4. It makes no sense to strain against the most natural reading of the impeachment clauses by seizing on the omission of the word “only” in a completely unrelated and semantically dissimilar context in which “only” would have been redundant: Article III’s careful enumeration of judicial powers unmistakably implies that those are the only powers granted.

No. 6. I do not think the Founders worried about the possibility of Congress impeaching private citizens—any more than they worried that Congress might give jaywalkers the death penalty—because their task was a bit too urgent to allow for spending the 10 years or so it might

have taken to conjure up every imaginable act of congressional irrationality and then seek to fashion watertight parchment barriers to prevent them all.

Remember, Article I provides that “judgment” in impeachment cases “shall not extend further than to removal from office, *and* disqualification . . .” (Emphasis added.) This may implicitly limit impeachment to officials, because the use of “and” in this context arguably suggests that nobody can be disqualified without first being removed.

Even if you read that “and” as meaning “or,” you also have to strain very hard indeed to imagine Congress going through all the time and agony of an impeachment and Senate trial in order to disqualify a private citizen from future federal office.

I could, with considerably less strain, come up with horrible hypotheticals flowing from the conventional interpretation. How about Congress deciding that a consensual sexual affair is a “high crime”? Or, perhaps, that such an affair warrants a vote of censure by the Senate? (That one is no hypo.)

The broader point is that far-fetched parades of horrors are the last refuge of advocates on the ropes—which helps explain why I am declining your generous invitation for *me* to throw in the towel.

You err, by the way, in saying that I think impeachment standards identical for judges and presidents.

I do doubt that the conventional interpretation of Article II, Section 4 (which I accepted until three weeks ago) can be squared with a dramatically narrower definition of “high crimes” for presidents than for judges.

The Isenbergh thesis, on the other hand, reads the impeachment clauses logically and sensibly as giving both House and Senate broad discretion to (among other things) deal differently with presidents than with judges. But you can’t take just that piece of it and reject the rest.

Sincerely,
Stuart

VI. GUIDED MISSIVES: AMAR RESPONDS TO TAYLOR—YOUR
REVISIONISM PROVED YOUR OPEN-MINDEDNESS; SO WILL REVERSING
YOURSELF¹⁵

by *Akhil Reed Amar*

Dear Stuart,

Let's review, my friend, the six points.

1. I claim your reading of Article II as a pure mandatory-sentencing rule and nothing more is illogical because, on your reading, good-faith members of Congress would always be free to observe a high crime, but charge a lesser crime and thereby retain *total* sentencing discretion to remove or not. You say my (mainstream) reading suffers from the same problem. Wrong. The mainstream reading attributes a *different* main purpose to Article II—to limit WHO may be impeached (only officers), and FOR WHAT (only high crimes). This is not an illogical purpose and the clause accomplishes it well. (Also, it is the purpose that Founders repeatedly attributed to Article II, whereas they never attributed your proposed purpose—see paragraph 2). As to WHO, the mainstream view holds that (by *expressio unius*) Article II protects private citizens from impeachment; and here Article II has worked perfectly, confirming many Founding statements that impeachment was limited to “officers.” As to WHAT, the mainstream view holds that (by *expressio unius*) Article II says that officers may be impeached only for high crimes. The Founders repeatedly said just this (see paragraph 2), and contrary to your suggestion that these words mean nothing (for otherwise your point collapses), the phrase meant something to them. It meant, at a minimum, that a good-faith Congress could not remove a President for vetoing an unpopular bill or for being a member of a minority party, or remove a judge merely because legislators disagreed with his good-faith rulings. By contrast, on your reading, impeachment is a free-standing power that good-faith Congressmen may use whenever they see fit, even in the absence of any officer criminality or wrongdoing of any kind. This is a truly radical parliamentarianization of American government wholly inconsistent with the Federalists' clear structural blueprint. (See paragraph 5.)

15. This section was first posted in *The American Lawyer Media On-line* on February 10, 1999. See Akhil Reed Amar, *Guided Missives: Amar Responds to Taylor* <<http://www.lawnewsnetwork.com/opencourt/backlog/c021099b.html>>.

2. What *explicit* historical evidence do you offer for this (illogical and radically counterstructural) mandatory-sentence reading? None—not a single explicit statement clearly proclaiming that Article I impeachment may occur outside the confines of Article II’s specification. By contrast, the Founders did explicitly support the mainstream reading. Begin with Hamilton’s Federalist No. 69. His whole point here—and of Federalists everywhere—is to reassure skeptics that the President will not become a dictator. He has every incentive to highlight limits on the Presidency. Yet he never says here or elsewhere (nor does any other Founder say) “don’t worry guys, the President may be removed at will any time half the House plus two-thirds of the Senate think he is too big for his britches.” Instead, Hamilton says that, unlike the English King, the president “would be liable to be impeached, tried, and, upon conviction of *treason, bribery, or other high crimes or misdemeanors* removed from office.” In context he is clearly saying that these are the *only* grounds—any other reading is wishful and willful, conjuring up an invisible stealth procedure that no one ever mentioned but somehow everyone understood. Hamilton’s New York counterpart is the Anti-Federalist Brutus, who writes emphatically that “The *only* causes for which [judges] can be displaced, is conviction of *treason, bribery, and high crimes and misdemeanors* They *cannot* be removed from office . . . for any error in judgement or want of capacity.” Quoting Article II, Brutus insists that judges “are removable *only* for crimes Errors in judgement . . . can *never* be supposed to be included in these words, *high crimes and misdemeanors*.” Whereas Brutus thinks this strong judicial independence is a reason to vote against the Constitution, Hamilton directly responds in the Federalist No. 78—not by disputing Brutus’s reading of the Constitution, but by claiming that strong judicial independence is a reason for citizens to *support* the document. Now hear the words of Pennsylvanian James Wilson, a leading Framers and later Supreme Court Justice: “In the United States and in Pennsylvania, impeachments are *confined* to *political characters, to political crimes, and to political punishments*. The *president, vice president, and all civil officers* of the United States; the *governour and all other civil officers* under [Pennsylvania,] are liable to impeachment; the *officers* of the United States, *for treason, bribery, or other high crimes and misdemeanors*; the *officers* of [Pennsylvania,] for any misdemeanor in office.” Surely, Stuart, unless we are playing some weird version of Simon Says, this explicitly repudiates your thesis and clearly affirms that Article II “*confines*” Article I by limiting WHO may be impeached and FOR WHAT. Another leading Framers, General Pinckney, expressed

similar views in the South Carolina ratification debates; and in North Carolina, the prominent Federalist Archibald Maclaine was emphatic: “Impeachments are *only* for high crimes and misdemeanors [It is] the most horrid ignorance to suppose that any officer . . . is to be impeached for every petty offence . . . [Instead, impeachment] will be a kind of state trial for *high crimes and misdemeanors* [T]he power of impeachment *only* extends to *officers* of the United States.” Fellow Federalist (and later Supreme Court Justice) James Iredell agreed: “[Impeachment] is calculated to bring [great offenders] to punishment for crime which is not easy to describe, but which *every one must be convinced is a high crime and misdemeanor*.” Iredell went on to discuss in detail why this check, limited to “high *officers* of state” should never be used for mere policy disagreement. You have invoked Iredell, but obviously misread him. You have also misread Madison—but I lack space here to detail how you are wrenching snippets out of context and missing the overwhelming pattern of historical and structural evidence. There is lots more historical evidence against you, and almost nothing that, properly construed, supports you.

3. You think Article II is an odd place to limit Congress’s Article I impeachment power, but on the mainstream view, Article II does—among other things—protect Presidents from being removed for anything less than high crimes. Article II seems an apt place for this protection (which also encompasses judges, but presidential impeachment was paramount in the Founders’ minds). Despite your somewhat dismissive rhetorical flourish about “inapposite numerological mysteries understood by full-time constitutionalists,” arguments about the interplay between different clauses (like Articles I and II) are a basic feature of constitutional law, as I detail in a February *Harvard Law Review* article (written long before our Dialogue) entitled “Intratextualism.” Later on—once our current dispute simmers down—I would truly be grateful for your reactions to this article.

4. You admit it sometimes does make contextual sense to infer the word “only” where it is merely implied rather than express. You claim Article II is not such a place—but the historical and structural evidence (see paragraphs 2 and 5) proves otherwise. The mainstream reading is a natural one—though not the only semantically permissible one—in the real world. You, my friend, are yourself proof of this, for you admit that until recently you, like everyone else, read the clause this way. Unless the entire world is cockeyed, you must concede that the words can be read both ways. Then the question becomes which reading makes more constitutional sense—for reasons of logic (paragraph 1), history (2), and

structure (5), not to mention two centuries of tradition. And on all these points, your reading fails quite badly.

5. Indeed, your reading is simply bizarre, structurally—threatening the basic independence of the executive and judiciary by allowing good-faith Congressmen to impeach for mere policy disagreement. *Your view means that it is easier for Congress to remove a President for vetoing a bill than it is to override the veto itself!* (The former, on your view, requires only a House majority, whereas the latter requires a House supermajority—and on your view, both impeachments and veto-overrides may be based on political disagreement.) This simply cannot be right—and if it is, why did no one at the Founding ever remark on this? (See paragraph 2.) Were Federalists really so stupid as to create the veto while utterly undermining it?

6. And were they so stupid as to render all private citizens impeachable? They explicitly said otherwise, repeatedly limiting impeachment to officers (see paragraph 2.) And the only place where this limit exists is Article II (by *expressio unius*). You claim this limit might be implicit(!) in Article I, Section 3—but your and-versus-or gambit simply fails as a matter of basic mathematical logic. Section 3 says punishment shall not *exceed* removal plus disqualification, and mere disqualification does not exceed this. (B is less than A plus B.) Note also that Founding statements limiting impeachments to officers invoked Article II, not Article I, see paragraph 2.

Stuart, although it is often awkward to back away from ideas one has publicly embraced, I hope you are open to rethinking your position. You proved yourself admirably open-minded in giving Joseph's thesis a close look. Are you willing to be equally open-minded in admitting that perhaps the thesis has more (and deeper) cracks than you first noticed, and that maybe the mainstream view is right after all? I hope so, my friend.

VII. GUIDED MISSIVES: TAYLOR & AMAR SAY FAREWELL¹⁶

by Stuart Taylor Jr. and Akhil Reed Amar

Dear Akhil,

Notwithstanding my urge to respond at length, I sense that my loquacity may be trying the patience of our hosts, and of any readers who may still be out there. It is time for me to conclude my part of this. So I'll be brief. For me.

I would be glad to concede error—it wouldn't be my first time—if our exchanges had persuaded me that Isenbergh and I are mistaken. But far from doing that, your emails have left me, on balance, more persuaded of Isenbergh's thesis than before. This is not because you are not a persuasive fellow, not because you are not a great constitutional scholar, and not because your points have not been thoughtful and well-considered. You are obviously a stunningly good advocate for your position. And that's why I am left thinking that if the Isenbergh thesis can survive an attack from someone of your talents—especially on the history-of-the-framing front—then it has passed the test of strict scrutiny. Perhaps, with more time and space than our medium permits, you would convince me that I am in error. But it hasn't happened yet.

A few specific responses to your latest revisiting of the six numbered points.

1. I incorporate by reference my previous post's five paragraphs under the heading "Nos. 1 and 5," which I think largely suffice to refute your first numbered point. I stress especially that (a) the real protection against a slide into parliamentarianism or unwarranted impeachments of judges is the requirement of a two-thirds vote to remove, and (b) that even as we speak, the Senate is "observ[ing] a high crime" (to borrow your words) and yet pretending that the crime is either not "high" or is unproven. So much for the determinative force of the phrase "high crimes or misdemeanors"—a porous parchment barrier that is far more central to your reading of the impeachment clauses than to mine.

2. I incorporate by reference my previous post's six paragraphs under the heading "No. 2." And I repeat that the text of the Constitution is

16. This section was first posted in *The American Lawyer Media On-Line* on February 16, 1999. See Stuart Taylor Jr. & Akhil Reed Amar, *Guided Missives: Taylor and Amar Say Farewell* <<http://www.lawnewsnetwork.com/opencourt/backlog/c021699b.html>>.

explicit evidence that supports my reading, and that there is very powerful implicit support for its various statements by various Founders along the lines of James Madison's assertion at the Convention that "the president [can] be impeached . . . for any act which might be called a misdemeanor." I challenge you to support your suspiciously conclusory and dismissive claim that I have "misread Madison" and have been "wrenching snippets out of context," and to cite anything I have said that is *misleadingly* out of context. *Every* quotation of less than a full text can unfairly be called "out of context," and I have supplied far more context for the snippets that I have cited than you have for yours.

That said, I concede that the language you quote from Hamilton's Federalist No. 69, James Wilson, Archibald Maclaine, and James Iredell, read in isolation, lends some support to your Argument. But their comments are very far from being dispositive. Hamilton does *not* explicitly say, or even clearly imply, that the President can be impeached *only* for "high crimes." And Iredell's comments at the North Carolina ratification debate are mixed: Consider, for example, his comments that "the President would be liable to impeachment . . . where he had received a bribe *or* had acted from some corrupt motive or other . . . The President must certainly be punishable for giving false information to the Senate [by] an impeachment for a misdemeanor upon that account." Nothing there about "high."

I disagree with your suggestion that Hamilton—a strong-presidency man whose preference for "energy in the executive" permeates his writings, and who was about as close to being a royalist as any of the Founders—"had every incentive to highlight limits on the presidency." And I suggest that Madison's comments on the impeachment power, both at the Convention and during the first Congress, and similar comments by others, are entitled to at least as much and perhaps more weight than the post-Convention, in-the-heat-of-advocacy comments at ratification debates that you cite, such as that one sentence from Hamilton's post-convention advocacy in Federalist 69.

It is entirely possible—indeed, it seems likely—that some of the Founders read the Constitution's impeachment clauses as you do, and others read them as Isenbergh and I do. If so, the most reliable guide to the correct reading is the text, and the second most reliable guide may be the interpretations of those who were most intimately involved in the drafting of the particular language in question. Here, that would be James Madison.

And the collected quotations of James Madison on impeachability—from his statement early in the Convention that impeachment was

“indispensable” to protect against the “incapacity, negligence or perfidy of the chief magistrate” through his statements in the First Congress—really do provide extremely compelling evidence for the Isenbergh thesis, as Isenbergh’s paper notes.

During the Virginia ratification debates, Madison said that “if the president be connected, in any suspicious manner with any person, and there be grounds to believe that he will shelter them, the House of Representatives can impeach him; they *can remove him* if found guilty.” (Emphasis added.) Translation: The President is impeachable for suspicious activities that are not “high crimes”; removal in such cases is optional.

In the First Congress, in 1789, Madison said that the President could be impeached “if he suffers [his subordinates] to perpetrate with impunity high crimes or misdemeanors against the United States, *or* neglects to superintend their conduct, so as to check their excesses.” (Emphasis added.) He also said that the President “is impeachable for any crime or misdemeanor before the Senate, at all times.” (Nothing there about “high.”) And he said that the House could impeach and the Senate could convict “an unworthy man” at any time, and that “the wanton removal of meritorious [executive branch] officers” was an act of “maladministration”—the very term that had been deleted from Article II, Section 4, at the suggestion of the same Madison, and replaced with “high crimes and misdemeanors”—that “would subject the President to impeachment and removal.” Akhil, if you can explain all these quotations away, your forensic skills are even greater than I had imagined.

3. I grant you that it is conceivable that the Founders thought that Article II was a logical place to specify limits on the impeachment power, given that presidential impeachment was paramount in their minds. It’s also possible, although rather odd, to suppose that the Founders decided to stick judges into Article II, Section 4 as “civil officers.” But if that was where they decided to list limitations on the impeachment power, why did they end up putting *most* of the limitations—including the limitation on “judgment in cases of impeachment” to removal and disqualification—in Article I, along with most other limitations on congressional powers?

A more logical reading, in my view, is that Article II, Section 4 is a mandatory sentencing provision intended to impose the ultimate limit on *presidential* power, by *requiring* the Senate—when it acts on “oath or affirmation” to render impartial judgment as a court of impeachment—to remove a president who is guilty of “high crimes” even if (for

example) he is a popular demagogue and more than one-third of the senators either want him to stay or might fear to remove him. Even senators who take their oaths seriously enough to convict a guilty president might well be swayed by faction or fear to let him off easy if the choice between removal and lesser sanctions such as censure is *discretionary*. The Founders hoped that the Senate would act more as a judicial than as a political body in impeachment trials (see Hamilton's *Federalist* 65) and may well have seen mandatory removal on conviction of "high crimes" as a bulwark against infection of the ultimate decision—what's the remedy, now that we've convicted the rascal?—by partisanship, faction, or fear.

Of course, the Senate's coddling of our current high-crime-committing President shows that the Framers' plan to *mandate* removal in such a case—under *both* of my interpretation and yours—has been thwarted.

Sad, to me, but of limited relevance to our disagreement.

4. Your only new point here is that until recently I accepted the same conventional view of the impeachment clauses that I now challenge. So I did. All that shows is that like most people, I don't have much time to embark spontaneously, without prompting, on the large project of revisiting the many unnatural readings of the Constitution that have become settled law. If I were to embark on such a project, where would I start? With the peculiar invocation of the due process clause as the fountainhead of abortion jurisprudence? With the misreading of the 11th Amendment as barring lawsuits by citizens against their own states? Life is too short.

That's why my initial reaction when I first skimmed Isenbergh's attack on 200 years of conventional wisdom was to toss it aside as surprisingly persuasive but way too late in our history to be taken seriously. Later, I studied it, and the Constitution, and some other stuff, and talked to some lawyers who had been thinking similar thoughts, and decided that Isenbergh really was extremely persuasive, if perhaps still too late.

5. See my answer numbered (1) above.

6. See the answer numbered (6) in my previous posting, which shows that the possibility of Congress impeaching private citizens was and is so remote and far-fetched that the Founders would not have worried about it, nor should we. In response to your closing paragraphs I'll admit that the settled interpretation of the impeachment clauses *may* be right after all. But on balance, I still believe rather strongly that—in

this, as in many other aspects of life and law—the conventional wisdom is wrong.

Best,
Stuart

Dear Stuart,

I'll keep this final response short—I remain very comfortable with my earlier missives to you, and would refer any doubtful reader to our last go-round in particular. My first and fifth points there seem to me quite forceful—dispositive, really—as a matter of logic and structure. And my sixth point highlights another obvious logical problem with your thesis. To put all these points together in a sentence: on your view, *anyone* may be impeached for *anything*.

In other words, if Article I, Section 2 is truly a free-standing font of power unlimited by Article II, Section 4, then everyone is potentially impeachable—even private citizens—and for conduct that could under no stretch of the imagination be deemed criminal or immoral. People could be impeached not merely for “misdemeanor” (misbehavior of some sort) but for simple demeanor—for being a member of the democratic party.

And here is where history comes in, for *no one at the Founding said anything close to that*. (Many at the Founding did say over and over things that support the mainstream reading—see point 2 in my last missive to you. And there is lots more, but I will resist the urge to pile on.) What Founders did often do is refer to the rather ponderous Article II, Section 4 phrase “treason, bribery, or other high crimes and misdemeanors” with crisper shorthand phrases—as you and I and everyone may do in conversation and even in print. And some Founders stressed “high” or “crimes” while others stressed “misdemeanors”—but they all were arguing *within* Article II, rather than suggesting that impeachment standards could exist *outside* Article II. Thus, none of your Founding material is a clear statement (1) that private citizens can be impeached, or (2) that impeachment can occur for no misconduct at all, or (3) that impeachment can occur outside Article II, Section 4, or (4) that Article II, Section 4 is merely a mandatory-sentencing rule and nothing more. At the Philadelphia Convention, for example, it is clear in context that the conversation is not (as you would have it) between what misconduct *requires* removal versus what conduct or misconduct merely *permits* removal. Rather, it is about what the *basic standards* for *all* removals should be (in keeping with the mainstream reading).

Since you are obviously keen not merely on Joseph Isenbergh's thesis but also on his article itself, let me confess that I am not a fan of this article. Almost none of the (often rather obvious) counterarguments and counterevidence I have raised in my missives to you were addressed in his article. Good articles—even "brilliant" ones—must squarely present the counterarguments and counterevidence for their readers to see.

My final point is a personal one: Thanks for keeping our disagreement so agreeable. I obviously read our Constitution very differently than do you and Joseph, but I send you both my warmest personal wishes.

Best,
Akhil

