CHAPTER TEN

Impeachment in the Constitutional Order

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No president of the United States has ever been convicted and removed from office as a result of an impeachment proceeding. Andrew Johnson was impeached by the House of Representatives but escaped conviction by one vote in the Senate. Richard Nixon resigned before he would have been impeached, and Bill Clinton beat House impeachment charges with substantial support in the Senate and in the country at large. What role does impeachment play and what role should impeachment play in a political system that has so rarely enacted, and has never completed, this process for punishing a president? Is impeachment an anachronism in a political order that has no real use for it? Or is the impeachment process a superfluous organ in the constitutional order, like an appendix in a human being, which may occasionally become inflamed but performs no important function for the health of the body? In this chapter, I show how and why the impeachment process, far from politically irrelevant, is a vital attribute of the theoretical architecture of a well-functioning separation of powers regime. The American pattern of disuse of the impeachment process may thus be a symptom of a serious problem in a constitutional order animated by separation of powers.

The Legalistic Interpretation

At least since the presidency of Andrew Johnson, political elites and the citizenry at large have generally understood the impeachment process to be a legal process, like a criminal prosecution. The constitutional structure and the norms and practices devised to enact it give considerable support to this conventional view. In the text of the Constitution, the House of Representatives is given the "sole power" to impeach a president, and

the Senate is given the "sole power" to try the executive.[1] These separate but complementary functions mirror those of a grand jury (with the power to indict), on the one hand, and that of a criminal trial, on the other.

The Congress has developed norms and institutional practices that amplify the grand jury–criminal trial analogy.[2] A committee of the House investigates allegations, with the aid of its own lawyers, and in recent times, after a report from a special prosecutor or independent counsel. If grounds for impeachment are found, the committee recommends articles to the House, which votes on them one by one. This process corresponds to the generation of "counts" or "charges" in ordinary criminal proceedings. On the floor of the House, according to its rules, members can add, amend, or drop articles proposed by the committee, but in practice they have never added any, although they have dropped some. Again, there seems to be a close analogy to a typical grand jury proceeding. If articles of impeachment are approved by the whole House, "managers" are appointed to present the case to the Senate. Managers seem to serve a function analogous to prosecutors in a criminal trial.

If these articles are sent to the Senate, according to the Constitution itself, Senators are required to take a new oath, one additional to their oath of office.[3] Following this constitutional mandate the Senate has adopted the pledge "to do impartial justice according to the Constitution and the laws." By taking a new oath, the Senate attempts to recompose itself into a new body, a jury. The Senators signify that although they are the same individuals, they will act differently than they ordinarily do. Collectively, they are pledging to change the culture and function of the Senate as a whole. This institutional shift is reinforced by the presence of the chief justice of the United States, to whom the Constitution explicitly gives the task of presiding over the trial of a president (but not other officials). The Senate is recomposed as a trial jury and the normal leadership of the Senate (the vice president of the United States and other majority and minority leaders) lose their function and are replaced by a justice who serves as the trial's judge. The Senate is being asked to transform itself from a legislative body into a different entity, one with a judicial character.

In establishing the judiciary, the Constitution provides that "the trial of all Crimes, except in Cases of Impeachment, shall be by jury."[4] This seems to equate impeachable offenses with crimes. What sorts of crimes

must these be? The offenses specified in the Constitution are these: "Treason, Bribery, or other High Crimes and Misdemeanors."[5] All of the offenses seem to be a subset of categories familiar to criminal law, crimes and misdemeanors. The history of the impeachment of presidents is largely a history of debate regarding the meaning of "other high crimes and misdemeanors." There was relatively little discussion of this phrase when the Constitution was drafted. George Mason had proposed to add "maladministration" to the offenses of treason and bribery. Reflecting hesitations and concerns expressed during the larger debate about assigning impeachment to the legislature, Madison objected that "maladministration" might suggest that the presidency served at the pleasure of the legislature rather than being an independent branch as the convention intended. Gouverneur Morris added that the electoral process is sufficient security against maladministration. Mason withdrew "maladministration" and replaced it with "other high crimes and misdemeanors." Although there is little discussion of the phrase in the convention notes, most commentators reasonably interpret this substitution as indicating that the president was not to be removed for mere partisan differences with the legislature. The rejection of the term "maladministration" is a central element of the legalist understanding of the impeachment process.[6]

Are "high crimes and misdemeanors" acts for which ordinary citizens might also be prosecuted, such as perjury, or murder, or tax evasion? Should the evaluation of evidence of these acts be similar to the evaluation of similar acts performed by ordinary citizens in ordinary criminal courts? The plain language of the text—language not technical but understandable on its face to ordinary citizens—seems to say yes. While the phrase appears to exclude some ordinary crimes in favor of "high crimes," legalists emphasize the idea that the offenses must be some subset of offenses comprehended by criminal codes. This legalistic view has prevailed in Senate debates regarding presidential misconduct since the time of Andrew Johnson.

It is a commonplace among historians that the motive for Andrew Johnson's impeachment was anger by the dominant political faction in Congress, the "Radical Republicans," over the president's refusal to support or to implement their domestic agenda for Reconstruction.[7] However, none of the ten articles of impeachment refers to the underlying policy debate that occasioned them. Johnson and his supporters convinced

Congress that the president could only be impeached for clear violations of law and that these violations needed to be definable as "treason, bribery, or other high crimes and misdemeanors." Conceding the president's premise, the Congress passed a law that secured the tenure of officers of the government until their replacements were confirmed by the Senate. This Tenure of Office Act thus had the effect of altering the president's removal power. Since the first Congress, the Constitution had been interpreted as granting the president sole power to fire his high-level executive branch subordinates without the consent of the Senate even though he shared the power of their appointment with them. The Reconstruction Congress thus sought to legally hamstring Andrew Johnson by reinterpreting and legalizing the removal power. When Johnson attempted to fire his secretary of war, Edwin Stanton, for advocating and executing policies at odds with the president's, Congressional Republicans charged that the president had broken the law. The key point here is that rather than respond to Andrew Johnson's uses of power, which had been repeatedly contested in the fight over Reconstruction, the Congress struggled to find a "legal" violation to express their political disillusionment.

In the course of the battle over Reconstruction, Andrew Johnson violated a nineteenth-century norm against presidents speaking directly to the people to campaign for legislation. Johnson not only made popular speeches but his speech was also accurately described as a series of "harangues." Johnson called his opponents in Congress "traitors" and likened himself to Jesus Christ. Because this speechmaking was so out of line with accepted standards for the conduct of his office, the House voted an article of impeachment for his inappropriate rhetoric.[8] Johnson's supporters succeeded in getting the Senate to drop that article, not because of lack of evidence for the allegation, but rather because it represented a political, rather than a strictly legal, charge. By establishing the principle that "high crimes and misdemeanors" must refer to violations of law, Johnson narrowed the debate to charges for which his guilt was very questionable. It was not clear that Edwin Stanton, appointed by Abraham Lincoln, was covered by the new Tenure of Office Act, for example; the act itself was arguably unconstitutional in light of the interpretation of the First Congress and the seemingly settled constitutional practice since the presidency of George Washington.

Although Johnson's supporters succeeded in deflecting attention from

his obstruction of Congressional will regarding Reconstruction, the Tenure of Office Act, which was invented to impeach him, did not establish a criminal offense. Succeeding in legalizing the process, Johnson's opponents failed to actually criminalize his alleged misdeeds and that failure contributed to his acquittal.

Richard Nixon was investigated for his role in a burglary attempt of the offices of the opposition Democratic Party in the Washington, D.C., building complex known as the Watergate during the election campaign of 1972. Although it has not been demonstrated that Nixon had a role in the direct planning or execution of the Watergate break-in, he was deeply involved in efforts to cover up the illegal actions of some of his subordinates. When the president lost a court case regarding his executive privilege to withhold evidence from the courts, and congressional committees began to discuss incontrovertible evidence of crimes of obstruction of justice, the president decided to resign rather than face impeachment and conviction. Although the case for impeachment depended upon the discovery of legal violations, deeper sources of criticism and anger toward the president had developed over the course of his administration because of disputes regarding his conduct of the war in Vietnam and his use of executive power more generally. A few years after Nixon's resignation, constitutional scholar Philip Kurland wrote a book entitled *Watergate and the Constitution*, which said nothing about Watergate, the break-in, and very little about obstruction of justice but instead reviewed the political disputes regarding executive privilege, executive agreements, impoundment of funds, and other uses of executive power that challenged congressional prerogatives.[9]

It is important to note here that the actual processes of investigation for impeachment did not bring these political issues to the center, but rather, faithful to the Andrew Johnson precedent, confined the case to strictly legal violations. Democrats certainly pressed hard for a broader definition of impeachable offense than Republicans were willing to accept. This prolonged debate in Congress and in the country at large resulted in a compromise that gained widespread consensus: while executive privilege, impoundment, and the use of other unilateral powers went unmentioned, the language of the articles of impeachment encased the criminal charges in a broader rhetoric that asserted the president had abused his office.

A fascinating complication arose after Republicans were successful in confining impeachable offenses to strictly legal violations. As it became clear that a majority of the nation would be persuaded that the president was guilty of impeachable offenses, Republicans pressed for a political understanding of the punishment. "If impeachable conduct—that is, conduct for which Congress may impeach—is analogized to a statutory offense, the 'political' discretion of Congress is analogous to prosecutorial discretion or to a power of mitigation or pardon which is lodged in the executive which defined the offense or the court which tried it." They urged their colleagues to consider politically contextual mitigating circumstances and "whether the best interests of the country would be served by his removal or continuance in office."[10] In other words, Republicans argued, although the president should not be impeached for political crimes, his legal violations should be assessed from a political perspective.

President Bill Clinton was investigated for allegations that he had violated law in handling real estate investments prior to his election to the presidency. In the course of this investigation, the independent counsel discovered evidence that the president had a sexual affair with a young intern in the White House and subsequently attempted to cover up this fact by deceiving litigants in a sexual harassment suit regarding his actions as governor of Arkansas. The independent counsel also charged that Clinton deceived the grand jury impaneled during the investigation. The impeachment charges presented to the Senate were crafted as violations of ordinary criminal law, for example, "perjury." Clinton and his supporters successfully convinced the House to ignore claims that he had diminished his "office" by his relationship with a young intern but instead to focus on his cover-up.[11] In addition to the precedent that impeachment required a "crime," Clinton's supporters stressed a distinction between private and public conduct. Consensual sex was not a "crime" and, on this view, it was also a private matter that was not the Congress's or the public's business. Because President Clinton knew that the prevailing standards for impeachment were narrow, strictly legal, violations, he took care to lie in ways that probably would not constitute "perjury." Perjury is not just a matter of lies but is a matter of lies provable in very technical ways.[12] Appealing to archaic linguistic conventions, Clinton made the plausible claim that not all inappropriate intimate acts were "sex." Clinton's artful dodges and unusual distinctions provided much material for late night

talk show hosts and other comedy routines, but the president was able to take advantage of the fact that, like Andrew Johnson, his defense was very strong on strictly legal questions, such as whether he had committed perjury, and very weak on the questions whether he had committed sex with a young intern in the Oval Office, whether he had deceived the public about his conduct, and whether by his conduct and his deceits he had diminished his office.

The arguments and actions of Presidents Andrew Johnson, Richard Nixon, and Bill Clinton all evidence the fact that the understanding of presidential impeachment as a predominantly legal process is now deeply ingrained in our political culture. Most students of impeachment would add that these three presidential episodes also show the superiority of a legal conceptualization over a political interpretation. On this reasoning, ours is a democratic polity where changes of partisan regimes should be a matter of election, not impeachment. It is good that coalitions should not attempt to repair their partisan political losses by short-circuiting the electoral process. On this view, Andrew Johnson should not have been thrown out of office because of his differences over policy with legislators. Had Nixon not violated the law, he should not have been forced from office because of political differences with the party opposite in Congress. And Republicans angry at Bill Clinton's "liberal" political views, or distressed by his governing style, should not have been able to accomplish in a "trial" what they could not accomplish in an election. Even if the motivation to impeach a president is political, the necessity to find a strictly legal ground for removal from office makes it more likely that the grounds for removal will be nonpartisan and that the coalition for removal will be bipartisan. Ours is not a parliamentary regime, with votes of no confidence. Ours is a separation of powers regime where the independence of the executive is a prized virtue of the system. On this view, presidents cannot be removed from office by Congress for acts that would be the usual basis for judgment in a democratic election.

The legalistic interpretation would not be so dominant if there were not some truth to its core claims about constitutional text, logic, structure, and the lessons of past impeachment proceedings. Some truth is not the whole truth, however. It is the burden of this chapter to show how and why the conventional wisdom is, nevertheless, wrong about the most important attributes of the impeachment process.

The Political Interpretation

Let me begin by returning to many of the same facts discussed from the legalistic point of view. The Constitution does offer a kind of template for an analogy between the processes for impeachment and conviction and those of indictment and trial. But the framers and subsequent institutional designers did not need to analogize this relation. They could have adopted the exact terms we use for criminal proceedings. Articles of impeachment could have been "counts;" impeachment clauses could have included the term "indictment"; the Senate "trial" could have referred to "criminal trial;" House managers could have been called prosecutors, and so on. If it was the intention to make the impeachment process a species of legal processes, the Constitution and the institutional practices that elaborate it could easily have said so. Instead, by making the impeachment process analogous to criminal trials, the Constitution signals that the two processes are alike in some respects and different in others. To say that the process of removal of a president is like a criminal proceeding is also to say that it is not a criminal proceeding.

In my review of the mechanics of the impeachment process, I did not mention that the Constitution mandates a punishment for conviction, removal from office,[13] and it also limits the punishment to removal from office "and disqualification to hold any Office of honor, Trust or Profit under the United States."[14] Should the president commit a crime for which, for example, an ordinary citizen might be executed, such as murder, all that Congress must do if they convict him is remove the president from office and all the Congress can do is fire the president and disqualify him from holding another governmental position. These constitutional stipulations have been interpreted to also mean that Congress, at its discretion, could deny the president his pension. But Congress could not hang him.

Indeed, the Constitution indicates that "the Party convicted shall nevertheless be liable to Indictment, Trial, Judgment and Punishment, according to Law."[15] The process of impeachment and conviction is thus distinguished and separated from the legal process in the text of the Constitution. Put another way, the Constitution indicates that the constitutional protection against "double jeopardy" does not prevent the president from being convicted by the Senate and later tried and convicted

by ordinary legal processes for the same criminal acts. This can only be true if the first proceeding, the impeachment process, does not terminate in a legal decision but rather something different, a political conclusion.

As noted earlier, I mentioned that in a presidential impeachment the chief justice of the United States presides over the Senate trial. While the justice is expected to assist the Senate by ruling on the admissibility of evidence, procedural fairness, and like matters, no technical rules of evidence apply and the Senate is free to overrule the chief justice by simple majority vote. Indeed, in the trial of President Clinton, the Senate leadership developed a set of procedural rules that took away much of the influence from the chief justice. Finally, conviction for any article of impeachment requires a vote of two-thirds of the Senators present, rather than the unanimity of all jurors, which is always required in jury trials in federal criminal cases (and is typically required in state criminal cases as well).

Why does the Constitution analogize impeachment to a criminal prosecution if it intends a political process rather than a legal one? Why offer and induce an elaborate array of legalistic pretenses instead of a more straightforward signification of a political process? The Constitution requires impeachment as part of its political processes at the same time that it intends that such politics not be politics as usual. Independence of the executive and a commitment to a separation of powers regime does mean that presidents do not serve at the mere pleasure of the legislature. But presidents are also accountable to the legislature as well as to the people more generally. To preserve "independence" and "accountability" at the same time is the difficult puzzle that impeachment was designed to solve. The core idea is that the pretense of legality would structure an extraordinary political process—a process more elevated and less partisan than ordinary politics. And at the same time that the elaborate pretenses of the Constitution elevate ordinary politics, they domesticate subversive or revolutionary politics. Benjamin Franklin praised the impeachment process as an institutional surrogate for assassination.[16]

The difficult constitutional puzzle of creating a political process that was more elevated than ordinary partisan politics was the context in which drafters and ratifiers wrestled with the phrase "high crimes and misdemeanors." Maladministration seemed to make the process too political in

the ordinary partisan senses, while restriction to crimes such as treason and bribery was not political enough. At the time of the Philadelphia Constitutional Convention, impeachment charges were being crafted in England against the British governor of India Warren Hastings for political failures. Although his trial had not yet begun, the plan for impeachment and the shape of the charges were well known to delegates in Philadelphia. Before Mason moved to add "maladministration" to treason and bribery as impeachable offenses, he indicated that Hastings had not committed treason or bribery. He appealed to his colleagues' sense that Hastings had failed to live up to his duties and that they needed to include that kind of "offense" in the Constitution.[17] Whether maladministration or high crimes and misdemeanors, the phrase should capture the kinds of political failures charged of Warren Hastings.

By contrast, legalists read the phrase through later understandings of crimes and misdemeanors despite the fact, as Raoul Berger argues, the phrase "high crimes and misdemeanors" actually preceded the invention of "misdemeanors" as a legal term, stating: "At the time when the phrase 'high crimes and misdemeanors' is first met in the proceedings against the Earl of Suffolk in 1386, there was in fact no such crime as a 'misdemeanor.' Lesser crimes were prosecuted as 'trespasses' well into the sixteenth century, and only then were 'trespasses' supplanted by 'misdemeanors' as a category of ordinary crimes."[18] Berger shows that impeachment was invented in England to punish actions beyond those comprehended by ordinary criminal law, and the phrase "high crimes and misdemeanors" was invented to capture such acts. "[Impeachment] was 'essentially a political weapon.'"[19]

Peter Charles Hoffer and N. E. H. Hull argue that the Constitution's impeachment processes were not modeled on English precedents, as Berger argues, but instead represent a new republican device originally invented for the state governments in America.[20] However one resolves their dispute with Berger, all agree that the variety of sources of the phrase construct impeachment as a political process. This is shown clearly in the most comprehensive account of the background of this phrase in the Constitution, a study by Joseph M. Bessette and Gary J. Schmitt, where English precedent, state governmental practices, constitutional convention debates, and the discussion in the ratifying conventions all depict a political understanding of this phrase. Indeed, Bessette and Schmitt note,

for those interested in "original intention," that some delegates meeting in the ratifying conventions, discussing the phrase without knowledge of the deliberations at Philadelphia because the minutes and notes of that proceeding were still secret, assumed that the phrase meant what we now know it replaced—"maladministration." Others included "malconduct," "misconduct," "mal-practices," "deviation from duty," "violation of duty," "great offenses," "acts of great injury to the community."[21] Bessette and Schmitt make a compelling case that all these formulations reflect the distinction between the powers and duties of the office, which they have detailed in their chapter for the present volume.

"High crimes and misdemeanors" comprehends not only violations of duty, including ordinary crimes, but much more. These sorts of offenses are political crimes in two senses: First, executive duties are not requirements of a legal code but of a Constitution. Second, assessing the welter of presidential acts in light of the executive's many duties requires a political interpretation sensitive to the competing considerations and priorities that characterize everyday political life. Thus, the same act might or might not be a "crime" depending on the surrounding political circumstances.

Because it was written in the midst of the investigation of President Clinton, Bessette and Schmitt spend a great deal of their effort examining the question whether impeachable offenses include private acts or whether they are limited to failures of more explicit governmental responsibilities. They suggest that executing the "office" includes refraining from actions that might undermine one's authority as an enforcer of law and mention previous impeachments of judges and other governmental officials whose charges included such acts as drunkenness. I would add that one cannot separate the private from the public acts of the president, especially because the structure of his office effaces that distinction in a way unlike that of any other governmental office in the United States. Unlike the Congress, for example, which goes on recess, executive power is in being all the time and is vested in the president of the United States. One might say that while presidents sleep, executive power never does. Presidents thus have a greater obligation than other governmental officers to conduct their "private" life in a way consistent with their constitutional duties.

Perhaps the keenest insight into the political nature of "high crimes and misdemeanors" is offered by Charles Black, who reminds us that there are many actions an ordinary citizen could take that would clearly be

impeachable offenses by a president. Black offers the hypothetical example of a president who publicly announces that he will not appoint any Catholics to his cabinet.[22] There is nothing "illegal" about that outrageous pledge and an ordinary citizen could not be punished by law for advocating that policy, but could anyone doubt that the president would violate his oath (to support a Constitution that includes "no religious tests") and should be removed from office were he to clearly advocate such a policy whether he carried it out or not?

Treason and bribery are violations of law that are directly connected to the functioning of the state. Ordinary crimes, like burglary or murder, are prosecuted by the state because they threaten social order even if they are directed at particular individuals. Impeachable crimes appear not to be crimes directed at individuals with indirect social effects but rather are crimes directed at the state itself. Treason, for example, is a betrayal of one's country and bribery is an attempt to subvert the political order for personal advantage. Presidential violations of duty, captured in the ambiguous phrase "high crimes and misdemeanors," are offenses that subvert the Constitution by neglecting the duties of governance in some way—perhaps diminishing the presidency itself by inappropriate conduct, perhaps by thwarting Congress by failing to execute a thoroughly deliberated legislative will, or perhaps by gross failures of political judgment as a president takes risks, though risks induced by his place in the constitutional order.

There may be no better illustration of these offenses than President Andrew Johnson. Johnson refused to enforce many properly enacted laws, indeed laws that had been passed over his vetoes; he refused to spend money appropriated for congressionally constructed institutions; he pardoned countless Confederates who would not pledge allegiance to the United States according to the law; he seized and returned land to former slave owners that had been legally confiscated and distributed to slaves who had worked the land; he used patronage power to bully politicians throughout the nation to support his version of reconstruction; and in a formal message to Congress he threatened to use military force against Congress to protect his understanding of the Constitution.[23] Yet despite the violation of the president's fundamental constitutional responsibilities evidenced by these acts, Congress limited its impeachment charges, as we have seen, to the fairly narrow issue of legal violations.

It is striking how often impeachment is mentioned in the Constitution. It appears in six clauses and in each of the three articles structuring the major branches of government. Impeachment is so woven into the fabric of the Constitution that clause-bound readings of its meaning are but the preface to the best way to understand this extraordinary process. Andrew Johnson's political actions were impeachable not because some clause explicitly listed them as offenses, but because they threatened the very functioning of a separation of powers Constitution. It is in that larger design of separation of powers that the political character of the impeachment process is best revealed.

The Constitutional Design

Legal academics generally discuss the development of a separation of powers doctrine, designed and elaborated to confine specified constitutional powers to assigned institutions. Political scientists usually understand separation of powers as a form of checks and balances, noting that it is hard to theoretically demarcate legislative and executive power. Attention to the place of impeachment in the logic of separation of powers allows us to recover an older more capacious understanding.[24] This older understanding, which I sketch below, may have become unfamiliar because the practice of politics in America has departed from it over time, much as the process of impeachment has become legalized over time. But elements of the theoretical view of the constitutional order persist despite this attenuation in practice.

Both the legalistic and political views of separation of powers are better understood as facets of a larger conception at the core of which is contestation between competing desiderata of democratic governance. In ordinary political discourse, the term *separation of powers* is used both to designate an aspect of the American system (such as the legal doctrine discussed by courts) and as a label for the system as a whole. How might it make sense to describe the whole American system of governance as separation of powers?

The president, Congress, and the Supreme Court are constituted not just by assigned power but rather by congeries of structures, powers, and duties. Plurality or unity of office holders, extent of the terms of office, modes of selection for office as well as specified powers and duties

combine to create a set of institutions that behave and "think" quite differently from each other. In older "mixed" regimes these differences could be traced to different social orders. A crucial invention of the new American science of politics was to design institutions to represent different constitutive principles of democracy rather than social orders or alternative regimes.

Basic desiderata of all democratic regimes include provision for the expression of popular will in and about public policy, protection of individual rights, and (common to all regimes) provision for security or self-preservation. These desiderata exist in tension with each other. Separation of powers can be thought of as an attempt to productively resolve those tensions by representing them in and among competing institutions. To some degree Congress, the president, and the Court all concern themselves with all three desiderata—but the priority or institutional bias of their concern varies. Congress, generally, is more concerned than other branches with representing popular will; the Court with protecting individual rights; and the president with ensuring the nation's security. The structure of each institution, as well as the arrangement of legal powers, can be thought of as an institutional design to make productive the tension between popular will, rights, and security both within and among the major institutions of government.

Abraham Lincoln once remarked that the same political or constitutional issue may arise before the president and the Court and be resolved differently. Different branches might resolve the same issue differently because each branch brings a different perspective, a different set of priorities and considerations. Interbranch contestation is a way to insure that competing perspectives, competing arrays of reasons and considerations, are brought to bear on major issues of public policy.

In a separation of powers arrangement, the ambitions of political actors are tied to the duties of their institution such that they tend to press the case for that institution's power and perspective.[25] In the post-9/11 world, for example, the president has been aggressive in asserting executive prerogatives and in using executive power. The creation of military tribunals, the aggressive collection of intelligence without judicial warrant, and the expansive interpretation of his war powers are all manifestations of an institution intentionally biased in its design to emphasize security concerns and needs. Congress or the Court may have a very

different perspective on the use of executive power given their own institutional biases and concerns, respectively, for constituent opinion and for individual rights. *The Federalist* stresses that the protection from potential abuses of executive power comes not from limiting the power, in principle, but rather from the exercise of competing powers by the coordinate institutions, Congress and the Court. If one has serious problems with executive overreaching, one should direct the complaint to Congress because, in a sense, the system is designed to incline each institution to overreach. Abuses of power in American national politics are much more the product of deference and abdication than they are the effect of power-wielding corruption. In principle, the president has any and all executive power necessary to carry out his duties. Rather than stint on power, including implied power, the Constitution creates a relationship between competing institutions that will ideally tailor the use of power to the contingencies of the moment. There is not a better word to capture the meaning of such a contest than the word "politics." This is politics not as craftiness or rule by the strongest or partisan selfishness but rather politics as the resolution of competing demands of democratic governance.

One can illustrate this process by reference to an earlier chapter in this volume, by David Crockett on executive privilege. Legalists worry whether the president has "executive privilege" because it is not explicitly mentioned in the Constitution. Crockett shows that the president has this power because he requires secrecy to faithfully perform the duties of his office. But it is also the case that Congress has competing powers and duties, to legislate new laws and evaluate old laws, for example. To carry out its duties, Congress sometimes needs information that the president seeks to deny. There is no legal principle or solution that will "balance" the needs of the president and Congress independent of the political circumstances that generate these competing claims. It is the separation of powers process itself that sorts out the relative importance of, for example, executive privilege and congressional oversight.

In a separation of powers system the three branches are said to be "equal and coordinate." While this suggests that they each represent equally important democratic principles, it does not mean that at any given moment all of the branches have equal power. Because of the president's institutional design and political biases, the executive has considerable advantages over the legislative at the outset of a policy process or

political crisis. Because of the executive's place in the system, the unity of the office, and other attributes designed to give the government an ability to act quickly and decisively, presidents are in a position to push Congress and the nation into war or to focus attention on presidential priorities rather than a legislature's agenda. Presidents have prospective advantage in the constitutional order. In order for Congress to be effective it must have retrospective advantage.

Just as the president is designed to see problems before the polity as a whole understands them, to act quickly if necessary, to focus or force debate, and to set priorities, Congress as a deliberative body has its own structural advantages and virtues. Congress is better suited to retrospective evaluation and judgment. It has its own tools to force presidents to reconsider their actions, or to be accountable—that is, to politically pay for poor choices or failures of judgment. Congress can hold hearings, question executive officials, pass restrictive legislation, or deny appointments. What is a Congress to do if an executive persists in following a course disapproved by Congress despite the legislature's efforts to alter it? Suppose a Congress, for example, passes a resolution demanding that the president withdraw troops from a failed expedition, holds up funds for the president's pet projects, denies political appointments he seeks—all demonstrating legislative determination to reset the course of the nation's policy—and yet the president continues to ignore the legislature. It is necessary for the Congress to have the power of impeachment to make Congress's retrospective power an effective balance to the president's prospective advantage. Without impeachment, our political branches would not be "equal and coordinate."

The Constitution captures this idea of coordinate but asymmetrical power in the way it grants the pardoning power to the executive.[26] In his classic theory, John Locke had used the power to pardon as his sole example of the executive's awesome power to violate the law itself in an effort to advance the public good by meeting necessity in an emergency. Because true emergencies are by their nature unforeseen, a well-constructed executive has almost limitless power to meet such circumstances, and the ability to pardon is itself an example of a power usually interpreted as one without limits. In contrast, our Constitution limits the pardoning power. It precludes a president from pardoning one who has been impeached. Moreover, although no pardon (except for someone impeached) can be

overturned by Congress or the Court, nothing prevents Congress from impeaching and convicting a president for misuse of his pardon power. The impeachment power trumps the pardoning power. In an effective Constitution founded on republican principles presidents are given extraordinary prospective powers, but Congress has the last word.

It is important to note that, in a theory of separation of powers, the utility of the impeachment process extends well beyond its deployment. To the extent that the culture embraces a robust political understanding of impeachment, the ordinary powers of Congress are enhanced and the likelihood of impeachment actually diminishes. If impeachment is a real political possibility, presidents will be much more likely to take seriously ordinary expressions of legislative will, such as resolutions, laws, budgets, appointments, and the like. These institutional actions gain in power and authority because executive opposition to them could itself become grounds for impeachment and conviction.

Impeachment is thus a constitutive feature in the theory of the constitutional separation of powers. Unfortunately, theory is not always reflected in practice. Since the mid-twentieth century it has increasingly become the case that Congress defers to the president over custody of its own constitutional powers (as is shown, for example, in the chapter in this volume by Jasmine Farrier on budget powers) or the president and Congress defer to the Court to resolve disputes between them (as is shown, for example, in some of the recent controversies regarding executive privilege). The political culture of Congress has changed in the twentieth century and its institutional self-confidence and self-understanding has waned. One of the deep sources of this development may be located in the constitutional design itself—in its reliance on pretense as a constitutional device.

Recall that the Constitution analogizes the impeachment process to a legal proceeding to elevate the kind of political process it actually intends. But for a pretense to be effective, it must be believed, and when believed, political actors will insist that the political process is a strictly legal one. Legalizing the impeachment process deprives the Congress of power necessary to the logic of separation of powers. However, unmasking the pretense, showing that the impeachment process is political in a broad sense risks "politicizing" impeachment the way James Madison feared if the constitutional standard was too loose, thereby potentially weakening the

standards that ought to guide how leaders act and judge each other. Pretense as an attribute of constitutional design is an inherently unstable device of political architecture.

If there is a solution to this constitutional puzzle, it lies in replacing legal pretense with a more robust and self-conscious political understanding. Instead of elevating politics by indirect means, it might be necessary to forthrightly and directly construct an overtly political common law to guide the impeachment process and to fortify the Congress of the United States. Resources for this kind of political reformation are buried in our political tradition already and periodically resurface. The Andrew Johnson case did include, for a time, a political article. The case for a political understanding was pressed in the Watergate era, and Nixon's articles were framed in rhetoric that echoed the older political understanding. Impeachment trials of officials other than the president have sometimes articulated broad political standards for misconduct in office. I have argued that these counterexamples to a legalistic understanding actually prove the current legalistic norm governing presidential impeachments because they all were articulated by the losing side in presidential impeachment contests. Today these remnants of a more robust early nineteenth-century understanding of separation of powers can serve as models for broader political understanding of presidential accountability, much as dissenting opinions sometimes eventually surpass majority views on the Supreme Court. The trick will be not merely to revive these "dissenting precedents," though that may indeed be part of the solution to our present political pathology. It is more important to craft a new kind of civic education to replace the indirect mode meant to accompany our political architecture. Because "pretense" is an inherently unstable form of political design, we need to recognize ourselves as a democracy mature enough to rectify the imbalances of overlegalization in some eras and overpoliticization in others.