

**Testimony of Andrew C. McCarthy
House Judiciary Committee**

**Hearing on: “Examining the Allegations of Misconduct Against IRS
Commissioner John Koskinen, Part II”**

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Chairman Goodlatte, Ranking Member Conyers, members of the committee, my name is Andrew C. McCarthy. For over eighteen years, I was a federal prosecutor in the Southern District of New York, retiring from the Justice Department in 2003 as the chief assistant United States attorney in charge of the Southern District’s satellite office (which oversees federal law enforcement in six counties north of the Bronx).

During my tenure in the office, I investigated, tried and supervised the prosecution of numerous criminal cases, running the gamut from organized crime and narcotics trafficking through political corruption and terrorism. In addition, I held various executive staff positions in the office, including deputy chief of the appellate unit, in which I wrote and edited briefs submitted by the United States to the Court of Appeals for the Second Circuit, and prepared other prosecutor for oral argument (in addition to writing briefs and presenting oral argument in numerous of my own cases).

During my Justice Department Service, I was twice awarded the Justice Department’s highest honors: the Attorney General’s Award for Distinguished Service in 1987 for the “Pizza Connection” organized crime and international narcotics trafficking case targeting the Sicilian mafia, and the Attorney General’s Award for Extraordinary Service in 1996 for the terrorism prosecution against the jihadist cell of Omar Abdel Rahman (a/k/a “the Blind Sheikh”) responsible for (among other atrocities) the 1993 World Trade Center bombing and an unsuccessful plot to bomb New York City landmarks.

Introduction

Since retiring from the Justice Department, I have been a writer, focusing on matters of law enforcement, national security, constitutional law, politics and culture. Concededly, I tend to come at policy matters from a conservative and constitutionalist perspective; nevertheless, I have always believed the application of legal principles and precedent should be a non-partisan endeavor, just as it was when I was a prosecutor. In my post-Justice Department career, I have written several books, including (in 2014), *Faithless Execution: Building the Political Case for Obama's Impeachment*.

In a nutshell, *Faithless Execution* argues that the Framers saw impeachment as an “indispensable” tool (to quote James Madison) in the constitutional framework of divided authorities, which obliges Congress to police executive overreach. The principal purpose of the Constitution is to limit the power of government to intrude on the liberties and suppress the rights of the American people. Separation of powers is the primary way the Constitution guarantees these liberties and rights. Thus, the Framers were deeply worried that maladministration – including overreach, lawlessness, or incompetence – could inflate the constitutionally-limited executive into an authoritarian rogue who undermines our constitutional order.

Impeachment is one of the principal checks on that damaging tendency. Executive overreach invariably involves the usurpation of congressional power, the misleading of Congress, and the abuse of authority granted to the executive by Congress. The Framers thus expected that lawmakers would have an incentive to defend both the American people and Congress as an institution, notwithstanding partisan ties to the president.

Nevertheless, I further posited in *Faithless Execution* that impeachment is a political remedy, not a legal one. Consequently, regardless of how clearly the legal requirement of “high crimes and misdemeanors” is established, impeachment and removal – as a practical matter – will not occur absent sufficient public consensus to induce the Senate to convict an impeached official by the required two-thirds supermajority. The theory presented in my book is that, to be viable, impeachment cases must be built politically by aggressive congressional exposure of executive misconduct. If they are not, it is a mistake for Congress to proceed with impeachment, even if

lawmakers are in a position to prove many instances of misconduct that rise to the level of high crimes and misdemeanors.

There is, of course, a caveat here: The degree to which political support must be built varies directly with the degree of political connection between the public and the executive branch official in question. The public has a great political investment in a president – the official in whom the Constitution vests all executive power, and whom Americans, in the case of President Obama, has elected not once but twice. The public has considerably less political investment in an unelected subordinate official responsible for carrying out the duties of a critical executive agency, the powers of which have been abused.

In the latter situation, it is a duty of the president to take action to discipline or terminate the rogue executive agency officials or be deemed personally responsible for that misconduct. Indeed, the point of the Constitution’s vesting of all executive power in a single official, the president, is precisely to make the president accountable for all executive branch conduct.

If the president is derelict in this duty, it is essential that Congress take action. The impeachment of subordinate, unelected executive officials in whom the public has evinced no political support is an ideal way to deal with executive lawlessness. It is a far less drastic remedy than, for example, impeaching the president or using Congress’s power of the purse to slash the funding of the abusive agency.

At the 1787 constitutional convention in Philadelphia, George Mason rhetorically asked, “Shall any man be above justice? Above all, shall that man be above it who can commit the most extensive injustice?” These epigrammatic questions elucidate the Framers’ rationale for including in the Constitution a procedure for the impeachment and removal of executive officials, up to and very much including the president.¹

Few matters at the convention addled the delegates as much as the dangerous potential that the

president of the United States – the powerful new position they were creating, the single official in whom they decided to vest the entirety of federal executive power – could become a king. The objective of the Constitution was to safeguard liberty, not sow seeds for the very tyranny from which the American colonies had liberated themselves.

Much of the convention, therefore, was dedicated to foreclosing that possibility. The president would have to face election every four years. While immense, the chief executive's authorities would be checked in every important particular. The president, for example, would be commander-in-chief, but Congress would retain the power to declare war and hold both the purse and significant powers over the armed forces. The president could make treaties and broadly conduct foreign affairs, but international agreements could not amend the Constitution (there being a separate process for that); treaties could not take effect unless approved by a Senate supermajority; and Congress was empowered to regulate foreign commerce. The president would appoint major government officials, but they could not take office without Senate approval.

Indeed, the main point of having a *unitary* executive – vesting awesome powers in one president, rather than in an executive committee or in a minister advised by a privy council² – was accountability. Ultimately responsible for all executive conduct and unable to deflect blame for wrongdoing, a single president, Alexander Hamilton argued, would be amenable “to censure and to punishment.”³ The future Supreme Court justice James Iredell concurred: The president would be “personally responsible for any abuse of the great trust reposed in him,” a key ingredient in making him “of a very different nature from a monarch.”⁴

Palpably, if the president is derivatively responsible for all misconduct committed by subordinate executive branch officials, those subordinate officials are responsible for misconduct committed by themselves and their own underlings when the authorities of their agencies are abused. Indeed, to the limited extent delegates at the Philadelphia convention dissented from the concept of congressional power to remove *a president* from power, it was on the theory that it would be both *essential and preferable to remove subordinate officials who had participated in the abuse of executive power*. Because chief executives would always have subordinates in the commission of any misconduct, some of the Framers thought it sufficient that these “coadjutors” could be punished during the presidential term. The removal of subordinate officials would address abuses

of power without the destabilizing effects impeaching a president would portend.

The Framers further concluded that it would be “indispensible,” as James Madison put it, for Congress to have the power to impeach and remove the president in order to protect the nation against “the incapacity, negligence or perfidy of the chief Magistrate.” At the Commonwealth of Pennsylvania’s later debate over ratification of the proposed Constitution, James Wilson explained that the imperative of a removal power stemmed from both the concentration of executive authority in one public official and the principle that no man was above the law:

The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes. . . . Add to all this, that officer is placed high, and is possessed of power far from being contemptible, yet not a single privilege, is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment.⁵

Support for the impeachment remedy was overwhelming, though not unanimous. Gouverneur Morris and Charles Pinckney, for example, opined that impeachment proceedings might be too much of a distraction, interfering with the president’s effective performance of his duties. Morris also offered what may be the ultimate perception that impeachment is a political rather than a legal matter: If a president were reelected, he opined, that would be sufficient proof that he should not be impeached.

Quite rightly, the other delegates were not moved by these qualms. After all, a president who was corrupt in the execution of his duties would spare no corrupt efforts to get himself reelected, especially if winning would immunize him from impeachment. His perfidy might not be discovered until after reelection was secured. These all too real possibilities, Mason pointed out, “furnished a peculiar reason in favor of impeachments whilst [the president was] in office.”

Plus, the law regarded principals as responsible and thus punishable for the wrongs of their coadjutors. Manifestly, this should no less be so when it came to the president – the principal capable of doing the greatest harm to the republic.

The Framers’ conclusion that the nation’s chief executive should be removed from power based

on the misconduct of subordinate officials, notwithstanding the tumult such a removal would portend, bears emphasis. Plainly, if subordinate misconduct would justify the removal of an elected president, it would more than justify – indeed, it would seem to compel – the removal of the subordinate officials complicit in the misconduct, unelected officials who merely exercise the chief executive’s power and in whom the public has no political investment.

It was, unsurprisingly, Benjamin Franklin who offered the convention’s most bracing point in impeachment’s favor: Historically, when no impeachment remedy was available to a society, “recourse was had to assassination” in cases where “the chief magistrate had rendered himself obnoxious” – an intolerable outcome that not only “deprived [him] of his life but of the opportunity of vindicating his character.”

Ever concerned about the balance of powers among the branches that is the Constitution’s genius, the Framers did worry that granting Congress impeachment authority could give it too much power over the president. After all, any governmental power can be abused, and impeachment is no exception. Nevertheless, though this danger could not be discounted, it would be mitigated by the unlikelihood that a large, bicameral legislature drawn from different states with divergent interests – as opposed to a single chief executive – could be broadly corrupted. Moreover, the high hurdle of a two-thirds’ supermajority needed for conviction in the Senate would guard against wrongful removal.⁶

Clearly, history attests to the framers’ wisdom. In over two-and-a-quarter centuries of constitutional governance, articles of impeachment have been formally voted by the full House of Representative against only two American presidents, Andrew Johnson and Bill Clinton. In each case, there were insufficient votes to convict and remove the incumbent from office. A third president, Richard Nixon, would surely have been impeached and removed had he, like Johnson and Clinton, chosen to fight to the bitter end.⁷ In addition, the House has impeached seventeen other federal officials: fifteen federal judges, one cabinet member, and one U.S. senator; the Senate has removed eight officials, all federal judges.⁸

The delegates at the Philadelphia convention concurred in the principles that the United States is

a nation of laws not men, and that the potential for abuse of the presidency's awesome powers required making provision for removal of an unfit incumbent. This consensus, however, did not immediately translate into agreement on an impeachment standard.

It was assumed from the first that the President (and, derivatively, subordinate executive officials) would be removable for "malpractice or neglect of duty." Yet, consistent with the concern that the executive not become too beholden to Congress, some of delegates suggested a narrower, objective standard that stressed the gravity of impeachment: The president would be removable only for treason and bribery. This, however, was clearly insufficient, failing to account for an array of corruption and incompetence not necessarily related to either cupidity or traitorous conduct.

Such condemnable conduct was not merely foreseeable in the abstract. The framers had a concrete, contemporaneous example: the sensational impeachment trial in Parliament of Warren Hastings, Britain's governor-general in India. The primary, tireless proponent of Hastings' impeachment was Edmund Burke, the renowned Whig parliamentarian, political philosopher, and supporter of the American Revolution. Burke extensively charged Hastings with "high crimes and misdemeanors," the ancient British standard for removing malfeasant public officials. While some of Hastings' offenses involved bribery, most related to widespread extortion, heavy-handed corruption, trumped up prosecutions (resulting in death and other severe punishments), the allegedly reckless conduct of warfare, and what we would today refer to as "human rights" abuses against the indigenous people of England's Indian domains. Far from treasonous, Hastings actions – however wanton they may have been – were designed to preserve and strengthen the British empire's position (even if, to Burke's mind, their immorality and disregard for Indian sensibilities arguably weakened it).⁹

The impeachment inquiry of Hastings' governance formally began in 1786 (dragging on for years afterwards), and articles against him in the House of Commons were voted the next year, only a few weeks before the Philadelphia convention. Mason used the opportunity to posit that limiting impeachment to treason and bribery would inadequately restrain the executive: "Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason[.]" After the

delegates finally agreed to add “high crimes and misdemeanors” to treason and bribery as grounds for impeachment, Hamilton explained that Great Britain provided “the model from which [impeachment] has been borrowed.”¹⁰

“High crimes and misdemeanors” was not Mason’s first choice. He urged adoption of “maladministration,” the term used in the impeachment provisions of several state constitutions. “Maladministration” was indeed closer than unalloyed treason and bribery to the concept the delegates had in mind. Blackstone’s *Commentaries on the Laws of England*, a magisterial legal treatise that profoundly influenced the Framers, described “maladministration of such high officers, as are in public trust and employment,” as the “first and principal” of the “high misdemeanors” – offenses “against the king and government” that were punished by “parliamentary impeachment.”¹¹

Nevertheless, Madison remained sensitive to the concerns about vagueness. Beyond the legitimate objective of empowering Congress to deal decisively with a president who had demonstrated himself truly unfit, promiscuous constructions of “maladministration” could devolve into legislative *dominance* over the executive. Mason responded by amending his proposal to “high crimes and misdemeanors,” which had the benefit of being a venerable term of art.¹² This standard was adopted by the convention and enshrined in the Constitution.¹³

All public officials are certain to err at times, and chief executives, who make the most consequential decisions, egregiously so. And of course, there will always be presidents who abuse their powers to a limited extent, whether because of venal character or because it is often the president’s burden to navigate between Scylla and Charybdis. Comparatively few presidents, though, will prove utterly unfit for high office. Thus impeachment was designed to be neither over- nor under-inclusive. “High crimes and misdemeanors,” complementing treason and bribery, was an apt resolution. It captures severe derelictions of duty that could fatally compromise our constitutional order but eschews impeachments based on trifling irregularities.

As Burke instructed, “high crimes and misdemeanors” had been used by the British parliament for centuries. It is a concept rooted not in statutory offenses fit for criminal court proceedings, but in damage done to the societal order by persons in whom great public trust has been reposed.

Hamilton fittingly described impeachable offenses as those

which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated *political*, as they relate chiefly to injuries done immediately to the society itself.¹⁴

Similarly fixing on betrayal of the executive's fiduciary duty and oath of allegiance to our system of government, Mason elaborated that "attempts to subvert the Constitution" would be chief among the "many great and dangerous offences" beyond treason and bribery for which removal of executive officials would be warranted. In cases where Congress has found that *actual, completed* abuses of executive power have occurred, it is noteworthy that, for the Framers, mere *attempts* to subvert the constitution were a sufficiently heinous breach of trust to warrant removal by impeachment.

The Constitutional Rights Foundation usefully recounts:

Officials accused of "high crimes and misdemeanors" were accused of offenses as varied as misappropriating government funds, appointing unfit subordinates, not prosecuting cases, not spending money allocated by Parliament, promoting themselves ahead of more deserving candidates, threatening a grand jury, disobeying an order from Parliament, arresting a man to keep him from running for Parliament, losing a ship by neglecting to moor it, helping "suppress petitions to the King to call a Parliament," granting warrants without cause, and bribery. Some of these charges were crimes. Others were not. The one common denominator in all these accusations was that the official had somehow abused the power of his office and was unfit to serve.¹⁵

It is this uniquely political aspect of impeachment that distinguishes it from judicial proceedings and technical legal processes. As the Constitution Society's Jon Roland has explained, it was immaterial whether the offenses cited in articles of impeachment "were prohibited by statutes"; what mattered were

the obligations of the offender.... The obligations of a person holding a high position meant that some actions, or inactions, could be punishable if he did them, even though they would not be if done by an ordinary person."¹⁶

This synopsis echoes Joseph Story's seminal 1833 treatise, *Commentaries on the Constitution*.

Elaborating on the “political character” of impeachment, Justice Story noted that while “crimes of a strictly legal character” would be included, the removal power

has a more enlarged operation, and reaches, what are aptly termed political offenses, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits and rules and principles of diplomacy, or departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations of foreign as well as domestic political movements; and in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence.¹⁷

Definitiveness is an essential attribute of criminal laws. Our jurisprudence mandates that they put a person of ordinary intelligence on notice about what is prohibited. Otherwise, law-enforcement becomes capricious and tyrannical. To the contrary, “high crimes and misdemeanors,” is neither conceived for nor applicable to quotidian law-enforcement. The concept is redolent of oath, honor and fiduciary obligation.

It may be freely conceded that these are more abstract notions. It is not as easy to divine what they demand in the various situations confronted by a public official as it is to say whether a given private citizen’s course of conduct satisfies the essential elements of a penal statute. This distinction, however, simply makes impeachment rare and reserved for grave public wrongs. It does not make impeachment arbitrary, as implied by the deservedly maligned claim that “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.” It is one of history’s curiosities that this assertion was made in 1970 by then-Congressman Gerald R. Ford, during his failed effort to impeach William O. Douglas, the irascible liberal Supreme Court Justice. Within a span of ten months beginning in October 1973, Ford would become vice-president in place of Spiro Agnew, then president in place of Richard Nixon, when each resigned to avoid impeachment and removal.¹⁸

How odd that a politician, law professor, or plaintiff’s lawyer who would not think twice about dressing down, condemning, or filing suit against a corporate CEO for breaches of fiduciary

obligations would complain that “high crimes and misdemeanors” is too amorphous a notion to apply to political wrongs. In truth, contrary to a citizen who is presumed innocent in the civilian criminal justice system, executive officials are more akin to military officers, whose duties make them punishable for actions that would not be offenses if committed by a civilian: such things as abuse of authority, dereliction of duty, moral turpitude, conduct unbecoming, and the violation of an oath.¹⁹

The delegates at the Philadelphia were adamant that impeachment not reach errors of judgment, what Edmund Randolph described as “a willful mistake of the heart, or an involuntary fault of the head.” On the other hand, betrayals of the constitutional order, dishonesty in the executive’s dealings with Congress, and concealment of dealings with foreign powers that could be injurious to the rights of the people were among the most grievous high crimes and misdemeanors in the Framers’ estimation. The concept also embraced the principle that “the most powerful magistrates should be amendable to the law,” as James Wilson put it in his *Lectures on the Law*, delivered shortly after the Constitution was adopted.

For example, in response to a hypothetical in which a president, to ram a treaty through to ratification, brought together friendly senators from only a few of the states so as to rig the Constitution’s two-thirds approval process, Madison opined: “Were the president to commit any thing so atrocious . . . he would be impeached and convicted, as a majority of the states would be affected by his misdemeanor.” Iredell, furthermore, made clear that the president “must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives.” It would be untenable to abide a president’s fraudulently inducing senators “to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them.”

Finally, the Framers stressed that the impeachment remedy was a vital congressional check on *the executive branch as a whole*, not just on the president’s personal compliance with constitutional norms. The chief executive, Madison asserted, would be wholly “responsible for [the] conduct” of executive branch officials. Therefore, it would “subject [the president] to impeachment himself, if he suffers them to perpetrate with impunity high crimes or

misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses.”

It is a common error to think of impeachment in legal terms because there is a legal process for it – just as there is a legal process attendant to many essentially political activities (e.g., the convening of electors to formalize the result of a presidential election). Moreover, to underscore the gravity of impeachment, the framers designed it to resemble a criminal proceeding. In fact, before adopting Gouverneur Morris’s proposal that impeachments be tried by the newly created Senate, the framers considered suggestions by Edmund Randolph and Alexander Hamilton, respectively, that they be conducted before “national” (what today are called “federal”) or state judges, as well as a report by the Convention’s “Committee of Detail” that recommended giving the new Supreme Court jurisdiction over impeachments.²⁰

As we’ve seen, the House was given “the sole Power of Impeachment” – meaning, the plenary authority to lodge the formal accusation – and the articles of impeachment it files are roughly analogous to a grand jury indictment. Though very different in nature and procedure, felony indictments and impeachment articles similarly serve the function of placing the accused on notice of the charges against him. In an impeachment, moreover, there follows a trial in the Senate (in cases of presidential impeachment, presided over by a federal judge, the chief justice of the Supreme Court). This is the simulacrum of a regular criminal trial, with senators ostensibly sitting as petit jurors, determining the fate of the defendant, the president.

Nevertheless, there are salient distinctions between impeachment proceedings and criminal trials – differences of kind, not just degree. The House is a political body, the elected and accountable representatives of the people. It is not a legal buffer between the people and the prosecutor, which is the constitutional role of the grand jury. Because grand juries are generally concerned with private infractions of the law investigated by police agencies, they deliberate in secret. By contrast, hearings in a House impeachment investigation probe wrongdoing by public officials and are conducted on the public record, as, of course, is the Senate’s eventual impeachment trial. House members considering impeachment and senators deciding on removal deliberate openly

and cast public votes, ensuring their accountability to voters for that momentous decision.

That is night-and-day different from a legal trial. The law demands that trial jurors be impartial. The venire is thus thoroughly vetted to weed out potential bias. Once seated, jurors are instructed throughout the proceedings to avoid prejudicial influences like press reports and the opinions of their family members about the case. The law mandates that they deliberate without fear or favor, basing their verdict solely on whether the evidence presented is sufficient to prove the allegations in the indictment.

To the contrary, lawmakers are political partisans. Some will be ardent presidential detractors, others loyalists, and all of them are apt to have a political stake in the outcome of a presidential impeachment controversy. The highly charged, over-archingly political nature of the impeachment process inexorably encourages these elected representatives – who of course want to be re-elected – to consider whether their constituents support or oppose the executive official’s removal. That practical consideration weighs far heavier in the politicians’ deliberations than whether, technically speaking, impeachable offenses have been proven. In fact, at the Clinton impeachment trial, the House “managers” who presented the case for impeachment, were chastised by Chief Justice William Rehnquist not to refer to senators as “jurors” – at the Senate’s insistence and on the rationale that their role was not merely to evaluate the evidence like jurors but to judge the effect the president’s removal might have on the nation.²¹

In addition, grand jurors are expected to take legal guidance from the prosecutor, and trial jurors from the judge. That guidance must be firmly rooted in the penal statutes and relevant judicial precedents defining the crimes charged and the analytical principles that apply. By contrast, members of Congress judge for themselves what rises to the level of “high crimes and misdemeanors.” They are not beholden to statutory law or jurisprudence.

In fact, unlike a judge, who is every bit the presiding government official at a criminal trial, the chief justice at a presidential impeachment trial in the Senate performs the essentially ministerial role of keeping the proceedings moving along. It is the senators who decide how to proceed, what evidence merits consideration, whether witnesses should be called, and whether the articles of impeachment have been proven to their satisfaction. Their calculations are political, not legal

– as seen to a fare thee well in the Clinton impeachment trial, in which, for example, senators permitted no live testimony then conveniently found the case had not been proved.

The double-jeopardy doctrine provides yet another telling constitutional distinction between legal cases and the political impeachment process. The Fifth Amendment, applicable to all federal criminal proceedings, protects Americans from being made “subject for the same offense to be twice put in jeopardy of life or limb.” Yet, this protection does not apply to impeachment. Instead, the Constitution expressly provides that “the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.”²² That is, once the politics is done and the decision is made whether to disqualify the president from holding public office, the law is free to take over and impose its distinct processes and penalties.

The tendency of non-lawyer politicians to view impeachment as a legal process beyond their ken is insidious. It is of a piece with the disturbing proclivity of modern lawmakers to abdicate to staff counsel their basic responsibility to read and understand the bills they enact. It subverts republican democracy. The Framers did not believe free people needed lawyers to figure out how to govern themselves. The standard they gave us for impeachment and removal from high public office is a simple and straightforward one.

The legal grounds for impeachment are vital; without them, the political case for impeachment cannot be built. The primary question, however, is whether the executive official’s conduct is so egregious that it has become intolerable to continue reposing power in the official. On that score, I would note that prominently included in Article 2 of the Articles of Impeachment the House was poised to file against President Richard M. Nixon before the president’s resignation was the allegation that the president “acting personally and through his subordinates” had “endeavored” to use the Internal Revenue Service to violate the rights of American citizens, including to cause “income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.” President Nixon was further accused, in Article 1, of making false or misleading statements in the course of a lawfully conducted investigation, and of “withholding relevant and material evidence or information” from such an investigation.

As I understand it, the instant matter involving Internal Revenue Service Commissioner John

Koskenin, pertains to an investigation into not a mere “endeavor” (largely unsuccessful in the Nixon case) to abuse IRS powers but actual, concrete abuse, of those powers, including “income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.” I further understand that the instant matter involves the provision of false statements and withholding of evidence from Congress.

I do not purport to have knowledge of the facts of Congress’s investigation. I note however that misconduct that was *merely potential* and coupled with blatantly obstructive actions was deemed sufficient to impeach (and would clearly have been sufficient to remove) a twice-elected president of the United States who had recently been reelected in one of the largest landslides in American history. It seems patent, then, that if established, *actual misconduct* in conjunction with blatantly obstructive actions would be sufficient to justify impeaching an unelected subordinate executive official responsible for administering the Internal Revenue Service.

¹ James Madison’s Notes on the Debates in the Federal Convention of 1787 (Max Farrand, *The Records of the Federal Convention of 1787* (1911) (<http://memory.loc.gov/ammem/amlaw/lwfr.html>)); see also Yale Law School, The Avalon Project (http://avalon.law.yale.edu/subject_menus/debcont.asp). Madison’s convention notes are heavily relied on in this chapter, as is the House Judiciary Committee Report prepared and released in connection with articles of impeachment approved in the Watergate investigation, “Constitutional Grounds for Presidential Impeachment” (House Judiciary Committee, 1974) (hereafter “House Jud. Cmte. Report”) (http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/watergatedoc_3.htm#TOP).

² *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., *dissenting*); see also John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (University of Chicago Press, 2005).

³ Alexander Hamilton, *The Federalist No. 70* (1788).

⁴ Raoul Berger, *Impeachment: The Constitutional Problems* (Harvard University Press 1974) (http://books.google.com/books/about/Impeachment.html?id=UT0_MCzwRW4C); see also House Judiciary Committee report, *supra*.

⁵ Jonathan Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836) (Liberty Fund Inc., *The Online Library of Liberty*)

(http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1905&Itemid=27); see also House Judiciary Committee report, *supra*.

⁶ U.S. Const., art. I, sec. 3.

⁷ Articles of Impeachment against President Nixon were approved by the House Judiciary Committee in late July 1974, and a vote by the full House to approve them was imminent. A contingent of Republican senators led by Barry Goldwater of Arizona visited the White House on August 7, 1974 to inform Nixon that they were unwilling and unable to prevent his impeachment and conviction. Nixon resigned the following day. See, e.g., Richard Lyons and William Chapman, "Judiciary Committee Approves Article to Impeach President Nixon, 27 to 11" (*Washington Post*, July 28, 1974) (<http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072874-1.htm>); Bart Barnes, "Barry Goldwater, GOP Hero, Dies" (*Washington Post*, May 30, 1998) (<http://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwater30.htm>).

⁸ Jared P. Cole and Todd Garvey, "Impeachment and Removal" (Congressional Research Service, Oct. 29, 2015) (<https://www.fas.org/sgp/crs/misc/R44260.pdf>).

⁹ For a thorough explication of the relevant history and sympathetic treatment of Burke's campaign against Hastings, see Conor Cruise O'Brien, *The Great Melody: A Thematic Biography of Edmund Burke* (University of Chicago Press, 1992). For a treatment more sympathetic to Hastings, see, e.g., Chris Monaghan, *In Defense of Intrinsic Human Rights: Edmund Burke's Controversial Prosecution of Warren Hastings, Governor General of Bengal* (Academia.edu, 2011) (http://www.academia.edu/1818643/IN_DEFENCE_OF_INTRINSIC_HUMAN_RIGHTS_EDMUND_BURKES_CONTROVERSIAL_PROSECUTION_OF_WARREN_HASTINGS_GOVERNOR-GENERAL_OF_).

¹⁰ Alexander Hamilton, *The Federalist No. 65* (1988); see also Berger, *Impeachment: The Constitutional Problems*, *supra*, at Chapter II.

¹¹ 4 Blackstone's Commentaries 121, (cited in House Jud. Cmte Report, n.55).

¹² See House Jud. Cmte. Report:

"High Crimes and Misdemeanors" has traditionally been considered a "term of art," like such other constitutional phrases as "levying war" and "due process." The Supreme Court has held that such phrases must be construed, not according to modern usage, but according to what the framers meant when they adopted them.⁵⁶ Chief Justice Marshall [in *United States v. Burr*, 25 Fed. Cas. 1, 159 (No 14, 693) (C.C.D. Va 1807)] wrote of another such phrase:

It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it.

¹³ U.S. Const., art. II, sec. 4.

¹⁴ Hamilton, *The Federalist No. 65*, *supra*.

¹⁵ Constitutional Rights Foundation, “High Crimes and Misdemeanors” (accessed Aug. 23, 2013) (<http://www.crf-usa.org/impeachment/high-crimes-and-misdemeanors.html>).

¹⁶ Jon Roland, “Meaning of ‘High Crimes and Misdemeanors’” (Constitution Society, Jan. 16, 1990) (http://www.constitution.org/cmt/high_crimes.htm).

¹⁷ 1 J. Story, *Commentaries on the Constitution of the United States*, 764, at 559 (5th ed 1905) (cited in House Jud. Cmte. Report, n.83).

¹⁸ See, e.g., Berger, , *Impeachment: The Constitutional Problems*, *supra*, at p. 56, n.1.

¹⁹ McCarthy, “It’s Not Crazy to Talk about Impeachment”, *supra*; see also McCarthy, “Impeachment Lessons”, *supra*.

²⁰ Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (University of Chicago Press 2000)

²¹ Douglas O. Linder, “The Impeachment Trial of President William Clinton” (University of Missouri at Kansas City, 2005) (<http://law2.umkc.edu/faculty/projects/frials/clinton/clintontrialaccount.html>).

²² U.S. Const., art. I, sec. 3. Also note that the Fifth Amendment requires that “no person shall be held to answer for ... [an] infamous crime, unless on presentment of indictment of a Grand Jury” (except in matters involving the armed forces that are inapposite for our purposes). As noted, articles of impeachment *resemble* a grand jury indictment but they are not the functional equivalent. If impeachment were a legal rather than a political proceeding, an indictment would be mandatory.