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Impeachment as a Technique of Parliamentary Control over Foreign Affairs in a Presidential System

Lori Fisler Damrosch
Columbia Law School, damrosch@law.columbia.edu

IMPEACHMENT AS A TECHNIQUE OF PARLIAMENTARY CONTROL OVER FOREIGN AFFAIRS IN A PRESIDENTIAL SYSTEM?

LORI FISLER DAMROSCH*

INTRODUCTION

With the country's attention riveted on the Clinton impeachment crisis, an essay on separation of powers in foreign affairs must emphasize different themes from those that might have been expected at any other time since the Nixon resignation. In the intervening quarter century, there has been little attention to the potential use—or misuse—of impeachment as a technique for legislative control of presidential actions involving war and foreign affairs. The impeachment trial has turned received wisdom upside down; now we must confront a deeper set of questions about whether the United States model of presidentialism (as we have known it for the last 130 or 210 years) is being discarded in favor of something more like a parliamentary model, under which the President's hold on his office is secure only for as long as he can retain the confidence of the legislature.

Nowhere are those deeper constitutional questions more pressing than in the field of foreign affairs. Although President Clinton's troubles are "domestic" in the strict etymological sense,[1] they interconnect with the most serious foreign policy judgments of his presidency, as did those of President Nixon a generation ago. If the Watergate investigations began domestically with the blunders of the 1972 Nixon reelection campaign, they eventually encompassed the most divisive

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1. *See* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 405 (3d ed. 1996) ("domestic . . . [ME.<OFr. *domestique* < L *domesticus* < *domus*: see DOME] 1. having to do with the home or housekeeping; of the house or family").

aspects of Nixon's foreign policy. In 1974, the House Judiciary Committee considered, but ultimately did not adopt, an article of impeachment concerning the secret bombing of Cambodia between March 1969 and the summer of 1973.[2] Clinton's decision to order a bombardment of Iraq on the eve of his impeachment by the House of Representatives, and the hardly sympathetic reaction from the congressional majority, are reminiscent of the unfortunate confluence of the Saturday Night Massacre and the outbreak of the Yom Kippur War in October 1973.[3]

The present crisis sends us back to first principles, to reexamine in a wholly new light the fundamental problem of the relationship between Congress and the President, especially in foreign affairs but truly across the board. Are we witnessing a transformation from what had hitherto been a system of balanced powers into one in which a president could be ejected from office (or at best severely crippled in the exercise of the powers of the office) by something comparable to a parliamentary vote of no confidence? If so, we would hardly recognize the American model of separation of powers, and all our previous thinking about presidential-congressional interactions, in foreign affairs contexts as well as others, would have to be reconceived.

Understanding the dynamics of legislative-executive relations in different kinds of constitutional systems has been a central focus of my recent research. In work-in-progress on comparative constitutionalism and war powers, I am exploring similarities and differences in the control of military activities under parliamentary and presidential models of government: how do different systems ensure civilian control of the military and restrain the outbreak of unwise or unlawful wars? I am finding an amazing richness of constitutional techniques, with the question of parliamentary control of the executive branch receiving different resolution or emphasis in light of the historical and political factors affecting particular democratic polities. Within the confines of the present essay, it will be sufficient to identify selected comparisons between the United

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2. On the Cambodia matter in the Nixon impeachment hearings, see *infra* Part III.A.

3. The national media publicly questioned President Nixon's motives in placing United States forces on worldwide alert on that occasion.

States presidential and British parliamentary systems, with attention to the potential legislative removal of executive leaders in relation to war and national security concerns.

In the American constitutional system, legislative-executive disputes over separation of powers in foreign affairs typically entail divergent conceptions of the extent to which the legislative branch is entitled to participate in foreign policymaking before the die is cast, or whether Congress is relegated to after-the-fact modes of control—most notably, cutting off funds for executive policies of which Congress disapproves. Along with the purse-string check, impeachment is, at least theoretically, available as an ultimate form of *post hoc* legislative control; indeed, some scholars assert that the power of the purse and impeachment are the only methods that the legislature should be able to use to constrain executive military decisions.[4] I incline toward the opposite perspective: that major exercises of foreign affairs power—especially decisions to initiate a substantial military conflict or create significant international obligations—should entail some measure of participation by the legislative branch before the decision is irrevocable, rather than reliance on the blunter instruments that are available only after the Executive has made serious errors of judgment. Under this conception, which I believe is the best understanding of American constitutionalism as applied to foreign affairs, Congress has the right to request and receive adequate and timely information bearing on foreign policy decisions and to be involved in authorizing major external commitments.

Impeachment, as a drastic after-the-fact remedy, could hardly foster the wisdom of major policy choices in the external realm. Indeed, impeachment for trivial causes unrelated to the great affairs of state, as we have seen in Clinton's case, could inflict incalculable damage to the country's ability to forge and carry out critical national security decisions. On the other hand, impeachment may properly belong in the legislative arsenal as a weapon of last resort against a president who has seriously subverted the constitutional system so that Congress cannot otherwise exercise its prerogatives of shared participation in important national foreign policy judgments.

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4. *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 295-96 (1996).

The records of the 1787 Constitutional Convention concerning impeachment confirm that the Framers rebuffed George Mason's proposal to make the President impeachable for "maladministration," because, as James Madison wrote, "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate."[5] Along with constitutional text and original understanding, two centuries of constitutional experience and the structural logic of American presidentialism point toward an exceedingly high threshold for invoking impeachment as a final safeguard against the most heinous acts—ones presumably more egregious than bungling a foreign relations matter or departing from the foreign policy preferences of Congress. Yet with the phrase "Treason, Bribery, or other high Crimes and Misdemeanors,"[6] the Framers evidently signaled certain possibilities for impeachment relevant to the foreign relations of the United States. It remains for us to explore what those possibilities might be.

The central inquiry for this essay is the proper use of the impeachment tool in foreign relations contexts, including war powers. In Part I, the essay begins with a brief review of British impeachment practice (limited to war and foreign policy concerns) known to the Founding generation and reflected in certain fundamental texts of the Founding; this treatment does not betoken any originalist orientation on my part (*au contraire*) but will set the context for later developments. Part II then turns to the travails of President Andrew Johnson as seen through the eyes of Walter Bagehot, the author of the classic treatment of the nineteenth-century British Constitution, which remains a cogent starting point for comparisons between parliamentary and presidential systems, including on the issue of removal of the head of government. Finally, after an examination in Part III of aspects of the Nixon impeachment crisis relevant to war and national security and a brief look at why impeachment was not considered for the Iran-Contra affair during the Reagan Administration, the essay concludes with some comparative reflections on parliamentary and presidential forms of governance and what such

5. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 605 (Ohio University Press 1984) (1893) [hereinafter MADISON'S NOTES].

6. U.S. CONST. art. II, § 4.

comparisons might portend for constitutional control of war and foreign affairs.

I. IMPEACHMENT IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES

A. *British Impeachments Relevant to War and External Affairs*

In the century and a half before the Philadelphia Convention, the British Parliament had impeached a number of civil officers for abuses related to war and external relations. These officers included the Earl of Strafford in 1640 for causes that related to use of the military; the Earl of Clarendon in 1667 for reverses in the second Anglo-Dutch War; Peter Pett, Commissioner of the Navy, in 1668 on charges including negligent preparation for a Dutch invasion; the Earl of Danby in 1679 for making an unauthorized offer to France of neutrality in a war between France and Holland and for arranging a clandestine payment from King Louis XIV of France to King Charles II; and the Earl of Oxford, Viscount Bolingbroke, and the Duke of Ormond in 1715 for their role in the Treaty of Utrecht.[7] Danby holds the distinction of having been impeached a second time in 1695 on charges of taking a bribe from the East India Company. In between the two impeachments, he played a key role in the conspiracy to bring about the 1688 invasion by William of Orange that overthrew King James II, as well as in the maneuvering to persuade the British Parliament to offer the throne to William and Mary.[8]

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7. *See* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 383 n.30 (1976) (citing, *inter alia*, T. PLUCKNETT, TASWELL-LANGMEAD'S ENGLISH CONSTITUTIONAL HISTORY 529-38 (11th ed. 1960)); *see also* STAFF OF THE IMPEACHMENT INQUIRY OF THE HOUSE COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 4-7 (Comm. Print 1974); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 7-102 (1973); Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 YALE L.J. 1419 (1975); Yoo, *supra* note 4, at 214 & nn.256-59. Oxford's impeachment involved a charge of withholding information about treaty negotiations from Parliament. *See* SOFAER, *supra*, at 9.

8. *See* 7 NEW ENCYCLOPEDIA BRITANNICA MICROPEDIA 239-40 (15th ed. 1998) (citing ANDREW BROWNING, 3 THOMAS OSBORNE, EARL OF DANBY AND DUKE OF LEEDS, 1632-1712 (1944-51)). The events surrounding Danby's 1679 impeachment included the disclosure that he had arranged for a secret subsidy from King Louis XIV of France to King Charles II, *see id.*; *see also* Yoo, *supra* note 4, at 214 n.247, an

Some United States scholars with originalist inclinations invoke British practices of the seventeenth and eighteenth centuries, such as the use of impeachment to control executive military conduct, as a privileged source of evidence of constitutional meaning.[9] In this vein, they argue that the United States Framers imported a view of separated powers under which the Executive had exclusive war-initiating authority, subject only to limited parliamentary control after the fact through the power of the purse or impeachment of the King's ministers.[10] As a method for discerning the overall contours of United States executive-legislative allocation of power (and wholly apart from the accuracy of treatment of the British antecedents or the soundness of the claim that the Framers implicitly adopted British impeachment practice),[11] there are substantial reasons to reject the general mode of argumentation from British eighteenth-century models, as Justice Jackson did in his famous concurrence in *Youngstown*

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episode to which Framer Gouverneur Morris alluded during the Convention's debate on the Impeachment Clause. *See* MADISON'S NOTES, *supra* note 5, at 335.

> [N]o one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in forign pay, without being able to guard agst. it by displacing him. One would think the King of England well secured agst. bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV. The Executive ought therefore to be impeachable for treachery . . . . When we make him amenable to Justice however we should take care to provide some mode that will not make him dependent on the Legislature.

Id.

9. *See* Yoo, *supra* note 4, at 196-217.

10. *See id.* at 198, 204, 210, 214, 217.

11. *See* W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 3, 51-74 (1981) (finding strong evidence in records from the Founding generation of Framers' intent that "Congress is to control most American decisions about war and peace"). In regard to the specifics of impeachment, although the Framers did borrow certain British features including a bicameral procedure and the concept of "high Crimes and Misdemeanors," in other respects they consciously departed from the British model, including the consequences of impeachment. *See* U.S. CONST. art. I, § 3, cl. 7 (limiting effects of judgment of impeachment to "removal from Office and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States," while preserving possibility of criminal prosecution in a separate proceeding after conviction on impeachment). Under British practice, imprisonment and even execution could be the result upon conviction. The Framers' adoption of a specific definition of treason in U.S. CONST. art. III, § 3, and limitations on its prosecution and consequences, were significant departures from British practice that could diminish the relevance of British precedents for impeaching on charges of high treason.

Sheet & Tube Co. v. Sawyer.[12]

The British have not had their Constitution frozen as of an arbitrary moment, but have been able to improve it with experience. It is thus difficult to see the appeal in a United States originalist view that would entrench putative British seventeenth- and eighteenth-century concepts into the United States Constitution for all time. Rather, my sympathies run with Charles Black, who wrote in his elegant guide to impeachment that "the English historical material I have seen does not seem to stand in the way of our working out, in any great case in our own times, a sensible concept of the meaning of 'high Crimes and Misdemeanors,' suitable to the spirit and structure of our Constitution."[13] Like Professor Black, I would not put much weight on British precedents for purposes of United States constitutional interpretation. Still, a few of the British stories are worth telling here, in a highly abbreviated (not to say idiosyncratic) review, as illustrations of mistakes to be avoided rather than models to be emulated.

If British history should be our inspiration for legal control of executive military misadventures, we could begin with the case of Admiral John Byng, who was sent in 1756 to relieve the island of Minorca from a French siege just before the Seven Years' War was declared. After a lackluster fight, Byng's fleet retreated and the besieged island fell to the French. Byng was thereupon found guilty of neglect of duty and executed by firing squad.[14] The French writer Voltaire gave his character Candide the chance to witness the spectacle of the execution, just as Candide was about to disembark at Portsmouth, England:

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12. 343 U.S. 579, 641 (1952) (Jackson, J., concurring) ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."). The evidence is clear that the Framers repudiated the substantive conceptions of executive authority exerted under royal prerogative. *See generally* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 12-17 (1993) (discussing revolutionary nature of the Constitution in terms of the powers assigned to Congress, the active role contemplated for Congress, and the disclaiming of the Crown as a model for the Presidency).

13. CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 50 (1974).

14. *See* 2 NEW ENCYCLOPEDIA BRITANNICA MICROPEDIA 693 (15th ed. 1998) (citing BRIAN TUNSTALL, ADMIRAL BYNG AND THE LOSS OF MINORCA (1928)).

> [Candide] inquired who the stout gentleman was that was killed with so much ceremony. "He is an admiral," they replied. "And why was this admiral killed?" "Because," said they, "he did not kill enough men himself. He attacked the French admiral, and was found guilty of not being near enough to him." "But then," said Candide, "was not the French admiral as far off from the English admiral, as he was from him?" "That is beyond doubt," they replied. "But in this country it is good to kill an admiral from time to time, *pour encourager les autres* (to encourage the others)."[15]

Candide was so shocked by what he had seen and heard that he declined even to set foot on English soil, and we too can recoil in horror from such a precedent.

Next to death by firing squad for a military mistake, impeachment represents a more civilized form of legal control.[16] The impeachment case uppermost in the Framers' minds was that of Warren Hastings. Indeed, George Mason mentioned the then-pending Hastings matter at the Philadelphia Convention while introducing an amendment to expand the category of impeachable offenses beyond treason and bribery with the explanation that "Hastings is not guilty of Treason."[17] Hastings, the first British governor-general of Bengal, had been impeached in 1786 in the House of Commons in a process introduced by Edmund Burke, on allegations concerning the forcible subjugation and corrupt governance of the province.[18] His trial before the House of Lords had not yet been held at the time of the Philadelphia Convention but would in due course stretch from 1788 to 1795, when he was acquitted.[19]

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15. VOLTAIRE, CANDIDE ch. 23 (1759) (translation adapted from VOLTAIRE, COLLECTED ROMANCES (1927) and BARTLETT'S FAMILIAR QUOTATIONS (14th ed. 1968)). A different version of this story circulates in the 1990s. On a congressional inspection tour of Bosnia-Herzegovina in the dangerous days following deployment of the NATO Implementation Force, the military escort quipped that nothing would improve the morale of the United States troops more than if a Senator's vehicle hit a landmine.

16. Under British practice, however, one possible outcome of impeachment was execution. *See supra* note 11.

17. MADISON'S NOTES, *supra* note 5, at 605.

18. *See* THOMAS BABINGTON MACAULAY, *Warren Hastings*, *in* 2 CRITICAL, HISTORICAL, AND MISCELLANEOUS ESSAYS AND POEMS 554, 554-657 (originally published in 1841 as a review of Hastings's collected papers); *see also* P.J. MARSHALL, THE IMPEACHMENT OF WARREN HASTINGS (1965).

19. Macaulay later wrote that a proper trial should have taken no more than three months, but "[t]o expect that their Lordships would give up partridge-shooting,

The Hastings impeachment was, at bottom, a policy dispute over the conduct and funding of British imperial rule in India, including the uses and abuses of military power. Burke's most serious accusation had to do with Hastings's decision to lend the army at his disposal to an Indian potentate for essentially mercenary purposes (in exchange for substantial compensation remitted back to London) in what was known as the Rohilla War. The House of Commons actually voted down the Rohilla War article of impeachment by a vote of 119 to 67 but sustained a number of other articles involving corruption, spoliation, and cruelty.[20] Burke, as head manager of the impeachment before the Lords, "proceeded to arraign the administration of Hastings as systematically conducted in defiance of morality and public law."[21]

In United States legal scholarship of the current period, the Hastings impeachment has been invoked to support the interpretation of "high Crimes and Misdemeanors" that emerged as the dominant position at the time of the Nixon impeachment hearings: "[a] showing of criminality is neither necessary nor sufficient for the specification of an impeachable offense."[22] As Laurence Tribe has written,

> With respect to the question of criminality, then, Edmund Burke's opening statement at the impeachment trial of Warren Hastings remains definitive: "It is by this tribunal that statesmen who abuse their power . . . are tried . . . not upon the niceties of a narrow [criminal] jurisprudence, but upon the enlarged and solid principles of morality."[23]

"Morality" in this conception ought to mean fundamental abuse of state power,[24] not merely a disagreement between

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in order to bring the greatest delinquent to speedy justice, or to relieve accused innocence by speedy acquittal, would be unreasonable indeed." MACAULAY, *supra* note 18, at 648.

20. *See id.* at 635-40; MARSHALL, *supra* note 18, at 44-46. Without defending the Rohilla policy as such, the government minister responsible for India pointed out that Parliament, with full knowledge, had not blocked Hastings's reappointment as governor-general after the Rohilla War. *See id.* at 45-46.

21. MACAULAY, *supra* note 18, at 645.

22. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 293-94 (2d ed. 1988) (footnote omitted) (emphasis omitted).

23. *Id.* at 294 (quoting 7 E. BURKE, WORKS 11, 14 (1839)) (alteration in original).

24. *Cf.* BLACK, *supra* note 13, at 37 (interpreting "high Crimes and

parliamentarians and executive officers over foreign policy (and still less the private peccadilloes of an officeholder).

Foreshadowing an argument to be made more than two centuries later on President Clinton's behalf,[25] supporters of Hastings contended that the dissolution of Parliament after the commencement of the impeachment but before completion of the trial was fatal to the entire proceeding. The legal argument failed,[26] as did a motion in the House of Commons to drop the whole matter, but a number of the articles of impeachment were withdrawn to expedite the trial. In Thomas Macaulay's wry observation, "In truth, had not some such measure been adopted, the trial would have lasted till the defendant was in his grave. . . . As Hastings himself said, the arraignment had taken place before one generation, and the judgment was pronounced by another."[27] In view of Hastings's belated vindication by the Lords' failure to convict, the impeachment and trial hardly fulfilled their lofty goals—not the least of which was to ensure lawfulness of imperial policy (through *ad hoc* and *post hoc* enforcement, to be sure)—but rather may have worked a serious injustice.

B. Impeachment and Foreign Relations in the Founding Texts

In between Hastings's impeachment in the House of Commons and his trial in the House of Lords, the Framers concluded their work at the Philadelphia Convention. In addition to the above-noted references to the Convention's deliberations, we know that the Framers were mindful, in their consideration of impeachment, of other recent events in foreign

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Misdemeanors" as *ejusdem generis* with treason and bribery in the sense that all are offenses "(1) which are extremely serious, (2) which in some way corrupt or subvert the political and governmental process, and (3) which are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute books").

25. *See Hearing on Impeachment Inquiry Before the House Comm. on the Judiciary*, 105th Cong. (Dec. 8, 1998), *available in* 1998 WL 18089984.

26. This decision (taken contrary to the views of the majority of lawyers in the House of Commons) has been called the trial's "most important contribution to the constitutional development of impeachments." MARSHALL, *supra* note 18, at 75. The issue had already generated some inconsistent practice in the seventeenth century. *See id.* at 75-76.

27. MACAULAY, *supra* note 18, at 649.

affairs—not only involving Britain, but also her adversaries and allies. For example, Benjamin Franklin discussed the case of the Prince of Orange, which took place during the fourth Anglo-Dutch war (1780-1784):

> An agreement was made between France & Holland; by which their two fleets were to unite at a certain time & place. The Dutch fleet did not appear. Every body began to wonder at it. At length it was suspected that the Statholder [the Dutch Prince] was at the bottom of the matter. This suspicion prevailed more & more. Yet as he could not be impeached and no regular examination took place, he remained in his office, and strengthening his own party, as the party opposed to him became formidable, he gave birth to the most violent animosities & contentions. Had he been impeachable, a regular & peacable enquiry would have taken place and he would if guilty have been duly punished, if innocent restored to the confidence of the public.
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> Mr. KING remarked that the case of the Statholder was not applicable. He held his place for life, and was not periodically elected. In the former case impeachments are proper to secure good behaviour. In the latter they are unnecessary; the periodical responsibility to the electors being an equivalent security.[28]

In any event, it seems clear that the Framers were determined to ensure that impeachment would be available as an ultimate safeguard to remove a chief executive who might "betray his trust to foreign powers"[29] or "abus[e] his power; particularly in time of war."[30] The civil remedy of removal from office would be a desirable safety valve, an alternative to removal through assassination or insurrection.[31]

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28. MADISON'S NOTES, *supra* note 5, at 334.

29. *Id.* at 332.

30. *Id.* at 334. The deliberate decision to define treason more restrictively than in the British practice, *see supra* note 11, may clarify the significance of these examples in relation to foreign powers. In *Federalist No. 43*, Madison explains that "as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger" through the constitutional definition and restrictions on prosecutions for treason. THE FEDERALIST NO. 43, at 273 (James Madison) (Clinton Rossiter ed., 1961).

31. *See* MADISON'S NOTES, *supra* note 5, at 332.

> Docr. FRANKLIN was for retaining the [impeachment] clause as favorable to the Executive. . . . What was the practice before this in cases

At the same time, the Framers' treatment of impeachment also reflected their nuanced compromises on more general problems of legislative-executive relations. The knotty matters of mode of selection, term of office, eligibility for reelection, and removal through impeachment were considered to be entangled not only with each other, but also with the specification of the powers of the Chief Executive in relation to Congress, the states, and the people.[32] Clearly, the Framers created a presidency that would not be subservient to the legislative branch,[33] but that could ultimately be held accountable under the rubric of "high Crimes and Misdemeanors" for serious subversion of the checks and balances of the constitutional system.

> where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character. It wd. be the best way therefore to provide in the Constitution for the regular punishment of the Executive where his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.

Id. (footnote omitted).

> The Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections. He is aware of the necessity of proceeding with a cautious hand, and of excluding as much as possible the influence of the Legislature from the business.

Id. at 334 (statement of Mr. Randolph).

Compare the shift in position of Gouverneur Morris, who originally argued that the chief magistrate should not be impeachable but that his key subordinates should be:

> As to the danger from an unimpeachable magistrate he could not regard it as formidable. There must be certain great officers of State; a minister of finance, or war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive, and will be amenable by impeachment to the public Justice.

Id. at 324; *see also id.* at 331. Later Morris came around to the view that the Chief Executive should be impeachable if his term of office were to be of significant length. *See id.* at 335.

32. *Cf. id.* at 335 (stating that near the conclusion of debate on impeachment, "Mr. PINKNEY apprehended that some gentlemen reasoned on a supposition that the Executive was to have powers which would not be committed to him: He presumed that his powers would be so circumscribed as to render impeachments unnecessary").

33. *See id.* at 605 (refuting a proposal to expand the circumstances for impeachment to a degree that would be "equivalent to a tenure during pleasure of the Senate"). On the Framers' conception of impeachment, see generally JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT 1-25 (1978).

In the ratification efforts, the impeachment provisions drew attention to points relevant to foreign affairs issues. As one of two numbers of the *Federalist Papers* devoted in whole or substantial part to impeachment,[34] *Federalist No. 66* deals with the Senate's role in the trial of impeachments and in the treaty power in the same breath. Responding to objections that the Senate would be an improper body to try impeachments by virtue of its union with the Executive in the treaty process, Publius (Alexander Hamilton) explained that the "JOINT AGENCY of the Chief Magistrate of the Union, and of two-thirds of the members of [the Senate], is designed to be the pledge for the fidelity of the national councils"[35] in respect of treaties:

> The convention might with propriety have meditated the punishment of the Executive, for a deviation from the instructions of the Senate, or a want of integrity in the conduct of the negotiations committed to him; they might also have had in view the punishment of a few leading individuals in the Senate who should have prostituted their influence in that body as the mercenary instruments of foreign corruption . . . .[36]

The error in the objection to conferring the power to convict on impeachment in the same two-thirds of the Senate that would approve a treaty, however, was exposed as follows:

> The truth is that in all such cases it is essential to the freedom and to the necessary independence of the deliberations of the body that the members of it should be exempt from punishment for acts done in a collective capacity; and the security to the society must depend on the care which is taken to confide the trust to proper hands, to make it their interest to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good.[37]

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34. *See* THE FEDERALIST NOS. 65, 66 (Alexander Hamilton). For other briefer mentions of presidential impeachment, see, for example, *id.* NOS. 69, 77. Separate numbers deal with impeachment of judges and other matters unrelated to the present inquiry.

35. THE FEDERALIST NO. 66, at 406 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

36. *Id.*

37. *Id.*

According to this conception, impeachment would have no place against a president who acted in conformity with the Senate's advice in the making of a treaty.[38] Perhaps more important, the primary safeguard against improper treaties is the prior involvement of an arm of legislature in the treaty process, not impeachment after the fact.[39] Impeachment in the treaty context would be reserved for derelictions subversive of that safeguard.

The constitutional provisions on presidential impeachment lay dormant for three-quarters of a century until they were activated in Congress's struggle with President Andrew Johnson, the topic to which we now turn.[40]

II. ANDREW JOHNSON'S TRIAL AS SEEN FROM ACROSS THE ATLANTIC

It is not too much of a stretch to think of the impeachment of President Andrew Johnson in foreign affairs terms. The impeachment was precipitated, after all, by Johnson's determination to fire Secretary of War Edwin M. Stanton; Congress and the President were bent on fundamentally irreconcilable policies toward conquered territory (albeit in a

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38. *See id.* ("So far as might concern the misbehavior of the executive in perverting the instructions, or contravening the views of the Senate, we need not be apprehensive of a want of a disposition in that body to punish the abuse of their confidence, or to vindicate their own authority.").

39. *Federalist No. 66*, in its references to the Senate's "instructions" to the President, appears to assume a more activist "advice" role for the Senate in the treaty-making process than has developed in practice. The underlying philosophy—that a legislative organ should share as a full partner in decisions for major external commitments—remains valid today, even though senatorial involvement in treaties has for more than two centuries centered on the "consent" rather than "advice" function.

40. Meanwhile, an episode often cited by specialists on legislative-executive war powers, but virtually ignored in the debates of 1998 to 1999 on censure as a potential alternative to impeachment, was the adoption by the House of Representatives in 1848 of an amendment characterizing the Mexican-American War as "unnecessarily and unconstitutionally begun by the President of the United States." CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848). Scholarship that refers to this gesture as a "censure" includes EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 451 n.7 (4th rev. ed. 1957) and JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 96 (1993), among others. As a one-House action, the 1848 measure lacks the formality of the censure of President Andrew Jackson that has been frequently mentioned as a potential precedent for congressional action concerning President Clinton.

civil rather than external war).[41] My objective in this section, however, is not so much to expound United States foreign relations law as to illuminate United States separation-of-powers problems in a comparative context, with reference to the contrasting British model of parliamentary governance. For vividness in drawing Anglo-American comparisons, I turn to Walter Bagehot's *The English Constitution*, which was published at the end of our Civil War and is rich in comparative insights.[42]

Through the lens of Bagehot's comparative observations formulated during the United States crisis of 1865 to 1868, we can better appreciate alternative models of parliamentary control over executive conduct of foreign affairs. It is perhaps best to understand him as having sketched archetypes rather than strictly accurate portrayals of either our system or his own as both were undergoing considerable change even as he wrote.[43]

For Bagehot, the American Civil War and its aftermath perfectly illustrated the defects of the American system of governance by comparison to the English system:

> Hobbes told us long ago, and everybody now understands, that there must be a supreme authority, a conclusive power, in every State on every point somewhere. . . .
>
> . . . .
>
> But the division of the sovereign authority in the American Constitution is far more complex than this. . . .
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> . . . .
>
> . . . [The American Constitution makers] shrank from placing sovereign power anywhere. They feared that it would generate tyranny; George III had been a tyrant to

41. Compare the frequent reliance on Civil War precedents, *see, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635 (1862), as authority for interpreting presidential powers over foreign affairs and military activities.

42. WALTER BAGEHOT, THE ENGLISH CONSTITUTION (1964) (initially written as a series of magazine articles from 1865 to 1866, republished in book form in 1867, and reissued with a new introduction in 1872). For United States-British comparisons, see, for example, *id.* at 59-61, 66, 69-81, 98-99, and *infra* notes 44-56 and accompanying text.

43. *See* R.H.S. Crossman, *Introduction* to BAGEHOT, *supra* note 42, at 33-35 (discussing criticisms of Bagehot's descriptions of both the United States and the English systems).

> them, and come what might, they would not make a George III. . . .
>
> The result is seen now. At the critical moment of their history there is no ready, deciding power. . . . The greatest moral duty ever set before a Government, and the most fearful political problem ever set before a Government, are now set before the American. But there is no decision, and no possibility of a decision. The President wants one course, and has the power to prevent any other; the Congress wants another course, and has power to prevent any other. The splitting of sovereignty into many parts amounts to there being no sovereign.
>
> . . . .
>
> The English Constitution, in a word, is framed on the principle of choosing a single sovereign authority, and making it good; the American, upon the principle of having many sovereign authorities, and hoping that their multitude may atone for their inferiority.[44]

If it were not for the American people's "genius for politics" and inherent excellence, Bagehot concluded, the "multiplicity of authorities in the American Constitution would long ago have brought it to a bad end."[45]

Bagehot additionally believed that the American Framers had labored under an understandable but significant misconception about British constitutional developments in the late eighteenth century. Because they held George III responsible for their miseries, they devised a constitution that would supposedly restrain tyrannical tendencies.[46] What they

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44. BAGEHOT, *supra* note 42, at 214-20. The same passage contains the following:

> [T]he Congress declares war, but they would find it very difficult, according to the recent construction of their laws, to compel the President to make a peace. The authors of the Constitution doubtless intended that Congress should be able to control the American executive as our Parliament controls ours. . . . But the fact remains that the President has now, by precedent and decision, a mighty power to continue a war without the consent of Congress, and perhaps against its wish.

Id. at 217-18. In a footnote to the paragraph on the impossibility of settling policy toward the conquered South, he added when the original essays were republished in book form: "This was written just after the close of the Civil War, but I do not know that the great problem stated in it has as yet been adequately solved." *Id.* at 219 n.1.

45. *Id.* at 220-21.

46. *See id.* at 99.

Living across the Atlantic, and misled by accepted doctrines, the acute

did not realize was that the British royal prerogative was already ebbing in favor of the "efficient secret" of a new form of government in which the monarch retained essentially ceremonial powers and real power lay in the hands of a cabinet drawn from the Parliament.[47]

Bagehot found special virtues in cabinet government where war and foreign affairs powers were concerned:

> Under a Cabinet Constitution at a sudden emergency this people can choose a ruler for the occasion. It is quite possible and even likely that he would not be ruler *before* the occasion. The great qualities, the imperious will, the rapid energy, the eager nature fit for a great crisis are not required—are impediments—in common times. . . . By the structure of the world we often want, at the sudden occurrence of a grave tempest, to change the helmsman—to replace the pilot of the calm by the pilot of the storm. In England we have had so few catastrophes since our Constitution attained maturity, that we hardly appreciate this latent excellence. . . . But even in England, at what was the nearest to a great sudden crisis which we have had of late years—at the Crimean difficulty—we used this inherent power. We abolished the Aberdeen Cabinet, the ablest we have had, perhaps, since the Reform Act—a

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Framers of the Federal Constitution, even after the keenest attention, did not perceive the Prime Minister to be the principal executive of the British Constitution, and the sovereign a cog in the mechanism. There is, indeed, much excuse for the American legislators in the history of that time. They took their idea of our Constitution from the time when they encountered it. But in the so-called Government of Lord North, George III was the Government. Lord North was not only his appointee, but his agent. The Minister carried on a war which he disapproved and hated, because it was a war which his sovereign approved and liked. Inevitably, therefore, the American Convention believed the King, from whom they suffered, to be the real executive, and not the Minister, from whom they had not suffered.

Id.

47. *See id.* at 65.

The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is *the Cabinet*. By that new word we mean a committee of the legislative body selected to be the executive body.

Id. at 65-66.

> Cabinet not only adapted, but eminently adapted, for every sort of difficulty save the one it had to meet—which abounded in pacific discretion . . . . "We turned out the Quaker, and put in the pugilist."[48]

Presumably, today's adaptation of Bagehot's epigram would depend on exactly who might replace our Commander in Chief: "We turned out the philanderer, and put in the philosopher," or: "We turned out the philanderer, and put in the phony."[49]

To Bagehot, the feud between Congress and President Andrew Johnson culminating in the impeachment proceedings showed "the characteristic evils of the Presidential system . . . most conspicuously:"[50]

> Nothing could be so conclusive against the American Constitution, as a Constitution, as that incident. A hostile legislature and a hostile executive were so tied together, that the legislature tried, and tried in vain, to rid itself of the executive by accusing it of illegal practices. The legislature was so afraid of the President's legal power that it unfairly accused him of acting beyond the law.[51]

By contrast, in a parliamentary system, either the Executive would yield or be displaced, or dissolution of the Parliament would produce a new mandate from the people.

Before leaving Bagehot's critique of the Johnson impeachment, it may be worth mentioning that, even for a parliamentary system, he perceived a residual role for impeachment in matters concerning royal prerogatives in the foreign affairs sphere. Indeed, those prerogatives might be sweeping:

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48. *Id.* at 78-79. By contrast, "under a Presidential government you can do nothing of the kind. The American Government calls itself a Government of the supreme people; but at a quick crisis, the time when a sovereign power is most needed, you cannot *find* the supreme people." *Id.* at 79.

49. The phrases in the text were formulated for their fricatives and not for the phenomenon of vice-presidential succession. If the Clinton impeachment trial had occupied the country through the November 2000 election, the successor president could have emerged from a phalanx of phrenetics.

50. BAGEHOT, *supra* note 42, at 300 (from the Introduction to the 1872 edition, reprinted as an appendix in the 1964 republication).

51. *Id.* at 301.

> Not to mention other things, [the Queen] could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the General Commanding-in-Chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. . . . In a word, the Queen could by prerogative . . . disgrace the nation by a bad war or peace, and could, by disbanding our forces, whether land or sea, leave us defenceless against foreign nations.[52]

But Bagehot claimed that the British realm need not fear such abuses of the royal prerogative because of the twofold checks of impeachment and changes of ministry. For ordinary errors of judgment made in good faith, the remedy would be a change of ministry,[53] while the check of impeachment on charges of high treason would remain available only against a minister "who advised the Queen so to use her prerogative as to endanger the safety of the realm."[54] It is perhaps superfluous to note that the British Parliament has not turned to this drastic recourse since Bagehot wrote. Indeed, the last impeachment in Britain was in 1806.[55]

Bagehot himself acknowledged that the British model could benefit from adapting certain features found in the American system, including prior parliamentary involvement in decisions on treaties.[56] And, as will be seen below, certain modern influential figures in the United States have urged serious consideration of importing aspects of the British system, especially in order to improve on dysfunctional aspects

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52. *Id.* at 287.

53. *See id.* at 288.

54. *Id.* at 287.

55. *See* 6 NEW ENCYCLOPEDIA BRITANNICA MICROPEDIA 271 (15th ed. 1998).

56. *See* BAGEHOT, *supra* note 42, at 288-96. Though alluding to American sources on the treaty power, including Benjamin Franklin, Bagehot did not recommend a wholesale copying of the American Senate's advice-and-consent role. Rather, his proposal—laying the treaty on the table in both Houses of Parliament and deeming it approved unless objection were raised within a fixed number days—eventually took hold under the practice known, since 1924, as the "Ponsonby rule." *See* Lord Sydney Templeman, *Treaty-Making and the British Parliament*, *in* PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY 153, 158-59, 175 n.11 (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994).

of our foreign policy process. This essay returns to those arguments after taking up aspects of the Watergate crisis and the Iran-Contra affair relevant to whether presidential decisions on war and external affairs can give rise to impeachable offenses.

III. IMPEACHABILITY OF PRESIDENTIAL ACTIONS IN FOREIGN AFFAIRS: WATERGATE AND BEYOND

A. War Powers in the Watergate Crisis

The Watergate crisis of the Nixon presidency was inextricably tied to the Indochina conflict. Of the articles of impeachment approved by the House Judiciary Committee in July 1974, several provisions concerned abuse of presidential power or misuse of executive agencies to suppress antiwar dissent.[57] Two articles charged misuse and unlawful use of the Central Intelligence Agency ("CIA") in order to obstruct justice and to prejudice constitutional rights,[58] contrary to the CIA statute, which gives that agency national security functions and prohibits it from engaging in internal political or law enforcement activities.[59] The article of impeachment concerning abuse of power specified not only unlawful electronic surveillance of private citizens, but also breaking and entering the offices of Dr. Lewis Fielding (the psychiatrist to Daniel Ellsberg, who had provided the Pentagon Papers to the *New York Times* and the *Washington Post*).[60] Each of these activities formed part of Nixon's long-running effort to discredit antiwar activists.

"National security" (real or spurious) formed part of the asserted legal justification for withholding the subpoenaed Oval Office tapes. Specifically, Nixon had interposed various claims tantamount to an invocation of a national security

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57. *See generally* IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305 (1974) [hereinafter H.R. REP. ON NIXON IMPEACHMENT] (approving, *inter alia*, Article II, which alleged various abuses of executive agencies, including electronic surveillance for purposes unrelated to national security and other actions in violation of the constitutional rights of citizens).

58. *See id.* art. I, at 2, art. II(3), at 157, art. II(5), at 177.

59. *See* National Security Act of 1947, 50 U.S.C. §§ 401-404f (1994 & Supp. II 1996).

60. *See* H.R. REP. ON NIXON IMPEACHMENT, *supra* note 57, art. II(4), at 171.

privilege (or to the unfeasibility of segregating state secrets from unprivileged material) in arguing that separation-of-powers considerations stood in the way of his being required to surrender the tapes to a coordinate branch of government. By the time the matter reached the Supreme Court, however, the President had refined his claim to one of executive privilege in receiving confidential advice from his subordinates rather than one of state secrets privilege. The Supreme Court explicitly reserved any questions concerning sensitive military, diplomatic, or national security information in holding that the President's undifferentiated claim of executive privilege could not prevail over the bona fide need for the subpoenaed materials in connection with a criminal proceeding.[61] On July 24, 1974, the Supreme Court unanimously held that the tapes had to be turned over to the district court for inspection *in camera*.

The most significant way in which the Watergate crisis and Nixon's national security practices intersected was in the weighing of a proposed article of impeachment concerning the secret bombing of Cambodia. On July 30, 1974, the House Judiciary Committee considered a draft article asserting that Nixon had

> on and subsequent to March 17, 1969, authorized, ordered, and ratified the concealment from the Congress of the facts and the submission to the Congress of false and misleading statements concerning the existence, scope and nature of American bombing operations in Cambodia in derogation of the power of the Congress to declare war, to make appropriations and to raise and support armies.[62]

By a vote of 26 to 12, the Committee decided not to report this draft article to the full House of Representatives. The Committee took note of the proponents' position that

> the President, by issuing false and misleading statements, failed to provide Congress with complete and accurate information and thereby prevented Congress from responsibly exercising its powers to declare war, to raise and support armies, and to make appropriations. They

61. *See* United States v. Nixon, 418 U.S. 683 (1974).
62. H.R. REP. ON NIXON IMPEACHMENT, *supra* note 57, at 217.

> stated that informing a few selected members of the Congress about the Cambodian bombing did not constitute the constitutionally required notice . . . . The supporters also stated that Congress had not ratified the President's conduct through inaction or by its 1973 limitation on bombing because Congress did not know of the bombing until after it voted the authorization.[63]

The principal arguments in opposition to the draft article were that President Nixon had indeed acted within his constitutional powers in ordering the bombing, and that Congress had, in any event, been sufficiently informed and, further, had acquiesced in or even ratified the bombing.[64]

In the months leading up to and following the Nixon resignation, eminent constitutional scholars embarked upon the challenge of explaining why a sufficiently egregious circumvention of constitutional checks and balances could, in principle, be impeachable even if no criminal law had technically been violated. These scholars also examined whether Congress should have concluded to impeach (or not to impeach) based on the facts of the Cambodia matter. Charles Black, writing in May 1974, cogently clarified the issues:

> It seems quite possible that military action, unauthorized by Congress and concealed from Congress, might at some point constitute such a murderous and insensate abuse of the commander-in-chief power as to amount to a "high Crime" or "Misdemeanor" for impeachment purposes, though not criminal in the ordinary sense. But . . . precedents of the distant and recent past make it hard to establish knowing wrongfulness in most such cases. And the question, specifically, whether the long-secret 1973 Cambodian bombing could amount to an impeachable offense is complicated by the fact that, on its being revealed, Congress, by postponing until August 15, 1973, the deadline for its ending, would seem to have come

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63. *Id.* at 218. The proponents further contended "that the technicalities or merits of the war in Southeast Asia, the acquiescence or protests of Prince Sihanouk, and the arguably similar conduct of past Presidents were irrelevant to the question of President Nixon's constitutional accountability in usurping Congress' war-making and appropriations powers." *Id.*

64. *See id.* at 219. It was also argued that the dispute over the legality of the Cambodia bombing was moot by virtue of the passage of legislation terminating the bombing as of August 15, 1973, as well as the War Powers Resolution adopted (over the President's veto) later the same year. *See id.*

> close to ratifying it. One is sailing very close to the wind when one says, "You may do it till August 15, but it is an impeachable offense."[65]
>
> . . . .
>
> Reluctantly, I have to conclude that only a very extreme and not now visible case ought to bring the impeachment weapon into play as a sanction against presidential warlike activity. Congress ought to deal with this matter comprehensively and clearly; if it did, then the president's violation of the congressional rules would be impeachable beyond a doubt, for the uncertainties generated by precedent would be cleared up.[66]

Black's approach has been echoed by other top constitutional scholars writing in the aftermath of the Watergate crisis and seeking to distill its lessons.[67]

A few years ago, John Hart Ely comprehensively reexamined constitutional aspects of the Indochina conflict, including the relevance of presidential concealment of facts from Congress and the responsibility of Congress to ferret out information for itself. In regard to the legal confusion concerning what Congress did and did not know, or did and did not approve about the Cambodia bombing, Ely concludes that with "tolerably full knowledge of what was going on"[68] Congress probably did authorize the bombing from mid-1970 until the

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65. BLACK, *supra* note 13, at 34-35. By contrast, Black presciently found it "preposterous" that anyone would think of impeaching a president for acts technically criminal but not amounting to extremely serious abuses of governmental power. His examples, conceived in 1974, included transporting a woman for "immoral purposes" or assisting a young White House intern in concealing a minor crime. *Id.* at 35-36.

66. *Id.* at 44. He added:

> The so-called War Powers Resolution passed last year is so far from filling this need that the Administration, not without plausibility, could publicly toy with the idea that the resolution, supposedly a restraint on the president, actually authorized resumption of the Cambodian bombing that Congress had earlier ordered to be ended!

Id. at 44-45.

67. *See, e.g.*, TRIBE, *supra* note 22, at 294 ("A deliberate presidential decision to emasculate our national defenses, or to conduct a private war in circumvention of the Constitution, would probably violate no criminal code, but it should surely be deemed a ground of impeachment."). On the rejection of the article of impeachment on Cambodia, see Louis Pollak, *The Constitution as an Experiment*, 123 U. PA. L. REV. 1318, 1329-39 (1975); *cf.* LABOVITZ, *supra* note 33, at 123-25 (noting that the Cambodia article, even though aimed at the deception of Congress rather than the bombing itself, was not adopted because it would have been unnecessarily divisive).

68. ELY, *supra* note 40, at 46.

legislated deadline of August 15, 1973.[69] By contrast, Nixon deliberately misled Congress about the bombing between March 1969 and April 1970, and continued to conceal the full truth of those activities until 1973. In an extended discussion of which aspects of the Indochina course of conduct might have been properly impeachable, Ely adopts Black's interpretation of "high Crimes and Misdemeanors" to include a serious and willful violation of the separation of powers.[70] On the facts of the Indochina conflict, Ely concludes that, although impeachment probably would not have been a plausible remedy for other problems, including what he calls "the (unenforceable) unconstitutionality of the 'secret war' in Laos,"[71] Congress ought to have gone forward with impeachment over the concealment of the Cambodia bombing:

> The other thing Congress can do is make damn sure that on the rare occasion when the facts converge in such a way as to make impeachment a politically viable option—where the secret of the war is actually kept from Congress, and only one president is involved—it *does* impeach him for fighting an unjustifiably secret and unauthorized war. Deterrence can work even at high levels. Of course the facts will seldom add up that way.
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> . . . .
>
> . . . [With respect to Cambodia], an impeachment inquiry would have been well designed to unravel alleged executive motives and determine which among them constituted only post facto rationalization. Unlike the war in Laos, the secret bombing of Cambodia was an offense consummated by one and only one president. Also unlike Laos, it was a well-kept secret—involving measures as extreme as hoodwinking the Air Force Secretary and Chief of Staff and providing falsified secret documents to the relevant congressional committees for up to four years after the events. The fact that Congress will not be in a moral position to impeach when it has in effect been part of the

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69. *See id.* at 30-46.

70. *See id.* at 95, 211 n.172 (citing BLACK, *supra* note 13, at 28, 33-37, 39-40; BERGER, *supra* note 7, at 70).

71. *Id.* at 68. Among the reasons precluding impeachment as regards Laos, Ely notes that various members of Congress knew enough about the Laotian war to put them on notice for further inquiry, that Congress's main concern once it learned of the matter was to bar the introduction of ground troops only, and that the Laos policy had stretched over the Kennedy and Johnson as well as the Nixon Administrations. *See id.* at 95-97.

> conspiracy makes it all the more important that it do so in the rare situation where it wasn't.
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> . . . .
>
> I'd have impeached him for it. Surely it would have been a more worthy ground than the combination of a third-rate burglary and a style the stylish couldn't stomach. As Congressman William Hungate put it: "It's kind of hard to live with yourself when you impeach a guy for tapping telephones and not for making war without authorization."[72]

Today, it ought to be even more difficult for Congress to impeach a president for lying about sex (telephonic or otherwise), when other presidents have lied about war without being held to account.

B. The Iran-Contra Affair

For enlightenment on why impeachment was never seriously considered over the Iran-Contra affair during the Reagan presidency, we may turn to two of our more distinguished former members of Congress: (1) William S. Cohen (who, as a freshman Republican on the House Judiciary Committee in 1974, supported and even helped draft the articles of impeachment against President Nixon, served on the select Iran-Contra committee in the 1980s, and most recently, as the Secretary of Defense, had to explain to a skeptical press corps why there was no "Wag-the-Dog" element in President Clinton's decision of December 16, 1998 to launch cruise missiles against Iraq) and (2) George J. Mitchell (former Senate majority leader and, later, mediator of the Northern Ireland conflict, a struggle perhaps even bloodier and more intractable than those between the President and Congress).[73] With reference to the remark of a Lord Chancellor of England in the seventeenth century that impeachment was like "Goliath's sword, to be kept in the temple and not used but on great occasions," Cohen and Mitchell observe that the Reagan Administration's "foreign policy mistake did not demand a

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72. *Id.* at 97-104 (footnotes omitted).

73. *See* WILLIAM S. COHEN & GEORGE J. MITCHELL, MEN OF ZEAL: A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS (1988).

political beheading,"[74] nor was it much like Watergate in its implications:

> The sale of weapons to Iran constituted a foreign-policy error of major proportions, but did not appear to involve the President in violation of a criminal statute. There was no evidence that President Reagan knew about the diversion of profits from the arms sale to the Contras. . . . Congressman Lee Hamilton stated . . . that if the President in fact had knowledge of the diversion, he might have committed an impeachable act. Hamilton's statement raised an important issue. Was knowledge of the diversion itself a serious breach of the President's constitutional responsibilities? Or would lying about having such knowledge have constituted an offense that would have warranted removing the President from office?[75]

Congress did not have to face the issue of impeachability over lying or concealment in the absence of evidence that President Reagan was aware of the diversion.

Another potential ground for Reagan's impeachment might have been his circumvention of congressional limitations on funding for the Contras (the so-called Boland Amendments), through executive solicitation of foreign governments to contribute to that cause. Some select committee members perceived a legal distinction between what the President might have lawfully done under his own constitutional authority and what he might have encouraged or condoned on the part of his subordinates in defiance of statutory restrictions: "The exact state of the President's knowledge about the fund-raising activities was never resolved. But even if the Committee had established that the President had been fully informed, it is doubtful that Congress would have considered that a 'high crime and misdemeanor.'"[76]

Finally, Congress had to be mindful of its own vacillation over policy toward the Contras. As with Indochina, the inference of congressional acquiescence in questionable executive activities was at least plausible: "Before Congress can seriously contemplate filing a resolution of impeachment for presidential misconduct, it must come forward with clean

74. *Id.* at 45.
75. *Id.* at 46-47.
76. *Id.* at 48.

hands, if not with a pure heart."[77]

For all these reasons, the congressional responses to the Iran-Contra affair stopped well short of the political beheading that impeachment would have entailed. Instead, a number of Reagan Administration figures were prosecuted for infractions of varying degrees of seriousness, including conspiracy to undermine congressional policies and misleading Congress.[78]

CONCLUSION

The above discussion can be restated simply in four principles: (1) impeachment needs to be reserved for the most serious assaults on constitutional governance; (2) an egregious subversion of constitutionally mandated congressional prerogatives concerning major foreign policy decisions could, in principle, constitute an impeachable offense; (3) impeachment is a last resort to safeguard our constitutional system and not a means for Congress to hold the President accountable for the ordinary conduct of the office (and still less for personal behavior); and (4) the essence of our constitutional system entails a sharing of major foreign policy decisions between the President and Congress, and not adversarial impeachment proceedings after mistakes have been made. Judged in these terms, the current impeachment of President Clinton is unjustifiable and runs the serious risk of undermining national security objectives at a time when United States presidential leadership in global affairs is sorely needed.

If the model of presidential-congressional balance that has survived more than two centuries founders over the present crisis, could more radical propositions for constitutional reform find an audience? On the occasion of the 1987 bicentennial of the United States Constitution, a blue-ribbon panel charged with making recommendations for constitutional

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77. *Id.* at 49 (citing House Judiciary Committee, Debates on Proposed Articles of Impeachment, July 30, 1974; Debate on Proposed Article on Concealment of Information About Bombing Operations in Cambodia).

78. Most of the convictions were either reversed by appellate courts or covered by a pardon later issued by President Bush. For more on the Iran-Contra affair, see generally HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION (1990).

The possibility of impeachment crossed the mind of at least one member of Congress with respect to President Reagan's decision to intervene in Grenada; a resolution of impeachment was introduced by Representative Ted Weiss but not acted upon. *See* H.R. Res. 370, 98th Cong. (1983).

improvements formulated a number of suggestions for reforming different aspects of the United States system. Those recommendations aimed at mitigating some of the dysfunctions inherent in our brand of divided government, including ones hindering the conduct of foreign relations, by importing miscellaneous features from parliamentary models.[79] The proposals, which received modest attention at the time, were reminiscent of previous studies influenced by British models, going back to Woodrow Wilson's famous thesis, *Congressional Government*.[80] One of the panelists, Senator J. William Fulbright, later wrote that Americans ought to abandon the "harmful myth . . . that there is something sacred about the principle of separation of powers,"[81] for the reason, among others, that our system "leads to indecision and stalemate. And it is growing inadequate for the formulation of a coherent, rational foreign policy."[82]

Like Bagehot, who wrote more than a century before, Fulbright extolled parliamentary governance for the ease of changing leadership as circumstances require:

> Another great weakness of our system is how hard it is to get rid of an inadequate leader. In a parliamentary system, if you have a serious problem with an issue of judgment, it is not such an extraordinary thing. . . . When Britain's Middle East policy collapsed at the time of Suez in 1956, Anthony Eden was out in two weeks, embarrassed but not disgraced, and the country was enabled to proceed with the conduct of its business . . . . In a parliamentary system

79. *See* COMMITTEE ON THE CONSTITUTIONAL SYSTEM, A BICENTENNIAL ANALYSIS OF THE AMERICAN POLITICAL STRUCTURE: REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM (1987).

80. WOODROW WILSON, CONGRESSIONAL GOVERNMENT (1885). As one of Wilson's biographers points out, "what can probably be said of no other thesis for the Ph.D.," Wilson's book "was still in print a hundred years later." AUGUST HECKSCHER, WOODROW WILSON: A BIOGRAPHY 77 (1991).

81. J. WILLIAM FULBRIGHT, THE PRICE OF EMPIRE, at x (1989).

82. *Id.* at 45; *see also id.* at 55 ("[W]e have celebrated our system of checks and balances for so long that we now ignore the ways in which it weakens our government with a dynamic of adversarial relationships that frustrates any coherent policy."); *id.* at 71-73 (stating that our checks and balances cannot cope with challenges such as large-scale military operations as well as a parliamentary system).

> Nixon would have been forced to resign early on and perhaps been packed off to the House of Lords.[83]

By contrast, for some British commentators, the Suez episode precisely illustrates the flaws of a system lacking effective checks on prime ministerial power.[84] Indeed, enthusiasts of importing British parliamentarianism to the United States should consider that the British parliamentary system concentrates state power to a degree that could be tolerable only in the case of a medium or small power but that would be dangerous to domestic and international security in the hands of a superpower.[85]

It is not my purpose here to argue for transplantation of pieces of either the United States or the British system to the other, though I do think there is much to be learned from their comparative study and from cross-fertilization of constitutional ideas. The most recent impeachment crisis, counterproductive as it has been for the nation as a whole, should provoke a new outpouring of reflections on the enduring problems of separation of powers, in which comparative constitutional analysis may be able to contribute some insights. Once in a generation, at least, we do need to ask ourselves the big questions.

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83. *Id.* at 66.

84. Thus Crossman wrote that Eden took the Suez decisions without even consulting his cabinet: "After the secret was revealed, he was able until he fell ill to enforce collective responsibility on a Cabinet only informed of his policy when it was already doomed to failure." Crossman, *supra* note 43, at 55-56. Crossman went on with a plea for checks and balances: "In theory—but also in practice—the British people retains the power not merely to choose between two Prime Ministers . . . but to throw off its deferential attitude and reshape the political system . . . even insisting that the House of Commons should once again provide the popular check on the executive." *Id.* at 56.

85. As Sir Oliver Wright, former British ambassador to the United States, commented concerning the "astonishing power to the executive" under British parliamentary government, "give the executive of a superpower . . . powers of that magnitude, and we all should be in trouble." Sir Oliver Wright, *The British View*, AM. HERITAGE, May-June 1987, at 92, *quoted in* Arthur M. Schlesinger, Jr., *The Constitution and Presidential Leadership*, 47 MD. L. REV. 54, 59 (1987); *see also* Leon D. Epstein, *Changing Perceptions of the British System*, 109 POL. SCIENCE Q. 483, 488-98 (1994); Monaghan, *supra* note 12, at 2 n.8 (citing ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 464-73 (2d ed. 1989) for the irony that proposals to adopt parliamentary features in the American system are being pressed even as English and Canadian reformers seek to make their systems more like the American one); Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 721-27 (1993).