

Mr. Chairman and Members of the Committee:

My name is Nicholas Katzenbach. I am a retired Senior Vice-President and Chief Legal Officer of IBM and a former Attorney General of the United States and Under Secretary of State now semi-retired from the practice of law in New Jersey. I appreciate the opportunity to testify before this once-familiar Committee on the important Constitutional question of Impeachment of the President of the United States.

A great deal has been written and spoken on the subject of impeachment by the media, by Members of Congress, witnesses testifying before the Committee, academics and others -- so much, in fact, that it seems to me we are in danger of losing sight and understanding of the fundamentals. So, in the hope of simplifying a complex issue, I'd like to begin with some fundamentals that are not, I believe, controversial.

The process of impeachment is simply to remove from office upon conviction -- not to otherwise punish the person involved. The Constitution provides the legislative branch -- the Congress -- with this means of removing from office the President, Vice-President and all civil officers upon conviction of treason, bribery, or other high crimes and misdemeanors. The threshold problem for the Committee and the House is, of course, to determine what constitutes the "high crimes and misdemeanors" which would justify removal from office of an elected President. The phrase "high crimes and misdemeanors" is not a familiar one in modern jurisprudence.

At common law it constituted a category of political crimes against the state, and neither "high crime" or "high misdemeanor" were ever terms used in criminal law. In the United States one of the Founders, James Wilson, made essentially the same point when he wrote that "impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments". Or, as Justice Story observed, impeachment is "a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross political misdemeanors. It touches neither his person nor his property, but simply divests

him of his political capacity”.

The problem which the Founders faced was how to adapt this process from a Parliamentary system in which there was no separation of powers to one in which Separation of Powers was of great importance. In Great Britain the impeachment process was aimed at officers appointed by the Crown in circumstances where the King himself could not be removed from office except by a revolution such as Oliver Cromwell’s. As the British system evolved and the Prime Minister became essentially a legislatively elected official where he or she could be forced to a mid-term election by a parliamentary vote of no confidence, impeachment lost its punch.

But in the United States, where the President is elected for a fixed term of office different from the legislative terms, the Founders thought it essential to have some means of removing him or her before the expiration of his term if he was guilty of “high crimes and misdemeanors”. And whatever that term may be found to mean, it is clear that the Founders intended it to be a limited power. Because in their debates the Founders dealt virtually exclusively with the President (civil officers were added late in the process), and because for most of the Convention the impeachment clause was confined to treason and bribery, they equated “other high crimes and misdemeanors” with “great offenses” when that term was added.

I appreciate that this brief history does not resolve in any decisive fashion the threshold problem the Committee is facing in determining what conduct by a President justifies impeachment. But I do think it tends to provide some parameters which should be helpful and which should not, when phrased generally, be very controversial. It is a serious matter for the Congress to remove a President who has been elected in a democratic process for a term of four years, raising fundamental issues about the Separation of Powers. If that power is not limited -- as it clearly is -- then any President could be removed if a sufficient number of Members of the House and Senators simply disagreed with his policies, thus converting impeachment into a Parliamentary vote of no confidence. Whatever its merits, that is not our Constitutional system.

Because impeachment is a political process it has always had a strong partisan political element and motivation. It still does and in a democratic political system probably always will. But that fact obviously increases the risk of subverting the Constitutional system. To appreciate those risks one need only review the impeachment of President Andrew Johnson, an unpopular

President who came close to being convicted in a process as unfair as it was partisan and an object lesson for all.

The job of this Committee is to weigh the facts of President Clinton's alleged conduct against the limiting provision of the Constitution -- "other high crimes and misdemeanors". The job may seemingly be made more difficult because of the application of that term to judges as well as the President and Vice-President: judges are appointed during "good behavior", a term which significantly does not apply to limit the four year term of the President. But removing one of several hundred federal judges from office does not have the same Constitutional significance as removing the President; even removal of a Supreme Court Justice would raise different considerations than removing the President where the standard is far higher than for judges, as Congressman (as he then was) Gerald Ford recognized when he proposed the impeachment of Justice William Douglas.

To come to the same conclusions on the same facts in such different situations would make a mockery of the Constitution and the intention of the Founding Fathers. Only if one takes the view articulated by Senator Fessenden in the Johnson impeachment that impeachment is a power "to be exercised with extreme caution" in "extreme cases" can the same standard apply to both Presidents and judges. One simply needs to take into consideration the different roles and responsibilities of the offices involved..

The proper way to resolve these problems -- which are made more difficult by unfamiliar language than by clear purpose -- is simply to return to the reasons for the provision. If we think of it in political -- not partisan -- terms, impeachment is designed to provide the legislative branch with a method of removing a person from office whose conduct is so egregious as to justify reversing the process by which he was appointed or elected. It seems to me clear that in our system of Separation of Powers this cannot mean simply disagreement -- however sincere and however strongly felt -- with either the decisions of judges or the policies of Presidents. It must be some conduct -- some acts -- which are so serious as to bring into question the capacity of the person involved to carry out his role with the confidence of the public.

If I am correct, then it seems clear to me that the fundamental question is simply whether the President has done something which has destroyed the public's confidence in his ability to

continue in office. If the public does not believe that what he has done seriously affects his ability to perform his or her public duties as President, should the Committee conclude that his acts have destroyed the public confidence essential to that office? The only question, after all, is removal from office of an elected official. Is it the proper role of a partisan majority in Congress to conclude that the offenses are so serious as to warrant removal even if the public believes otherwise?

I do not find the arguments for this position persuasive in the slightest. First, there is the argument that perjury (and for purposes of analysis I take this as correct) is always so serious (irrespective of circumstance) as to warrant removal of a President. I suggest that some perjury is more serious than others: If, for example, the President were to swear falsely that he had no knowledge of a CIA plot to assassinate the Speaker, that would be pretty serious -- and I have no doubt the public would regard it as such. Indeed, if he simply told the public, not under oath, that he had no knowledge of such serious misconduct when he did have knowledge, I think that would raise serious questions of impeachability. My point is simply that all perjury may be reprehensible, but it is still not of similar import when the ultimate issue is public confidence to perform the duties of office. Isn't it clear that despite the strongly held views of some, the public does not put perjury about sexual relations in the category of "high crimes or misdemeanors"?

Second, the argument is made that the public's view as to what does or does not constitute a cause for impeachment is irrelevant because of the duty of the House to determine whether or not the President has committed a "high crime or misdemeanor". If this were a criminal trial, I would agree. If the President were extremely unpopular, as was Andrew Johnson, I would agree -- simply because I would be unable to separate dislike for the President based on unpopular policies from lack of confidence based on "high crimes or misdemeanors". A public that does not like the President is more likely to find high crimes and misdemeanors whatever the facts. In those circumstances the Congress has a particularly difficult and demanding task of being sure that its partisan feelings and those of the public are not subverting the Constitutional standard; Congress must be sure that there has been a loss of confidence because of the President's personal behavior and not his policies. From the retrospective of

history one cannot but admire those Senators in the Johnson impeachment trial who, despite political affiliation or interest, had the courage to see that Constitutional distinction and who voted to acquit because, whatever the political feeling, the Constitutional standard had not been met.

This Committee and this Congress are also faced with a totally new impeachment problem. Due to the existence of the Independent Counsel the facts are publicly known and the areas of factual dispute relatively minor. Members of Congress have expressed concern over the evils of perjury and other alleged offenses and their serious nature. For whatever reason, the public remains unpersuaded. It continues, in the recent election and in the polls, to express confidence in the President's ability to carry out his official responsibilities. In those circumstances it is difficult for me to see any basis for his removal other than the obviously partisan -- however sincere -- views of a putative majority.

Frankly, I cannot see any Constitutional basis for impeachment. To remove a popularly elected President requires, in my judgment, a showing of "great offenses" against the public weal sufficient to bring into question in the minds of reasonable people the capacity of the incumbent to continue to govern in a democracy with public support. If those "great offenses" are known, I have no doubt the public will appreciate their serious nature and react accordingly. Today the public knows all the facts and does not regard them as of sufficient importance to justify impeachment. In these unprecedented circumstances a contrary finding by the Committee would appear to be simply an act of political partisanship, not adherence to the Constitution. That would be most unfortunate and most destructive of our Constitutional Separation of Powers.

Thank you.