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## RESPONSES

HIGH CRIMES WITHOUT LAW<sup>†</sup>

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Imagine if Justice Ruth Bader Ginsburg resigned from the Supreme Court to serve as President Donald Trump’s lawyer. You now have a sense of the whiplash Capitol Hill experienced 150 years ago when former Justice Benjamin Curtis agreed to represent President Andrew Johnson in his impeachment trial. When Curtis accepted the position, he was best known for his dissenting opinion in *Dred Scott v. Sandford*<sup>1</sup> — a decision that so disgusted him that he quit the Supreme Court in protest.<sup>2</sup> President Johnson, by contrast, was best known for embodying that decision’s observation that some white men would never respect a black person. A white supremacist<sup>3</sup> from Tennessee, President Johnson frequently clashed with members of Congress over what he termed “nigger equality.”<sup>4</sup> President Johnson vetoed civil rights laws.<sup>5</sup> He accused senators of plotting with members of his Administration to undermine his policies.<sup>6</sup> And at campaign rallies across the Midwest, President Johnson drew jeers and laughter by issuing “loud threats and bitter menaces” against a Congress whose commitment to helping black people he regarded as “Radical.”<sup>7</sup>

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<sup>†</sup> Responding to LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY (2018).

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<sup>1</sup> 60 U.S. (19 How.) 393 (1857).

<sup>2</sup> See STUART STREICHLER, JUSTICE CURTIS IN THE CIVIL WAR ERA 148–49 (2005).

<sup>3</sup> President Johnson once proclaimed: “This is . . . a country for white men, and by God, as long as I am President, it shall be a government for white men.” ANNETTE GORDON-REED, ANDREW JOHNSON 112 (2011).

<sup>4</sup> JOHN SAVAGE, LIFE AND PUBLIC SERVICES OF ANDREW JOHNSON 311 (New York, Derby & Miller 1865); see also GORDON-REED, *supra* note 3, at 12.

<sup>5</sup> See, e.g., CONG. GLOBE, 39th Cong., 1st Sess., 1679 (1866) (reporting President Johnson’s veto of a civil rights bill).

<sup>6</sup> See MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 95–100 (1999); HANS L. TREFOUSSE, ANDREW JOHNSON 235 (1989).

<sup>7</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 4 (1868).

It was in part due to these Midwestern rallies that the House of Representatives impeached President Johnson in 1868. Many congressmen saw President Johnson as an embarrassment, a threat to the Republic whose unprecedented insults were unpresidential. Invoking the Constitution's lone provision for prematurely ending a President's term, the House called for the Senate to convict President Johnson and remove him for committing "high crimes and misdemeanors."<sup>8</sup> Most of the eleven articles of impeachment the House drafted accused President Johnson of violating a criminal statute that prohibited him from removing certain cabinet officials, but two charged him with delivering such "intemperate, inflammatory, and scandalous harangues" that they rose to the level of high misdemeanors.<sup>9</sup> One of these speech-related charges eventually became the focus of the subsequent impeachment trial and the first charge on which prosecutors asked the Senate to deliberate and vote.<sup>10</sup>

So why did Benjamin Curtis, *Dred Scott* dissenter, agree to defend such a racist demagogue? In his opening argument before the Senate, Curtis explained that a greater principle than President Johnson or even the presidency was at stake. Then as now, there was an ongoing scholarly debate over the meaning of the phrase "high Crimes and Misdemeanors."<sup>11</sup> Most people, including a majority of the House of Representatives, interpreted the phrase to refer not to literal crimes or misdemeanors but to any serious abuses of presidential power.<sup>12</sup> This interpretation remains the dominant one 150 years later. In the words of Professor Laurence Tribe and Joshua Matz, the majority view is that a president can legally be impeached for "intentional, evil deeds"<sup>13</sup> that "drastically subvert the Constitution and involve an unforgivable abuse of the presidency" — even if those deeds didn't violate any criminal laws.<sup>14</sup>

But Curtis was not so convinced. Acknowledging that he was about to make an argument that had been rejected by most of the "learned dissertations" on the question of what should constitute an impeachable offense, Curtis thought the answer was actually pretty straightforward.<sup>15</sup> An impeachment proceeding is a trial, Curtis began, in which

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<sup>8</sup> *Id.* at Supp. 3; *see also* U.S. CONST. art. II, § 4.

<sup>9</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 4–5 (1868). Article X accused the president of bringing "the high office of the President of the United States into contempt" with his speeches. *Id.* at Supp. 4. Article XI accused him of "denying and intending to deny that the legislation of [the] Congress was valid or obligatory upon him." *Id.* at Supp. 5.

<sup>10</sup> *Id.* at Supp. 4.

<sup>11</sup> U.S. CONST. art. II, § 4.

<sup>12</sup> *See* CONG. GLOBE, 40th Cong., 2d Sess., Supp. 411 (1868).

<sup>13</sup> LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY 42 (2018).

<sup>14</sup> *Id.* at 38.

<sup>15</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 134 (1868) (opening argument of Benjamin Curtis).

the House brings charges of “high Crimes and Misdemeanors” and the Senate judges whether the defendant is guilty.<sup>16</sup> It is a basic principle of impartial justice, Curtis continued, that a judge cannot declare something a crime or misdemeanor unless it was made so by some law at the time it was done.<sup>17</sup> But in President Johnson’s case, there was no law outlawing scandalous speeches. The House had declared President Johnson’s conduct a high misdemeanor only in retrospect. As Curtis put it, these charges asked each senator to say, “if I cannot find a law I will make one.”<sup>18</sup> And what Curtis was defending wasn’t President Johnson’s uncouth behavior but the principle of *nullum crimen sine lege*: “There can be no crime, there can be no misdemeanor without a law.”<sup>19</sup>

The principle of no crime without law has been described as one of the most “widely held value-judgments in the entire history of human thought.”<sup>20</sup> It is embedded throughout the Constitution — particularly in its prohibitions against ex post facto laws that criminalize behavior retroactively;<sup>21</sup> against bills of attainder that tailor a crime to fit an accused;<sup>22</sup> and against deprivations of liberty without prior notice of what was illegal.<sup>23</sup> Quoting these prohibitions alongside the Constitution’s discussion of impeachment, Curtis found it “impossible not to come to the conclusion” that a person should be impeached only for “high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done.”<sup>24</sup> Otherwise, he told the senators, “when each one of you . . . called God to witness that he would administer impartial justice in this case according to the Constitution and the laws, he meant such laws as he might make as he went along.”<sup>25</sup> Curtis repeated: “There must be some law; otherwise there is no crime.”<sup>26</sup>

“Judge Curtis gave us the law, and we followed it,” Senator William Pitt Fessenden later wrote.<sup>27</sup> When the arguments ended and the House prosecutors asked the Senate to vote on one of the charges, they selected one of the speech-related charges on which they were certain the Senate would vote to convict — but Fessenden and six other Republicans surprisingly defected from their party’s position to acquit the President by

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<sup>16</sup> *Id.* at Supp. 123.

<sup>17</sup> *Id.* at Supp. 134.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Rogers v. Tennessee*, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting) (quoting JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 59 (2d ed. 1960)).

<sup>21</sup> U.S. CONST. art. I, §§ 9–10.

<sup>22</sup> *Id.*

<sup>23</sup> *See id.* amends. V, XIV.

<sup>24</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 134 (1868).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> STREICHLER, *supra* note 2, at 173.

a single vote.<sup>28</sup> (A week later, the same seven Republicans also voted to acquit President Johnson of two of the other charges that accused the President of violating the criminal statute that forbade him from removing certain cabinet officials.<sup>29</sup>) These seven acquitters were no friends of President Johnson. They included Senator Lyman Trumbull, coauthor of the Thirteenth Amendment, and Senator James W. Grimes, coauthor of the Fourteenth.<sup>30</sup> But as Senator Grimes explained, “I cannot agree to destroy the harmonious working of the Constitution for the sake of getting rid of an unacceptable President.”<sup>31</sup> Like Curtis, Senator Grimes refused to accept an interpretation of “high Crimes and Misdemeanors” as something that changed “according to the law of each Senator’s judgment, enacted in his own bosom, after the alleged commission of the offense.”<sup>32</sup> He wanted President Johnson out of office — but thought that a conviction for a crime without the violation of any law would be “construed into an approval of impeachments as part of future political machinery.”<sup>33</sup>

The senators were right to be concerned about the precedential value of their votes. “Once set the example of impeaching a President for what, when the excitement of the hour shall have subsided, will be regarded as insufficient causes,” Senator Trumbull warned, “and no future President will be safe who happens to differ with a majority of the House and two thirds of the Senate on any measure deemed by them important, particularly if of a political character.”<sup>34</sup> But even though Senator Trumbull and his colleagues acquitted President Johnson, future generations have nevertheless associated impeachment more with politicalization than with proceduralism — especially since 1970. That year, then-Representative Gerald Ford famously defined an impeachable offense as “whatever a majority of the House of Representatives

<sup>28</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 411 (1868) (roll call of Art. XI). The final tally was 35 “guilty,” 19 “not guilty” — one less than the two-thirds needed to convict. See U.S. CONST. art. I, § 3.

<sup>29</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 414–15 (1868) (roll calls of Arts. II and III); see Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 (repealed 1887).

<sup>30</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 414–15 (1868); David B. Kopel, *Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer*, 47 LOY. U. CHI. L.J. 1117, 1119 (2016); Earl M. Maltz, *The Fourteenth Amendment as Political Compromise — Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 958 (1984).

<sup>31</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 424 (1868) (opinion of Sen. James W. Grimes).

<sup>32</sup> *Id.* at Supp. 423–24.

<sup>33</sup> *Id.* at Supp. 424. *But see* GORDON-REED, *supra* note 3, at 138–39 (arguing that Senator Grimes was also persuaded by promises from President Johnson to cease interfering with Reconstruction).

<sup>34</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 420 (opinion of Sen. Lyman Trumbull); *cf. id.* at Supp. 457 (opinion of Sen. William P. Fessenden) (noting the argument that “the remedy provided by impeachment is of a political character” and asserting that this remedy risks making the presidency “the mere sport of temporary majorities,” which “tends to the great injury of our Government and inflicts a wound upon constitutional liberty”).

considers it to be at a given moment in history.”<sup>35</sup> Since then, a parade of law professors have joined Ford in rejecting Curtis’s argument that the phrase “high Crimes and Misdemeanors” refers to literal crimes or misdemeanors, starting with Irving Brant’s *Impeachment: Trials and Errors* (1972), Professor Raoul Berger’s *Impeachment: The Constitutional Problems* (1973), and Professor Charles L. Black, Jr.’s *Impeachment: A Handbook* (1974). While these authors all offer fairly divergent theories of the appropriate scope of the impeachment power, all converge on the judgment that Curtis’s proposed line is not constitutionally required.<sup>36</sup>

More recent entries, including Laurence Tribe and Joshua Matz’s *To End a Presidency*, are careful to introduce meaningful limits on Ford’s broad-strokes view to prevent impeachment proceedings from becoming partisan farces. But they likewise argue that “impeachment doesn’t require proof of a crime”<sup>37</sup> or “say anything at all about criminal liability.”<sup>38</sup> Tribe and Matz take from President Johnson’s experience that Congress should have impeached the President for noncriminal abuses of power and for failing to “take Care that the Laws be faithfully executed.”<sup>39</sup> Even Professor Michael Stokes Paulsen, whose recent review of Tribe and Matz’s book dismisses its anti-Trump authors as “badly partisan,”<sup>40</sup> offers a similarly noncriminal definition of high crimes and misdemeanors: “[A] wide range of misconduct as judged, ultimately, by legislators themselves.”<sup>41</sup> “The academic consensus on this point is strikingly universal,” Paulsen writes, “uniting the best serious scholarly books on impeachment over the last fifty years and scholars across the ideological spectrum.”<sup>42</sup>

These law professors all may be right about impeachable offenses in a realpolitik sense: only the House and Senate can judge whether a President’s conduct is truly worthy of impeachment and conviction. But they are wrong to conclude that it is consistent with the text or spirit of the Constitution to convict someone for conduct that was lawful when it was done — that is, to convict someone of “high Crimes” without law. As Curtis told the assembled senators in 1868, the Constitution itself

<sup>35</sup> 116 CONG. REC. 11,913 (1970) (statement of Rep. Gerald Ford).

<sup>36</sup> Among these authors, Brant comes the closest to endorsing Curtis’s view, concluding that the impeachment power is largely coextensive with criminality. But even he concludes that a President can be impeached for knowingly violating his or her oath of office even if Congress doesn’t make that conduct a crime. See IRVING BRANT, *IMPEACHMENT: TRIALS & ERRORS* 19, 83 (1972).

<sup>37</sup> TRIBE & MATZ, *supra* note 13, at 44.

<sup>38</sup> *Id.* at 47.

<sup>39</sup> *Id.* at 55.

<sup>40</sup> Michael Stokes Paulsen, *To End a (Republican) Presidency*, 132 HARV. L. REV. 689, 691 (2018).

<sup>41</sup> *Id.* at 701.

<sup>42</sup> *Id.* at 695 n.21.

defines an impeachment proceeding as a criminal proceeding: “The Trial of [a] Crime[.]”<sup>43</sup> Only if a President is guilty of a charged offense — “Treason, Bribery, or other high Crimes and Misdemeanors” — can the Senate “Convict[.]” and punish the President with removal from office.<sup>44</sup>

But offenses — “Crimes” — should always be defined by laws, not by prosecutors. Many of the law professors avoid this conclusion by labeling an impeachment proceeding as a civil, not criminal, proceeding, or by arguing that the constitutional prohibitions against ex post facto laws and bills of attainder aren’t obstacles if Congress wants to retroactively define conduct as a crime. But these evasive maneuvers are inconsistent with the history of impeachments, the text and structure of the Constitution, and the intuitive understanding that articles of impeachment aren’t a recall or a referendum but rather an accusation that the President deserves punishment for past conduct.

As talk of impeaching a sitting President grows louder than it has in twenty years, Curtis’s argument is worth reflecting on in detail — as are his contemporaries’ observations that a precedent set for a present-day enemy might one day entrap a future ally. Accordingly, the remainder of this Response first elaborates on Curtis’s conclusion that “the language ‘high crimes and misdemeanors’ means ‘offenses against the laws of the United States.’”<sup>45</sup> It then responds to the modern-day counterarguments, presented most recently by Tribe and Matz and Paulsen — that “high Crimes and Misdemeanors” don’t necessarily refer to crimes or misdemeanors at all.

## I. CURTIS’S ARGUMENTS

Benjamin Curtis delivered his opening defense of President Andrew Johnson over two days in April before a packed gallery of the Senate chamber.<sup>46</sup> He spoke while sharing the Senate floor with dozens of Republicans ideologically committed to sinking his Democratic client. The Republicans on the floor included President Johnson’s prosecutors, led by Representative John Bingham;<sup>47</sup> a jury of fifty-four senators,<sup>48</sup> divided 42–12 in favor of Republicans;<sup>49</sup> and presiding Chief Justice Salmon P. Chase, a Republican appointed by President Abraham Lincoln.<sup>50</sup>

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<sup>43</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>44</sup> U.S. CONST. art. II, § 4.

<sup>45</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 134 (1868) (opening argument of Benjamin Curtis).

<sup>46</sup> See *id.* at Supp. 130–36.

<sup>47</sup> *Id.* at Supp. 3.

<sup>48</sup> See *id.* at Supp. 418.

<sup>49</sup> William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 917 (1991).

<sup>50</sup> See CONG. GLOBE, 40th Cong., 2d Sess., Supp. 195 (1868).

Few observers believed that President Johnson had a chance at acquittal in such a hostile environment.<sup>51</sup>

Months earlier, when the House of Representatives voted 126–47 to impeach President Johnson, only two Republicans voted with the Democratic minority against the accusations.<sup>52</sup> Two of the eleven articles of impeachment the House adopted accused the President of committing “high crimes and misdemeanors” by delivering abusive speeches before the 1866 midterm elections.<sup>53</sup> In those speeches, the President called the Republican-dominated Congress a “Congress of only a part of the States” whose goal was to “encroach step by step upon constitutional rights, and violate, day after day and month after month, fundamental principles of the Government.”<sup>54</sup> Now, Republicans in the House who were still furious about the effect of those speeches on the campaign trail argued that the speeches demonstrated the President’s illicit purpose of “denying and intending to deny that the legislation of said Congress was valid or obligatory upon him.”<sup>55</sup>

Curtis couldn’t credibly argue that President Johnson hadn’t delivered the 1866 speeches. His only defense was that the speeches didn’t constitute a “high misdemeanor” worthy of impeachment, conviction, and removal from office. So he spent most of his two-day argument attempting to define the phrase “high Crimes and Misdemeanors” as something that didn’t include abusive yet legal speeches.<sup>56</sup> “In the front of this inquiry the question presents itself: What are impeachable offenses under the Constitution of the United States? Upon this question learned dissertations have been written and printed,” Curtis began.<sup>57</sup> “In my apprehension,” he answered, “the teachings, the requirements, the prohibitions of the Constitution of the United States prove all that is necessary to be attended to for the purposes of this trial.”<sup>58</sup>

Specifically, Curtis concluded that the phrase “high Crimes and Misdemeanors” “refers to, and includes only, high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done.”<sup>59</sup> Curtis based this interpretive conclusion on three lines of argument: first, a textual argument that the phrase “high Crimes and Misdemeanors” refers to something analogous to treason and bribery; second, a structural argument that im-

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<sup>51</sup> See, e.g., *Impeachment the All-Absorbing Topic: The Odds in Favor of Conviction*, LOUISVILLE DAILY COURIER, May 10, 1868, at 4.

<sup>52</sup> CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868).

<sup>53</sup> *Id.* at Supp. 31–41.

<sup>54</sup> *Id.* at Supp. 4.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at Supp. 130–56.

<sup>57</sup> *Id.* at Supp. 134 (opening argument of Benjamin Curtis).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

peachment proceedings are criminal trials; and third, a structural argument that Congress could not use impeachment proceedings to subvert the constitutional prohibitions against ex post facto laws and bills of attainder. All three arguments were variations on a basic principle: *nulum crimen sine lege* — there can be no crime without law. And because no criminal law made President Johnson’s speeches illegal, Curtis argued, the Senate had no choice but to acquit his client.

#### A. *The Textual Argument*

Curtis’s first argument was the most straightforward. The phrase “high Crimes and Misdemeanors” appears once in the Constitution, in a clause that reads: “The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>60</sup> Invoking a traditional canon of interpreting an ambiguous word’s meaning by looking at the unambiguous words it accompanies, Curtis explained that the phrase “high Crimes and Misdemeanors” had to mean something similar to “Treason” and “Bribery.”<sup>61</sup> Treason and bribery, Curtis argued, are both “high criminal offenses . . . against the United States, made such by the laws of the United States, which the framers of the Constitution knew must be passed in the nature of the Government they were about to create, because these are offenses which strike at the existence of that Government.”<sup>62</sup> He therefore concluded that “high Crimes and Misdemeanors” also referred to high criminal offenses, like treason and bribery, whose elements Congress or the Constitution had to define.<sup>63</sup>

Other clauses in the Constitution confirmed this textual interpretation, Curtis argued. He focused particularly on two clauses: the clause in Article II that outlines the President’s power to grant pardons for “Offences against the United States, except in Cases of Impeachment”<sup>64</sup> and the clause in Article III that says “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”<sup>65</sup> Curtis contended that it wouldn’t make sense for these clauses to exempt “Cases of Impeachment” from “Offences against the United States” or “The Trial of all Crimes” unless cases of impeachment referred to criminal offenses.<sup>66</sup> That is, these clauses confirmed that impeachable offenses belonged to a subcategory of crimes: those so important and “so high that they belong in this company with treason and bribery.”<sup>67</sup>

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<sup>60</sup> U.S. CONST. art. II, § 4.

<sup>61</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 134 (1868) (opening argument of Benjamin Curtis).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>65</sup> *Id.* art. III, § 2, cl. 3.

<sup>66</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 134 (1868) (opening argument of Benjamin Curtis).

<sup>67</sup> *Id.*

### B. *The Structural Argument*

Curtis transitioned from this textual argument into his second, structural argument: an impeachment proceeding is a criminal trial. That is, the assembled senators sitting before him weren't sitting as a legislature that could *define* the law but as a criminal court that had to *interpret* existing law. "Mr. Chief Justice, I am here to speak to the Senate of the United States sitting in its judicial capacity as a court of impeachment, presided over by the Chief Justice of the United States, for the trial of the President of the United States," Curtis declared.<sup>68</sup> "This statement sufficiently characterizes what I have to say."<sup>69</sup>

Curtis elaborated that "there is enough written in the Constitution to prove that this is a court in which a judicial trial is now being carried on."<sup>70</sup> As evidence, he quoted all seven provisions of the Constitution that mentioned impeachment<sup>71</sup>: (1) "The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors";<sup>72</sup> (2) "The Senate shall have the sole Power to try all Impeachments";<sup>73</sup> (3) "When the President of the United States is tried, the Chief Justice shall preside";<sup>74</sup> (4) "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury";<sup>75</sup> (5) "The President . . . shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment";<sup>76</sup> (6) "[N]o Person shall be convicted without the Concurrence of two thirds of the Members present";<sup>77</sup> and (7) "Judgment in Cases of Impeachment shall not extend further than to removal from Office."<sup>78</sup> Curtis then summarized what all these clauses meant. The first three clauses confirmed that an impeachment proceeding was a *trial*: "You are the triers, presided over by the Chief Justice of the United States in this particular case, and that on the express words of the Constitution."<sup>79</sup> The fourth and fifth provisions confirmed that what was being tried was a *crime*: "Cases of Impeachment" were a subcategory of "The Trial of all Crimes" involving "Offences against the United States."<sup>80</sup> The sixth provision confirmed that "[t]here is also, according to [the

<sup>68</sup> *Id.* at Supp. 123.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at Supp. 134.

<sup>71</sup> *See id.*

<sup>72</sup> U.S. CONST. art. II, § 4.

<sup>73</sup> *Id.* art. I, § 3, cl. 6.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* art. III, § 2, cl. 3.

<sup>76</sup> *Id.* art. II, § 2, cl. 1.

<sup>77</sup> *Id.* art. I, § 3, cl. 6.

<sup>78</sup> *Id.* cl. 7.

<sup>79</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 134 (1868) (opening argument of Benjamin Curtis).

<sup>80</sup> *Id.*

Constitution's] express words, to be an acquittal or a conviction on this trial for a crime."<sup>81</sup> And the seventh provision confirmed that "[t]here is also to be a judgment in case there shall be a conviction."<sup>82</sup>

All told, these provisions signaled that the Senate was not sitting as a legislative body, but as a judicial body. Curtis argued:

Here, then, there is the trial of a crime, a trial by a tribunal designated by the Constitution in place of court and jury, a conviction, if guilt is proved, a judgment on that conviction, a punishment inflicted by the judgment for a crime; and this on the express terms of the Constitution itself. . . .

I say, then, that it is impossible not to come to the conclusion that the Constitution of the United States has designated impeachable offenses as offenses against the United States, that it has provided for the trial of those offenses, that it has established a tribunal for the purpose of trying them, that it has directed the tribunal in case of conviction to pronounce a judgment upon the conviction and inflict a punishment.<sup>83</sup>

Curtis's description of an impeachment proceeding as a criminal trial wasn't his invention. Rather, it was consistent with how British lawyers had understood impeachment proceedings ever since Parliament invented impeachments in the fourteenth century.<sup>84</sup> As explained by William Blackstone, the most famous British jurist of the eighteenth century, Parliament was not only the highest legislature in Great Britain; it was also the highest judicial court. It often sat as "the supreme court in the kingdom, not only for the making but also for the execution of laws, by the trial of great and enormous offenders . . . in the method of parliamentary impeachment."<sup>85</sup> Blackstone elaborated: "The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords, who are, in cases of misdemeanors, considered not only as their own peers, but as the peers of the whole nation."<sup>86</sup> Blackstone wrote that when Parliament sat as a court of impeachment, it sat as "the most high and supreme court of criminal jurisdiction" to try "a prosecution of the already known and established law . . . by the most solemn grand inquest of the whole kingdom."<sup>87</sup> The only difference between impeachment proceedings and other "courts of criminal jurisdiction" was the venue. Because nobles, crown ministers, and the worst offenders might overawe ordinary criminal tribunals with their influence, Parliament was the only place where they all could be tried by genuinely impartial peers.<sup>88</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 7–26 (1973).

<sup>85</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*256.

<sup>86</sup> *Id.* at \*257.

<sup>87</sup> *Id.* at \*256.

<sup>88</sup> *Id.* at \*258; *see also* BERGER, *supra* note 84, at 60–62.

### C. *The Ex Post Facto Argument*

Of course, there were also important differences between parliamentary impeachment and congressional impeachment — differences that Curtis emphasized to make his third defense of President Johnson: the constitutional prohibitions against ex post facto laws and bills of attainder forbade Congress from using impeachment proceedings to punish a specific target for conduct that had never been against the law.<sup>89</sup>

As Curtis was likely aware, the British Parliament had long claimed the power to punish specific people for conduct that was legal when the conduct was committed. For example, in 1641, after the Earl of Strafford advised King Charles I on how to legally collect revenue without Parliament's consent, the House of Commons impeached the Earl for having "traitorously endeavoured to subvert the fundamental Laws and government . . . by giving His Majesty Advice."<sup>90</sup> When it appeared that the House of Lords might acquit the Earl because nothing he did was illegal, the House of Commons withdrew its articles of impeachment and instead passed a bill proclaiming the Earl a "traitor" without any need for a parliamentary trial.<sup>91</sup> This bill, which resulted in the Earl's execution, not only defined the offense of "treason" capaciously to include giving bad advice, but it was also a "bill of attainder" (because it inflicted punishment on the Earl specifically) and an "ex post facto law" (because it retrospectively punished the Earl for doing something that violated no then-existing law). To future generations, this bill and other "excrescences" of parliamentary power were so "dangerous" that the Constitution included several safeguards to ensure that they could never happen in the United States.<sup>92</sup> The Constitution specifically prohibited Congress from passing any "Bill of Attainder or ex post facto Law."<sup>93</sup> And while the Constitution permitted the House of Representatives to impeach people for "Treason," it defined the offense narrowly: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."<sup>94</sup>

To Curtis, these constitutional safeguards, particularly the Constitution's prohibition on ex post facto laws, were intended to provide a meaningful

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<sup>89</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 134 (1868) (opening argument of Benjamin Curtis).

<sup>90</sup> 8 HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE, 1640–1641, at 1–18 (London, D. Browne 1721); see also BERGER, *supra* note 84, at 43–45.

<sup>91</sup> 2 JOURNAL OF THE HOUSE OF COMMONS, 1640–1643, at 139–41 (London, H.M. Stationery Office 1802).

<sup>92</sup> 3 JAMES WILSON, *Of Crimes, Immediately Against the Community*, in THE WORKS OF THE HONOURABLE JAMES WILSON 95, 96 (Bird Wilson ed., Philadelphia, Bronson & Chauncey 1804).

<sup>93</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>94</sup> *Id.* art. III, § 3.

check on Congress's ability to punish people for whatever conduct it felt like. "According to that prohibition of the Constitution," he continued, "if every member of this body sitting in its legislative capacity, should unite in passing a law to punish an act after the act was done, that law would be a mere nullity."<sup>95</sup> It was therefore absurd, Curtis continued, for anyone to think it would be appropriate for the assembled senators, "sitting here as judges, not only after the fact but while the case is on trial, . . . [to each] create a law by himself to govern the case."<sup>96</sup> Such a senator would, in effect, be saying: "if I cannot find a law I will make one."<sup>97</sup>

Curtis thought it similarly absurd that the same Constitution that prohibited Congress from passing a bill of attainder would nevertheless authorize a majority of the House of Representatives to craft an impeachable offense in order to punish a specific person of conduct that was never before a crime.<sup>98</sup> "What is a bill of attainder? It is a case before the Parliament where the Parliament make the law for the facts they find," Curtis explained.<sup>99</sup> But if Congress could punish President Johnson for delivering legal speeches, Curtis observed, then "bills of attainder are not prohibited by this Constitution; they are only slightly modified."<sup>100</sup> Unless an impeachable offense was something Congress had to define prospectively, rather than to suit a particular individual, impeachments would accomplish "an attainder; and it is done by the same process and depends on identically the same principles as a bill of attainder in the English Parliament. The individual wills of the legislators, instead of the conscientious discharge of the duty of the judges, settle the result."<sup>101</sup>

Putting this all together, Curtis argued that the Senate was sitting as a judicial court overseeing a criminal trial; that the only permissible offenses in an impeachment trial were those analogous to treason and bribery; and that the court of impeachment had to abide by the Constitution's prohibitions against punishing someone for a crime that was defined retroactively or that applied only to him or her individually.<sup>102</sup> Accordingly, it would be grievous error for the Senate to convict Curtis's client for conduct that Congress hadn't previously declared to be a criminal offense. Only by impeaching the President for conduct that Congress previously defined as a crime would each senator ensure

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<sup>95</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 134 (1868) (opening argument of Benjamin Curtis).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *See id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

that “he would administer impartial justice in this case according to the Constitution and the laws” — as opposed to “such laws as he might make as he went along.”<sup>103</sup> Only this would be consistent with the basic principle of no crime without law. “There can be no crime, there can be no misdemeanor without a law, written or unwritten, express or implied,” Curtis stated. “There must be some law; otherwise there is no crime.”<sup>104</sup>

## II. THE MODERN COUNTERARGUMENTS

### A. *Tribe and Matz*

As discussed at the outset, Curtis’s argument was persuasive. Seven Republicans ultimately voted to acquit President Johnson of committing a high misdemeanor with his speeches, and several of these senators, including William Pitt Fessenden, specifically acknowledged that cases “where the offense is one not defined by any law, would, in my judgment, not be justified by a calm and considerate public opinion as a cause for removal of a President of the United States.”<sup>105</sup>

Modern interpretations of the phrase “high Crimes and Misdemeanors” are also not far from Curtis’s conclusion. In *To End a Presidency*, for example, Laurence Tribe and Joshua Matz follow Curtis’s interpretive path. Like Curtis, Tribe and Matz start with the phrase’s proximity to “Treason” and “Bribery”; pass through the Constitution’s discussions of “Trial[s]” and “Conviction[s]”; and finish with the Constitution’s prohibitions on bills of attainder and ex post facto laws. They, too, conclude that impeachable offenses are those that “drastically subvert the Constitution and involve an unforgivable abuse of the presidency.”<sup>106</sup>

But whereas Curtis thought that an impeachable offense had to be specified somewhere — “written or unwritten, express or implied” — Tribe and Matz and virtually every one of their colleagues who has written on the subject are satisfied so long as the offense is “so plainly wrong by current standards that no reasonable official could honestly profess surprise at being impeached.”<sup>107</sup> In other words, Tribe and Matz see no legal problem with an impeachment proceeding in which Congress retroactively defines a targeted individual’s legal conduct as a “Crime” or “Misdemeanor” worthy of “Conviction,” “Judgment,” and punishment. Significantly, they fail to see an inconsistency between their definition of an impeachable offense and the Constitution’s prohibitions on ex post facto laws and bills of attainder. But for the reasons Curtis lays out, this oversight cannot go unquestioned. If Congress lacks the power to

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at Supp. 457 (opinion of Sen. William P. Fessenden).

<sup>106</sup> TRIBE & MATZ, *supra* note 13, at 38.

<sup>107</sup> *Id.* at 42.

define crimes retroactively, then it can't impeach and convict someone for a never-before-defined crime.

The way Tribe and Matz escape this inconsistency is by arguing that an impeachment proceeding isn't a criminal proceeding at all. Instead, they write that an impeachment proceeding is a civil proceeding.<sup>108</sup> The Supreme Court long ago concluded that the Ex Post Facto Clause and the Bill of Attainder Clause apply only to punishments, not to civil sanctions.<sup>109</sup> Therefore if an impeachment proceeding is only a civil trial, then Congress can be as retroactive and person-specific as it wants.

But it is difficult to maintain this position in light of the way the Constitution repeatedly defines impeachable offenses. Civil trials don't end in a "Conviction," a term one eighteenth-century dictionary defined as "detection of guilt"<sup>110</sup> and that modern dictionaries define as "[t]he act or process of judicially finding someone guilty of a crime."<sup>111</sup> Similarly, if "Cases of Impeachment" weren't criminal proceedings, it wouldn't make sense to exempt them from clauses delineating the "Trial of all Crimes" or "Pardons for Offenses against the United States." And it is undoubtedly a punishment to strip someone of their office and disqualify them from holding certain offices because of their commission of "high *Crimes* and *Misdemeanors*." Curtis's contrary conclusion is by far the more intuitive one: impeachment proceedings are criminal proceedings in which the prohibitions against bills of attainder and ex post facto laws apply.

This isn't to say that Curtis's interpretation doesn't carry with it apparent inconsistencies of its own. Tribe and Matz point to two. First, the Constitution authorizes two rounds of punishment for a person convicted of an impeachable offense: (1) "removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States," followed by (2) any additional "Indictment, Trial, Judgment and Punishment, according to Law."<sup>112</sup> If an impeachment proceeding is a criminal proceeding, Tribe and Matz observe, then this clause is in tension with the Fifth Amendment, which declares, "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb."<sup>113</sup> Second, the Sixth Amendment, which applies to "all criminal prosecutions," specifies that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

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<sup>108</sup> See *id.* at 45–53.

<sup>109</sup> See, e.g., *United States v. Brown*, 381 U.S. 437, 460–61 (1965); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

<sup>110</sup> SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Dublin, W.G. Jones 1768).

<sup>111</sup> *Conviction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>112</sup> U.S. CONST. art. I, § 3, cl. 7.

<sup>113</sup> *Id.* amend. V; see TRIBE & MATZ, *supra* note 1314, at 47.

wherein the crime shall have been committed, which district shall have been previously ascertained by law.”<sup>114</sup> On its face, this amendment might be inconsistent with an impeachment proceeding in which the jury comes not from “the State and district wherein the crime shall have been committed”<sup>115</sup> but from the Senate.

These apparent inconsistencies can easily be untangled, however. On its own terms, the Fifth Amendment applies only to cases in which a person is put in jeopardy “of life or limb.” Although the Supreme Court has in recent years interpreted this phrase capaciously, it is difficult to characterize an impeachment proceeding as one that puts an impeached officer in any jeopardy of losing his or her life or limb. Instead, Congress’s judgment can extend only to “removal from Office” and “disqualification” — a punishment to be sure, but not one contemplated by the specific text of the Fifth Amendment. In any event, the Fifth Amendment was adopted three years after the ratification of the Constitution; even if the inconsistency were irreconcilable, all that would mean is that an impeached officer shouldn’t be subsequently prosecuted as the unamended version of the Constitution originally contemplated.

Criminal impeachment proceedings also comply with the Sixth Amendment. As Curtis emphasized, the only difference between an impeachment trial and an ordinary criminal trial is that the jury in an impeachment trial consists entirely of legislators. Although the Sixth Amendment could be read to mean that all juries have to come from a “State *and* district,” this interpretation would lead to serious problems in contexts outside of impeachments. For example, crimes that take place overseas, in federal territories, or in the District of Columbia are all tried before juries that don’t necessarily come from a “State.” They come only from a “district . . . previously ascertained by law.”<sup>116</sup> In the same way, impeachment proceedings can be thought of as criminal proceedings in which the relevant “district” is the only court with original jurisdiction over the crime: the U.S. Senate. The relevant “jury,” meanwhile, consists of senators. As Blackstone wrote of the House of Lords, when legislators try a high crime or misdemeanor they function as a literal jury of “peers”: the “peers of the whole nation.”<sup>117</sup>

### B. Paulsen

For his part, Michael Stokes Paulsen emphasizes that the scope of the impeachment power “is strikingly broad . . . , indefinite, and by no means limited to commission of criminal offenses.”<sup>118</sup> Invoking the

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<sup>114</sup> U.S. CONST. amend. VI.

<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g., Callan v. Wilson*, 127 U.S. 540, 548 (1888).

<sup>117</sup> 4 BLACKSTONE, *supra* note 85, at \*257.

<sup>118</sup> Paulsen, *supra* note 40, at 693–94.

“original meaning” of the phrase “high Crimes and Misdemeanors,” Paulsen writes that in English practice, “the term embraced a broad range of political offenses, as well as wrongs that might otherwise be punishable by the criminal law.”<sup>119</sup> For example, he notes that Warren Hastings, governor-general of India, was impeached for “maladministration, corruption, and cruelty toward the people of India.”<sup>120</sup> He might also have included the list of English impeachments set out in Professor Raoul Berger’s masterful 1974 history: a list that included the “misapplication of funds,” “abuse of official power,” “neglect of duty,” “encroachment on or contempts of Parliament’s prerogatives,” and corruption.<sup>121</sup>

Paulsen, like Berger, argues that the authors of the U.S. Constitution borrowed this capacious phrase to incorporate all kinds of malicious and abusive attempts to “subvert the Constitution.”<sup>122</sup> He also quotes at length from Alexander Hamilton’s observations in his *Federalist* essays that “the ‘jurisdiction’ of impeachment extends broadly to offenses that ‘proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.’”<sup>123</sup> Paulsen concludes that the phrase “does not have a fixed, determinate, limited meaning, but instead constitutes a broad grant of interpretive power and practical judgment to the two houses.”<sup>124</sup> “It follows,” Paulsen concludes, “that Congress rightfully possesses power to impeach and remove Presidents (and other executive officials and judges) for a wide range of misconduct as judged, ultimately, by legislators themselves.”<sup>125</sup>

Benjamin Curtis would likely agree with everything Paulsen writes. There is no denying that Parliament impeached people under the label of “high Crimes and Misdemeanors” for conduct that wasn’t criminal when the conduct was committed. It is also undoubtedly true that the phrase “high Crimes and Misdemeanors” refers to a broad range of possible offenses and gives Congress the “jurisdiction” to determine what those offenses are.

But even accepting Paulsen’s conclusions, it still doesn’t follow that Congress — sitting as a legislature or as a court of impeachment — has the same authority that Parliament once had to determine *retroactively* what

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<sup>119</sup> *Id.* at 696–97.

<sup>120</sup> *Id.* at 697 (quoting STAFF OF THE IMPEACHMENT INQUIRY, H.R. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 7, H.R. DOC. NO. 28-959 (2d Sess., Comm. Print 1974)).

<sup>121</sup> BERGER, *supra* note 84, at 70.

<sup>122</sup> Paulsen, *supra* note 40, at 698 (quoting James Madison, Notes on the Constitutional Convention (Sept. 8, 1787) (statement of George Mason), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 547, 550 (Max Farrand ed., 1911)).

<sup>123</sup> *Id.* at 689, 699 (quoting THE FEDERALIST NO. 65, at 394 (Alexander Hamilton) (Clinton Rossiter ed., 2003)).

<sup>124</sup> *Id.* at 701.

<sup>125</sup> *Id.*

conduct should constitute an impeachable offense. Unlike Parliament, Congress is bound by the U.S. Constitution's prohibitions on ex post facto laws and bills of attainder.<sup>126</sup> So while Congress may have broad and, perhaps, unlimited discretion to determine for itself which offenses should be worthy of impeachment, Congress is quite limited in defining those offenses after the fact to convict and punish a specified target. And it was this attempt to convict President Johnson of a retrospective crime that Curtis found so objectionable.

To understand the distinction between the point Paulsen makes and the point Curtis made, imagine Congress in 1865 had passed a law declaring it a "high misdemeanor" for the President to bring Congress into contempt with his campaign speeches. The idea isn't so farfetched — as alluded to in the opening paragraphs of this response, in 1867, Congress prospectively declared it a "high misdemeanor" for the President to fire certain cabinet officials without Senate approval.<sup>127</sup> According to Paulsen, the phrase "high Crimes and Misdemeanors" is broad enough to include such abusive conduct. And Curtis would likely agree that Congress has "extraordinarily broad discretion" to prospectively declare certain conduct crimes or misdemeanors.

But this hypothetical 1865 law was missing at the time President Johnson was impeached in 1868. And that omission makes all the difference. Regardless of how broad the phrase "high Crimes and Misdemeanors" is, it doesn't provide a self-executing definition of unlawful conduct that can adequately give people notice of what does and doesn't violate the law. As Curtis put it, "High crimes and misdemeanors' against what law? There can be no crime, there can be no misdemeanor without a law, written or unwritten, express or implied. There must be some law; otherwise there is no crime."<sup>128</sup> In other words, granting that Congress *can* define all sorts of conduct as a high crime or misdemeanor doesn't mean that Congress *has done so* in order to comply with the prohibitions against bills of attainder and ex post facto laws.

Of course, one might conclude from all of this that even if Curtis's argument were adopted by mainstream scholarship, the consequences would be minor. It is quite easy to imagine certain process crimes, such as perjury or obstruction of justice, being used today as grounds for impeachment. Because these crimes are so broadly defined, one might argue that the "no crime [and no impeachment] without law" requirement has become no more than a formality. If that is so, then at least one of the chief virtues of a narrow definition of "high Crimes" — its limit on partisan impeachment — is less compelling today than it may have been in 1868.

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<sup>126</sup> For an elaboration of this point, see, for example, Theodore W. Dwight, *Trial by Impeachment*, 6 AM. L. REG. (N.S.) 257, 268–69 (1867).

<sup>127</sup> See Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 (repealed 1887).

<sup>128</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 134 (1868) (opening argument of Benjamin Curtis).

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But despite the proliferation of criminal laws since 1868, the principle of no crime without law remains an important safeguard for all potential criminal defendants — from the President to you and me. The federal corruption statutes may be broadly defined, but it remains a challenge to convict anyone, beyond a reasonable doubt, of intentionally violating each element of an offense as drafted.<sup>129</sup> If prosecutors had the power not only to charge someone with an offense but also to erase all of the difficult-to-prove elements of that offense — to convict someone of perjury, say, because they once told a meaningless lie to a buddy — no one would be safe from conviction. There is no reason why when Congress acts as a prosecutor it should be permitted to ignore the Constitution’s basic protections of due process and criminal procedure.

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In the end, however, it doesn’t really matter how logical Benjamin Curtis’s argument may have been considering how often it has been ignored in practice. In the century-and-a-half since 1868, six federal judges have been convicted and removed from office for conduct that wasn’t necessarily a crime when they committed it — a clear violation of Curtis’s conclusion.<sup>130</sup> And today, many legal commentators have argued that President Donald Trump — the twenty-first-century version of President Andrew Johnson if there ever was one — should be impeached for committing abusive, antidemocratic conduct even if he didn’t violate any actual criminal laws.

But to enforce the rule of law by impeaching a President without any legal justification — to convict someone of “high Crimes” without law — is the sort of gross irony that once roused a former Justice to defend an ideological adversary. It would also set a dangerous precedent, giving congressional prosecutors and judges as much unlimited discretion as Parliament once had to accuse and convict a political opponent of a crime. And as the seven Republican senators in 1868 observed, such a precedent would apply not just to someone as unpopular as President Trump but also to future Presidents whose policies happen to misalign with a congressional majority. “Blinded by partisan zeal, with such an example before them, [Congress] will not scruple to remove out of the way any obstacle to the accomplishment of their purposes,” Senator Lyman Trumbull said in his written opinion acquitting President Johnson.<sup>131</sup> “[A]nd what then becomes of the checks and balances of

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<sup>129</sup> See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

<sup>130</sup> The six judges are Robert W. Archbald (1913), Halsted Ritter (1936), Harry E. Claiborne (1986), Alcee Hastings (1989), Walter L. Nixon, Jr. (1989), and G. Thomas Porteous (2010). See JARED P. COLE & TODD GARVEY, CONG. RESEARCH SERV., R44260, IMPEACHMENT AND REMOVAL 1 n.6 (2015).

<sup>131</sup> CONG. GLOBE, 40th Cong., 2d Sess., Supp. 420 (1868) (opinion of Sen. Lyman Trumbull).

the Constitution, so carefully devised and so vital to its perpetuity?”<sup>132</sup> With his words in mind, Curtis’s argument is worth resurrecting even if it challenges a well-developed consensus.

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<sup>132</sup> *Id.*