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House Select Committee on Investigations
South Dakota House of Representatives
Capitol Building
500 East Capitol Avenue
Pierre, SD 57501-5070

Dear Speaker Gosch and Members of the Committee:

I have been engaged by Attorney General Jason Ravnsborg to provide the House Select Committee on Investigations with information and precedent related to standards of impeachment. By way of background, I teach Political Investigations and Impeachment Law at Tulane University Law School. As a practicing lawyer, I have worked on several state impeachments. I was appointed Deputy Attorney General of Alabama to represent the Office of the Governor of that state in connection with impeachment proceedings. I have also represented the Office of the Governor of Connecticut, the Office of the Governor of South Carolina, the Office of the Governor of Missouri, and the Office of the Governor of the Commonwealth of the Northern Mariana Islands in impeachment proceedings.

Executive Summary

No official in South Dakota has ever been impeached. In fact, it is rare in the American experience for any elected official to be impeached and removed from office. Only three U.S. presidents have been impeached and none has been removed. Since the founding of our Nation, fewer than 20 governors have ever been impeached and only eight have been removed from office. Impeachments of other state elected officials are similarly sparce. Modern impeachments are particularly rare. Since 1929, only two state governors have been impeached, both of whom were convicted and removed. Only 13 other state officials have been impeached and five removed during that same period. The modern record reflects not a single instance in which a legislative body (the U.S. Congress or a state legislature) removed an elected official for acts wholly unrelated to the performance of their duties.

In the only reported impeachment case involving a state Attorney General, the Nebraska Supreme Court, sitting as a court of impeachment, considered a constitutional impeachment

provision analogous to South Dakota's. The Court in that case held that an impeachable offense must relate to the duties of an official's office:

> An important issue in this case is what constitutes an impeachable offense. The Constitution provides that all civil officers of this State shall be liable to impeachment "for any misdemeanor in office." Neb. Const. art. IV, 5. We think this provision of the Constitution means that the act or omission for which an officer may be impeached and removed from office ***must relate to the duties of the office***.[1]

Article XVI, §3 of the South Dakota Constitution identifies impeachable offenses as "drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office." Principles of constitutional construction establish that only the most grave acts that implicate the public official's office may be considered impeachable. Certainly, officials may not be impeached simply for engaging in some type of "malfeasance," "drunkenness," or any "crime" or "misdemeanor" at any point in their lives. To warrant impeachment and removal, the actions of the official must be sufficiently serious and, as held by the Nebraska Supreme Court, *supra*, relate to an official's duties of office.

This limitation is sensible. The purpose of impeachment is not to punish, but as a remedy for grave public wrongs and to protect the public against further such wrongs. The Congressional report concerning the potential impeachment of President Richard Nixon (the "Rodino Report") said it this way:

> [i]mpeachment is a constitutional remedy addressed to serious offenses against the system of government….Impeachment is directed to address constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself….[2]

The clear implication is that impeachment is for wrongs that impact the official's office. Not just any misconduct or even crime will warrant impeachment. As Hamilton wrote in Federalist 65, impeachment is reserved for:

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

Were this not the case, then *any* misconduct, crime or even drunkenness in an official's *past* would put that individual and the state's citizens at peril of undoing an election for political reasons. It would also make an official who has not lived a perfect life effectively subservient to the House of Representatives, disrupting the Constitution's carefully crafted separation of

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[1] *State v. Douglas*, 217 Neb. 199, 201 (Neb. 1984) (emphasis added); *see also State v. Hergert*, Supreme Court of Nebraska, No. S-06-425, July 7, 2006.

[2] Staff of the House Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 19 (Comm. Print 1974) [hereinafter "Rodino Report"]

powers. Indeed, adopting this standard could be remarkably destructive to the regular functioning of government. The impeachment process is enormously tumultuous, time-consuming and expensive. It has been said that impeachment "is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at."[3]

A review of impeachment precedent makes clear that impeachment is reserved for situations in which no lesser response will do, where the misconduct is so clear and so grave that no other remedy is adequate. Indeed, impeachment has been called the "political equivalent of capital punishment."[4] It is no wonder it has been used so sparingly, particularly with respect to elected officials.

Any consideration of impeachment must adhere to principles of law, not simply further expedient political motives or even respond to the political passions of the moment. At stake is nothing less than South Dakota's constitutional form of democracy.

I. A Stringent Impeachment Standard Is Vital To Preserving The Balance Of Powers And The Public's Right To A Popularly Elected Government.

A. Impeachment Disrupts The Necessary Balance Of Powers Between The Separate And Coordinate Branches Of Government.

The South Dakota Constitution delineates the separation and balance of powers between the legislative, executive, and judicial branches. Article II provides: "The powers of the government of the state are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution."

The South Dakota Supreme Court has recognized that a purpose of the Constitution's separation of powers provision "is to prevent an unnecessary and therefore dangerous concentration of power in one branch of government."[5]

Impeachment is an "exception to the separation of powers," and, for that reason, must be "narrowly channeled."[6] When the legislature considers impeachment, it puts one "branch in a position to sit in judgment on another, empowering the [legislature] essentially to decapitate the executive branch in a single stroke...."[7] Impeachment "involves the uniquely solemn act of having one branch essentially overthrow another."[8] As legal scholars have long recognized, the "most critical point possible in the relations" between the branches of government is "the actual

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[3] James Bryce, *The American Commonwealth*, Vol. I, 212 (1919).
[4] Lawrence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 Geo. Wash. L. Rev. 712, 723 (1999).
[5] *Wegleitner v. Sattler, 1998 S.D. 88, ¶ 11 (S.D. 1998).*
[6] Raoul Berger, *Impeachment: The Constitutional Problems* 5 (1974).
[7] Tribe, *supra* note 4, at 723.
[8] *Id.*

imminence of impeachment proceedings."[9] Therefore, "it is utterly vital to the health of our polity" that the legislature heed the highest caution, adhere with the greatest care to the confines of the Constitution, and have "appreciation of the constraints."[10]

Because impeachment so subverts the ordinary constitutional processes that define the boundaries between the branches, it must "remain a remedy to be deployed only in extremely serious and unequivocal cases, where [there is] a high degree of confidence that the conduct in question falls squarely and unambiguously within the parameters of a persuasive definition, and where the insult to the constitutional system is grave indeed."[11] Central to this restrained approach is the realization that lowering the standard for impeachable conduct would unduly weaken the role of Executive Branch of the State of South Dakota and permanently shift South Dakota's system of government, based on the separation of powers, toward a parliamentary system. Unlike the parliamentary system in Great Britain, the American system of government does not allow a legislature to cast out an elected executive based on a vote of no confidence.

Indeed, the Framers of the United States Constitution deliberately and distinctly rejected "maladministration" as a ground for impeachment because such a standard would undesirably weaken the executive and reduce future leaders to serving "during [the] pleasure of the Senate."[12] One noted scholar's observation in the context of a presidential impeachment bears repeating here:

> Anyone who lowers the bar on what constitutes an impeachable offense simply in an effort to "get" [the President], whether for partisan reasons or in a spirit of equally genuine patriotism, may live to regret the abuses by future Congresses, and the resulting incapacity of future presidents, that might just as easily be unleashed were we to establish a precedent making it too easy – easier than the Constitution contemplated – to remove a President simply because, as in a parliamentary system, the legislature has come to disagree profoundly with his or her public policies or personal proclivities and has thus lost confidence in the President's leadership."[13]

Because not only the Attorney General, but also the Governor and all other state and judicial officers are subject to impeachment, diluting the constitutional standard of impeachment would also serve as a precedent to undermine the offices, and independence, of all executive and judicial officials.[14] With this in mind, weakening officials by "watering down the basic meaning"

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[9] Charles L. Black, Jr., *Impeachment: A Handbook* 69 (1974); *see also* Rodino Report, *supra* note 2, at 19 (observing that impeachment implicates "issues of state going to the heart of the constitutional division" between the different branches of government).

[10] Black, *supra* note 9, at 69.

[11] *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) [hereinafter "*Subcommittee Hearings*"] (prepared statement of Professor Jack Rakove), at 247.

[12] 1 Max Farrand, *The Records of the Federal Convention of 1787*, 230 (1911); *see also* Black, *supra* note 11, at 27-29, 30 (observing that an executive's policy "ought to play *no* part in the decision on impeachment" and that "without any flavor of criminality or distinct wrongdoing, impeachment and removal would take on the character of a British parliamentary vote of 'no confidence'").

[13] Tribe, *supra* note 4, at 713.

[14] S.D. Const. Art. XVI § 3.

of an impeachable offense is "a singularly ill-conceived…way of backing into a new – and for us at least, untested – form of government."[15] Therefore, impeachment "is not, within the political logic of the separation of powers system, designed to cope with just any situation where [an official] might face 'outrage,' nor just any situation where [an official] might patently have engaged in 'wrongdoing.'"[16] It is predicated only upon "constitutional wrongs that subvert the structure of government" and the Constitution itself.[17] To diminish this standard would "risk lowering the threshold for impeachment in a way that would genuinely threaten a transformation of our constitutional system."[18]

B. Impeachment Of An Attorney General Nullifies A Popular Election And Must Not Be Used To Cut Short The Term Of A Democratically Elected Official.

Legislative removal "is a stunning penalty, the ruin of a life. Even more important, it unseats the person the people have deliberately chosen for the office."[19] It replaces the decision made by, and constitutionally entrusted to, the people in a popular election with the judgment of a different branch of government. This concern is particularly grave when a legislature contemplates impeachment of an elected executive, such as a president, governor or attorney general. Impeachment of an elected executive "essentially cancels the results of the most solemn collective action of which" South Dakota "as a constitutional democracy" is capable: the election of an attorney general.[20] This exceptional "frustration of popular will" should not occur except when necessary to remedy the most egregious misconduct that "corrupt[s] or subvert[s] the political and governmental process"; otherwise, impeachment would itself undermine the political process and the executive's accountability to the electorate whose interests he or she is charged with serving.[21]

The basic constitutional design of the United States and of South Dakota contemplates that when a constitutional officer is elected in a regular, periodic election, he or she will serve out the constitutionally prescribed term absent the type of truly egregious wrongdoing that threatens our system of government and could justify invocation of the impeachment power. The South Dakota Constitution provides that an Attorney General shall be elected and serve a term of four years.[22] When the people have chosen through an election one eligible to act as a state official for a term certain, that election cannot be undone and that official cannot be removed, except through the impeachment process mandated by the South Dakota Constitution.

As Chief Justice William Rehnquist noted, "[o]ne need only note the way in which the framers arranged the text of the United States Constitution to realize that they were concerned about the separation of powers….The framers were particularly concerned about the possibility of overreaching and bullying by the legislative branch—Congress—against the other branches. To

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[15] Tribe, *supra* note 4, at 716-17.
[16] *Subcommittee Hearings*, *supra* note 11, at 70 (prepared statement of Professor Matthew Holden, Jr.) (emphasis omitted).
[17] Rodino Report, *supra* note 2, at 26-27.
[18] *Subcommittee Hearings*, *supra* note 11, at 247 (prepared statement of Professor Jack Rakove).
[19] Black, *supra* note 9, at 17.
[20] Tribe, *supra* note 4, at 723.
[21] Black, *supra* note 9, at 17, 37.
[22] S.D. Const. Art. 4 § 7.

that end, they established the terms of office…, where they could not be changed by Congress."[23] The stability of democratic government and the integrity of such periodic elections demand that legislators not cut that term short, even if they have lost confidence in the particular official's ability to lead. In short, "the impeachment process is not merely about replacing a leader who is at present sagging in the polls…."[24] As one eminent impeachment scholar noted, "taking, at intervals, of public opinion polls on guilt or innocence, should be looked on as an unspeakable indecency."[25]

C. Separation Of Powers Issues Are Intensified In South Dakota Because An Official Is Suspended Upon Impeachment.

A distinct feature of South Dakota's impeachment procedure further heightens issues of the balance and separation of powers, as well as the electoral implications of impeachment. In contrast to the federal system, which allows an impeached President to remain in office until convicted by the Senate, the South Dakota Constitution provides that an official is stripped of his or her duties immediately upon impeachment.[26] Those duties are restored only if and when the official is acquitted after trial.[27]

Therefore, a decision by the House to impeach would, itself, potentially disrupt the Executive Branch, breach the separation of powers, and overturn a statewide election, even if the Attorney General is subsequently acquitted. Accordingly, the House cannot view its role as merely a gatekeeper or the counterpart of a grand jury in a criminal proceeding. To pass an article of impeachment, the House must conclude, not that the alleged conduct is sufficient to justify a *trial*, but that it unmistakably warrants *removal*.

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[23] William H. Rehnquist, *Grand Inquests* 9, 10 (1992) (concluding that the acquittal of President Andrew Johnson and Supreme Court Justice Samuel Chase from impeachment "was of extraordinary importance to the American system of government" and that, if "convicted, the future independence of the president [and the judiciary] could have been jeopardized").
[24] Black, *supra*, note 9, at x (forward by Akhil Reed Amar).
[25] *Id.* at 20.
[26] S.D. Const., Article XVI, § 5.
[27] *Id.*

II. Impeachment Must Be Limited To The Most Serious Crimes Or Grave Misconduct Involving Corruption To The System Of Government.

A. Scholars And Experts Agree That Impeachment Must Be Reserved Only For Grave Misconduct That Corrupts The Constitutional Form, The Political Process, Or The System Of Government.

Only the gravest public wrongdoing that corrupts or subverts the political and governmental process warrants impeachment. This requirement stems not only from concerns regarding the separation of powers and due respect for the outcome of a popular election, but also from the harm that impeachment causes to the individual, the people, and the system of government. Because impeachment is so harmful to the people and to the system of government, "it is predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties…."[28] While the language of the constitutional provision for impeachment in South Dakota differs from the federal standard, invocation of the extraordinary process of impeachment will always give rise to the same concerns regarding separation and balance of powers. Accordingly, analysis of the federal standard is useful and instructive.

"Impeachment is a constitutional remedy addressed to serious offenses against the system of government. The purpose of impeachment under the Constitution is indicated by the limited scope of the remedy (removal from office and possible disqualification from future office) and by the stated grounds for impeachment (treason, bribery, and other high crimes and misdemeanors). It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are 'high' offenses in the sense that word was used in English impeachments."[29]

The available historical sources confirm that impeachment was intended only to reach conduct in the official's public capacity. Alexander Hamilton, one of the chief authors of the Federalist Papers, explained that impeachable conduct relates "chiefly to injuries done immediately to the society itself."[30] Similarly, former Supreme Court Justice Joseph Story wrote that impeachable offenses are those "committed by public men," which inflict "injuries to the society in its political character."[31] The Staff of the House Committee tasked with considering impeachment against President Nixon stated that, in the impeachment context, "the crucial factor is not the intrinsic quality of behavior but the significance of its effect upon our constitutional system or the functioning of our government."[32]

With respect to the impeachment of an elected official, "the principal goal of the impeachment clause is to allow impeachment for a narrow category of large-scale abuses of

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[28] Rodino Report, *supra* note 2, at 27.
[29] *Id.* at 26.
[30] *The Federalist* No. 65, at 334 (Alexander Hamilton) (Basil Blackwell 2d ed., 1987).
[31] Joseph Story, *Commentaries on the Constitution of the United States*, Vol. I, § 746, at 529-30 (Little, Brown , and Company, 4th ed. 1873).
[32] Rodino Report, *supra* note 2, at 26.

authority that come from the exercise of distinctly [gubernatorial] powers. Outside of that category of cases, impeachment is generally foreign to our traditions and prohibited by the Constitution."[33] An impeachment "must relate to some reprehensible exercise of official authority."[34] The wrongdoing that properly qualifies as impeachable must therefore not only be public, but also substantial.[35]

For example, one scholar noted that where the conduct in question consists of an "omission of duty without the element of fraud," it is "not impeachable, although it may be highly prejudicial to the interests of the State."[36] Even willful wrongdoing is not impeachable except where it is truly egregious and harmful to the constitutional order. Impeachment is strictly confined to "offenses against the government" where the offense is "convincingly established [and] so egregious that [the executive's] continuation in office is intolerable."[37] This requirement of substantiality follows in part from a paramount, constitutional prohibition against *ex post facto* laws and bills of attainder.[38] As Professor Black forcefully notes, the definition of an impeachable offense "must not be so interpreted as to make its operation in a given impeachment case equivalent to the operation of a bill of attainder, or of an *ex post facto* law, or of both. When a congressman says, in effect, that Congress is entirely free to treat as impeachable any conduct it desires so to treat, he (or she) is giving a good textbook definition of a bill of attainder and an *ex post facto* law, rolled into one."[39]

To be sure, although impeachable conduct must cause substantial public injury and will often constitute criminal conduct, it need not necessarily fit squarely within the prohibition of an extant criminal statute. Grave abuses that threaten democracy or are "seriously incompatible with either the constitutional form and principles of our government" may not always technically qualify as a crime.[40] That impeachable conduct need not be criminal, however, does not imply that impeachment may lie for conduct less egregious; to the contrary, impeachment "must occur only for reasons at least as pressing as those needs of government that give rise to the creation of criminal offenses."[41] For this reason, the House "must feel more comfortable when dealing with conduct clearly criminal in the ordinary sense, for as one gets further from that area it becomes progressively more difficult to be certain, as to any particular offense, that it is impeachable."[42]

In sum, impeachment must be reserved only for serious crimes or other "grave misconduct that so injures or abuses our constitutional institutions and form of government as to justify" the

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[33] *Subcommittee Hearings*, *supra* note 11, at 38 (prepared statement of Professor Cass R. Sunstein) (emphasis omitted).
[34] *Id.* at 115 (prepared statement of Father Robert F. Drinan, S.J.).
[35] *See* Rodino Report, *supra* note 2, at 27 ("Not all [executive] misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality.").
[36] Paul S. Fenton, *The Scope of the Impeachment Power*, 65 Nw. U. L. Rev. 719, 746-47 (1970).
[37] John R. Labovitz, *Presidential Impeachment*, 26, 110 (Yale University ed. 1979).
[38] *See, e.g.*, U.S. Const. art. I, § 9, cl. 3.
[39] Black, *supra*, note 9, at 32 ("Our Framers abhorred both these things, and we have never wavered from that abhorrence. It cannot be right for Congress to act toward [the chief executive] as though these prohibitions did not exist.").
[40] Rodino Report, *supra* note 2, at 27.
[41] *Id.* at 22.
[42] Black, *supra*, note 9, at 35.

removal of an elected official.[43] "Some of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law."[44] But impeachable conduct will rarely, if ever, consist of ethical transgressions, omissions, or other lapses that do not threaten this type of severe harm to the constitutional order.

B. Allegations Of Impeachable Conduct Must Be Proved By At Least Clear And Convincing Evidence.

The "drastic remedy of impeachment and removal" is "truly the political equivalent of capital punishment."[45] The "adoption of a lenient standard of proof could mean that this punishment, and this frustration of popular will, could occur even though substantial doubt of guilt remained."[46] Impeachment "is the heaviest piece of artillery in the legislative arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at."[47]

The "clear and convincing evidence" standard is the appropriate standard of proof in impeachment proceedings before both the House and any committee designated by the speaker for the purposes of impeachment ("The Committee"). This is particularly apt in light of fact that in South Dakota an elected official is suspended from office upon impeachment by the House. Under these circumstances, there can be no rationale to impose differing standards for House and Committee proceedings. A lower standard of proof could unfairly result in the political equivalent of capital punishment, breach the constitutional balance of powers, and unseat a popularly elected official who did not commit an impeachable offense. Therefore, the legislature may not impeach the Attorney General without clear and convincing proof he engaged in impeachable conduct.

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[43] Rodino Report, *supra* note 2, at 22.
[44] *Id.* at 24.
[45] Tribe, *supra* note 4, at 723; *see also* 144 Cong. Rec. H11, 976 (daily ed. Dec. 19, 1998) (statement of Rep. Schumer) (stressing that impeachment is the "political version of capital punishment"); 144 Cong. Rec. H11, 822 (daily ed. Dec. 18, 1998) (statement of Rep. Klink) (arguing that "just as every crime does not justify the death penalty, neither should impeachment, the political equivalent of the death penalty, be the punishment for every presidential misdeed").
[46] Black, *supra* note 9, at 17.
[47] Bryce, *supra* note 3, at 212.

C. The History Of Impeachment In The United States Confirms That Impeachment Is To Be Exercised Only When It is Clearly Established That An Official Has Engaged In Heinous Criminal Conduct Or Poses A Serious Threat Against The System Of Government Beyond.

The State of South Dakota has never impeached any official. The United States Congress has never convicted and removed a single official in the Executive Branch. Since the New Deal, every impeachment of a federal official has involved evidence of serious criminal wrongdoing relating to service in office or a serious threat against the system of government. None has been predicated solely on allegations of ethical wrongdoing or lesser crimes. As noted above, in the past 90 years, only two state governors have been impeached. Before they were impeached, both of those governors were first subject to criminal charges alleging that they had committed felonies in connection with the performance of their official duties. The history of presidential and state gubernatorial impeachments in the United States confirms that the impeachment of a sitting official is a grave and extraordinary event in the American experience and should be limited to situations presenting serious criminal conduct or comparable wrongdoing that perpetrates grievous injury to the constitutional order.

1. Presidential Impeachment

To date, there have been five impeachment proceedings that have led to an impeachment or resignation of a President of the United States. In 1868 President Andrew Johnson was impeached for his removal of Secretary of War Edwin Stanton in violation of the Tenure of Office Act.[48] He was acquitted by the Senate. In 1974, President Richard Nixon was subject to impeachment proceedings related to the cover up of a burglary at the Democratic National Committee headquarters. He resigned prior to an impeachment vote.[49] In 1998-99, President Bill Clinton was impeached for obstruction of justice and criminal perjury. He was acquitted.[50] More recently President Donald Trump was impeached and acquitted twice, first for an alleged abuse of power in soliciting an investigation by Ukraine of Joe Biden and then for actions related to a riot at the United States Capitol that delayed Congress's certification of the 2020 presidential election results.

Each of these historical precedents, which are relevant because *conviction and removal* of a national elected official is a close analogue to *impeachment* of an Attorney General of South Dakota, provides historical evidence of consensus that impeachment should be limited to serious criminal offenses or similarly serious wrongdoing that threatens the political process or system of government.

The impeachment proceedings involving President Johnson can be understood largely as a consequence of the regional partisanship created by the Reconstruction Era, and both experts and scholars have almost universally pointed to the impeachment as "a gross abuse of the impeachment

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[48] Rehnquist, *supra* note 23, at 210; *see also* Act of Mar. 2, 1867, Ch. 154, 14 Stat. 430 (1867).

[49] *See* House Comm. on the Judiciary, *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93-1305, 93d Cong., 2d Sess., at 1-4 (1974).

[50] *See Impeachment Inquiry: Hearing Pursuant to H. Res. 581 Before the House Comm. on the Judiciary*, 105th Cong., 2d Sess. 19 (1998); 145 Cong. Rec. s1462-02, *S1594 (daily ed. Feb. 12, 1999).

process, an attempt to punish the President for differing with or obstructing the policy of Congress."[51] Its legacy has prompted the observation that the "history of impeachment in this country has been one primarily of misuse. Where it has been used, for the most part, it has been subject to gross abuse for purely partisan advantages and the trial of Andrew Johnson illustrates this. The trial of the five governors in the reconstruction [era] illustrates it, and in each one of those cases it was the senate that was the guilty body."[52]

Nevertheless, the Senate did not convict President Johnson. In perhaps the most notable account of this episode, late Chief Justice Rehnquist of the United States Supreme Court declared, "[t]he acquittal of Andrew Johnson by the Senate was of course a victory for the independence of the executive branch of the government" and the "importance" of this acquittal "in our constitutional history can hardly be overstated." [53] It "surely contributed as much to the maintenance of our tripartite…system of government as any case decided by any court."[54] Had Andrew Johnson "been convicted, the future independence of the president could have been jeopardized. It was the United States Senate which…made th[is] fundamental decision[]." [55] Historians and scholars agree:

> Had the impeachment drive succeeded, the constitutional separation of powers would have been radically altered, and the alteration would have been protected and maintained by the lowered threshold of impeachment. The presidential system might have become a quasi-parliamentary regime, in which the impeachment process would have served as the American equivalent of the vote of no confidence. The Presidency would have been permanently weakened and our polity permanently changed.[56]

The impeachment proceedings involving President Nixon were in sharp contrast to the lawless and partisan Johnson impeachment process. All of the Articles of Impeachment that the House Judiciary Committee drafted prior to President Nixon's resignation allege wrongdoing that bears a clear relationship to serious criminal violations and to subversion of the basic structure of government.[57] Notably, the Committee rejected a proposed article that would have accused the President of tax evasion and misappropriation of government funds, concluding that "even if the tax fraud were proved…it was not the type of abuse of power at which the remedy of impeachment is directed."[58]

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[51] Berger, *supra* note 6, at 308; *see also* Archives of Maryland, *Proceedings and Debates of the 1967 Constitutional Convention*, Vol. 104-1, Debates 2622, at 1 (Dec. 19, 1967).
[52] Archives of Maryland, *supra* note 62, at 1 (statement of Delegate Scanlan).
[53] Rehnquist, *supra* note 23, at 250, 278.
[54] *Id.* at 278.
[55] *Id.* at 10.
[56] *Subcommittee Hearings*, *supra* note 11, at 102 (prepared statement of Professor Arthur M. Schlesinger); *see also* Irving Brant, *Impeachment: Trials and Errors* 3-4 (1972) (predicting that if the Johnson impeachment "had been successful and had been accepted as precedent, it would have converted a government of divided powers, of checks and balances, into a congressional dictatorship").
[57] *See* House Comm. on the Judiciary, *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93-1305, 93d Cong., 2d Sess., at 1-4 (1974).
[58] *Id.* at 220-23 (stating that "an impeachment inquiry in the House and trial in the Senate are inappropriate forums to determine the President's culpability for tax fraud").

In the impeachment and subsequent acquittal of President Clinton, each of the offenses charged by the full House – grand jury perjury and obstruction of justice – constitutes serious criminal conduct. Indeed, following the conclusion of the impeachment proceedings, the Independent Counsel reported "that the evidence was sufficient to prosecute President Clinton for federal crimes."[59] Nevertheless, President Clinton was acquitted, a result that reflects the United States Senate's view that the charges of grand jury perjury and obstruction of justice did not, in this case, warrant the drastic remedy of removal.[60]

The first Trump impeachment, involving communications between President Trump and the President of Ukraine, was marked by partisan rancor and recrimination. Not a single member of the President's party supported opening an impeachment inquiry or the final impeachment resolutions, and the Senate quickly voted to acquit with tallies not even approaching the necessary 2/3 required for removal. In this way, the first Trump impeachment could be said to resemble the Johnson impeachment. The effort shed little light on the substantive standard for impeachment.

The second Trump impeachment was also not particularly illuminating with respect to the impeachment standard. In that case, the President was impeached just days before leaving office. His trial was held after his term ended and resulted in a decisive acquittal. But several senators expressed the opinion that a president could not be subject to an impeachment trial after leaving office, a position endorsed by some scholars. In any event, this impeachment also has little to teach about the appropriate standards for impeachment.

What is clear is that the United States Congress has never removed an elected official from office, and the history of presidential impeachment proceedings evidence that the impeachment and removal of a chief executive from office is a solemn act to be reserved only for conduct that seriously threatens the system of government or constitutional form.

2. Impeachment Of State Elected Officials

The history of state impeachments also confirms that the dire remedy of impeachment is to be reserved only for the most serious, indictable offenses or similar wrongdoing that corrupts the constitutional form. In the more than two-hundred years since the Founding, only 15 state governors have been impeached and only 8 of those impeachments have resulted in conviction.[61]

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[59] *Final Report of the Independent Counsel*, In re Madison Guaranty Sav. & Loan Ass'n Regarding Monica Lewinski and Others, at 20 (filed May 18, 2001).

[60] *See* 145 Cong. Rec. S1462-02, *S1539 (daily ed. Feb. 12, 1999) (statement of Sen. Specter) ("Perjury and obstruction of justice are serious offenses which must not be tolerated by anyone in our society. However, I remain unconvinced that impeachment is the best course to vindicate the rule of law on this offensive conduct. President Clinton may still be prosecuted in the Federal criminal courts when his term ends."); *id.* at *S1568 (statement of Sen. Collins) ("I believe that in order to convict, we must conclude from the evidence presented to us with no room for doubt that our Constitution will be injured and our democracy suffer should the President remain in office one moment more. In this instance, the claims against the President fail to reach this very high standard.").

[61] Two governors of the Commonwealth of the Northern Mariana Islands, an unincorporated territory of the United States, have also been impeached, both for alleged misuse of their offices. The first, Governor Benigno Fitial, was impeached in 2013 and resigned prior to trial. https://www.samoanews.com/facing-impeachment-trial-cnmi-governor-resigns. The second, Governor Ralph Torres, was impeached earlier this year on charges of misusing his office. https://www.postguam.com/news/local/cnmi-governor-impeached-for-corruption-

In the last 90 years, only two state governors have been impeached. Since the New Deal, no state governor has been impeached without a prior indictment or arrest for a serious felony related to his office. In the same period there have been only 13 other impeachments of state elected officials. This number includes the 2018 impeachment of all of the justices of the West Virginia Supreme Court, who were accused of various offenses related to alleged abuses of their offices.[62] No official in modern times has been removed for offenses unrelated to their office.

Although most States adopted impeachment clauses soon after ratification of the United States Constitution, there were only two state impeachments (both judges) until the social and political upheaval occasioned by the Civil War and Reconstruction. Indeed, that period accounts for approximately half of all the gubernatorial impeachments in American history, and seven out of the 15 impeachments occurred during the five-year period between 1871 and 1876.[63] After the end of Reconstruction, there were only two state impeachments (both state supreme court justices) before 1913, when New York Governor William Sulzer was removed as a result of what is generally believed to be the work of the Tammany Hall political machine.[64] The political abuse of impeachments persisted during the social unrest of the 1920s and into the Great Depression.[65]

Since the New Deal, not one state has impeached a governor without a prior indictment or arrest for serious and affirmative criminal conduct involving his service in office. The rarity of impeachment is shown by the fact that, in the last ninety years, only two state governors have been impeached. In 1988, following indictment on criminal charges, Evan Mecham of Arizona was impeached and removed from office for obstruction of justice, for perjury relating to more than $365,000 in concealed monies, and for loaning $80,000 of state money to a business that he and his wife owned.[66] The Arizona legislature removed Governor Mecham only upon finding clear and convincing evidence of serious criminal wrongdoing.[67]

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felony-neglect-of-duty-senate-prepares-for-trial/article_72540460-734b-11ec-a66e-7f9e7db344e7.html He is awaiting trial.

[62] *House votes to impeach all current Justices*, West Virginia Record, August 13, 2018. https://wvrecord.com/stories/511530305-house-votes-to-impeach-all-current-justices

[63] The impeachments that took place during the Civil War and Reconstruction are: Charles Robinson of Kansas, 1862 (acquitted); Harrison Reed of Florida, 1868 (never tried); William Woods Holden of North Carolina, 1871 (removed); David Butler of Nebraska, 1871 (removed); Powell Clayton of Arkansas, 1871; Harrison Reed of Florida, 1872 (never tried); Henry Clay Warmoth of Louisiana, 1872 (never tried); Adelbert Ames of Mississippi, 1876 (resigned); William Pitt Kellogg of Louisiana, 1876 (acquitted).

[64] *See, e.g.*, John R. Dunne & Michael A.L. Balboni, *New York's Impeachment Law and the Trial of Governor Sulzer: A Case for Reform*, 15 Fordham Urb. L.J. 567, 568-70 (1987); *see also* Samuel P. Orth, *The Boss and the Machine* 119-32 (1921) ("No episode in recent political history shows better the relations of the legislature to the political machine and the great power of invisible government than the impeachment and removal of Governor William Sulzer in 1913….The proceeding was not merely an impeachment of New York's Governor. It was an impeachment of its government.").

[65] The impeachments that took place between 1900 and the New Deal are: William Sulzer of New York, 1913 (removed); James Ferguson of Texas, 1917 (removed after criminal indictment); John Walton of Oklahoma, 1923 (removed); Henry S. Johnston of Oklahoma, 1927 (impeachment invalidated by Oklahoma Supreme Court); Henry S. Johnston of Oklahoma, 1929 (removed); Huey P. Long of Louisiana, 1929 (acquitted).

[66] *See* In the Matter of the Impeachment of Evan Mecham, *Report of the House Managers in the matter of the impeachment of the Honorable Evan Mecham, Governor of the State of Arizona*, Ariz. H. Res. 2002 (Feb. 8. 1988).

[67] *See* Ronald J. Watkins, *High Crimes and Misdemeanors: The Term and Trials of Former Governor Evan Mecham* 312, 348-58 (1990) (describing the conclusion of the trial and the removal on April 4, 1988).

Similarly, the Illinois legislature did not begin impeachment proceedings against Governor Rod Blagojevich until Governor Blagojevich was arrested on federal corruption charges.[68] Contrary to the historical application of impeachment, Illinois, which defines its constitutional standard for impeachment as "cause", did not agree on a controlling evidentiary standard.[69] The Illinois General Assembly impeached Governor Blagojevich based on a substantial totality of evidence of conduct that fit squarely within one of the two enumerated grounds for impeachment in the United States Constitution – "bribery" – and went to the heart of what constitutes an impeachable offense – the corruption or subversion of the political process.[70]

Modern impeachments of other state officials tell a similar story. In 1941, Daniel Coakley, who had been elected to the Massachusetts Governor's Council, was impeached and removed for selling pardons.[71] In 1958, Tennessee Judge Rawlston Schoolfield was impeached and removed for bribery and corruption.[72] In 1984, Nebraska Attorney General Paul Douglas was impeached but acquitted on charges related to his office's handling of an investigation of a failed bank, including allegedly lying to investigators about his dealings concerning the bank.[73] In 1989, A. James Manchin, the State Treasurer of West Virginia was impeached for alleged improprieties related to the state's investment fund.[74] He resigned before trial.[75] In 1991, Kentucky's Commissioner of Agriculture, Ward "Butch" Burnette, was impeached and then resigned after being convicted and imprisoned for corruptly putting an employee on his payroll before she started work.[76] In 1994, Rolf Larsen, a justice on the Pennsylvania Supreme Court was impeached and removed after he was convicted of crimes related to a scheme by which he had prescriptions unlawfully written in the names of court employees.[77] In 1994, Missouri Secretary of State Judith Moriarty was impeached and removed after she was convicted of having illegally used her office to help her son in an election.[78] In 2004, Nevada State Controller Kathy Augustine was impeached for alleged offenses related to the use of her office.[79] The Nevada State Senate convicted Augustine but declined to remove her and instead issued a censure.[80] In 2005, University of Nebraska Regent David Hergert was impeached and removed for offenses related to his campaign for office.[81] In 2018, the entire West Virginia Supreme Court was impeached over allegations of misusing their positions. Most of the impeached justices resigned or retired; one was censured.[82]

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[68] *See Final Report of the Special Investigative Committee*, 95th Ill. Gen. Ass., at 8 (Jan. 8, 2009). Rod Blagojevich was arrested by federal agents on December 9, 2008; the House of Representatives then created the Special Investigative Committee on December 15, 2008. *See id.* at 1, 8.
[69] Ill. Const. Art. IV, § 14.
[70] U.S. Const. Art. II, § 4; *see Final Report of the Special Investigative Committee*, *supra* note 114, at 8-9 & nn.30, 31.
[71] *Coakley Ousted: Guilty on 10 Counts*, The Boston Daily Globe, June 14, 1941.
[72] *Raulston Schoolfield, Impeached Judge, Dies*, The New York Times, October 8, 1982.
[73] 19 *Creighton Law Review* 357 (1986)
[74] *Manchin Impeached but Vows to Stay On*, The Free-Lance-Star, March 30, 1989.
[75] *Treasurer of West Virginia Retires Over Fund's Losses,* The New York Times, July 10, 1989.
[76] *Jailed Official Resigns Before Impeachment Trial*, Orlando Sentinel, February 7, 1991.
[77] *Rolf Larsen, disgraced Pa. Supreme Court justice, 79,* The Philadelphia Inquirer, August 13, 2014.
[78] *Supreme Court Impeaches Moriarty,* UPI, December 12, 1994.
[79] *Augustine goes back to work today Senate concludes impeachment trial with censure; does not remove state controller from office,* Tahoe Daily Tribune, November 5, 2004.
[80] *Id.*
[81] *State v. Hergert*, Supreme Court of Nebraska, No. S-06-425. July 7, 2006.
[82] *WV Supreme Court Stopped Impeachment of Justices Almost 2 Years Ago*; Charleston Gazette-Mail, February 4, 2020.

Perhaps even more informative are three situations in recent history in which impeachment of an elected official was threatened but averted. In 2009, South Carolina Governor Mark Sanford faced impeachment for leaving the state on a secret trip to Argentina to see his mistress and misuse of state resources. The House committee tasked with investigating the allegations and making a recommendation on impeachment decided not to recommend impeachment and instead recommended censure, concluding that Governor Sanford's conduct was not sufficient to meet the constitutional standard for impeachment."[83] In 1994, Governor David Walters of Oklahoma faced possible impeachment after he was indicted on eight felony counts, including perjury and conspiracy, and resolved the charges by pleading guilty to a misdemeanor campaign finance violation.[84] In light of this result, the Oklahoma House of Representatives concluded that impeachment was not warranted.[85] In 1985, Alaska Governor Bill Sheffield was also investigated by a criminal grand jury for alleged political corruption. The grand jury subsequently declined to indict him, but formally referred the matter to the Alaska Senate (which initiates impeachment under the Alaska Constitution).[86] Although the grand jury recommended impeachment, the Senate rejected that recommendation, concluding that there was not sufficient evidence that Bill Sheffield had committed an impeachable offense.[87]

These modern impeachment proceedings and investigations evidence and confirm that state legislatures generally initiate impeachment proceedings only after a prior criminal indictment or arrest for substantial criminal behavior related to the official's office and not for personal transgressions, and moreover, that the dire remedy of impeachment is to be applied only when there is a serious criminal offense or similar wrongdoing that corrupts or subverts the political process or constitutional form.

CONCLUSION

In considering the impeachment of a sitting Attorney General of South Dakota, the House must be mindful that it could be embarking on a course of historic dimension. It is considering whether to undo a popular election. It is considering whether to breach the balance of powers between the Legislative and Executive Branches. It is considering whether to cripple permanently future executive officials in South Dakota. The Constitution of South Dakota mandates, and history instructs, that impeachment of a duly elected executive branch official is warranted only upon clear and convincing proof of evidence of serious crimes or other egregious misconduct related to his office that has seriously crippled the administration of justice in all its

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[83] *See* Shaila Dewan, *South Carolina Panel Rejects Impeachment of Governor*, The New York Times, Dec. 9, 2009, at A28.
[84] *See* Mick Hinton, *Bid to Impeach Walters Defeated, House Votes 52-47 Against Investigation*, Daily Oklahoman, Feb. 10, 1994, at A1; Ellen Knickmeyer, *Oklahoma Governor Survives Impeachment Fight*, Assoc. Press, Feb. 9, 1994; *cf.* Arnold Hamilton, *Statewide Grand Jury Calls on Lawmakers to Impeach Walters*, Dallas Morning News, Dec. 10 1993, at A34.
[85] *Id.*
[86] Alaska Const. Art. II, § 20.
[87] *See Alaska Senate Clears Governor*, Chi. Trib., Aug. 6, 1985, at C3; *Panel in Alaska Advises Ending Bid to Impeach*, N.Y. Times, Aug. 4, 1985, at A1.

departments. Impeachment of a duly elected Attorney General for actions unrelated to his office would set a dangerous precedent that could have far-reaching consequences.

Respectfully,

/s/

Ross Garber*

c: Sara Frankenstein, Esq.

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