

UVA LAW | What Is Impeachment?

MICAH SCHWARTZMAN: I'm Micah Schwartzman I'm the director of the Karsh Center for Law and Democracy, which is a relatively new center at the law school, and I'm here to host this session on impeachment. We're running a series, a faculty-student discussion series. There'll be three of these events. This is the first of them on the question what is impeachment.

We'll have a second session about a week from now, and you should look for the-- there's a poster outside, and you'll see, I think in the email that's gone around about this series, the second one will be about the nature of corruption and bribery and what kinds of offenses count for purposes of the impeachment power, and then lastly, we'll have a session on national security and impeachment.

So our basic format is to have two members of the faculty discuss their thoughts on these topics for about 10 or 15 minutes a piece, and then we'll open things up for questions for about half an hour, and that'll be that. It's a chance for you to talk to some members of the faculty and for them to give us their thoughts based on their expertise on these matters and then to have a discussion about them.

So today we have with us Sai Prakash, who teaches constitutional law and specializes in presidential powers, and Fred Schauer, who also teaches constitutional law and who specializes in everything. And thanks to all of you for being here on this Monday afternoon, and after they've talked for a little while, I'll open things up to questions and invite you to share your thoughts. Thanks.

SAIKRISHNA

Can you hear me? All right, so it's a pleasure to be with you today for this late lunch, and I

PRAKASH:

won't mind at all if you close your eyes and meditate during our talk here. I've been asked to talk about what is impeachment, Fred as well. I'm just going to describe the origins and briefly describe the process and sort of introduce you to the whole topic. I'm sure many of you are well aware of it, but some of you may not be.

So impeachment is a process that comes from Great Britain. In Great Britain, the House of Commons could impeach. They would take a vote on articles of impeachment, and then they would appoint managers who would then go argue the case before the House of Lords. In Great Britain, anybody in the realm could be tried in this way. It was just a trial. Anybody could be tried in this way. You did not need to be an executive officer. You did not need to be a judicial officer. Just a common person could be tried in this method.

And the punishment could be anything, right? There was no limit on the types of punishment. It was just basically a criminal trial in held in parliament through this process of the House of

Commons impeaching and then the House of Lords trying. And so the Parliament had judicial power. We all know that the House of Lords was the highest court in the land. But this was a way of starting the process in a sort of different method, not using the King's Bench, but using - not using the King's courts, the King's judges, but using the House of Commons itself.

And so that process found its way to the colonies, and it found its way into several state constitutions. And when they created the Constitution in Philadelphia, they decided they were going to have two chambers, the House of Representatives and the Senate, and they decided to recreate impeachment, but they did so with certain changes. First, only certain people could be impeached and removed, or rather impeached and tried. They had to be officers of the United States, which means that we no longer, people in this room, unless you're an officer of the United States, you can't be impeached by the House or convicted by the Senate because they've limited the scope of who can be covered by the process.

And then secondarily, they no longer made it possible for the Senate to order some jail or order that someone be hanged and what have you. The Constitution itself provides that the punishment for impeachment shall be removal-- shall go no further than removal from office and disqualification from holding future office. So we can't have a tower of London where the Senate puts people in irons after a trial, although there actually is a tradition of either chamber putting people in jail, but that has to do with their contempt power, something we're not going to talk about today.

So they limited who can be impeached and tried, and they limited the types of punishments. And so our constitution says officers of the United States early on, they discussed the possibility that a senator could be impeached and tried, and they basically decided no, senators aren't officers of the United States within the meaning of the impeachment clause.

Ever since then, it's been executives and judges who have been subject to the impeachment process. My understanding is that the House has impeached 17 people. The Senate has convicted eight of those people. The people convicted are all judges, although two presidents have been impeached by the House, they were not convicted by the Senate, Andrew Johnson post Civil War and then Bill Clinton in 1999. Neither of those people were convicted by the Senate.

So it's a very elaborate process for removing someone from office. It's seldom invoked, in part because it takes so much of the House's energy and then the Senate's energy to actually pull

it off. I think for the most part, people in Congress hope that people resign rather than forcing Congress to go through this process. And oftentimes, executive branch officials will resign if they see the handwriting on the wall.

That's probably why Nixon resigned. He was told by his Republican colleagues that he would be convicted, and he decided not to go through that humiliating process. Other times, presidents decide to put people to the test. Obviously, Johnson and Clinton decided to do that. But more often than not, people resign rather than going through this process. Because judges have such a secure tenure, they can't be fired by ordinary means, you know, impeachment's more typically used for judges.

So I don't know, how long have I gone on here, Mike? Have I gone 10 minutes? So you know the big question of the day I think is, you know, has the president committed a high crime and misdemeanor? Has he committed treason, bribery, or high crime and misdemeanor? And you will hear different things from different people, and it's generally influenced by their perception of the president. That's often the case.

Impeachment is a judicial process, but it's also a political process, and I think there's some people who argue that it's got to be a crime. Nixon's attorneys tried to argue that. Other people will say, of course, it doesn't have to be a crime. If you abused your office or show yourself to be unfit for office, they can impeach you for something that isn't a crime.

I have the view that it doesn't have to be a crime, that the phrase high crime and misdemeanor isn't a reference to crimes themselves, but to some act that's sufficiently worthy of condemnation by the House and the Senate. And so you don't need to prove a crime. But many people, I think find the idea of a crime comforting in the sense that if they think the officer has committed a crime, it seems more shut and dry, that the person ought to be impeached and removed.

Of course, those of you who have read about the Clinton episode know that you can be guilty of a crime, but not be removed from office, because there's some element of politics that goes on. There's some sense, certainly from the Clinton impeachment scenario where Democrats, I think, concluded that maybe Clinton committed a crime, but it wasn't-- the crime itself wasn't worthy of removal because he committed a crime to protect his wife and his daughter from the sordid details of an affair with an intern in his office.

And so there's going to be a lot of argumentation about whether Trump committed an

impeachable offense, and we'll wait and see.

FRED SCHAUER: OK, so thank you all for coming. So Mike introduced me as someone who teaches and occasionally writes about constitutional law, but that's not why I'm here. I'm here is an evidence person. And in fact, as some of you know, I will leave this event and will go to evidence class. So I'm here largely to talk about evidence, procedural dimensions, and so on.

So if there is an impeachment, then after that, under Article 1 Section 3 Clause 6 of the Constitution, if there is an impeachment, then there is a trial in the Senate, a trial in the Senate in which the Senate can convict by a 2/3 vote. And importantly, the Constitution says sole power to try all impeachments is in the Senate. For impeachments of the president, the presiding officer is the Chief Justice of the United States.

So that's the bare bones of the procedure. There are a couple of interesting issues that come out of that. One of them, and perhaps the most important of them, confusingly comes out of the case of *Nixon v. The United States*. I say confusingly, because Nixon was not Richard. Nixon was Walter Nixon, United States District Judge in Mississippi. And Walter Nixon was impeached, and then there was a trial in the Senate.

And Walter Nixon challenged the procedures for the trial in the Senate. He claimed that-- I should mention, just as an aside, the impeachable offense was perjury. The perjury came out of a number of events in which Walter Nixon had tried to interfere in a state criminal proceeding. Having interfered or tried to interfere in a state criminal proceeding, he was then asked to testify about this before a grand jury, at which grand jury hearing he lied.

So Walter Nixon claimed that the trial before the Senate was a trial, and by granting the power to try to the Senate, it was required that all of the senators be there, all of the senators preside over the taking of evidence and the like. The Senate had decided that it had better things to do. So in accordance with the Senate rules about impeachment, it had created a committee, a subcommittee of senators to hear the evidence and then make a recommendation to the full Senate.

The issue before the Supreme Court in *Nixon v. The United States* was not the issue of whether that was proper but rather whether the decision about whether it was proper was to be made by the Senate or to be made by the courts. So here, for the benefit of those of you who are 1Ls that have not yet confronted this issue, this implicated what is known as the political question doctrine.

The political question doctrine is not about questions that are political, as you might think from the name. Rather, it is about questions that are held by the courts and by the Supreme Court to be for the political branches of governments and not for the judicial branches of governments. The Supreme Court in *Nixon v. The United States* said that partly because of difficulties in a court making these determinations, but mostly because of what is known as a textually demonstrable commitment to a coordinate branch of government, these were decisions to be made entirely by the Senate.

Most of what the court talked about was the word sole, and the court said, whether they were right about this is contested, that by giving the sole power of impeachment to the Senate, that meant that the Senate could make all of the rules and that the courts would quite simply not be involved except for the fact that the Chief Justice would preside over the impeachment of the president.

So what we wind up with as a result of *Nixon v. The United States*-- that's 1993-- is a situation in which the Senate decides what the procedures will be. There are elaborate Senate rules that have been in place for some time about what the procedures will be, and those are the procedures that determine how everything will go on. It turns out that in many respects, consistent with what Sai was saying and consistent with the fact that the word try is there in the Constitution, however political a process it may be, at least according to the Senate rules, it more or less-- and the less is as important as the more-- it more or less looks like a trial.

There is a committee of prosecutors. There are defense counsel. There is evidence that is taken. There is cross examination. There are a whole bunch of things of this variety that sort of resemble a trial, despite the fact that perhaps in the most interesting dimension, it's not a trial. That is, in the normal course of things, the jury at a trial does not get to determine what is or is not a crime.

Here, the Senate largely determines what is or is not a high crime or misdemeanor, but other than that, in many respects, it looks like a trial. So if there is going to be a trial in the upcoming weeks or months or whatever, the Chief Justice will preside. Interesting aspect of this is that the Chief Justice, who has an extraordinary academic record, an extraordinary record as an appellate lawyer, an extraordinary record as an appeals court judge, to the best of anyone's knowledge has never actually tried a case and has never sat as a judge in a trial.

Many judges wind up as court of appeals judges by virtue of having been a federal district judge. That is not the case with Chief Justice Roberts. I don't even know whether he took evidence or not. I assume yes, but I have no way to find out, at least no legal way to find out. But he will preside.

One of the interesting dimensions of this, for those of you who know or are learning something about evidence, is that evidentiary rulings are largely made in the context of objections. There will be objections to evidentiary rulings, evidentiary rulings at least what we know about the potential upcoming case, may involve questions about whether hearsay evidence can be taken, may involve questions about personal knowledge, may involve constitutional questions about the right to confront and cross-examine, may involve a whole bunch of other things.

In the first order of business or in the first iteration of all of this, there might be an objection to some form of evidence, and then the Chief Justice presiding will make an evidentiary ruling. What happens then? In a normal trial, when the trial judge makes an evidentiary ruling, except for the very rare cases in which they are appealed, that's that.

It turns out that under the rules of the Senate, if there is an evidentiary ruling, that can then be challenged or appealed to the full body. That did not happen once in the Clinton trial. It did happen some number of times in the Andrew Johnson trial. So there is the possibility out there that Chief Justice Roberts will make an evidentiary ruling. One member of the Senate will then stand up and say, well, based on my experience as a trial lawyer, that's an incorrect ruling as a matter of evidence, and then the full Senate will determine whether that's a correct ruling or not. Whether that happens, we don't know.

So one question is how evidentiary matters will be dealt with. Another question is the extent to which, if at all, the normal rights that one would expect a defendant in a criminal proceeding to have. So I mentioned confrontation briefly. That is the Sixth Amendment right to confront and cross-examine opposing witnesses. That's a big deal in evidence law at the moment, as some of you know and the rest of you will know next week. That's a big deal in evidence law.

But there is a question whether the president on trial would have a Sixth Amendment right to confront and cross-examine witnesses. There is a question whether the president on trial would have the right of refusal of self incrimination, that is the right not to take the stand, the claim the Fifth Amendment rights. There are a bunch of other due process rights, Fifth Amendment rights, Sixth Amendment rights, and so on that might be applicable. But we don't

have an answer to the question of whether a president would be entitled to them. What we do have an answer to is presumably, the senate's decision on all of this will be final.

One final observation about all of this. This is a little bit of my pet peeve. Some of you have heard this pet peeve before. So if you accept the view that this mostly looks like a trial, subject to some important differences, and if you accept the view that in mostly looking like a trial, the impeachment process is mostly analogous to grand jury indictments, and that trial before the Senate is mostly analogous to a criminal trial, which means that the members of the Senate are sitting as jurors, then what should we expect of senators prior to the actual trial?

In a normal criminal trial, if a juror announces in advance her or his view about the guilt or innocence of the defendant before the trial has even started, they will be immediately excluded as a juror, with the possible exception of Senator Sanders, who at least has mentioned the word juror and has occasionally been a little bit reluctant to express a view about this. All of the other sitting senators who are now running for president have already expressed a view about the guilt or innocence of the defendants.

That's curious. And maybe it's right. Maybe it's wrong. You can think about that. I am troubled by it, not only because of the analogy to a criminal trial, but even in the absence of the analogy to a criminal trial, we might expect a deliberating body of any variety to at least try to keep an open mind prior to hearing the evidence. We haven't seen that. I'll stop at that.

MICAH

So we have about half an hour, a little more than that for questions. The floor is open. If you

SCHWARTZMAN:

have questions, I'll call on you. I was going to say, if you don't have questions, I have lots of notes. Yeah, go ahead.

AUDIENCE:

So there's been some speculation, despite Senator McConnell's insistence to the contrary, that, if the House votes to impeach, the Senate might not hold a trial. Is there any chance of that happening? And, if it were to take place, would there be any recourse?

SAIKRISHNA

Well, I think, given what he has said, I don't think it's going to happen. Is there a requirement that the Senate conduct a trial after the House impeaches? I think, you know, if you're an originalist, you might think the implicit answer is yes. But you know, I think we've seen other instances where you might think the Senate had an obligation to do something, and they didn't do it. I'm referring to the treatment of nominees to various federal benches, but also executive branch appointments, et cetera.

PRAKASH:

That's been going on for at least the century where presidents have nominated people, and they've just made them cool their heels until the president leaves office. So I don't think we're going to have to confront that question, because McConnell has said there's going to be a trial.

FRED SCHAUER: So I think that's right. If the Senate decided not to have a trial, at least a fair reading of *Nixon v. The United States* would suggest that that's not reviewable. Senator McConnell has never asked for my advice on anything, but if that's what he wanted to do, and if he asked my advice, I would probably suggest to him that he conduct a proceeding that looked somewhat like a motion to dismiss.

That is, one way to avoid the trial would be to have right at the very beginning a senator to essentially make a motion that the indictment was insufficient to state the elements of a crime or something of that sort, then have the Senate vote on the motion to dismiss, and now, that gets in tricky issues of where the majorities are in everything else, but there might be procedurally slightly easier ways of doing it, rather than just saying no.

MICAH Before you ask, can you grab a mic?

SCHWARTZMAN:

AUDIENCE: This is a question about the Senate procedure and getting back to how evidence might be disposed of. What is the vote threshold going to be on these questions? Is it going to be a majority vote, or are these subject to a 60 vote threshold as many Senate votes are?

FRED SCHAUER: My understanding-- I don't have the rules in front of me, but my understanding is that it is majority vote, and my understanding is that it was majority vote during the Johnson trial. I might be wrong about that, but I think it is majority vote on evidentiary rulings, even though it is a super majority for conviction.

AUDIENCE: Various members of the executive branch have stated that they will refuse to appear before the House during the impeachment inquiry. What power does the House have to compel them to come in that sense?

SAIKRISHNA Well, the House has the Sergeant at Arms. And in the past, they've used the Sergeant of Arms
PRAKASH: to arrest people and put them in jail if they don't want to testify. And I think if you read the papers, there are Democrats saying that they will do that. So they could do that. That's a measure of self-help.

They could also go to court and try to compel testimony by having the courts intervene. The problem with that approach is it will take months to resolve. So I don't think that they'll be able to compel someone to testify. I mean, I don't think they'll be able to compel someone to testify in the short term, because I don't think they're going to jail people. And of course, you can jail someone, and they still won't testify.

The whole point of jailing them is to get them to testify. It's a contempt procedure. So having said all that, the president can't really stop someone from testifying, right? And I think despite his counsel's letter, some people that you might have thought were covered by it testified.

FRED SCHAUER: I mean, that suggests-- there's been a lot of talk over the last couple of months about supposed constitutional crisis. My own view is that a procedure that is actually provided for in the Constitution is not a constitutional crisis. A constitutional crisis might exist under circumstances of extreme disobedience to highest court orders.

So I look around the room, there aren't that many people here who are likely to remember the Watergate era and talks about constitutional crises at the time. But at least, there was some talk at the time of constitutional crisis when there was discussion of the possibility that Nixon, President Nixon, Richard Nixon, not Walter, while still president would disobey a Supreme Court order.

So the president was ordered to turn over some number of records, mostly tapes to the investigation. The president then claimed executive privilege. That case went to the Supreme Court. During the Supreme Court argument and just after the Supreme Court argument, the president's lawyer, James St. Clair, prominent Boston lawyer at the time, was asked the question, if the president loses, will the president comply with a Supreme Court order to turn over the documents.

St. Clair then said cryptically, "We must never forget that the president has his own constitutional obligations." Shortly, thereafter, there was an outcry against that, and the president caved. That is, the position changed. The position of the administration was if we lose before the Supreme Court, and the president, by name, in particular, is ordered to turn over the documents, the president will do so.

But at the time, there was a worry. What if the president doesn't turn over the documents under those circumstances? That's a genuine constitutional crisis. So under those

circumstances, a court can summon the court's intrinsic enforcement authority. That is, it can summon the its power to have a Sergeant at Arms, or more accurately, in this context, the United States Marshal service, actually enforce a court order.

But what people worried about at the time is what if the United States Marshal service, even all of them, show up at the White House to enforce the order, and the president says no. At that point, we can imagine that there is a fundamental foundational conflict in which on the one hand, we have the United States Marshal service with about 2,000 members, and on the other side, we have the Army, Navy, Air Force, and the Marines, and then we come down to the final question of is ultimate authority even in a democracy, ultimately a matter of who has the final repository of force?

We've never come to that here. Put aside the Civil War and the like, we've never come to that here. But if you look at recent events in various countries throughout the world, this happens. I think that's what a lot of people mean when they talk about a constitutional crisis, as in Egypt, 10 years ago roughly, in which at the exact same time, there were two different competing forces both claiming to be the constitutional force of the governments. Basically, the military made that decision.

We haven't come to that recently and probably would not have in 1974, but that's a real constitutional crisis, probably not just going through the impeachment procedures as set forth in the document.

AUDIENCE: I can't remember the Clinton impeachment very well, but I remember some of it being live on NPR. Can you speak about how public this process will be? I know there's criticism now of how private the process is at the moment.

SAIKRISHNA
PRAKASH: Well, the House has rules that allow the taking of testimony in private, and that's what they're choosing to rely upon. I don't think there's any suggestion that the Senate's going to conduct a secret trial of the president. And a lot of his concerns will be, I think, met in that forum. So I don't suspect that the whistleblower will be kept secret at that point. I mean, Senator Graham has said that they're not going to allow someone to make a claim against the president without revealing who they are and their background.

FRED SCHAUER: The Senate rules on Senate trials of impeachment-- I don't the exact language in front of me-- but says something to the effect of the doors shall be open. That is, at least the proceedings are as public as normal senate proceedings. That doesn't say anything about whether they will

be on radio or on television or who can come or any of that, but at least according to the Senate's own proceedings and implicitly according to the Constitution, they can't be secret.

SAIKRISHNA

There's no way they're going to have a secret trial. All those senators want to be on TV. It's

PRAKASH:

just not going to happen. To go back to Fred's earlier comment about defying a judicial order, I think what's a constitutional crisis is really just in the eye of the beholder. And I mean that in the following sense.

What you might have thought was a constitutional crisis 200 years ago, like a president starting a war, is no big deal anymore. And if you look at this particular context, the House is acting as a grand jury. The Senate's acting as a petite jury. They are a court of sorts, and if the president ignores the order, you might have thought in a different era that was a constitutional crisis. But presidents have long defied subpoenas issued by Congress, maybe not impeachment subpoenas, but other subpoenas.

And so I think people almost expect-- the counsel's letter from the president was written in very interesting ways. But I don't know if it came as a big surprise to people that the president's not going to cooperate.

FRED SCHAUER: And it is interesting, one of the things that makes this process perhaps more political than legal

is in a normal criminal trial, we don't expect the defendant to cooperate with the prosecution.

The defendant just says, I am taking the Fifth and leaving it at that. Whether that analogy carries over, we don't know.

SAIKRISHNA

Well, my advice to the president is not to say I'm taking the Fifth.

PRAKASH:

AUDIENCE:

So Professor Prakash, I know you mentioned that your view on high crimes and misdemeanors is that doesn't require a crime, but there's sort of been dispute as to that. Is that dispute something that's judicially reviewable, or is that up to the Senate to decide?

SAIKRISHNA

I mean, I think Fred's absolutely right. The courts aren't going to intervene and decide what a

PRAKASH:

high crime and misdemeanor is. That is to say if the president is convicted, and he says it's not a high crime misdemeanor what you convict me of, he'll be out of luck. It will be President Pence at that point, and the court's not going to reinstate him to office.

FRED SCHAUER: I mean, if as in *Nixon v. The US*, if the court is not going to touch issues of procedure, which

we would think courts are good at, then it's certainly not going to touch issues of what's the ultimate substantive issue of is this a crime or not.

AUDIENCE: Sorry. Is there a burden of proof in an impeachment trial, and if so, how does that work when there aren't any elements? And if not, how does a trial work without a burden of proof?

SAIKRISHNA I'll let you handle this one.

PRAKASH:

FRED SCHAUER: There is no specified burden of proof. Because there is no specified burden of proof, there is nothing explicitly saying to the 100 members of the Senate, you should find the defendant guilty, if and only if you are convinced beyond the reasonable doubt. So as between beyond the reasonable doubt, clear and convincing evidence or a preponderance of the evidence, once again, we don't know. Once again, it's inconceivable that this would be reviewable by the Supreme Court.

And I think the implicit understanding is that each member of the Senate should make her or his own decision about what the burden of proof ought to be for that senator's vote.

AUDIENCE: Are there any implications of timing in terms of with the parallels to a criminal trial, a right to a speedy trial, and then also in the instance of timing about how long impeachment proceedings may or may not take with the impending national election? Just I'm thinking about the actual kind of constitutional legal framework of the timing of the process.

SAIKRISHNA Well, I don't think there's any claim that there has to be a speedy trial. I suspect that people will say there has to be a speedy trial one that favors them politically, and when it doesn't, they won't. I think you're right that the Democrats are thinking about the election calendar in two different senses. I don't think they're going to want to have an impeachment in September of next year, because it will appear to be an odd thing to do when the people are about to vote on Trump in another way.

So I suspect that they'll move sooner rather than later, and I don't think that the Senate's going to dilly dally with holding the trial or delaying it in some way. But I think Fred's got it right. The Constitution says the House tries, and the Senate-- sorry, the House impeaches, and the Senate tries. It doesn't really specify a lot more beyond that. It's not clear the extent to which all the protections found in the Bill of Rights related to procedure are supposed to apply to impeachment.

So I suspect if someone is talking about a speedy trial, they just want to get this over with. And if someone denies that there's such a right, they want to prolong it.

FRED SCHAUER: It will be an interesting case study for the extent to which formal legal language in the Constitution with formal legal implications spills out into the larger debate and spills out into the larger culture. Just as lots of people these days talk about the First Amendment in contexts in which the First Amendment does not apply, the First Amendment, for example, does not apply to the National Basketball Association. It's a private entity.

But we have seen over the last 100 years a form of public discourse in which the First Amendment that technically applies only to governmental institutions now applies across the board. There may be a similar thing that will happen if impeachment becomes more public. Will formal criminal procedure protections, Fifth Amendment, Sixth Amendment, speedy trial, proof beyond a reasonable doubt, presumption of innocence, and everything else will as a matter of public discourse, will they spill over into public discourse even if they are not technically applicable in the same way that the First Amendment has spilled over into public discourse even if not technically applicable? This remains to be seen.

And it's likely to be political. We certainly see even these days in vast numbers of different contexts, someone who has been accused of something outside of the criminal process, making claims about the presumption of innocence, we're likely to see the same thing here.

AUDIENCE: I have a question.

FRED SCHAUER: OK.

AUDIENCE: I wonder if you could say something a little more about high crimes and misdemeanors, recognizing that the definition ultimately is in the hands of the House and the Senate, but when it comes to drafting articles of impeachment, how the two sides are likely to understand these terms constitutionally outside the courts, I mean, what the tradition or precedence is.

FRED SCHAUER: OK, so let me-- Sai knows more about this than I do. Let me just say one very brief thing. The language is not just high crimes and misdemeanors. It's treason, bribery, and other-- and, or is it or?

SAIKRISHNA And other high crimes and misdemeanors.

PRAKASH:

FRED SCHAUER: And other high crimes and misdemeanors. So indulge me for committing an act of statutory interpretation. There is a maximum statutory interpretation, a ejusdem generis, E-J-U-S-D-E-M, new word, G-E-N-E-R-I-S, that says that where there is a general term followed by specifics, the general term should be interpreted in light of the specifics that are given.

So that maxim would say that, in determining what is a high crime and what is a misdemeanor, it should be things that look like treason and bribery.

SAIKRISHNA

I think people will make arguments about what the standard is based on I think their

PRAKASH:

perception of whether Trump needs to go or not. I think that's just natural. We saw that during the Clinton impeachment where Republicans emphasized that the president had committed a crime, and Democrats emphasized that the crime, if there was a crime at all, had to relate to the office in question. And they claimed that the crime the president committed, President Clinton, didn't relate to the office.

I have a view. It's very broad. Gerald Ford once said it's whatever the House thinks is impeachable is impeachable. And a lot of law professors criticize that. I think it really depends on what he meant by this. I think if the House thinks that someone is not fit for office, I think they can find that to be a high crime misdemeanor, and what do they mean by that? I think it could be an abuse of authority. It can mean something as simple as a crime.

There is an interesting book out by Cass Sunstein written about a year or two ago about the whole impeachment process, and he says murder is a high crime and misdemeanor, even though it doesn't relate to the office. But he doesn't think that everything that could be a crime that doesn't relate to the office would be impeachable. I think he says that not paying your taxes is not an impeachable offense.

I would be inclined to think they both are. Again, if the House and the Senate conclude that whatever you've done suggests that you're not fit for office, that seems like a fine standard to me. So I don't agree with-- I think Fred's argument might suggest. And I'm not saying Fred believes it, but it might suggest that it has to be a really important crime or something super, super serious.

Now, murder, of course, is super serious, but it certainly doesn't relate to the office necessarily. I'd be inclined to give it a very broad ambit. I think that impeachment, as Thomas Jefferson said, is a scarecrow. It's rarely used, and I think, in part, because the conviction

threshold in the Senate is so high. And that does most of the work. you have this wonderful process laid out in the Constitution that's meant to police who gets to serve. But it's very hard to roll out because it's so involved, and then you've got this ridiculously high threshold in the Senate, and that's what's, I think, prevented the House and the Senate from impeaching and convicting more people.

FRED SCHAUER: You raise an interesting question about assume that you are a member of the Senate, assume that you are an open minded conscientious member of the Senate.

[LAUGHTER]

SAIKRISHNA Why are we laughing, Fred?

PRAKASH:

FRED SCHAUER: We're in the realm of the counterfactual here, but is it permissible to aggregate smaller crimes? This turns out-- as those of you who were in my evidence class know-- to be a big issue at the moment in some number of non-political trials. It's an issue now before the Pennsylvania appellate court in *Commonwealth v. Cosby*. It is an issue likely to come up in *People v. Harvey Weinstein* and some number of other cases. How should a trier of fact and how should a trial deal with multiple events?

One view would say a moderately common scenario in some number of sexual harassment or sexual violence episodes, what if it turns out that there is someone who is probably guilty, but not beyond a reasonable doubt guilty in six or seven or 14 different events? Is it permissible for a jury to say, we can't say that this person is guilty beyond a reasonable doubt in any one particular one, but we can say beyond the reasonable doubt that this person has committed at least one of these?

That's totally impermissible in a criminal trial. Whether it would be permissible in an impeachment trial is an interesting question. That is, if a member of the Senate says there's a lot of stuff that troubles me, there may not be one that all by itself rises to the level of an impeachable offense, proved beyond the reasonable doubt. But there's a lot of stuff that troubles me. There's a lot of stuff that I think is probably wrong. I'm going to aggregate all of them together.

Now we're just in the realm of senatorial conscience, rather than formal law, but it's likely, especially here, to be an issue.

SAIKRISHNA I think Fred's describing what would go on inside a senator's head, not what they would
PRAKASH: actually say.

FRED SCHAUER: That's clearly right.

SAIKRISHNA And if they don't say it, then we don't really know. We don't have to-- we don't know enough to
PRAKASH: know that they don't really think that there is a preponderance of evidence or proof beyond a reasonable doubt in any particular one. To go back to Fred's earlier comment, if you recall during the Kavanaugh hearings, people spoke of about due process and the presumption of innocence. And so there is a sense in which constitutional law not just sort of pervades all kinds of discourse.

And of course, that was a constitutionally described scenario. But I don't know if people had pop before that the presumption of innocence applied in a judicial confirmation.

MICAH We're not going to hold a captive audience. Thank you all for coming to this event.

SCHWARTZMAN:

[APPLAUSE]