ETHICS COMMISSION REPORT

November 2009

SUMMARY

After giving the Ethics Commission report to the House of Representatives earlier this afternoon, Governor Sanford has decided to make public that same document as part of his continued efforts to both fully cooperate with the Commission and share as much relevant information with the public as possible. We believe that when the full story is told, it will be clear that this Administration has kept a consistent eye out for the taxpayer.

It is important to remember that we are still in the early stages of the ethics process, and that we continue to support the Ethics Commission being able to complete their work and then release all findings to the public. The steps are as follows: first, a preliminary report to determine whether or not there was anything even worth looking at (which was not unexpected as allegations had made headlines for months); next, will come our chance to shed light on any remaining questions when the Commission holds hearings; then, their conclusion will follow.

Through this process, we will have the opportunity to show that Governor Sanford has complied fully with the law. For instance, that he has simply followed a legislatively audited and long held practice regarding overseas travel – the same practice accepted over the last 30 years as business class tickets were used by South Carolina Commerce staff, Members of the House and Senate, governors and Secretaries of Commerce on overseas investment trips.

We feel vindicated that in this case the issues of probable cause are limited to about three dozen minor, technical matters that do not include any allegations of criminal conduct. It is also important to remember, as the Ethics Commission has itself emphasized, that a finding of probable cause is not a finding of guilt – and the Governor looks forward to being able to respond to the Commission's questions in the very near future.

We will have more on this over the days ahead, but examples of context to the pages that follow are:

• The Ethics Commission reviewed 772 flights taken by Governor Sanford, and no questions were raised regarding 97% of these flights.

• The Commission examined 622 of the Governor's campaign expenditures from 2005-2009, and no questions were raised in 98% of their findings.

• Of the 37 questions that the Commission is now going to look at, 18 of them involve the use of business class tickets on international business trips – and as mentioned above, this

was the routine and perfectly legal practice of every administration for roughly three decades.

• The Commission reviewed 741 flights on state and private planes. 732 of these flights were found to be fine and in complete compliance with the law. We look forward to addressing the 9 remaining flights as we work toward closure with the Commission.

• Of the 622 campaign expense items considered, only 10 were found to warrant further analysis. Of these 10, half were related to telephone or internet service cost at the mansion, and we look forward to providing additional information in this regard.

• If you total the 10 campaign expenditures in question, they amount to $2,940 – or about 1/45 of one percent of the roughly $13 million raised by the Governor's campaign committees.

The governor has and will continue to fully cooperate with the Ethics Commission, and we look forward to the opportunity to finally present our arguments and evidence to both the Commission and the House Committee to address the few remaining questions they have. We believe that once all of the facts have been considered, it will once again confirm that this Administration has been a good steward of tax dollars and public resources.

Finally, the Ethics Commission's remaining questions must be considered in context. Impeachment is an extraordinary and rare remedy, and, though questions remain that will be fully answered, one thing is abundantly clear: nothing the Ethics Commission is considering rises anywhere near the level of impeachment.

Consider the following:

1) Impeachment is rare.

No governor of South Carolina has ever been impeached. Looking more broadly, in the entire 230-year plus history of the United States, only 16 governors have been impeached and only eight have been removed from office. In fact, only two governors have been impeached in the past 80 years and both of these governors were first subject to criminal felony charges.

2) There is a high bar for impeachment.

The Constitution of South Carolina sets a high standard for impeachment of a governor – "serious crimes or serious misconduct in office" – to make sure only the most egregious offenses would lead to impeachment, and not merely personal moral failings, neglect of duty or a temporary absence from the state. The 1895 Constitution had no clear standard for impeachment, so the "serious crimes" standard was added to avoid impeachment for relatively minor crimes or misconduct.

3) Impeachment is rare for a reason.

Impeachment by definition overthrows the results of a democratically held election. It would also fundamentally disrupt the balance of powers between the Legislative and Executive branches and create a dangerous precedent that could permanently weaken future governors' offices.

4) Temporary absence from the state is not an impeachable offense.

A governor's temporary absence from the state – whether on vacation or otherwise – does not rise to the level of an impeachable offense under South Carolina law. In fact, the state Constitution specifically outlines the automatic, temporary transfer of authority to the lieutenant governor in such a situation. Article IV, § 11 states that "in the event of the temporary absence of the Governor from the State, the Lieutenant Governor shall have full authority to act in an emergency."

5) Impeachment is limited to situations where no other response is adequate.

Impeaching a sitting governor is a seldom used and serious legal action that many have termed "the political equivalent to capital punishment." It is reserved for situations in which no lesser response or reprimand will do.

THE CONSTITUTIONAL STANDARD FOR IMPEACHMENT OF A GOVERNOR OF SOUTH CAROLINA

November 2009

Prepared on behalf of the Office of the Governor of South Carolina

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THE CONSTITUTIONAL STANDARD FOR IMPEACHMENT OF A GOVERNOR OF SOUTH CAROLINA

November 2009

EXECUTIVE SUMMARY

No governor of South Carolina has ever been impeached. In fact, it is rare for any governor to be impeached. Since the founding of our Nation, only sixteen governors have been impeached and only eight have been removed from office. Modern impeachments are particularly rare. In the past eighty years, only two governors have been impeached. Before they were impeached, both of these governors were first subject to criminal charges alleging that they had committed felonies in connection with the performance of their official duties.

The Constitution of South Carolina sets a high standard for impeachment of a governor. The Constitution provides that impeachment is warranted only if a governor has committed "serious crimes or serious misconduct in office." South Carolina deliberately adopted this strict standard to make clear that only the most grievous offenses against the system of government warrant impeachment. A review of South Carolina constitutional history further reveals what does not constitute an impeachable offense: misdemeanors, minor crimes, personal transgressions, neglect of duty and temporary absence from the State.

As explained below, the words "serious crimes or serious misconduct in office" were added to the South Carolina impeachment provision in 1971 to make explicit that only the most egregious and damaging wrongs warrant impeachment. In its original form, the Constitution of 1895 had no explicit standard for impeachment. The committee charged with evaluating potential revisions to the Constitution (the "West Committee") was concerned that the lack of a standard might result in the impeachment of an official for relatively minor crimes or misconduct. The Committee found that even the federal standard applicable to Presidents – "treason, bribery, or other high crimes and misdemeanors" – was not rigorous enough. In response to this concern, the current standard was added to the Constitution with the intent of fortifying the impeachment standard in South Carolina.

The constitutional standard for impeachment in South Carolina makes clear that not every violation of the law will justify impeachment of a governor. Even the commission of a crime will not lead to impeachment unless it is a "serious" crime that subverts or corrupts the system of government. This is consistent with the generally accepted interpretation of the federal standard for impeachment of a President. In connection with the potential impeachment of President Richard Nixon, a Congressional report (the "Rodino Report") noted that "[i]mpeachment 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."

To be sure, impeachable conduct need not necessarily be specifically prohibited by a criminal statute, although it usually is, since impeachment is a remedy only for actions that cause substantial public injury. The Rodino Report concluded that impeachment is appropriate "only for reasons at least as pressing as those needs of government that give rise to the creation of criminal offenses." In his treatise on impeachment, Charles Black noted that "it remains true that the House of Representatives and the Senate 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."

A governor's temporary absence from the State, even if his location is unknown, does not rise to the level of an impeachable offense under South Carolina law. In fact, the South Carolina Constitution specifically contemplates such a situation and provides for the automatic, temporary transfer of authority to the lieutenant governor. Article IV, § 11 of the South Carolina Constitution provides that "in the event of the temporary absence of the Governor from the State, the Lieutenant Governor shall have full authority to act in an emergency." Because of this provision, the State's system of government will not be subverted in the event of a governor's temporary absence from the State because the lieutenant governor, by operation of law, has full authority to act in an emergency. Under the South Carolina Constitution, a governor need not take any affirmative action to transfer power to the lieutenant governor when he or she leaves the State. Article IV, § 11 makes the transfer of authority automatic. In fact, the West Committee considered and rejected a provision requiring the governor to officially transfer power to the lieutenant governor when the governor temporarily left the State.

Even conduct that constitutes a "willful neglect of duty" does not warrant impeachment of a governor under the South Carolina Constitution. Article XV, § 3 of the Constitution provides that "[f]or any willful neglect of duty, or other reasonable cause, which shall not be sufficient ground of impeachment, the Governor shall remove any executive or judicial officer upon address of two thirds of each house of the General Assembly." Although Article XV, § 3 relates to a separate category of state officials, it is one of three sections of Article XV that govern impeachment, and the precise language unequivocally provides that "willful neglect of duty…shall not be sufficient ground for impeachment." Constitutional history supports this reading, since even prior to the strengthening of the standard for impeachment, the West Committee unequivocally found that "[t]he language of this section implies that impeachment shall be only for misdemeanor, high crimes, and treason. Removal of an officer for neglect of duties or other 'reasonable' cause shall be by the Governor…." The West Committee's findings further reveal that this language "should be considered in conjunction with Article XV on impeachment" and that "federal experience has tended to fix impeachable offenses as

indictable offenses." In other words, both the clear language of Article XV and the constitutional history relating to the Article's most recent revisions demonstrate that a neglect or dereliction of duty, even if willful, is not a justifiable ground for impeachment of a governor by the General Assembly.

Just as the standard for impeachment in South Carolina is a high one, the burden of proof that must be achieved to warrant impeachment is also rigorous. For impeachment to be justified, the evidence of impeachable conduct must be "clear and convincing." Particularly since a governor of South Carolina is suspended from office pending trial in the Senate, no lesser standard is acceptable. The "clear and convincing evidence" burden has become the accepted standard in impeachment proceedings. It was the burden agreed to by the House Impeachment Committee in the impeachment investigation relating to President Nixon. It was the standard invoked by Senators as a factor in their decision not to convict President Clinton. It was the operative evidentiary standard in the impeachment of Arizona Governor Evan Mecham. It was the established standard in the impeachment investigation relating to Connecticut Governor John Rowland. It was the standard invoked by members of the House Committee of the Judiciary in the recent impeachment of United States District Court Judge Samuel Kent. It was integral to the Alaska Legislature's decision to rebuff a grand jury's recommendation to impeach Governor Bill Sheffield. It is also the evidentiary standard of proof applied in two South Carolina Supreme Court cases involving the removal of a judicial official and a state official from their respective offices. The "clear and convincing" standard is thus the appropriate evidentiary standard of proof in impeachment proceedings.

There are important reasons why impeachment is so rare, the standard for impeachment is so high, and the proof of misconduct necessary for impeachment must be so rigorous. Impeachment of a governor would overthrow the results of a democratically held election, negating the voters' choice of a chief elected official. It would fundamentally disrupt the balance of powers between the Legislative and Executive branches established by the South Carolina Constitution. It would also create a precedent that could permanently weaken future Offices of the Governor in South Carolina. Indeed, the impeachment process alone is enormously tumultuous. 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."

Impeachment is, therefore, 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. It is no wonder that impeachment has been called the "political equivalent of capital punishment."

FORMAT

This memorandum is divided into three sections:

Section I examines the impact of the impeachment mechanism on South Carolina's separation of powers and on the public's right to choose its leaders through popular election.

Section II begins, in Part A, by summarizing the legal, scholarly and expert consensus regarding the federal constitutional standard of impeachment, which is that impeachment is appropriate only in situations of (i) serious criminal wrongdoing or similarly grave misconduct in office (ii) that threatens our system of government or corrupts or subverts the political process or democratic form and (iii) that is established by clear and convincing evidence. Parts B and C of Section II then demonstrate that the South Carolina Constitution establishes an unambiguously high and rigorous standard for impeachment and that the history of South Carolina's constitutional standard makes explicit that minor crimes, misdemeanors, personal transgressions, neglect of duty and temporary absence from the State do not rise to the level of an impeachable offense. Part D of Section II confirms the high constitutional standard of impeachment through a review of prior impeachments involving state governors and presidents.

Finally, Section III discusses other less drastic means of responding to executive misconduct, both formal and informal, the existence of which confirms that impeachment is a tool of last resort, reserved only for the most serious forms of official wrongdoing.

I. A Strict 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 Three Separate And Coordinate Branches Of Government.

The South Carolina Constitution delineates the separation and balance of powers between the legislative, executive and judicial branches. Article I, § 8 provides: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."[1] The "principle of the separation of the powers of government is fundamental to the very existence of constitutional government as established in the United States."[2] The "division of governmental powers into executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people."[3] It "is a matter of fundamental necessity, and is essential to the maintenance of a republican form of government."[4] As the South Carolina Supreme Court has noted, "no maxim has been more universally received and cherished as a vital principle of freedom."[5]

Impeachment is an "exception to the separation of powers," and, for that reason, must be "narrowly channeled."[6] When the General Assembly 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 imminence of impeachment proceedings."[9] Therefore, "it is utterly vital to the health of our polity" that the General Assembly 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

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[1] S.C. Const. art. I, § 8.
[2] State *ex rel.* McLeod v. Yonce, 274 S.C. 81, 86 (1979).
[3] Id.
[4] Id.
[5] Id. at 87.
[6] Raoul Berger, *Impeachment: The Constitutional Problems* 5 (1974).
[7] Lawrence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 Geo. Wash. L. Rev. 712, 723 (1999).
[8] Id.
[9] Charles L. Black, Jr., *Impeachment: A Handbook* 69 (1974); see also Staff of the House Comm. on the Judiciary, 93d Cong., *Constitutional Grounds for Presidential Impeachment* 19 (Comm. Print 1974) [hereinafter "Rodino Report"] (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.

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 Governor in the State of South Carolina and permanently shift South Carolina'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 a chief 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]

Since all "officials elected on a statewide basis" in South Carolina, as well as all state judges, are subject to impeachment by the South Carolina General Assembly, diluting the constitutional standard of impeachment would also serve as a precedent to undermine the offices, and independence, of both state judges and state-elected officials.[14] With this in mind, weakening our officials by "watering down the basic meaning" 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

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[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 9, 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 7, at 713.

[14] S.C. Const. art. XV, § 1.

[15] Tribe, *supra* note 7, at 716-17.

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 A Chief Executive 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 chief executive, such as a president or governor. Impeachment of an elected chief executive "essentially cancels the results of the most solemn collective action of which" South Carolina "as a constitutional democracy" is capable: the election of a governor.[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 chief 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 this State contemplates that when a chief executive 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 Carolina Constitution provides that: "The Governor shall be elected by the qualified voters of the State at the regular election every other even-numbered year" and "[n]o person shall be elected Governor for more than two successive terms."[22] When "the people at large have chosen by election an officer charged with duties affecting the interests of the entire State, such an officer is responsible to all the people, and there are the strongest reasons why the commission received from the people should not be annulled by removal."[23]

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[16] *Subcommittee Hearings*, *supra* note 11, at 70 (prepared statement of Professor Matthew Holden, Jr.) (emphasis omitted).
[17] Rodino Report, *supra* note 9, 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 7, at 723.
[21] Black, *supra* note 9, at 17, 37.
[22] S.C. Const. art. IV, § 3.
[23] McDowell v. Burnett, 92 S.C. 469, 479, 482 (1912) (holding that a magistrate could not be removed during the two-year tenure of his office without an "indictment and conviction").

As former Chief Justice, William Rehnquist, of the United States Supreme Court, notes, "[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 that end, they established the terms of office…, where they could not be changed by Congress."[24] 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 chief executive's ability to lead. In short, "the impeachment process is not merely about replacing a leader who is at present sagging in the polls…."[25] 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."[26]

C. Separation Of Powers Issues Are Intensified In South Carolina Because A Governor Is Temporarily Removed Upon Impeachment.

A distinct feature of South Carolina'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 Carolina Constitution mandates the suspension of a Governor from office immediately upon impeachment by the House of Representatives.[27] The Governor would resume his post only upon acquittal by the Senate, and the Lieutenant Governor would become Acting Governor in the interim.[28]

Therefore, a decision by the House to impeach would itself disrupt the Executive Branch, breach the separation of powers, and overturn a statewide election, even if the Senate ultimately disagrees that the conduct can be established by clear and convincing evidence or that it qualifies as an impeachable offense. That is likely why, unlike the federal government, South Carolina requires the same overwhelming and "affirmative vote of two-thirds of all members elected" in the House to impeach an elected official as well as to convict the elected official by the Senate.[29] Moreover, in South Carolina, no person can be "elected Governor for more than two successive terms."[30] Therefore, when a Governor is at or near the end of his or her second term in office, impeachment becomes the functional equivalent to conviction and removal. Accordingly, the House cannot view its role as merely a gatekeeper or the counterpart of a grand jury in a

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[24] 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").
[25] Black, *supra*, note 9, at x (forward by Akhil Reed Amar).
[26] Id. at 20.
[27] See S.C. Const. art. XV, § 1 ("Any officer impeached shall thereby be suspended from office until judgment in the case shall have been pronounced, and the office shall be filled during the trial in such manner as may be provided by law.").
[28] See S.C. Const. art. IV, § 11 ("In case the Governor be impeached, the Lieutenant Governor shall act in his stead and have his powers until judgment in the case shall have been pronounced.").
[29] S.C. Const. art XV, § 1.
[30] S.C. Const. art. IV, § 3.

criminal proceeding. To pass an article of impeachment, the House must apply the same burden of proof that controls in the Senate and conclude, not that the alleged conduct is sufficient to justify a Senate *trial*, but that it unmistakably warrants *removal*.

II. Impeachment Must Be Limited To Serious Crimes Or Serious Misconduct, Involving Corruption To The System Of Government, That Can Be Established By Clear And Convincing Evidence.

A. Scholars And Experts Agree That Impeachment Should 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…."[31] The constitutional standard for impeachment in South Carolina ("serious crimes or serious misconduct in office") is unique – no other State has this standard. Nevertheless, 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."[32]

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."[33] 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."[34] 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

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[31] Rodino Report, *supra* note 9, at 27.
[32] Id. at 26.
[33] *The Federalist* No. 65, at 334 (Alexander Hamilton) (Basil Blackwell 2d ed., 1987).
[34] Joseph Story, *Commentaries on the Constitution of the United States*, Vol. I, § 746, at 529-30 (Little, Brown , and Company, 4th ed. 1873).

behavior but the significance of its effect upon our constitutional system or the functioning of our government."[35]

With respect to the impeachment of a governor, "the principal goal of the impeachment clause is to allow impeachment for a narrow category of large-scale abuses of 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."[36] The impeachment of a chief executive "must relate to some reprehensible exercise of official authority. If a [chief executive] commits treason he has abused his executive powers. Likewise, a [chief executive] who accepts bribes has abused his official powers. The same misuse of official powers must be present in any consideration of a [chief executive's] engaging in 'other high crimes and misdemeanors.'"[37] The wrongdoing that properly qualifies as impeachable must therefore not only be public, but also substantial.[38]

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."[39] Even willful wrongdoing is not impeachable except where it is truly egregious and harmful to the constitutional order. Impeachment of a chief executive 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."[40] This requirement of substantiality follows in part from a paramount, constitutional prohibition against *ex post facto* laws and bills of attainder.[41] 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."[42]

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.[43] That impeachable conduct

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[35] Rodino Report, *supra* note 9, at 26.
[36] *Subcommittee Hearings*, *supra* note 11, at 38 (prepared statement of Professor Cass R. Sunstein) (emphasis omitted).
[37] Id. at 115 (prepared statement of Father Robert F. Drinan, S.J.).
[38] See Rodino Report, *supra* note 9, at 27 ("Not all [executive] misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality.").
[39] Paul S. Fenton, *The Scope of the Impeachment Power*, 65 Nw. U. L. Rev. 719, 746-47 (1970).
[40] John R. Labovitz, *Presidential Impeachment*, 26, 110 (Yale University ed. 1979).
[41] See, e.g., U.S. Const. art. I, § 9, cl. 3; S.C. Const. art. I, § 4.
[42] 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.").
[43] Rodino Report, *supra* note 9, at 27.

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."[44] For this reason, "it remains true that the House of Representatives and the Senate 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."[45]

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 removal of a governor.[46] "Some of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law."[47] 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. The Plain Language And History Of The South Carolina Constitution Establish An Unambiguously High And Rigorous Standard For Impeachment.

"[S]erious crimes or serious misconduct in office" is the constitutional standard for impeachment in South Carolina, just as "treason, bribery, or other high crimes and misdemeanors" is the federal standard.[48] A review of South Carolina's constitutional law and history reveals that South Carolina deliberately adopted this standard in order to be unequivocal and explicit that what constitutes an impeachable offense in South Carolina is not an improperly diluted translation of "high crimes and misdemeanors" to mean any crime or any misdemeanor, but instead a serious offense against the system of government. In adopting this standard, South Carolina intended to adopt an unambiguously high and rigorous standard for impeachment. An examination of the South Carolina Constitution, as well as the history of and revisions to the Constitution, further reveals what does not constitute an impeachable offense: misdemeanors, minor crimes, personal transgressions, neglect of duty and temporary absence from the State.

South Carolina has had seven constitutions in its history: The Constitutions of 1776, 1778, 1790, 1861, 1865, 1868, and 1895. In the first State Constitution, adopted on March 26, 1776, the governor was called "president" and there was no mention of impeachment.[49] It was not until March 19, 1778 that the second State Constitution used the term "governor," and constitutionally prescribed impeachment, relating to all officials, for "mal and corrupt conduct in their respective offices."[50] The South Carolina

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[44] Id. at 22.
[45] Black, *supra*, note 9, at 35.
[46] Rodino Report, *supra* note 9, at 22.
[47] Id. at 24.
[48] S.C. Const. art. XV, § 1; U.S. Const. art. II, § 4.
[49] S.C. Const. of 1776, III, XIV.
[50] S.C. Const. of 1778, IV, XXIII.

Constitution of 1868 did not set forth any explicit standard for impeachment.[51] Instead, the Constitution of 1868 provided only that the "House of Representatives shall have the sole power of impeachment."[52]

Without an explicit standard, the General Assembly nevertheless considered itself bound in its impeachment power by what was understood from the Constitution and its history. Accordingly, in January 1872, during the single instance of an impeachment proceeding against a governor in the history of South Carolina, the House of Representatives voted not to impeach then Governor Robert Kingston Scott for the overissue of state bonds despite evidence of "dishonest" conduct.[53] Applying the federal constitutional standard of "high crimes and misdemeanors," the Committee tasked with investigating the allegations of impeachment against Governor Scott made this constitutionally principled conclusion: "In accordance with our above mentioned obligations to our oath, we deemed it our duty to protect the officers of our commonwealth, until, in accordance with our Constitution, good and substantial reasons should be adduced before we could be warranted to casting our votes to impeach them of high crimes and misdemeanors…."[54]

The Constitution of 1895, as originally adopted, also did not dictate an explicit standard for impeachment. That Constitution was, however, amended in 1971 as the result of a recommendation made, in a 1969 report, by the West Committee. As amended, Article XV of the South Carolina Constitution provides that "officials elected on a statewide basis, state judges, and such other state officers as may be designated by law" are subject to impeachment "in cases of serious crimes or serious misconduct in office."[55]

The members of the West Committee, whose recommendations are now reflected in the current Article XV of the State Constitution, were well aware of the federal standard for impeachment, and it is clear from the minutes taken from the West Committee's meetings that they chose to include the words "serious crimes or serious misconduct in office" not to lessen the federal standard but to strengthen it.[56] The federal standard for impeachment reads, "treason, bribery, or other high crimes and misdemeanors." While experts agree that the operative "word 'other' is a dead giveaway [that] high crimes and misdemeanors are offenses that bear some strong resemblance to the flagship offenses listed by the Framers – treason and bribery," the West Committee

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[51] See S.C. Const. of 1868 art. VII, §§ 1-4.
[52] Id. at § 1.
[53] H.R. Journal of S.C., Reg. Sess. 1871-1872 (Republican Printing Co. 1872) [hereinafter "H.R. Journal"], at 193.
[54] U.S. Const. art. II, § 4; H.R. Journal, *supra* note 53, at 194. There has also been some judicial recognition that the applicable standard was high crimes and misdemeanors. See, e.g., State ex rel. Richards v. Ballentine, 152 S.C. 365, 379 (1929) (Cothran, J., dissenting) ("It is immaterial that there is an absence of constitutional or statutory definition of impeachable offense. The grant of the general power of impeachment properly and sufficiently indicates the causes for its exercise. Under the common law the wrongs justifying impeachment need not be statutory offenses, or even offenses against any positive law. Generally speaking they are designated as high crimes and misdemeanors.") (internal quotations omitted).
[55] S.C. Const. art. XV, § 1.
[56] See Minutes of the Committee to Make a Study of the Constitution of South Carolina of 1895, [hereinafter "Minutes of the West Committee"], 92d Cong. 93-94 (Nov. 17 1967).

was concerned that a "[m]isdemeanor is anything" and that state officials, including a chief executive, "could be impeached for a traffic ticket."[57] A condensed transcript of the minutes taken from the meeting in which the West Committee revised Article XV, § 1 bears this out:

> Mr. Stoudemire: You see "The House of Representatives shall have the sole power of impeachment. A vote of two-thirds of all members elected shall be required for impeachment. Any officer impeached shall thereby be suspended from office until judgment in the case shall have been pronounced…." …Now, notice here that this does not give any grounds – now the Federal Constitution says that the President, Vice-President, and all other civil officers shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. One would assume that similar grounds would be used in South Carolina, would you not? Do you think that we should clear this up and insert grounds?...
>
> …Mr. Workman: Now, your question is do we spell out grounds for impeachment?
>
> Mr. Stoudemire: Yes, and if so, I would think that the federal wording would be the one we would want to take as being standard.
>
> Mr. West: Impeachment for conviction of treason, bribery, or other high crimes and misdemeanors. Frankly, that's pretty inclusive. Misdemeanor is anything – so he could be impeached for a traffic ticket.
>
> Mr. Workman: Unless you use the adjective "high" misdemeanor.
>
> Miss Leverette: What's a high?
>
> Mr. Workman: I don't know. What's a high sign?
>
> Mr. Stoudemire: Now, here Dr. Larson says this is – federal experience has tended to fix impeachable offenses as indictable offenses. Although the South Carolina Constitution is silent on this matter, it is reasonable to assume that the same standard is intended….
>
> Mr. West: I sorta' like "for serious crimes or serious misconduct in office."
>
> Mr. Walsh: Would you like some wording to this effect – that serious crimes affecting public interest? A fellow can be guilty of some things that have no affect [*sic*] on how he runs his office.
>
> …Mr. West: I think it is a matter of policy. Do you think a man should be impeached if he runs off with another man's wife?

[57] Tribe, *supra* note 7, at 717, 718 (concluding that "'high crimes and misdemeanors' cannot be equated with mere crimes" and, instead, "as terms of art, must refer to major offenses against our very system of government, or serious abuses of the governmental power with which a public official has been entrusted (as in the case of a public official who accepts a bribe in order to turn his official powers to personal or otherwise corrupt ends), or grave wrongs in pursuit of governmental power (as in the case of someone who subverts democracy by using bribery or other nefarious means in order to secure government office and its powers, or in order to hold onto such office once attained")); Minutes of the West Committee, *supra* note 56, at 93.

> Mr. Walsh: I'll say this, I expect there are a right good many in office if that were a high crime, it might be impeachment. Now, they might not run off with another man's wife, but I expect there are a few of them that are just staying put. The point I'm trying to make is – from something personal as to something pertaining to his office.
>
> Mr. West: Suppose the Governor of the State got caught driving drunk, at night?
>
> Mr. Sinkler: Or worse yet, how about some notorious conduct. That might affect his ability to administer the law.
>
> Mr. Walsh: I know one that does that frequently – not in this State – the Governor of another State – and nobody tends to say that he is disqualified.
>
> Mr. Stoudemire: Well, one term they always use is "infamous crimes". What is worrying John is the misdemeanor angle.
>
> Mr. West: Right.[58]

The passage reveals that the West Committee inserted the words, "serious crimes or serious misconduct in office" to make explicit that the standard for impeachment in South Carolina is very high and that only the most egregious wrongs justify impeachment. The Constitution of 1895, in its original form, had no explicit standard for impeachment, and the West Committee was concerned that the lack of a standard might result in the application of the federal standard, which, in turn, might be misapplied to impeach an official for misdemeanors or personal transgressions.[59] As such, the West Committee deliberately added an explicit standard with the intent of fortifying or heightening the standard of impeachment in South Carolina.

Both South Carolina's Constitution and constitutional history make clear that a misdemeanor, by itself, is not an impeachable offense.[60] To the contrary, the inclusion of the word "serious" as an adjective to modify "crimes" dictates that there is an entire category of crimes that, though wrong and in violation of the law, does not rise to the level of an impeachable offense.[61] The wording of the Constitution, and its history, also make clear that a personal transgression, even if serious, does not constitute an impeachable offense.[62]

Attention to the specific language of the South Carolina Constitution reveals additional conduct that, though potentially harmful, also does not rise to the level of egregious wrongdoing "that so injures or abuses our constitutional institutions and form of government as to justify impeachment."[63] Article XV, § 3 of the South Carolina

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[58] Minutes of the West Committee, *supra* note 56, at 93-94.
[59] See S.C. Const. of 1895 art. XV, § 1, *amended by* S.C. Const. art. XV, §1.
[60] See S.C. Const. art. XV, § 1; see also Minutes of the West Committee, *supra* note 56, at 93-94.
[61] S.C. Const. art. XV, § 1.
[62] See id.; Minutes of the West Committee, *supra* note 56, at 93-94.
[63] Rodino Report, *supra* note 9, at 22; see also Fenton, *supra* note 39, at 746-47 (The "omission of duty without the element of fraud" is "not impeachable, although it may be highly prejudicial to the interests of the State.").

Constitution provides that "[f]or any willful neglect of duty, or other reasonable cause, which shall not be sufficient ground of impeachment, the Governor shall remove any executive or judicial officer upon address of two thirds of each house of the General Assembly."[64] The "word 'shall' generally indicates a command that admits of no discretion" and is "generally imperative or mandatory."[65] Although Article XV § 3 relates to a separate category of state officials, it is one of three sections of Article XV that govern impeachment, and the precise language unequivocally provides that "willful neglect of duty…shall not be sufficient ground for impeachment."[66]

That a willful neglect of duty does not warrant the solemn invocation of impeachment is corroborated by the views of the West Committee. The West Committee, with the duty to revise and modernize the Constitution of 1895, analyzed the language of what is now Article XV, § 3 and at the time was Article XV, § 4. Writing when the South Carolina Constitution did not state an explicit standard for impeachment, the West Committee unequivocally found that "[t]he language of this section implies that impeachment shall be only for misdemeanor, high crimes, and treason. Removal of an officer for neglect of duties or other 'reasonable' cause shall be by the Governor…."[67] The West Committee's findings further reveal that this language "should be considered in conjunction with Article XV on impeachment" and that "federal experience has tended to fix impeachable offenses as indictable offenses."[68] "Although the South Carolina Constitution [prior to the 1971 amendment] is silent on this matter, it is reasonable to assume that the same standard is intended, particular [*sic*] since Section 4 of this Article [now § 3] provides a method for removal of officers for other causes."[69] In other words, both the clear language of Article XV and the constitutional history relating to the Article's most recent revisions demonstrate that a neglect or dereliction of duty, even if willful, is not a justifiable ground for impeachment by the General Assembly.

There is additional constitutional evidence that a temporary absence from the State, even if a governor's location is allegedly unknown, does not rise to the level of an impeachable offense under South Carolina law because it does not subvert South Carolina's system of government. The South Carolina Constitution provides a specific constitutional remedy when a governor is absent and unable to discharge his or her duties: "[I]n the event of the temporary absence of the Governor from the State, the Lieutenant Governor shall have full authority to act in an emergency."[70] Article IV, § 11 of the South Carolina Constitution provides an institutional safeguard that ensures that the State's system of government will not be subverted in the event of a governor's

[64] S.C. Const. art XV, § 3 (emphasis added).
[65] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 661-62 (2007) (quoting Ass'n of Civil Technicians v. FLRA, 22 F.3d 1150, 1153 (D.C. Cir. 1994); Black's Law Dictionary 1375 (6th ed. 1990)).
[66] S.C. Const. art XV, § 3.
[67] West Committee, Working Paper No. 10 on Impeachment (Nov. 14, 1967) [hereinafter "Working Paper 10"], at 4.
[68] West Committee, Working Paper No. 9 on the General Assembly (Nov. 14, 1967) [hereinafter "Working Paper 9"), at 21; Working Paper 10, *supra* note 67, at 1.
[69] Working Paper 10, *supra* note 67, at 1.
[70] S.C. Const. art IV, § 11.

temporary absence from the State because the lieutenant governor, by operation of law, has full authority to act in an emergency.[71] Under the South Carolina Constitution, a governor does not need to transfer power to the lieutenant governor each and every time he or she travels to and from the State.[72] In fact, the West Committee, whose recommendations now form Article IV, § 11 of the South Carolina Constitution, specifically considered and rejected requiring the governor to transfer power to the lieutenant governor in the event that the governor left the State for fewer than thirty days.[73]

In sum, a review of South Carolina's Constitution and constitutional history reveals that only affirmative public wrongdoing that corrupts or subverts the political and governmental process warrants impeachment. In adopting the impeachment standard "serious crimes or serious misconduct in office," the South Carolina Constitution is designed to provide a strong and rigorous impeachment standard and to make explicit that allegations of misdemeanors, minor crimes, personal misconduct and neglect of duty do not justify impeachment. The federal standard for impeachment requires "clear and convincing evidence" of "constitutional wrongs that subvert the structure of government."[74] Given the language and history of the South Carolina Constitution, it is clear that nothing less would be required here.

C. Allegations Of Impeachable Conduct Must Be Proved By Clear And Convincing Evidence.

The "drastic remedy of impeachment and removal" is "truly the political equivalent of capital punishment."[75] Therefore, 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."[76] The General Assembly "ought not to be satisfied, or anything near satisfied, with the mere 'preponderance' of an ordinary civil trial."[77] "The evidentiary standard should be clear and convincing."[78]

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

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[71] See id.
[72] See id.
[73] See Minutes of the West Committee, *supra* note 56, 92d Cong. 84-88 (Oct. 27 1967).
[74] Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 719 (1988); Rodino Report, *supra* note 9, at 26.
[75] Tribe, *supra* note 7, 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").
[76] Black, *supra* note 9, at 17.
[77] Id.
[78] *Impeachment Inquiry: Hearing Pursuant to H. Res. 581 Before the House Comm. on the Judiciary*, 105th Cong., 2d Sess. 19 (1998), at 63 (testimony of Professor Bruce Ackerman); see also Rotunda, *supra* note 74, at 719.

a large mark to aim at."[79] The same constitutional imperatives that demand a rigorous definition of impeachable conduct, therefore, also require that the General Assembly impeach only where alleged conduct has been established by clear and convincing evidence. "Clear and convincing evidence is typically defined as that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegation sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases."[80] "The seriousness and the uniqueness of impeachment caution that it should not be too readily or too easily accomplished. The standard of proof should be a high one, such as 'clear and convincing evidence….'"[81]

A clear and convincing standard has been employed in many occasions in the impeachment context. It was the standard invoked by Senators as a factor in their decision not to convict President Clinton.[82] It was the standard agreed to by the House Impeachment Committee in the impeachment investigation relating to President Nixon.[83] It was the operative evidentiary standard in the impeachment of Arizona Governor Evan Mecham.[84] It was the established standard in the impeachment investigation relating to Connecticut Governor John Rowland.[85] It was the standard invoked by members of the House Committee of the Judiciary in the recent impeachment of United States District Court Judge Samuel Kent.[86] It was integral to the Alaska Legislature's decision to rebuff a grand jury's recommendation to impeach Governor Bill Sheffield.[87]

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[79] James Bryce, *The American Commonwealth*, Vol. I, 212 (1919).

[80] Rotunda, *supra* note 74, at 719; see also Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 265 n.4 (1996) ("Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegation sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt….") (internal quotations omitted).

[81] Rotunda, *supra* note 74, at 719.

[82] See, e.g., 145 Cong. Rec. s1462-02, *S1594 (daily ed. Feb. 12, 1999) (statement of Sen. Jeffords) ("I have used the clear and convincing evidence standard to judge the impeachment charges against President Clinton….I feel that in impeachment trials it is most appropriate to use a standard that is somewhere in between the extremes.").

[83] See, e.g., Rotunda, *supra* note 74, at 719 ("In the House Impeachment Committee on Richard Nixon, the staff and members of the Committee, (both those who voted for and those who voted against impeachment), agreed that the 'clear and convincing evidence' standard was the correct standard."); see also Labovitz, *supra* note 40, at 192-94; *Impeachment Inquiry: Hearings Pursuant to H. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess., 1889 (1974) (statement of James St. Clair); id at 1927 (statement of John Doar) ("[A]s a practical matter, proof must be clear and convincing.").

[84] Ronald J. Watkins, *High Crimes and Misdemeanors: The Term and Trials of Former Governor Evan Mecham* 312 n.*, 352 (1990); Ron Harris, *Arizona House Votes Mecham Impeachment*, L.A. Times, Feb. 6, 1988, at A1; Marty Sauerzopf, *Impeachment Burden of Proof is Different*, Ariz. Repub., May 9, 2003, at A14.

[85] *Final Report of the Select Committee of Inquiry Pursuant to House Resolution 702*, Conn. H. Res. 702, at 7 (June 28, 2004).

[86] *Impeaching Samuel B. Kent, judge of the United States District Court for the Southern District of Texas, for High Crimes and Misdemeanors*, H. Res. 520, 111th Cong. (2009) (statement of Rep. Sensenbrenner, Jr.).

[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.

It is also the evidentiary standard of proof applied in two South Carolina Supreme Court cases involving the removal of a judicial official and a state official from their respective offices.[88] In the 1996 case of In re McKinney, the South Carolina Supreme Court confirmed that, to remove a municipal judge from office, "factual findings of misconduct must be supported by clear and convincing evidence."[89] Likewise, in Rose v. Beasley, the South Carolina Supreme Court affirmed the removal of the Director of the South Carolina Department of Public Safety by the Governor, under S.C. Code § 1-3-240, because "the grounds for removal asserted by the Governor were supported by clear and convincing evidence."[90] It is inconceivable that the General Assembly can adopt a standard of proof for the impeachment of a governor that is lower than that which is required by the South Carolina Supreme Court to remove other officials.

The "clear and convincing" standard is thus the appropriate evidentiary standard of proof in impeachment proceedings. Given that an impeachment by the House of Representatives requires the same affirmative "vote of two-thirds of all members elected" as a conviction by the Senate, and both result in the immediate removal of a chief elected official from office, the clear and convincing standard is appropriate in both the House and the Senate.[91] 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 chief executive who did not commit an impeachable offense. Therefore, the General Assembly may not impeach the Governor without at least clear and convincing evidence of an impeachable offense.

D. The History Of Impeachment In The United States Confirms That Impeachment Is To Be Exercised Only Where There Is Clear And Convincing Evidence Of Serious Criminal Conduct Or A Serious Threat Against The System Of Government.

The State of South Carolina has never impeached a governor. 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 allegations of serious criminal wrongdoing relating to service in office. None has been predicated solely on allegations of ethical wrongdoing or minor crimes. In the last eighty years, not one State in our Nation has impeached a governor without a prior indictment or arrest for a serious and affirmative criminal offense. The history of presidential and state gubernatorial impeachments in the United States confirms that the impeachment of a sitting chief executive is a grave and extraordinary event in the American experience and should be limited to situations presenting clear and convincing evidence of serious

[88] See In re McKinney, 324 S.C. 126, 127 (1996) (per curiam) (concluding that "factual findings of misconduct must be supported by clear and convincing evidence" and applying that standard to the removal of a municipal judge); Rose v. Beasley, 327 S.C. 197, 204-206 (1997) (applying a "clear and convincing standard" in the removal of the Director of the South Carolina Department of Public Safety).
[89] See In re McKinney, 324 S.C. at 127 (citing In re Peeples, 297 S.C. 36 (1988) (per curiam)).
[90] Rose v. Beasley, 327 S.C. at 205, 206 & n.9 (noting that both the Governor and the Circuit Court agreed that "clear and convincing evidence" was the appropriate evidentiary standard to remove the state official).
[91] S.C. Const. art. XV, §§ 1, 2.

criminal conduct or comparable wrongdoing that perpetrates grievous injury to the constitutional order.

1. Presidential Impeachment

To date, there have been three impeachment proceedings that have led to an impeachment or resignation of a President of the United States: the impeachment and acquittal of President Johnson in 1868 for his removal of Secretary of War Edwin Stanton in violation of the Tenure of Office Act;[92] the impeachment investigation and subsequent resignation of President Richard Nixon in 1974 for obstruction of justice and abuse of power;[93] and the impeachment and acquittal of President Clinton in 1998-1999 for obstruction of justice and criminal perjury.[94] Each of these historical precedents, which are relevant because *conviction and removal* of the national chief executive is a close analogue to *impeachment* of a Governor in South Carolina, 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 process, an attempt to punish the President for differing with or obstructing the policy of Congress."[95] 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."[96]

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."[97] It "surely contributed as much to the maintenance of our tripartite…system of government as any case decided by any court."[98] Had Andrew Johnson "been convicted, the future

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[92] Rehnquist, *supra* note 24, at 210; see also Act of Mar. 2, 1867, Ch. 154, 14 Stat. 430 (1867).
[93] 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).
[94] 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).
[95] 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).
[96] Archives of Maryland, *supra* note 95, at 1 (statement of Delegate Scanlan).
[97] Rehnquist, *supra* note 24, at 250, 278.
[98] Id. at 278.

independence of the president could have been jeopardized. It was the United States Senate which…made th[is] fundamental decision[]."[99] 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.[100]

In contrast to the lawless and partisan character of the Johnson impeachment, the proceedings involving President Nixon are paradigmatic of the modern, accepted practice. All of the Articles of Impeachment that the House Judiciary Committee drafted prior to Nixon's resignation allege wrongdoing that bears a clear relationship to serious criminal violations and to subversion of the basic structure of government.[101] 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."[102] Likewise, 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."[103] 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 impeachment.[104]

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[99] Id. at 10.

[100] *Subcommittee Hearing*, *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").

[101] 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).

[102] 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").

[103] *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).

[104] 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.").

The United States Congress has never removed a chief executive 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 Governors

The history of state gubernatorial 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 sixteen state governors have been impeached and only eight of those impeachments have resulted in conviction and removal. In the last eighty years, only two state governors have been impeached. Since the New Deal, no governor has been impeached without a prior indictment or arrest for a serious felony.

Although most States adopted impeachment clauses soon after ratification of the United States Constitution, not one state applied the drastic remedy of impeachment until the social and political upheaval occasioned by the Civil War and Reconstruction. Indeed, that period accounts for half of all the gubernatorial impeachments in American history, and seven out of the sixteen impeachments occurred during the five-year period between 1871 and 1876.[105] After the end of Reconstruction, there were no more impeachments until 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.[106] The political abuse of impeachments persisted during the social unrest of the 1920s and into the Great Depression.[107]

Since the New Deal, not one state has impeached a governor without a prior indictment or arrest for serious and affirmative criminal conduct. The rarity of impeachment is shown by the fact that, in the last eighty years, only two 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

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[105] 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); Powell Clayton of Arkansas, 1871 (resigned); David Butler of Nebraska, 1871 (removed); 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).

[106] 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.").

[107] 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); Henry Horton of Tennessee, 1931 (acquitted).

money to a business that he and his wife owned.[108] Significantly, the Arizona Legislature chose not to initiate impeachment proceedings until the criminal grand jury investigation had produced an indictment of Governor Mecham.[109] The Arizona Legislature removed Governor Mecham only upon finding clear and convincing evidence of serious criminal wrongdoing.[110]

Similarly, the Illinois General Assembly, did not begin impeachment proceedings against Rod Blagojevich until after a federal judge issued a criminal arrest warrant and until after Governor Blagojevich was arrested by the Federal Bureau of Investigation on federal corruption charges.[111] 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.[112] The Illinois General Assembly, however, impeached Governor Blagojevich based on a substantial totality of evidence, provided by federal authorities, of conduct that fits squarely within one of the two enumerated grounds for impeachment in the United States Constitution – "bribery" – and goes to the heart of what constitutes an impeachable offense – the corruption or subversion of the political process.[113]

Perhaps even more indicative are three situations in recent history in which impeachment of a sitting governor was threatened but averted. In 2004, Connecticut Governor John Rowland, under investigation for federal corruption and bribery charges, resigned from office. The Connecticut General Assembly did not decide to impeach Governor Rowland, but the Select Committee of Inquiry did agree on an evidentiary "standard of 'clear and convincing' proof."[114] 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.[115] In light of this result, the Oklahoma House of Representatives concluded that impeachment was not warranted.[116] 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

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[108] 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); see also Watkins, *supra* note 84, at 238.

[109] See Mecham v. Gordon, 156 Ariz. 297, 299 (1988); see also Watkins, *supra* note 84, at 238, 301 (describing the indictment on January 8, 1988 and the impeachment on February 8, 1988).

[110] See Watkins, *supra* note 84, at 348-58 (describing the conclusion of the trial and the removal on April 4, 1988).

[111] 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.

[112] Ill. Const. art. IV, § 14.

[113] U.S. Const. art. II, § 4; see *Final Report of the Special Investigative Committee*, *supra* note 111, at 8-9 & nn.30, 31.

[114] *Final Report of the Select Committee of Inquiry Pursuant to House Resolution 702*, *supra* note 85, at 7.

[115] 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.

[116] Id.

referred the matter to the Alaska Senate (which initiates impeachment under the Alaska Constitution).[117] Although the grand jury recommended impeachment, the Senate rejected that recommendation, concluding that there was not "clear and convincing" evidence that Bill Sheffield had committed an impeachable offense.[118]

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 and, moreover, that the dire remedy of impeachment is to be applied only when there is clear and convincing evidence of a serious criminal offense or similar wrongdoing that corrupts or subverts the political process or constitutional form.

III. Impeachment Is Inappropriate When Less Drastic Mechanisms Are Available In Our Constitutional System To Redress Conduct That Falls Short Of The Standard For Impeachment.

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 [executive] misdeed."[119] Any improprieties by the chief executive should of course meet with disapproval from the electorate and the General Assembly. But impeachment, "a dire remedy not often employed," is rarely the appropriate response.[120]

The consequences of impeachment are extreme: for the individual, for the electorate, for the Office of Governor, both current and future, for the independence of all officials elected on a statewide basis, as well as state judges, and for the constitutional structure of government in the State of South Carolina. Most misconduct or offenses, however distasteful, will not warrant these repercussions and attendant risks. Diluting the standard of impeachment in order to capture conduct that does not qualify is not only wrong, but would also serve as a dangerous precedent that has the potential to weaken permanently executive authority in the State of South Carolina and throughout the United States.[121] Diluting the standard would operate as "a sword of Damocles, designed not to fall but to hang," serving only to paralyze future chief executives and to render them unduly deferential to the General Assembly and unduly sensitive to the concerns, not of the people, but of the House and Senate.[122]

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[117] Alaska Const. art. II, § 20.

[118] 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.

[119] 144 Cong. rec. H11, 822 (daily ed. Dec. 18, 1998) (statement of Rep. Klink).

[120] Working Paper 9, *supra* note 68, at 21.

[121] See, e.g., *Impeachment Inquiry: Hearing Pursuant to H. Res. 581 Before the House Comm. on the Judiciary*, 105th Cong., 2d Sess. 19 (1998), at 63 (testimony of Professor Bruce Ackerman) ("The [ ] crucial point is that a vote of impeachment is itself a terrible political precedent for the next generation or two. If this dramatic lowering of the standard from the historic examples is tolerated…there is going to be an overwhelming political temptation to exploit a moment of political vulnerability…to, once again, use a low standard….").

[122] Rehnquist, *supra* note 24, at 270.

The "impeachment remedy is clearly inappropriate when" other remedies "are readily available."[123] Significantly, our constitutional system provides for other means of response or redress where a chief executive has engaged in alleged misconduct that falls short of the constitutionally mandated, high standard for impeachment. First, in certain instances, a legislative censure resolution or condemnation may be appropriate to respond to misconduct. Both the United States House of Representatives and Senate have adopted resolutions or public condemnations of governmental officials.[124] For example, in 1834, the Senate passed a censure resolution against President Jackson for attempting to destroy the National Bank.[125] More recently, the State of Nevada, in 2004, chose not to remove late Nevada State Controller Kathy Augustine permanently from office for violations of state ethics laws during her 2002 re-election campaign, but instead to fine and censure her "as a reminder to all public officers of their duty to uphold the laws of this State, to ensure that their staff understands the political activities which must not be conducted on governmental time and to carry out their service solely for the benefit of the general public whom they have been elected to serve…."[126]

Second, the political process itself contains self-activating mechanisms to respond to alleged misdeeds by a chief executive that fall below the constitutional standard of impeachment. A chief executive who has engaged in misconduct may squander any hope of re-election or of a meaningful future in public life. During the balance of his tenure, depending on the nature of the alleged misconduct, the chief executive may find his "political capital" depleted. A public figure who engages in publicized misconduct may also suffer irreparable reputational injury and face public ridicule – consequences of particular significance to a person in public life.

Depending on the nature of the allegations, the chief executive may also face other consequences as a result of misconduct that falls beneath the impeachment standard. Where a chief executive is found to have violated ethics rules, he or she may be subject to public condemnation and possible financial penalties. Indeed, ethics rules are enacted precisely to address situations in which public officials violate defined standards of ethical conduct.[127] Transgressions of those laws expose a public official to penalties specifically prescribed by statute and are, therefore, addressable without the extreme and severe risks connected to impeachment. In addition, where the chief executive holds a professional license, such as the license to practice law, the alleged misconduct may

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[123] National Municipal League, *Model State Constitution* 64 (6th ed. 1963) (revised 1968) (referenced by Mr. Workman in Minutes of the West Committee, *supra* note 56, 92d Cong. 93 (Oct. 27 1967) ("In the light of the nature of the [impeachment] remedy its application should remain limited to unusual circumstances.").

[124] See Jack Maskell, Congressional Research Service Report for Congress, *Censure of the President by Congress*, at 3-6 (Sept. 29, 1998); see generally Larry D. Kramer, *Foreword: We the Court*, 115 Harv. L. Rev. 4, 106-110 & n.460 (Nov. 2001).

[125] See 10 Cong. Deb. 58-59 (1834). In 1837, President Jackson's censure was "[e]xpunged by order of the Senate." S. Res. 68, 24th Cong., 2d Sess. 81-83 (1837).

[126] Nev. S. Res. 5, 21st Spec. Sess., *Censuring Kathy Augustine, Controller of the State of Nevada, and pronouncing the judgment of the Senate in the matter of her impeachment*, at 3 (Dec. 2004).

[127] See S.C. Code Regs. 52-201 (2008).

result in loss of that license, a sanction imposed on President Clinton following his impeachment acquittal.

CONCLUSION

In considering the impeachment of a sitting Governor of South Carolina, the General Assembly 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 Offices of the Governor in the State of South Carolina. The Constitution of South Carolina mandates, and history instructs, that impeachment of a Governor is warranted only upon clear and convincing evidence of serious crimes or other similarly serious misconduct that has corrupted the system of government in South Carolina.