

THE OVERCRIMINALIZATION OF
IMPEACHMENT

HON. AL GREEN

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, September 27, 2017

Mr. AL GREEN of Texas. Mr. Speaker, I would like to include the following CATO article for the RECORD:

[From CATO.org, Aug. 7, 2017]

(By Gene Healy)

Trying to tamp down impeachment talk earlier this year, House minority leader Nancy Pelosi (D-CA) insisted that President Donald Trump's erratic behavior didn't justify that remedy: "When and if he breaks the law, that is when something like that would come up."

Normally, there isn't much that Pelosi and Tea Party populist Rep. Dave Brat (R-VA) agree on, but they're on the same page here. In a recent appearance on Trump's favorite morning show, "Fox & Friends," Brat hammered Democrats calling for the president's impeachment: "there's no statute that's been violated," Brat kept insisting: They cannot name the statute!"

Actually, they did: it's "Obstruction of Justice, as defined in 18 U.S.C. §1512(b)(3)," according to Rep. Brad Sherman (D-CA) who introduced an article of impeachment against Trump on July 12. Did Trump break that law when he fired FBI director James Comey over "this Russia thing"? Maybe; maybe not. But even if "no reasonable prosecutor" would bring a charge of obstruction on the available evidence, that wouldn't mean impeachment is off-limits. Impeachable offenses aren't limited to crimes.

That's a settled point among constitutional scholars: even those, like Cass Sunstein, who take a restrictive view of the scope of "high Crimes and Misdemeanors" recognize that "an impeachable offense, to qualify as such, need not be a crime." University of North Carolina law professor Michael Gerhardt sums up the academic consensus: "The major disagreement is not over whether impeachable offenses should be strictly limited to indictable crimes, but rather over the range of nonindictable offenses on which an impeachment may be based."

In some ways, popular confusion on this point is understandable. Impeachment's structure echoes criminal procedure: "indictment" in the House, trial in the Senate—and the constitutional text, to modern ears, sounds something like "grave felonies, and maybe lesser criminal offenses too."

But "high crimes and misdemeanors," a term of art in British impeachment proceedings for four centuries before the Framers adopted it, was understood to reach a wide range of offenses that, whether or not criminal in nature, indicated behavior incompatible with the nature of the office. For James Madison, impeachment was the "indispensable" remedy for "Incapacity, negligence, or perfidy" on the part of the president—categories of conduct dangerous to the republic, only some of which will also constitute crimes.

The criminal law is designed to punish and deter, but those goals are secondary to impeachment, which aims at removing federal officers unfit for continued service. And where the criminal law deprives the convicted party of liberty, the constitutional penalties for impeachable offenses "shall not extend further than to removal from Office," and possible disqualification from future officeholding. As Justice Joseph Story explained, the remedy "is not so much designed to punish an offender, as to secure the state against gross official misdemeanors. It touches neither his person, nor his property;

but simply divests him of his political capacity."

No doubt being ejected from a position of power on the grounds that you're no longer worthy of the public's trust can feel like a punishment. But the mere fact that removal is stigmatizing doesn't suggest that criminal law standards apply. Raoul Berger once illustrated that point with an analogy Donald Trump would probably find insulting: "to the extent that impeachment retains a residual punitive aura, it may be compared to deportation, which is attended by very painful consequences, but which, the Supreme Court held, 'is not a punishment for a crime.'"

Had the Framers restricted impeachment to statutory offenses, they'd have rendered the power a "nullity" from the start. In the early Republic, there were very few federal crimes and certainly not enough to cover the range of misdeeds that would rightly disqualify public officials from continued service.

Criminality wasn't an issue in the first impeachment to result in the removal of a federal officer: the 1804 case of district court judge John Pickering. Pickering's offense was showing up to work drunk and ranting like a maniac in court. He'd committed no crime; instead, he'd revealed himself to be a man "of loose morals and intemperate habits," guilty of "high misdemeanors, disgraceful to his own character as a judge."

As Justice Story noted in 1833, in the impeachment cases since ratification, "no one of the charges has rested upon any statutable misdemeanors." In fact, over our entire constitutional history, fewer than a third of the impeachments approved by the House "have specifically invoked a criminal statute." What's been far more common, according to a comprehensive report by the Nixon-era House Judiciary Committee, are "allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions."

The president's violation of a particular criminal statute can serve as evidence of unfitness, but not all such violations do. That's obvious when one considers the enormous growth of the federal criminal code in recent decades. Overcriminalization may have reached the point where Donald Trump, like everyone else, is potentially guilty of "Three Felonies a Day," but even in Lawrence Tribe's wildest imaginings, that wouldn't translate to three impeachable offenses daily. If Trump were to import crocodile feet in opaque containers, fill an (expansively defined) wetland on one of his golf courses, or misappropriate the likeness of "Smokey Bear" he'd have broken the law, but would not have committed an impeachable offense.

It's also easy enough to imagine a president behaving in a fashion that violates no law, but nonetheless justifies his removal. To borrow an example from the legal scholar Charles Black, if the president proposed to do his job remotely so he could "move to Saudi Arabia [and] have four wives" (as well as his very own glowing orb), he couldn't be prosecuted for it. Still, Black asks: "is it possible that such gross and wanton neglect of duty could not be grounds for impeachment?"

A more plausible impeachment scenario presented itself recently, with reports that President Trump had "asked his advisers about his power to pardon aides, family members and even himself" in connection with the special counsel's Russia investigation. The president's power to self-pardon is an open question, but his power to pardon others has few limits. There's little doubt Trump could issue broad prospective pardons for Don Jr., Jared Kushner, Paul Manafort, Mike Flynn, and anyone else who might end up in the Mueller's crosshairs—and it would

be perfectly legal. It would also be impeachable, as James Madison suggested at the Virginia Ratifying Convention: "if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; [and he can be removed] if found guilty."

Some years ago, I put together a collection of essays on the expansion of the criminal sanction into areas of American life where it doesn't belong—published under the title, *Go Directly to Jail: The Criminalization of Almost Everything*. The idea that criminal law concepts had infected and weakened the constitutional remedy of impeachment wasn't quite what I had in mind with that subtitle, but it seems to fit.

Congress has made the problem worse by outsourcing its investigative responsibilities to the executive branch. As Princeton's Keith Whittington observes in a recent essay for the Niskanen Center "relying so heavily on prosecutors to develop the underlying charges supporting impeachment has come at a high cost . . . it has created the widespread impression that the impeachment power can only appropriately be used when criminal offenses have been proven."

It's important to get this straight, because confusing impeachment with a criminal process can be harmful to our political health. It may lead us to stretch the criminal law to "get" the president or his associates, warping its future application to ordinary citizens. And it can leave the country saddled with a dangerously unfit president whose contempt for the rule of law is apparent, even if he hasn't yet committed a crime.

RECOGNIZING THE LIFE OF FALL-
EN MISSISSIPPI MARINE LANCE
CORPORAL (LCPL) JOSHUA
SCOTT OSE

HON. TRENT KELLY

OF MISSISSIPPI

IN THE HOUSE OF REPRESENTATIVES

Wednesday, September 27, 2017

Mr. KELLY of Mississippi. Mr. Speaker, today I rise in memory of fallen Mississippi Marine Lance Corporal (LCpl) Joshua Scott Ose who gave his life while in service to our nation on September 20, 2010, during Operation Enduring Freedom. LCpl Ose was assigned to the 1st Battalion, 8th Regiment, 2nd Marine Division, II Marine Expeditionary Force.

LCpl Ose was killed by enemy gunfire while conducting combat operations in Musa Qala, Helmand Province, Afghanistan. The day after LCpl Ose's death was announced, a United States flag was flown over the U.S. Capitol in his honor. That same day, flags were flown at half-staff in his hometown of Hernando, Mississippi.

LCpl Ose enlisted in the U.S. Marine Corps during his senior year at Hernando High School. He graduated in 2009. Sissy Fernandez Ose, LCpl Ose's mother, said her son began talking about serving in the military when he was in the sixth grade. "That was all he wanted to do," Mrs. Ose said. "It was his choice. He was very proud."

Reverend Robert A. Hatcher, pastor of the First Presbyterian Church of Hernando, delivered the eulogy at the funeral which was held at the Trinity Baptist Church in Southaven. According to the Associated Press, Rev. Hatcher

praised LCpl Ose for his service. "Josh was fighting to keep terrorism away from American soil," Rev. Hatcher said. "Some may question the philosophy of war, but do not question this young man's desire to put an end to terrorism. He did not shirk his duty to fight for America."

Lee Caldwell, a family friend, said LCpl Ose set a great example for others to follow. "He was an exemplary young man," Mrs. Caldwell said. "He paid the ultimate sacrifice. We will never forget him and all those who have fought for our country as he did."

Retired U.S. Marine Corps Reserve Colonel (Col) John Caldwell was asked by the family to escort LCpl Ose's body from Dover Air Force Base to the First Presbyterian Church of Hernando where a visitation was held. Col Caldwell said LCpl Ose was a true hero. "He epitomized what it was to be a Marine," Col Caldwell said. "He wanted to represent his country and fight. He and Marines like him are true heroes. We need to remember them every day. We need to remember them for paying the ultimate price."

In 2011, the Mississippi State Legislature passed House Concurrent Resolution No. 49. The resolution commended LCpl Ose for his service. It further stated that LCpl Ose is counted among Mississippi and America heroes who committed to our nation's safety and security.

LCpl Ose is survived by his parents, Ross and Sissy Fernandez Ose, grandparents, Earl and Darlene Ose; aunts and uncles, Brenda and John Conrad, Sherry and Scott Fernandez, Dr. Dennis and Dr. Wendy Ose, and Paul and Sarah Ose.

LCpl Ose will always be remembered for his sacrifice to protect America.

125TH ANNIVERSARY ALLEGHENY COUNTY ANCIENT ORDER OF HIBERNIANS, DIVISION 17

HON. MICHAEL F. DOYLE

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, September 27, 2017

Mr. MICHAEL F. DOYLE of Pennsylvania. Mr. Speaker, I rise today to recognize the Allegheny County Ancient Order of Hibernians Division 17, which is currently celebrating its 125th anniversary as a pillar of Irish-American heritage and charitable service in the Pittsburgh region.

The AOH has its roots in the efforts by the Tudor Kings and Queens of England to impose greater control over the Irish. These efforts affected most aspects of life, from language and religion to law and politics to land ownership—and even clothing. Secret societies formed to protect Irish Catholics from government excesses and extrajudicial violence.

Faced with centuries of English oppression, as well as a series of crop failures, many Irish emigrated in search of better opportunities. A great many came to America, but found they were forced to confront the same anti-Catholic prejudice that they had faced back home. In response to this discrimination, Irish Americans began forming fraternal organizations to combat anti-Irish prejudice, support each other, and keep their culture and religion alive. In May 1836, the first and largest of these groups, the Ancient Order of Hibernians, was

founded simultaneously in New York City and Pottsville, Pennsylvania.

Through the rest of the nineteenth century, the AOH grew significantly, opening its first division in Allegheny County in 1859. Allegheny County Division 17 was established in 1892. During this time, in addition to working to preserve Irish culture, AOH members did their best to embody the Hibernian motto of "Friendship, Unity, and Christian Charity." The Hibernians taught civics and English classes to help new Irish immigrants become citizens, and they provided much needed social programs to care for the sick and needy in their communities. At the same time, they worked to confront and eradicate harmful anti-Irish stereotypes.

Since then, the AOH's ranks have included notable actors, generals, and even a President of the United States—John F. Kennedy. All the while, the organization has continued its mission to preserve Irish Americans' connection with their ancestral homeland and to care for the needy in their communities. For 125 years, Allegheny County Division 17 has been actively involved in this mission. Division 17 Hibernians donate time and money to three local parishes each Christmas, as well as food banks in Braddock, and a number of other charitable organizations, including Rosaries for the Troops, St. Vincent de Paul, and the Sisters of Charity. They have also endeavored to preserve their Irish heritage and lobbied the Pennsylvania state government to support Irish independence.

Today, the AOH stands as a testament to the tenacity of the Irish people, a celebration of our culture, and a monument to a people who helped build this country. I'm proud to be of Irish ancestry—and to be a member of Allegheny County Division 17 of the AOH. As we commemorate the AOH's legacy of faith and perseverance in the face of adversity, let us also take inspiration from its story and recognize the responsibility each of us shares to help make our nation as welcoming a land as our ancestors dreamed it would be.

I would like to congratulate Allegheny County Division 17 of the Ancient Order of Hibernians on the occasion of their 125th anniversary. I commend them for their service to the community, and I wish them the best in the years to come. Ireland Forever (Erin go Bragh).

CONGRATULATIONS TO DR. TRICIA DERGES

HON. BILLY LONG

OF MISSOURI

IN THE HOUSE OF REPRESENTATIVES

Wednesday, September 27, 2017

Mr. LONG. Mr. Speaker, I rise today to congratulate Dr. Tricia Derges of Springfield, Missouri, on her recent winning of two prestigious awards.

Dr. Derges has been a resident of the Springfield area for 40 years and during this time she has contributed to the community in many ways. Dr. Derges has recently won both the National Jefferson Award for Southwest Missouri and the Jacqueline Kennedy Onassis Award. Both of these awards recognize individuals for their public service. The Jacqueline Kennedy Onassis Award is only awarded to five individuals per year across the United

States. This clearly highlights the significant work Dr. Derges has taken over the years to help her community.

Dr. Derges set up the mission clinic named Lift Up in Springfield. This clinic provides a range of medical, dental and mental health services to veterans and the poor across Springfield. Dr. Derges and her clinic have helped thousands of people in the Springfield area.

I am truly honored to recognize the work by Dr. Derges and her dedication to improving the lives of others. On behalf of Missouri's 7th Congressional District, I ask all of my colleagues to join me in congratulating Dr. Derges on her recent awards and wishing her all the best.

IN RECOGNITION OF WESTERN MICHIGAN UNIVERSITY RENAMING RESIDENCE HALLS IN HONOR OF DISTINGUISHED ALUMNI

HON. DEBBIE DINGELL

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

Wednesday, September 27, 2017

Mrs. DINGELL. Mr. Speaker, I rise today on the occasion of Western Michigan University recognizing a lifetime of work by three leaders who bonded in college and remained friends through life, by naming two residence halls within the Western Heights complex Hall-Archer-Pickard West and East. These dormitories are being renamed in celebration of three legendary Western Michigan graduates, and their legacy will inspire generations of university students to come.

Ronald Hall Sr., Dennis Archer, and William Pickard attended Western Michigan University in the 1960s and enjoyed membership in Alpha Phi Alpha Fraternity, America's first intercollegiate African-American fraternity. The three men's undergraduate experience at Western Michigan University instilled a desire to give back to the greater Michigan community and invest in meaningful educational and social change throughout the state. Hall, Archer, and Pickard are remembered for the close, meaningful friendship they cultivated at Western Michigan and their passion to make change after graduating.

After graduating from Western Michigan University, the three men remained in Michigan to influence change to the community they love. Ronald Hall Sr. served as president of the Michigan Minority Business Development Council and founded Bridgewater Interiors, LLC. He passed away in May 2016, and is remembered for turning Michigan's Minority Business Development Council into one of the country's lead minority business organizations. Dennis Archer served as Mayor of Detroit from 1994 to 2001, and has served as president of the American Bar Association and on the Michigan Supreme Court. William Pickard is an executive member of the NAACP Detroit Branch, and is the founder of the Michigan-based Global Automotive Alliance. Their post-graduate work has impacted countless lives and opened doors wider for students of color, and their friendship is a testament to the meaningful bonds forged during college.

Mr. Speaker, I ask my colleagues to join me in honoring Western Michigan University and