

IMPEACHMENT, DISQUALIFICATION, AND HUMAN RIGHTS

Gerald L. Neuman*

ABSTRACT

Disqualification after impeachment prevents the return of unfit leaders to power by barring their re-election—but for how long? This article examines international human rights decisions on the duration of post-impeachment disqualification, including an important 2022 opinion of the European Court of Human Rights, along with the experience of impeachment in the United States. The neglected history of impeachment in U.S. states adds dimensions to the thinner narrative of impeachment at the U.S. federal level. The European insistence on keeping disqualification proportionate resonates with a minority practice of partial disqualification in the states. Nonetheless, the European Court's prohibition of irreversible lifelong disqualification may be too rigid for democracies under threat.

* J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law, Harvard Law School. I am grateful to Michael Gerhardt for early advice on U.S. federal practice, and to my colleagues at the Harvard Law School Library for superb documentary assistance. All errors are mine.

TABLE OF CONTENTS

Introduction.....	629
I. Human Rights and Proportionality after Impeachment.....	632
A. Troubles in Lithuania.....	633
B. Initial Observations.....	643
II. Disqualification and its Limitation in the United States.....	650
A. Optional or Mandatory Disqualification.....	654
B. Total or Limited Disqualification.....	656
C. Subsequent Lifting of Permanent Disqualification.....	661
III. Reciprocal Reflections.....	667
Conclusion.....	672

INTRODUCTION

Impeachment proceedings can serve not only to remove unfit leaders, but to prevent their future return to power by barring their re-election. But for how long? In February 2021, the unsuccessful impeachment effort against Donald Trump for inciting the January 6 attack on the U.S. Congress was aimed centrally at the constitutionally authorized measure of permanent disqualification from federal office in order to protect American democracy.¹ In contrast, the European Court of Human Rights issued an important opinion in April 2022 that elaborated human rights limitations on the duration of post-impeachment disqualification, and thereby brought to an end a longstanding dispute that had arisen from the only impeachment of a head of state in Europe, Lithuanian President Rolandas Paksas.²

Impeachment is a double-edged sword for democracy and human rights. It can terminate abuses or it can be wielded abusively for wholly partisan purposes. The framers of the U.S. Constitution emphasized impeachment as an ultimate check against a president who betrays the country or its constitutional system, while restricting its effects to removal and disqualification.³ Other countries have emulated the United States in fashioning their own methods of extraordinary accountability within a separation of powers.⁴ The risks that the U.S. framers envisioned have renewed relevance amid the current challenges to democracy worldwide.

The contemporary European human rights system, using its characteristic modes of reasoning, has accepted the possibility of disqualification but has sought to regulate it with principles of

1. See PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP VOLUME I—PRELIMINARY AND FLOOR TRIAL PROCEEDINGS, S. DOC. No. 117—3, at 296 (argument of Rep. Raskin).

2. See Advisory Opinion, on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings, Request No. P16-2020-002 (Eur. Ct. H.R. Apr. 8, 2022) (Grand Chamber); *Paksas v. Lithuania*, App. No. 34932/04 (Eur. Ct. H.R. Jan. 6, 2011) (Grand Chamber).

3. MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 7-8, 11 (3d ed. 2019) (discussing the framers' agreement to make the president impeachable and limit the punishments to removal and disqualification).

4. See Tom Ginsburg et al., *The Comparative Constitutional Law of Presidential Impeachment*, 88 U. CHI. L. REV. 81 (2021) (surveying modalities of impeachment in presidential and semi-presidential systems, with case studies and quantitative analysis).

proportionality.⁵ The older U.S. constitutional system, following text and tradition, provides an option of total disqualification and relies on the Senate's restraint on the very rare occasions when the choice is actually made. One could ask whether the United States should learn more from Europe or whether Europe should learn more from the United States. One could also ask what the global human rights system should learn from both the European and U.S. approaches.

This article critically examines the European Court's 2022 opinion, against the background of earlier litigation over the Paksas impeachment.⁶ It explores the U.S. experience with disqualification after impeachment, widening the lens to consider state-level impeachments as well as federal ones. Bringing state constitutional practice into that discussion highlights the largely forgotten option of partial disqualification, which could provide a different method for pursuing proportionality in U.S. impeachment proceedings. Nonetheless, the article concludes that permanent and irreversible disqualification should remain an available outcome.

For purposes of this article, "impeachment" refers to mechanisms for the removal of a public official singled out by the legislature on charges of wrongdoing. Historically, impeachment involved accusation by the lower house, and trial and judgment by the upper house, as it does under the U.S. Constitution and most state constitutions today.⁷ More broadly, some countries and some U.S. states have established a larger role for the judiciary in the impeachment process. Either way, impeachment for violation of a legal standard differs from dismissal at will by a vote of no confidence in a parliamentary system, which may properly be based on simple policy disagreements or partisan alignments.

5. For background on proportionality, see *infra* Part I, and for an explanation and analysis of the principle of proportionality in international human rights law, see Yutaka Arai-Takahashi, *Proportionality*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 446 (Dinah Shelton ed., 2013).

6. The author should disclose that he was involved in an aspect of this litigation, as a member of the UN Human Rights Committee when it decided the communication *Paksas v. Lithuania*, Hum. Rts. Comm., Views Adopted by the Committee at its 110th session Concerning Communication No. 2155/2012, (Human Rights Committee 2014), UN Doc. CCPR/C/110/D/2055/2012 (2014), as discussed *infra*.

7. See PETER CHARLES HOFFER & N.E.H. HALL, *IMPEACHMENT IN AMERICA*, 1635—1805, 3 (1984) (describing English practice of impeachment charges by the House of Commons followed by trial in the House of Lords).

In addition to removal from the current office, a substantial number of national constitutions provide for disqualification from future office as an outcome of the impeachment process.⁸ Disqualification may be a mandatory consequence of conviction or an optional element in the judgment.⁹ The impeached official may be barred only from the same office, or from a broad range of offices.¹⁰ The disqualification may last for a certain number of years, or may be permanent.¹¹ In Lithuania, as will be explained, the constitutional provision on impeachment did not explicitly mention disqualification until recently, but permanent disqualification was recognized as a matter of constitutional interpretation.

This article proceeds as follows. Part I describes the impeachment of Rolandas Paksas in 2004 and the human rights proceedings at the international level that arose from it, culminating in the spring 2022 decision of the European Court of Human Rights (A). It then provides some first thoughts about the European Court's approach to limiting the duration of disqualification after impeachment (B). Part II then turns to U.S. impeachment practice,

8. Disqualification may also result from legislation that specifies details of the impeachment process, rather than being mentioned in the constitution itself. In Japan, where impeachment applies only to judges, removed judges are prohibited from practicing law, but the Judge Impeachment act provides that after five years they may ask the (legislative) impeachment court to lift the disqualification. Judge Impeachment Act, article 38 (Japan); *see also* Noboru Yanase, *Overview of the Judge Impeachment System in Japan: Focusing on the Constitutional Design for the Impeachment Committee and Court*, 31 *NIHON UNIV. COMPAR. L.* 1, 8 n.11 (2014). I am grateful to Professor Miki Tanikawa for assisting me with this statute.

9. *See, e.g.*, MADAGASCAR CONST. OF 2010, art. 132 (making disqualification mandatory); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 175 (making disqualification optional). A mandatory disqualification may appear in the eligibility grounds for an office rather than as an element in the impeachment process. *See, e.g.*, CONST. OF THE INDEPENDENT STATE OF SAMOA, art. 18(2)(c) (providing that a person previously removed as Head of State for misbehavior may not be appointed Head of State).

10. *See, e.g.*, ÚSTAVA ČESKÉ REPUBLIKY [CONSTITUTION], art. 65(2) (Czech) (making a removed president ineligible for future presidency); CONSTITUCIÓN DE LA NACIÓN ARGENTINA, art. 60 (stating that impeached officials may be declared ineligible for national offices).

11. *See, e.g.*, CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL [CONSTITUTION], art. 52 (stating that the disqualification of impeached officials is limited to eight years); CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991, art. 175 (noting the ineligibility of impeached officials to hold future positions may be temporary or permanent).

including the often-overlooked state impeachment experience, in light of the human rights analysis. It discusses optional and mandatory disqualification, total or limited disqualification, and subsequent revision of impeachment decisions. Part III brings together the European and U.S. approaches, for the light that they shed on each other.

I. Human Rights and Proportionality after Impeachment

The issue of post-impeachment disqualification as a possible infringement on human rights was raised before two human rights tribunals in the case of the ex-president of Lithuania, Rolandas Paksas, which this part describes at some length. He sought the intervention of the European Court of Human Rights (ECtHR) first, and later the UN Human Rights Committee, after the ECtHR had ruled that some of his claims were outside its jurisdiction. The failure of Lithuania to enact reforms implementing the ECtHR judgment in his favor set the stage for the later proceedings seeking the court's guidance on the disqualification of another Lithuanian politician, and the court's 2022 advisory opinion.

To briefly introduce the institutional actors: the ECtHR is the regional human rights court for the Council of Europe, which engages in binding adjudication of cases brought by individuals under the European Convention on Human Rights and its supplementary treaties ("protocols") against any of the 46 member states.¹² The Human Rights Committee is the treaty body that monitors compliance with the International Covenant on Civil and Political Rights (ICCPR), one of the principal human rights treaties at the global level.¹³ It issues decisions ("Views") that are influential but not legally binding on claims brought by individuals against states that have ratified both the ICCPR itself and the optional protocol that authorizes the individual cases.¹⁴ Both the European Convention system and the ICCPR protect

12. There were 47 member states until 2022, when Russia was expelled because of its invasion of Ukraine. EUR. CONSULT. ASS. *Resolution CM/Res (2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe* (Mar. 16, 2022).

13. See Gerald L. Neuman, *Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members*, in *THE HUMAN RIGHTS COVENANTS* AT 50, 31 (Daniel Moeckli et al. ed. 2018) (describing the functions of the Human Rights Committee and its members).

14. *Id.* at 34 (describing the communications procedure and the effect of the resulting decisions).

the right of individuals to stand as candidates for office, though in different ways, as will be described.

A. Troubles in Lithuania

Lithuania, a Baltic state ruled by the Soviet Union until the end of the Cold War, has a semi-presidential system of government with an independently elected president and a prime minister chosen by the unicameral parliament (the Seimas) under its 1992 Constitution.¹⁵ The Constitution makes the president, parliamentarians, and higher court judges subject to removal by a three-fifths vote of the parliament.¹⁶ The impeachment process is governed partly by the Constitution, as construed by the Constitutional Court, and in further detail by the statute of the parliament. The grounds for impeachment include gross violation of the Constitution and breach of the oath of office, and commission of crime.¹⁷ To determine whether an official has committed a gross violation and breach of oath, the parliament seeks a ruling from the Constitutional Court, and the parliament is bound by the court's conclusions.¹⁸ Ordinarily, impeachment on grounds of crime is authorized after final conviction by the courts.¹⁹ The Constitution also

15. See WAYNE C. THOMPSON, *NORDIC, CENTRAL, & SOUTHEASTERN EUROPE* 170 (20th ed. 2022) (describing the Lithuanian political system).

16. LIETUVOS RESPUBLIKOS KONSTITUCIJA [CONSTITUTION], art. 74 (Lith.).
The President of the Republic, the President and justices of the Constitutional Court . . . [or] of the Supreme Court . . . [or] of the Court of Appeal, as well as any Members of the Seimas, who grossly violate the Constitution or breach their oath, or are found to have committed a crime, may be removed from office or have the mandate of a Member of the Seimas revoked by a 3/5 majority vote of all the Members of the Seimas.

Id.

17. *Id.*

18. See Conclusion on the Compliance of Actions of President Rolandas Paksas of the Republic of Lithuania Against Whom an Impeachment Case Has Been Instituted with the Constitution of the Republic of Lithuania, The Constitutional Court of the Republic of Lithuania, March 31, 2004, LRKT Case No. 14/04, part IV, ^ 4. The Constitutional Court considers the two issues of gross violation and breach of oath as having the same reach—each entails the other. *Id.* part II, ^ 6.

19. See Ruling on the Compliance of Article 227 (Wording of 9 November 2004) of the Statute of the Seimas of the Republic of Lithuania with the Constitution of the Republic of Lithuania, The Constitutional Court of the Republic of Lithuania, LRKT Case No. 4/2016, Feb. 24, 2017, ^ 10.2.5. There are two exceptions. First, the parliament itself can determine the commission of a crime if

separately provides that persons serving a court-imposed sentence are not eligible for election to parliament, or to be president.²⁰

The basic procedural facts of the Paksas impeachment are well-documented, although there are competing narratives of the background facts and motivations.²¹ Paksas had served for two brief periods as Prime Minister under President Valdas Adamkus before forming his own party and beating Adamkus in the 2002 election.²² A few months after his inauguration he conferred Lithuanian citizenship by special decree on a resident Russian businessman, Jurij Borisov, who had been a major donor to his election campaign.²³ An intelligence report became publicly known in the fall of 2003, raising concerns about *quid pro quo* corruption and possible influence of the Russian government or Russian criminal networks on the Lithuanian presidency.²⁴ The parliament requested a ruling by the Constitutional Court on the constitutionality of the President's decree, and after taking testimony the Constitutional Court concluded that Paksas had granted citizenship irregularly and for reasons of his own personal interest—not for a legitimate public purpose—thereby violating the Constitution and his oath of office.²⁵ Meanwhile, the parliament had

the official was caught in the course of committing it. *Id.* ^ 10.2.4.2. Second, the president is constitutionally immune from criminal prosecution while in office, and so the parliament acting alone can make the findings needed for removal on this ground. *Id.* ^ 10.2.3. Criminal acts may also involve gross violation of the Constitution and breach of the oath; some do and others do not. *Id.* ^ 10.3.2.

20. LIETUVOS RESPUBLIKOS KONSTITUCIJA [CONSTITUTION], art. 56, | 2 (Lith.) (providing ineligibility for election to Seimas); *Id.* art. 78, ^ 1 (making eligibility for president depend on eligibility for the Seimas). Furthermore, criminal convictions are relevant to the qualifications of judges. *Id.* art. 116.

21. For two different perspectives on Paksas's impeachment, see Terry D. Clark & Eglė Verseckaitė, *PaksasGate: Lithuania Impeaches a President*, 52 PROBS. OF POST-COMMUNISM 16 (2005) and Zenonas Norkus, *Political Development of Lithuania: A Comparative Analysis of Second Post-Communist Decade*, 8 WORLD POL. SCI. REV. 217 (2012).

22. Clark & Verseckaitė, *supra* note 21, at 17, 19.

23. *Id.* at 18; Norkus, *supra* note 21, at 230-31.

24. Clark & Verseckaitė, *supra* note 21, at 18-20; Norkus, *supra* note 21, at 231, 238.

25. Ruling on the Compliance of the Decree of the President of the Republic of Lithuania (No. 40) "on Granting Citizenship of the Republic Lithuania by Way of Exception" of 11 April 2003 to the Extent that it Provides that Citizenship of the Republic Lithuania is Granted to Jurij Borisov with the Constitution of the Republic of Lithuania and Paragraph 1 of Article 16 of the Republic of Lithuania's Law on Citizenship, The Constitutional Court of the Republic of Lithuania Dec. 30, 2003, LRKT Case No. 40/03, 24, 68.

initiated an impeachment investigation, and in February 2004 it requested the determination of the Constitutional Court on several proposed accusations, including one based on corruption leading to the grant of citizenship; one based on warning Borisov that the intelligence services were investigating him and tapping his phone; and a separate charge based on pressuring a private company to transfer shares in a road-building company for the benefit of an associate of Paksas (who was also involved in communications between Borisov and Paksas).²⁶ The Constitutional Court rejected some of the charges, but concluded that each of these three allegations had been demonstrated and that each involved gross violation of the Constitution and breach of his oath of office.²⁷ After receiving these conclusions the parliament voted by the required three-fifths majority to remove Paksas as president, based on all three charges.²⁸

The impeachment saga entered a new phase, however. With Paksas removed, the chairperson of the parliament became acting president, and a new presidential election was called for June 2004.²⁹ Paksas sought to run in that election too, and the parliament amended the presidential elections act to provide that an official removed in impeachment proceedings could not be elected president until five years had elapsed since the removal.³⁰ Some members of the parliament requested the Constitutional Court to find the disqualification rule unconstitutional.³¹ Instead, the Constitutional Court held that the five-year rule did not go far enough. Construing the constitution as a whole, the Constitutional Court announced for the first time that an official who is removed by impeachment for grossly violating the Constitution and breaching the oath of office is permanently disqualified from certain offices of constitutional stature,

26. See Conclusion on the Compliance of Actions of President Rolandas Paksas of the Republic of Lithuania Against Whom an Impeachment Case Has Been Instituted with the Constitution of the Republic of Lithuania, The Constitutional Court of Republic of Lithuania Mar. 31, 2004, LRKT Case No. 14/04, pml.; pt. I, pt. VII, ^ 4.1, pt. VIII, ^, 8.

27. *Id.* at 71-72.

28. See Norkus, *supra* note 21, at 231-32.

29. *Id.* at 231.

30. See Clark & Verseckaitė, *supra* note 21, at 21; see also Ruling on the compliance of Article 1¹ (Wording of 4 May 2004) and Paragraph 2 (Wording of 4 May 2004) of Article 2 of the Republic of Lithuania's Law on Presidential Elections with the Constitution of the Republic of Lithuania, The Constitutional Court of the Republic of Lithuania, May 25, 2004, LRKT Case No. 24/04.

31. Ruling on the compliance of Article 1¹, *supra* note 30, pt. II.

including the presidency and membership in the Seimas.³² The Constitutional Court stressed that “[i]mpeachment is a form of public and democratic scrutiny of those holding public office, a measure of self-protection for the community, a . . . defence against high-ranking officials who disregard the Constitution and laws.”³³ In compliance with the Constitutional Court’s decision, the parliament then amended the election laws to add the permanent disqualification.³⁴

Barred from seeking re-election, and also from the parliament, Paksas turned to the European Court of Human Rights, where he achieved partial success. The case was decided directly by the ECtHR Grand Chamber, presumably because of the novelty and importance of a challenge to the first impeachment of a head of state in Europe.³⁵ In 2011, the court set aside Paksas’s procedural objections to the impeachment proceedings and the disqualification, but held that the lifelong disqualification violated his right to stand for election to the legislature.³⁶ The decision focused narrowly on his disqualification from candidacy for the Seimas rather than candidacy for president, because the electoral provision of the European Convention addresses only legislative elections.³⁷

32. *Id.* pt. III, ^ 11. The Constitutional Court identified the other relevant offices as members of the Seimas, members of the Government (i.e., ministers), justices of the Constitutional Court, judges of other courts, and the state controller, all of which are constitutional offices for which an oath is prescribed by the Constitution as a prerequisite to office. *Id.*

33. *Paksas v. Lithuania*, App. No. 34932/04 (Eur. Ct. H.R. 2011) (Grand Chamber), ^ 34 (quoting the Constitutional Court’s decision).

34. *Id.* Π 35-36.

35. *Id.* A Grand Chamber of seventeen judges is the largest formation in which the ECtHR sits, approximately comparable to an *en banc* sitting in the Ninth Circuit, where there are also too many judges to sit all at once. The ECtHR has one judge from each of the member states. Grand Chamber judgments are especially authoritative.

36. *Paksas*, App. No. 34932/04, Π 67-68. The ECtHR rejected his claims of violation of the presumption of innocence and the prohibition of retroactive criminal sanctions, because the impeachment proceedings were not criminal in nature and therefore these rights did not apply; it rejected his claims of unfair procedure because the impeachment proceedings were neither criminal nor civil proceedings within the scope of the fair trial guarantee of Article 6.

37. *Id.* ^ 72; see Protocol 1 to the European Convention of Human Rights art. 3, Nov. 4, 1950, ETS 9 (“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”). It has long been established that the provision does not apply to a typical presidency. See *Boškoski v. Former Yugoslavian Republic of Macedonia*,

The ECtHR found the lifelong disqualification from election to the legislature to be disproportionate.³⁸ The ECtHR observed that electoral legislation must be assessed in light of the political evolution of the country concerned and that limiting a person's right to stand for office did not require as strong a justification as limiting a person's right to vote.³⁹ Moreover, the purpose of Lithuania's restriction was legitimate: the European Convention "does not exclude the possibility of imposing restrictions on the electoral rights of a person who has, for example, seriously abused a public position or whose conduct has threatened to undermine the rule of law or democratic foundations," and the Constitutional Court's findings about Paksas were of that kind.⁴⁰ Paksas's misconduct was clearly within the scope of the disqualification rule, and the Convention did not require that the domestic courts make an individualized determination of the proportionality of disqualification under the particular circumstances.⁴¹ The impeachment procedures also provided several safeguards against arbitrariness, including the involvement of the Constitutional Court, the right to be heard by that court, and the three-fifths supermajority rule in the parliament.

Nonetheless, the ECtHR was not persuaded that permanent and irreversible disqualification from candidacy for the legislature as a result of a categorical rule was a proportionate response to the need for preserving the democratic order. It was not the usual rule in Europe, where most states that allow impeachment of the head of state either impose no disqualification from parliament but rather leave the choice to the voters, or require a specific judicial decision on the case to so disqualify, and subject that disqualification to a time limit.⁴² The historical circumstances of Lithuania should be taken into account, but that situation was likely to evolve, and the disqualification was permanent. Finally, the Court observed that the adoption of the rule

App. No. 11676/04, at 6 (Eur. Ct. H.R. Sept. 2, 2004) (declining to adjudicate presidential disqualifications, because they fall outside the scope of article 3 of Protocol No. 1 and article 6). The later Protocol No. 12 to the European Convention establishes a nondiscrimination guarantee that does apply to presidential elections. *Sejdić and Finci v. Bosnia and Herzegovina*, App. No. 27996/06, 34836/06 (Eur. Ct. H.R. Dec. 22, 2009) (Grand Chamber), ¶¶ 53-54. However, Lithuania has not ratified that Protocol.

38. *Paksas*, App. No. 34932/04, ¶ 112.

39. *Id.* ¶ 96.

40. *Id.* ¶ 101.

41. *Id.* ¶¶ 101-02.

42. *Id.* ¶ 106.

was apparently influenced by the particular circumstances of the just-completed impeachment, adding to the sense that rule was disproportionate.⁴³ Accordingly, a majority of the Grand Chamber found a violation.⁴⁴ It ordered no payment of damages, but its declaration of the inconsistency of the permanent disqualification rule with the European Convention triggered an enforcement process in a different component of the European human rights system that would be pressuring Lithuania to change its law.⁴⁵

Having had only some of his claims addressed, Paksas turned next to the Human Rights Committee, submitting a “communication” against Lithuania under the Optional Protocol to the ICCPR.⁴⁶ An unusual provision of the Optional Protocol enables individuals who have already had their complaints examined by the ECtHR to raise them a second time before the Committee, but only after the ECtHR proceedings have ended.⁴⁷ This possibility is normally invoked by claimants who have lost, not won, at the ECtHR.⁴⁸ The Committee denied that it could receive Paksas’s complaint about parliamentary disqualification, because the European enforcement proceedings on the same issue were still ongoing. The Committee thereby avoided giving

43. *Id.* ¶ 111.

44. Three judges dissented, finding Paksas’s challenge to the disqualification untimely and so inadmissible; their opinion suggested that the claim should probably have failed on the merits if proper deference were given to public authorities. *Paksas*, App. No. 34932/04, ¶ 12, (Costa, J., dissenting).

45. The Committee of Ministers in the Council of Europe has responsibility for supervising the execution of the ECtHR’s judgments, and it maintains a substantial bureaucracy for that purpose. See Rafaella Kunz, *Securing the Survival of the System: the Legal and Institutional Architecture to Supervise Compliance With the ECtHR’s Judgments*, in RESEARCH HANDBOOK ON COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW 12, 28-35 (Rainer Grote et al. eds., 2021).

46. Hum. Rts. Comm., *Paksas v. Lithuania*, *supra* note 6.

47. Optional Protocol to the International Covenant on Civil and Political Rights, art. 5(2)(a), G.A. Res. 2200A (XXI) (conditioning admissibility on whether the same matter is “being examined” by another international tribunal).

48. Paksas raised both his losing and winning claims: the procedural arguments that the ECtHR had dismissed, the objection to presidential disqualification that the ECtHR had found outside the scope of its Convention, and the objection to parliamentary disqualification on which he had prevailed (as well as peripheral issues about disqualification for offices of lesser interest). In the Committee’s 2014 Views, the procedural claims failed on the same grounds as at the ECtHR. The impeachment proceedings were not criminal proceedings subject to the procedural rights that he claimed, and neither were they civil proceedings subject to the fair trial provision. Hum. Rts. Comm., *Paksas v. Lithuania*, *supra* note 6, at ¶¶ 7.7-7.8.

an unneeded second opinion that would have been less binding anyway (because ECtHR judgments are binding and HRC Views are not). But the right to stand for office under the ICCPR is broader than the corresponding right in the European Convention,⁴⁹ and the Committee did speak to the key issue of candidacy for president, as well as disqualification from appointment as minister or prime minister.⁵⁰

The Committee took note of Lithuania's argument about the gravity of the unconstitutional conduct. But the Committee, like the ECtHR, regarded the fairness of the procedure leading to the disqualification as relevant to its proportionality. The Committee reiterated that the rights of citizens to seek election and have access to public service positions could not be "excluded except on grounds which are established by laws that are objective and reasonable, and that incorporate fair procedures."⁵¹ After reviewing the sequence of events, the majority concluded that

the lifelong disqualifications on being a candidate in presidential elections, or on being a prime minister or minister, were imposed on [Paksas] following a rule-making process that was highly linked in time and substance to the impeachment proceedings initiated against him. Under the specific circumstances of the instant case, the Committee therefore considers that the lifelong disqualifications imposed on the author lacked the necessary foreseeability and objectivity and

49. Article 25(b) ICCPR protects in general terms the right "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors," without discrimination or unreasonable restrictions. See International Covenant on Civil and Political Rights, art. 25(b), G.A. Res. 2200A (XXI). Article 25(c) protects the right "[t]o have access, on general terms of equality, to public service in [one's] country." *Id.* art. 25(c). For the right to stand for office in the European Convention, see Protocol 1 to the European Convention of Human Rights, *supra* note 37.

50. The Committee dismissed the claim concerning disqualification to run in local elections on the ground that the disqualification did not apply to local elections; it dismissed the claim concerning disqualification to serve as a judge or a state controller on the ground that Paksas did not have the other qualifications for such offices and so was not affected. Hum. Rts. Comm., *Paksas v. Lithuania*, *supra* note 6, at ¶ 7.4–7.5.

51. *Id.* ¶ 8.3; U.N. Hum. Rts. Comm., General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), ¶ 4, CCPR/C/21/Rev. 1/Add.7 (July 12, 1996).

thus amount to an unreasonable restriction under article 25(b) and (c) of the Covenant⁵²

The Committee added that Lithuania was obliged to revise “the lifelong prohibition of [Paksas’s] right to be a candidate in presidential elections or to be a prime minister or minister”⁵³

One Committee member—the present author—dissented from the Committee’s finding of violation, specifically with regard to disqualification as president, arguing that it was reasonable and foreseeable that an impeached president would not be entitled simply to run again as if he had lost a vote of no confidence.⁵⁴ The dissent also maintained that the Committee’s fact-specific finding did not call into question long-established disqualification rules in a variety of constitutions.⁵⁵

Paksas’s legal victories in Strasbourg and Geneva did not, however, lead to quick repeal of his disqualification. Instead, they resulted in a lengthy confrontation between the Council of Europe and Lithuania. The Constitutional Court insisted upon its interpretation of the Constitution, explaining that only a constitutional amendment could change the rule, and the Seimas was unable to muster the supermajorities needed to amend the Constitution.⁵⁶

Ultimately, the impasse benefited from the adoption of a new procedure enabling national courts to seek nonbinding advisory opinions from the European Court of Human Rights on issues in cases before them.⁵⁷ A second dispute over disqualification arose from the 2014 impeachment of a Seimas member.⁵⁸ The highest administrative

52. Hum. Rts. Comm., *Paksas v. Lithuania*, supra note 6, at ¶ 8.4.

53. *Id.* ¶ 10.

54. *Id.* at 18 (Committee Member Gerald L. Neuman, partially dissenting).

55. *Id.*

56. See Compliance of Paragraph 5 (Wording of 22 March 2012 of Article 2 of the Republic of Lithuania Law on Elections to the Seimas with the Constitution of the Republic of Lithuania, Case No. 8/2012, Ruling, 12-14 (Sept. 5, 2012) (Const. Ct. of the Republic of Lith.) (rejecting an effort to limit disqualification to four years by ordinary legislation); Article 148 allows the Seimas to amend the Constitution, but requires two votes to be taken, at least three months apart, with a two-thirds majority on each occasion. LIETUVOS RESPUBLIKOS KONSTITUCIJA [CONSTITUTION], art. 148 ¶ 3 (Lith.).

57. See Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, art. 1, ¶ 1, CETS No. 214 (entered into force Aug. 1, 2018).

58. Advisory Opinion, supra note 2, ¶¶ 23-25. Expulsion of a legislator for misconduct is accomplished in Lithuania by impeachment: LIETUVOS RESPUBLIKOS

court of Lithuania, needing to decide whether the legislator's continuing ineligibility for parliament six years after her impeachment violated her European Convention rights, requested an advisory opinion on the criteria for analyzing the proportionality of the disqualification under Protocol No. 1, Article 3 of the European Convention.⁵⁹ The ECtHR Grand Chamber construed its own authority as narrowly limited to the new request, but expressed awareness that its guidance could also facilitate the reform required by the *Paksas* judgment.⁶⁰ The disqualification of the legislator was also a result of the same "general and unlimited ban" against standing for office applied in *Paksas*.⁶¹ The court summarized the principles that it had applied in *Paksas* and in other decisions regarding qualifications for the legislature, or removal from other offices, before turning to the issue directly before it.

De-emphasizing the particular facts that led to its finding of violation in *Paksas*, the court asserted that "decisive weight should be attached to the existence of a time-limit and the possibility of reviewing the [disqualification] measure in question."⁶² Nonetheless, given the deference due to the state's authority to structure qualifications for the legislature (with a "wide margin of appreciation"⁶³), the court did not require that there be both a time-limit and a possibility of later reconsideration.⁶⁴ A time limit could be set in the abstract (presumably by a general law) or on a case-by-case basis, and proportionality could be achieved either through an appropriate legislative framework or

KONSTITUCIJA [CONSTITUTION], arts. 63(5), 74 (Lith.). The complex facts regarding the impeachment of Neringa Venckiene, who fled to the United States to avoid prosecution that she regarded as persecution, are summarized in the ECtHR's opinion, and are not important for the present discussion; *see also* Venckiene v. United States, 929 F.3d 843 (7th Cir. 2019) (upholding district court's refusal to stay her extradition to Lithuania). The Constitutional Court found that she had unjustifiably failed to perform her duties as a Seimas member, thereby breaching her oath and grossly violating the Constitution; thus, the disqualification was triggered by her removal.

59. Advisory Opinion, *supra* note 2, ¶ 7.

60. *Id.* ¶¶ 62-63.

61. *Id.* ¶ 70.

62. *Id.* ¶ 90.

63. *Id.* ¶ 91. The "margin of appreciation" doctrine is a rubric under which the ECtHR determines the degree of deference that it will afford to national decisions challenged as violating rights. A wider margin corresponds to greater deference. Yuval Shany, *Margin of Appreciation*, in ELGAR ENCYCLOPEDIA OF HUMAN RIGHTS 443-47 (Christina Binder et al. eds., 2022).

64. Advisory Opinion, *supra* note 2, ¶ 91-92.

through individualized review by a judicial or similar independent body.⁶⁵

The criteria that should be used in determining the proportionality of a disqualification from parliament after impeachment,

should be objective in nature and allow relevant circumstances connected not only with the events which led to the impeachment of the person concerned, but also—and primarily—with the functions sought to be exercised in the future by that person to be taken into account in a transparent way.⁶⁶

Because the purpose was primarily to protect parliamentary institutions, the main focus of the inquiry should be “the requirements of the proper functioning of the institution of which that person seeks to become a member, and indeed of the constitutional system and democracy as a whole in the State concerned.”⁶⁷ The individual’s “respect for the country’s Constitution, laws, institutions and independence” may form part of that inquiry.⁶⁸ Protecting “institutional and democratic stability” is an important factor;⁶⁹ however, the risk that a person poses to democratic stability may vary over time, particularly as democratic institutions consolidate in a country, “for example by reason of its full European integration.”⁷⁰

Within a few weeks of receiving the advisory opinion, the Seimas completed the process of adopting a constitutional amendment stating that a person impeached and removed for gross violation of the Constitution and breach of the oath regains eligibility for office ten years after the date of removal.⁷¹ The amendment retains the automatic character of the disqualification and applies the same time limit to all impeachments on such grounds regardless of the office previously held, the office currently sought, or the degree of

65. *Id.* ¶¶ 92, 96. The court also stated that the person disqualified should be heard by the independent body, and that a reasoned decision should be given. *Id.* ¶ 96.

66. *Id.* ¶ 94.

67. *Id.*

68. *Id.* ¶ 95.

69. *Id.*

70. *Id.* ¶ 91.

71. See Secretariat of the Comm. of Ministers, *Communication from the Authorities in the Case of Paksas v. Lithuania*, 1436th meeting, Doc. DH-DD(2022)450 (reporting the amendment).

seriousness of the constitutional violation.⁷² By restoring eligibility for all offices, the amendment goes beyond the scope of the violation found by the ECtHR in *Paksas*, and also deals with the broader violation found by the Human Rights Committee. Furthermore, it appears to make the ex-legislator who was the subject of the advisory opinion eligible in 2024, in time for the next parliamentary election. The Committee of Ministers closed its proceedings on execution of the *Paksas* judgment in September 2022.⁷³

B. Initial Observations

The ECtHR judgment and advisory opinion, taken together, appear to place stronger limits on disqualification than the Human Rights Committee's views. Even if the ECtHR's analysis in *Paksas* gave some weight to concerns relating to the unforeseen adoption of the disqualification rule, the advisory opinion pursued the same proportionality analysis in relation to an impeachment that took place long afterward.

In part, the European Court's more restrictive attitude may result from two factors highly specific to Europe. First, the ECtHR often uses a technique of evaluating a challenged restriction in light of a perceived European consensus, and its judgment in *Paksas* found Lithuania to be an outlier within current European impeachment practice.⁷⁴ Second, because the right to stand for office is narrowly defined in Europe, relating solely to legislative elections, the ECtHR may have perceived the disqualification as a near-total deprivation of the right.⁷⁵ In contrast, the Human Rights Committee was addressing

72. *Id.* The amendment also does not change the rule regarding impeachment on grounds of a crime that does not involve a gross violation of the Constitution, by which the person is ineligible only for election to the parliament, and only during the period of a court-imposed sentence.

73. Eur. Comm. Of Ministers, *Execution of the Judgement of the European Court of Human Rights Paksas Against Lithuania*, 1443rd meeting, Res. CM/ResDH(2022)253 (2022).

74. *Paksas v. Lithuania*, App. No. 34932/04, ¶ 106 (Eur. Ct. H.R. Jan. 6, 2011) (Grand Chamber). On the role of consensus, see Luzius Wildhaber et al., *No Consensus on Consensus? The Practice of the European Court of Human Rights*, 33 HUMAN RIGHTS L.J. 248 (2013).

75. "Near-total" because the disqualification did not extend to eligibility for election to the European Parliament, a European union body that the ECtHR regards as also counting as part of the "legislature" for EU member states. See *Matthews v. United Kingdom*, App. No. 24833/94, ¶¶ 40-44 (Eur. Ct. H.R. Feb. 18, 1999) (Grand Chamber) (explaining why the European Parliament should be

a more selective disqualification from the broad range of offices for which the ICCPR guarantees a politician's right to stand.

The rulings also reflect the European Court's wider discomfort with lifelong sanctions that do not allow for reassessment of their continuing necessity, as seen in the context of life imprisonment and deportation. After the death penalty had been abolished in the Council of Europe, the ECtHR focused on the cruelty of "irreducible" life sentences, the equivalent of "life imprisonment without (the possibility of) parole," that offered the prisoner no prospect of future release. The court held in 2013 that irreducible life sentences were categorically prohibited as "inhuman or degrading," no matter how serious the offense.⁷⁶ A criminal defendant could be sentenced to life imprisonment, but after about 25 years had passed there needed to be periodic reviews of whether continued detention could no longer be justified on legitimate penological grounds, taking into account such factors as the prisoner's rehabilitation.⁷⁷ A similar preference for reevaluating severe sanctions arises when states deport settled immigrants who have been convicted of crimes and permanently bar their return, although in this context the Court sometimes finds a

considered part of the 'legislature' despite its supranational character); *Occhetto v. Italy*, App. No. 14507/07, ^ 42 (Eur. Ct. H.R. Nov. 12, 2013) (inadmissibility decision). In fact, Rolandas Paksas did run in European Parliament elections, serving there from 2009 until 2019. The ECtHR mentioned that Paksas was a member of the European Parliament at the beginning of its 2011 judgment, but made no reference to the European Parliament in its merits analysis, or in the later Advisory opinion. *Id.* ^ 9.

76. *Vinter v. United Kingdom*, App. Nos. 66069/09, 130/10, and 386/10 fl 119–22 (Eur. Ct. H.R. Jul. 9, 2013) (Grand Chamber). Article 3 of the European Convention on Human Rights prohibits torture and inhuman or degrading treatment or punishment. This prohibition is absolute within its scope. *See Sanchez-Sanchez v United Kingdom*, App. No. 22854/20 (Eur. Ct. H.R. Nov. 3, 2022) (Grand Chamber), ^ 78.

77. *See Vinter*, App. Nos. 66069/09, ^ 120 ("[T]he Court would also observe . . . clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence."); *Bodein v. France*, App. No. 40014/10 (Eur. Ct. H.R. Nov. 13, 2014) (accepting somewhat longer period, less than thirty years, as within state's margin of appreciation). The possibility of wholly discretionary executive clemency is not sufficient. *See Vinter*, App. Nos. 66069/09, fl 125-30. The prohibition also extends to extraditing an accused to a country where he faces a real risk of receiving an irreducible life sentence, although the relevant procedures may be different in that context. *See Sanchez-Sanchez*, App. No. 22854/20, fl 95-99 (adapting principles of *Vinter* to extradition decisions).

criminal record so serious that permanent expulsion can be proportionate.⁷⁸

The ECtHR was aware that a proposed constitutional amendment setting a ten-year disqualification for all relevant impeachments was pending in Lithuania, and that it might or might not pass. The advisory opinion took no position on whether a fixed ten-year bar on legislative office might still be disproportionate in relation to some impeachments, including that of the legislator whose case prompted the referral; that was an issue left to the national court by the advisory opinion procedure. In fact, the opinion seems ambiguous on what kind of time limit might make later individualized review unnecessary. Arguably a fifty-year time limit would be as burdensome as a permanent disqualification, and would still require a later opportunity for restoration of eligibility. For shorter disqualifications, there may be some tension between the court's description of the appropriate criteria and the idea that a fixed time limit set by legislation is permissible.⁷⁹

The advisory opinion could have been written in a manner that placed more reliance on the mandatory character of the disqualification rule in Lithuania. Under the Constitutional Court's 2004 interpretation, the parliament could not remove an official for gross violation of the Constitution and breach of the oath without activating the lifetime disqualification from the designated offices. As the ECtHR was aware, the pending amendment would not change the automatic disqualification, although it would be limited to ten years. The advisory opinion identifies the two alternatives of placing a time

78. See *Savran v. Denmark*, App. No. 57467/15, ¶¶200-01 (Eur. Ct. H.R. Dec. 7, 2021) (Grand Chamber) (finding that expulsion and permanent re-entry ban, without opportunity for reconsideration in light of improvement, violated the rights of a long-term foreign resident convicted of serious crimes but committed for psychiatric care). *But see* *Levakovic v. Denmark*, App. No. 7841/14 (Eur. Ct. H.R. Oct. 23, 2018) (upholding permanent expulsion of settled immigrant with extensive criminal record); *Johansen v. Denmark*, App. No. 27801/19 (Eur. Ct. H.R. Feb. 1, 2022) (upholding denationalization and permanent expulsion of dual national who went to Syria and joined ISIL). Article 8 of the European Convention on Human Rights protects the right to respect for one's private and family life, but is subject to proportionate limitation. See *Savran*, [^] 181.

79. Perhaps the approaches can be reconciled by a demanding understanding of "the requirements of the proper functioning of the legislature, entailing that a minimum waiting period is required for confidence that the misconduct that prompted the removal will not be repeated. Advisory Opinion, *supra* note 2, at [^] 94.

limit on the disqualification or providing subsequent reconsideration of the disqualification by an independent body, but it does not present as a third alternative the greater individualization of the sanction in the impeachment process itself, without opportunity for later reconsideration.⁸⁰ This silence does not appear to be merely a result of the particular question presented to the court, but rather an expression of the court's strict opposition to irreversible lifelong disqualification from the legislature.

One might compare the ECtHR's stance with the Human Rights Committee's approach to the somewhat analogous case of *Arias Leiva v. Colombia*. Rather than impeachment, it addressed the lifelong disqualification of a former minister of agriculture who had been convicted by the Colombian Supreme Court on criminal charges relating to the massive diversion of funds and illegal contracts.⁸¹ Under a broad constitutional provision, all persons convicted of "offences involving State assets" (*delitos que afecten el patrimonio del Estado*) were rendered ineligible for both elected and appointed public office.⁸² The Committee insisted that a state "may impose a lifelong suspension of the rights [to seek elected and appointed office] only in the most exceptional circumstances, for serious crimes and when justified by the individual circumstances of the convicted person."⁸³ The Committee found the automatic disqualification under this vague provision, by means of a Supreme Court judgment that did not offer a "meaningful individualized assessment" of the ban, a violation of article 25 ICCPR.⁸⁴ A concurring opinion suggested that imposing a lifelong disqualification could be justified either by an individualized judicial assessment of proportionality or by a categorical law applying to a "clearly-defined range of serious crimes, when committed by a narrow range of high-level public servants."⁸⁵

80. *Id.* ¶ 92, 95-96.

81. *Arias Leiva v. Colombia*, Comm'n No. 2537/2015 (Hum. Rts. Comm. Dec. 18, 2018). The concurring opinion notes that the funds at issue amounted to millions of dollars. *Id.* at 16 (Sarah Cleveland, concurring), para. 4. For the background, see also *Arias Leiva v. Warden*, 928 F.3d 1281 (11th Cir. 2019) (upholding extradition to Colombia to serve the sentence).

82. *Arias Leiva v. Colombia*, No. 2537/2015, ¶ 2.12, n.1.

83. *Id.* ¶ 11.7.

84. *Id.*

85. *Id.* at 16 (Sarah Cleveland, concurring), para. 4. It may not be evident why automatic disqualification for a serious enough crime should be limited only to those who already held a high-level position within a narrow range.

Because the ECtHR advisory opinion sought to answer a question about the proportionality of disqualification from *legislative* elections, which are the sole subject of Article 3 of Protocol No. 1, its analysis may be insufficient to address disqualification from other offices.⁸⁶ In fact, the court included in the summary of its prior case law a description of the recent Chamber judgment in *Xhoxhaj v. Albania*,⁸⁷ which upheld a lifetime prohibition of judicial office for a constitutional court judge who had been removed by an anticorruption tribunal. Although disqualification from judicial office raises no issue under Article 3 of Protocol No. 1, the ECtHR has developed an interpretation of Article 8 ECHR, guaranteeing respect for “private life,” that limits government action having severe impact on access to employment in public service.⁸⁸ Nonetheless, the advisory opinion drew no conclusions from the acceptance of disqualification in *Xhoxhaj* for the opinion’s own proportionality analysis.

The ECtHR must have been aware of the parallel question of disqualification for presidential office, which was also covered by the pending amendment, and which was a focus of the Human Rights Committee decision that the ECtHR quoted in the background portion of its advisory opinion. It is possible that the ECtHR would not regard disqualification from presidential office, taken in isolation, as a severe limitation of the right to respect for private life, necessitating a proportionality analysis under Article 8.⁸⁹ If so, the advisory opinion gave Lithuania no hint on that issue.

86. Moreover, the ECtHR’s singular focus on legislative office may distract from the difficulty of drafting an appropriate framework for disqualification from multiple offices. The drafter must necessarily consider more than that one possibility. A uniform time limit would represent a compromise among the varying periods appropriate for different offices, or reduction to the lowest common denominator. If a compromise, then the term that would be proportionate for the range of offices might appear excessive for a particular office in subsequent litigation. It may be too much for a human rights court to expect legislation, let alone a constitution, to set out an array of disqualification periods that approximates individualized justice for each.

87. Advisory Opinion, *supra* note 2, ^ 85; see *Xhoxhaj v. Albania*, App. No. 15227/19 (Eur. Ct. H.R. Feb. 9, 2021).

88. See *Xhoxhaj*, App. No. 15227/19, ^ 403; see also *Denisov v. Ukraine*, App. No. 76639/11, W07-17 (Eur. Ct. H.R. Sept. 25, 2018) (Grand Chamber); *Polyakh v. Ukraine*, App. No. 58812/15, fl 203-10 (Eur. Ct. H.R. Oct. 17, 2019).

89. It is less clear how the ECtHR would regard disqualification from service as president, prime minister, head of government ministry, or state controller, the full list of executive positions barred by impeachment under the Lithuanian Constitutional Court’s ruling. See note 32 *supra*. The *Xhoxhaj* decision does suggest

Evaluating a disqualification rule requires attention to competing risks. Assuming that the removal by impeachment was itself justified, disqualification protects against neglect, corruption, or abuse of power. On the other hand, disqualification limits the erring official's self-realization and may deprive the official's supporters of a favored representative. The power to disqualify may itself be abused, to eliminate a political rival in the long term.

From the perspective of the voters, the "free expression of the opinion of the people in the choice of the legislature" does not require that they have the opportunity to elect any candidate they wish, whenever they wish, regardless of legitimate reasons for ineligibility.⁹⁰ The ECtHR itself recognizes that reality, and calls only for proportionality in disqualification.

Different offices may vary not only in the characteristics required to perform them credibly, but also in the potential for harm that they pose. A parliamentarian is a single member of a large decisional body, whose main task is the joint adoption of legislation. Parliamentarians may have secondary functions that they perform alone, and they may have opportunities to inflict other harms separately, such as leaking sensitive information, but their power is usually contingent on combined action with their colleagues.⁹¹ Solo officials, especially those with protected tenure in office, pose greater dangers. The powers of a non-ceremonial president can inflict deep harm when abused.⁹² So can those of a prime minister, even though the

that the ECtHR would regard disqualification from judicial office, which impeachment in Lithuania also entails, as severe enough to require a proportionality analysis, at least for an individual who had sufficient legal training to be eligible in the first place. See *Xhoxhaj*, 363-64. ¶¶

90. See, e.g., Eur. Comm'n for Democracy Through L., *Rep. on Exclusion of Offenders From Parliament*, Opinion No. 807/2015, at 4-6 (2015) [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)036cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)036cor-e) [<https://perma.cc/GW9V-VXKD>].

91. See, e.g., Anthony W. Bradley & Cesare Pinelli, *Parliamentarism*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 650, 660-62 (Michel Rosenfeld and Andrés Sajó eds. 2012) (discussing immunity and liability of parliamentarians for individual wrongdoing).

92. See, e.g., Héctor Fix-Ferro & Pedro Salazar-Ugarte, *Presidentialism*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 628, 636-39 (Michel Rosenfeld and Andrés Sajó eds. 2012) (describing risks of presidential powers' leading to authoritarianism).

prime minister may be legally subject to removal by a parliamentary majority.⁹³

In both its 2011 judgment and its 2022 advisory opinion, the ECtHR alluded to the greater democratic stability afforded over time by full European integration.⁹⁴ It may be understandable that in 2011 the court regarded membership in the Council of Europe and the European Union as bolstering a state's democratic character, and diminishing the need for disqualification as a protection against a politician who abuses power and has dangerous allies.⁹⁵ By 2022, however, having witnessed in its own workload the regressive trend that includes "illiberal democracy" in Hungary, the political takeover of the judiciary in Poland, and Russia's invasion of Ukraine, the court had less reason to express faith in the growth and protective aegis of European integration.⁹⁶ At any rate, the global human rights system with its broader coverage does not have similar bases for reassurance.

If the ECtHR's proposal of subsequent reconsideration by an "independent body" is implemented, and especially if it is extended to disqualification for executive office (such as a president or prime minister), then the advisory opinion may have dismantled an important tool for resisting democratic decay. The court appears to be focused on fairness to the former official and concern that the reviewing body may be too restrictive, not that it may be too lenient. As a result, the opinion hands to later majorities the formula by which they can

93. See, e.g., Péter Krekó & Zoltan Enyedi, *Orbán's Laboratory of Illiberalism*, 29 *J. Democracy* 39 (2018) (discussing prime minister of Hungary); Sumit Ganguly, *India under Modi: Threats to Pluralism*, 30 *J. Democracy* 83 (2019) (discussing prime minister of India).

94. *Paksas*, No. 34932/04, ¶¶7-09 (Grand Chamber) (citing *Ždanoka v. Latvia*, App. No. 58278/00 (Eur. Ct. H.R. Mar. 16, 2006)); Advisory Opinion, *supra* note 2, at ^ 91 (same).

95. *Id.* ¶ 107-08.

96. See, e.g., *Baka v. Hungary*, App. No. 20261/12 (Eur. Ct. H.R. June 23, 2016) (Grand Chamber) (finding that the Orbán regime violated the rights of the president of the supreme court by demoting him in retaliation for his criticism of its efforts to reorganize the courts); *Karácsony v. Hungary*, App. Nos. 42461/13, 44357/13 (Eur. Ct. H.R. May 17, 2016) (Grand Chamber) (finding that the legislative majority imposed disciplinary fines on opposition members for engaging in a protest, without affording them basic procedural safeguards); *Xero Flor w Polsce v. Poland*, App. No. 4907/18 (May 7, 2021) (finding that due to irregular appointments by the new legislative majority, the constitutional court did not qualify as a tribunal established by law); Press Release, Eur. Ct. H.R., The Eur. Ct. grants urgent interim measures in applications concerning Russ. Military operations on Ukr. Territory (Mar. 1, 2022).

reinstate a justifiably disqualified leader by means of a nominally independent commission.

II. Disqualification and its Limitation in the United States

This part explores U.S. federal and state impeachment practice with attention to the factors highlighted in Part I. After introducing impeachment procedures and disqualification, it discusses the optional or mandatory character of disqualification (A), the options of total and limited disqualification (B), and the issue of post-hoc relief from permanent disqualification (C), in order to inform the comparative reflections in Part III.

The U.S. Constitution provides for impeachment as an extraordinary procedure of accountability for abuse of power. Its object, Joseph Story wrote, “is to reach high and potent offenders, such as might be presumed to escape punishment in the ordinary tribunals, either from their own extraordinary influence, or from the imperfect organization and powers of those tribunals.”⁹⁷ The salient issue that occupied debate in the federal convention was the accountability of the president, but the authority extends to all federal civil officers, including judges.⁹⁸

Compared with most writings on impeachment in the United States, this article will pay greater attention to state impeachment processes, particularly those that can lead to disqualification from future state office. Regrettably, there is no comprehensive compilation of state impeachment data.⁹⁹ From a functional perspective, states may

97. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 307 (2005).

98. Amid the copious literature, see, e.g., GERHARDT, *supra* note 3, at chs. 1 and 2 (describing the Philadelphia convention and the state ratifying debates); CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN’S GUIDE 41-61 (2017); LAURENCE TRIBE AND JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 1-9 (2018) (discussing the Philadelphia convention).

99. For purposes of this article, the most relevant categories are impeachment convictions and accompanying disqualifications (total or partial). The author is aware of 67 convictions in 29 states, producing 21 total disqualifications and 11 partial disqualifications, between 1778 and 2022 (counting Vermont prematurely as a state in the 1780s). six of these convictions (all without disqualification) occurred before 1789. The number of convictions understates the importance of impeachment, because impeachment efforts often prompt resignations, for which the documentation is even more dispersed. submitting a resignation usually leads to the abandonment of the impeachment process, but sometimes the legislators insist on completing it.

have more occasion for impeachment than the federal government does, because a wider range of officials are elected and not subject to executive removal during their terms. On the other hand, some states have additional forms of removal procedures that the federal government lacks, such as removal by resolution of “address” and recall elections.¹⁰⁰ Those methods, however, do not involve subsequent disqualification. For judges, there are also modern professionalized systems of discipline and removal.¹⁰¹

The authorized grounds for impeachment in the federal Constitution include “treason, bribery, or other high crimes and misdemeanors.”¹⁰² Some state constitutions copy this list, while others vary it slightly; some include the charge of “maladministration” that the federal convention expressly rejected (but that certain state constitutions before 1787 already contained).¹⁰³ Several state constitutions contain no listing of grounds, and simply assume that the institution of impeachment is sufficiently understood.¹⁰⁴ As the Texas Supreme Court once wrote, “While impeachable offenses are not defined in the [Texas] Constitution, they are very clearly designated or pointed by the use of the term ‘impeachment,’ which at once connotes the offenses to be considered and the procedure for the trial thereof.”¹⁰⁵ The federal and state governments share a common legal culture of impeachment, with local modifications.

100. In England, the resolution of address developed as a parliamentary mechanism for removal of judges who were protected by their tenure against removal by the Crown. It still exists in some states, either as a form of legislative resolution requiring removal, or as a legislative resolution authorizing executive removal. In some states it applies not only to judges, but to a wider category of state officials. See John T. Nugent, *Removal of Judges by Legislative Action*, 6 J. LEGISLATION 140, 142-44 (discussing history of removal by address and its survival in some states); Op. of the Justices, 274 A.3d 269 (Del. 2022) (describing procedural requirements for removal by address in Delaware). On recall elections in U.S. states, see, e.g., Shaun Bowler, *Recall and Representation: Arnold Schwarzenegger Meets Edmund Burke*, 40 REPRESENTATION 200 (2004) (describing state-level recall processes and their history).

101. See CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 3-4, 7 (2002) (describing professional accountability mechanisms for judges, including sanction of removal).

102. U.S. CONST. art. II, § 4.

103. E.g., VA. CONST. OF 1776, ART. I, | 15; MASS. CONST., pt. II, ch. I, § II, art. VIII; PA. CONST. OF 1776, § 22.

104. E.g., GA. CONST. ART. III, § VII; ILL. CONST. ART. IV, § 14; N.Y. CONST., art VI, § 24; TEX. CONST. ART. XV.

105. *Ferguson v. Maddox*, 114 Tex. 85, 96 (1924).

The federal Constitution imitated British parliamentary practice by placing the power of accusation in the House of Representatives and the power of trial in the Senate.¹⁰⁶ Early state constitutions experimented with different approaches to the separation of powers, and offered different answers to the question of where impeachments by the legislature should be tried.¹⁰⁷ In the nineteenth century, the federal model of trial by the upper house of the legislature became dominant, although a few states have returned to judicial trial (Nebraska and Missouri) or abolished impeachment altogether (Oregon).¹⁰⁸

In the federal Constitution and the current constitutions of thirty-eight states, the authorized consequences of impeachment include both removal from office and disqualification from other offices. Seven states expressly limit the sanction to removal alone,¹⁰⁹ and four are more ambiguous.¹¹⁰

106. THE FEDERALIST No. 65 (Alexander Hamilton).

107. HOFFER & HALL, *supra* note 7, at 68-77.

108. See ROGER FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, HISTORICAL AND JURIDICAL 528-29 (1895) (describing impeachment proceedings in Nebraska and abolition of impeachment in Oregon); William P. French and John G. Loughrey, *Impeachment Power: The Legislature as Moral and Ethical Watchdog Over the Executive*, 1 EMERGING ISSUES IN STATE CONST. L. 101, 104-05 (1988) (describing impeachment procedure in Missouri).

109. Michigan was the first, in its statehood Constitution of 1835, where it arguably expressed a principle of Jacksonian democracy that the people should judge the qualifications of candidates. Michigan Constitution of 1835, article VIII § 2. The second was the official 1842 Constitution of Rhode Island, repeating a limitation that had already appeared in the "people's constitution" of 1841 drafted during the Dorr rebellion. Rhode Island Constitution of 1842, article IX § 3; "people's constitution," article VII, § 3. Nonetheless, the elimination of disqualification did not spread widely among the states in the antebellum period. The Reconstruction constitution of South Carolina (1868), drafted by a majority Black convention, eliminated disqualification; one delegate expressed his support based on trust in the voters and belief in forgiveness, especially after repentance. South Carolina Constitution of 1868, article VII, § 3. Proceedings of the Constitutional Convention of South Carolina (1868), vol. I, at 654 (remarks of Mr. Langley). They were followed in the twentieth century by Oklahoma (Oklahoma Constitution, article VIII, § 5), Missouri (Missouri Constitution, article VII, § 3), Alaska (Alaska Constitution, article II, § 20), and Montana (Montana Constitution, article V, § 13).

110. Indiana authorizes removal but does not make it the maximum. IND. CONST. ART. 6, § 8. Louisiana and Kansas require removal on conviction but do not make it the maximum. LA. CONST. ART. X, § 24; KAN. CONST. ART. II, § 27. Maryland does not describe the consequences of impeachment for executive officials. MD. CONST. ART. II, § 15.

At the federal level, the Constitution makes removal mandatory after the Senate convicts on an impeachment: “The President, Vice President, and all civil officers of the United States *shall be removed from office* on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”¹¹¹ A different clause contemplates additional consequences, and limits them:

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.¹¹²

The option of disqualification had already appeared in the Virginia Constitution of 1776, the first of the state constitutions of the American revolution.¹¹³ ¹¹⁴ The express limitation of sanctions to removal and disqualification originated in the New York Constitution of 1777,¹¹⁴ which sought both to protect against officials’ abuse of power

111. U.S. CONST. art. II, § 4 (emphasis added). State constitutions do not necessarily contain such a clause, and may permit a lesser sanction of time-limited *suspension* from office after conviction on impeachment. The Massachusetts Senate applied a one-year suspension to justice of the peace William Hunt in 1794, and Vermont had suspended justice of the peace John Barret for six months in 1785. See HOFFER AND HALL, *supra* note 7, at 81, 141-42. Several modern statutes regulating impeachment proceedings provide for suspension as an alternative to removal. See, e.g., NEV. REV. ST. § 283.250 (2021) (“The judgment may be that the defendant be suspended, or that the defendant be removed from office and disqualified to hold any office of honor, trust or profit under the State.”). In 2004 the Nevada Senate convicted the state controller on an impeachment charge, and imposed only a censure. Geoff Dornan, *Augustine Goes Back to Work Today: Senate Concludes Impeachment Trial With Censure; Does Not Remove State Controller From Office*, TAHOE DAILY TRIBUNE, Dec. 5, 2004.

112. US CONST. art. I, § 3, cl. 7.

113. VA. CONST. of 1776 (“If found guilty, he or they shall be either forever disabled to hold any office under government, or be removed from such office *pro tempore*, or subjected to such pains or penalties as the laws shall direct.”). The Virginia provision contemplated impeachment by the House of Delegates, followed by trial in a judicial court. Hoffer and Hall credit John Adams’s *Thoughts on Government* (1776) with inspiring the inclusion of impeachment in the Virginia Constitution. HOFFER & HALL, *supra* note 7, at 64-66.

114. N.Y. CONST. Art. XXXIII (1777) (“[N]or shall it extend farther than to removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit under this State.”). New York provided for trial of impeachments by state

and to avoid making impeachment a means of political warfare.¹¹⁵ This limitation spread nearly verbatim to Massachusetts (1780)¹¹⁶ and New Hampshire (1784)¹¹⁷ and then to the federal Constitution, where it became a model for many other states.

In the system of U.S. federalism, the fullest legal disqualification that an impeachment can impose is actually limited to offices under the government that the former official had served. States disqualify from their own offices, and the U.S. Senate disqualifies from federal office. Other obstacles to office may arise from the disgrace or from the facts, but the sanction does not amount to a nationwide bar. The point is not merely theoretical: North Carolina's Reconstruction governor William Woods Holden was impeached, removed and disqualified for state office by the resurgent ex-Confederates, but President Ulysses S. Grant appointed him as federal postmaster in Raleigh.¹¹⁸

A. Optional or Mandatory Disqualification

Disagreements have arisen over whether the federal constitutional language or its state law variants make disqualification a mandatory or optional consequence of conviction. When the U.S. Senate passed judgment in its first impeachment conviction—against the aged judge John Pickering in 1804—only removal was considered.¹¹⁹ At the next conviction, of Judge West Humphreys for joining the Confederacy without resigning his Union post, the Senate debated whether disqualification could be separated from removal and decided to bifurcate the vote.¹²⁰ It has since become settled practice that disqualification requires an explicit vote after conviction, and can

senators, with some of the judges adjoined. It still retains that hybrid structure. N.Y. CONST. art. VI § 24.

115. PETER J. GALLIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 43 (1996).

116. MASS. CONST. Part II, ch. 1, §. 2, art. VIII (1780). The limitation had already been included in the proposed Massachusetts constitution of 1778, which was rejected by the voters for other reasons. A Constitution and Form of Government for the State of Massachusetts-Bay (1778), art. XX.

117. N.H. CONST., pt. 2, Senate

118. EDGAR E. FOLK & BYNUM SHAW, *W.W. HOLDEN: A POLITICAL BIOGRAPHY* 221-35 (1982).

119. ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* §§ 2339-41 (vol. 6 1907).

120. CONG. GLOBE, 37th Cong., 2d Sess. 2951-53 (1862).

be adopted by a simple majority rather than the two-thirds needed to convict.¹²¹

Disputes have also arisen in the state impeachment context, especially where the constitutional language provides that judgment “shall extend only to” removal and disqualification.¹²² Such wording could be seen as a more vernacular version of the federal phrase “shall not extend further than,” or instead as making an indivisible penalty of removal and disqualification the sole possibility. The claim that disqualification is mandatory was raised and debated in the 1917 Texas Senate trial of Governor James Ferguson, without definite resolution,¹²³ and was arguably endorsed in dictum by the state supreme court when Ferguson later sued.¹²⁴ In 1976, however, the next time the Texas Senate convicted, it seemed to treat disqualification as optional.¹²⁵ The Arizona Supreme Court held in 1990 that “shall extend only to removal and disqualification” had the same meaning as the federal “shall not extend further.”¹²⁶ Meanwhile, Florida amended its Constitution in 1968 to replace the “extend only” with language explicitly making disqualification discretionary for the Senate.¹²⁷

121. GERHARDT, *supra* note 3, at 80.

122. This phrasing occurs currently in ARIZ. CONST. art. VIII, pt. 2, § 2; CAL. CONST. art. IV, § 18(b); IOWA CONST. art. III, § 20; TEX. CONST. art. XV, § 4; UTAH CONST. art. VI, § 19; and WASH. CONST. art. V, § 2. In addition, the variant form “only extend to” appears in COLO. CONST. art. XIII, § 2; TENN. CONST. art. V, § 4; and WYO. CONST. art. III, § 18.

123. *See Record of Proceedings of the High Court of Impeachment on the Trial of Hon. James E. Ferguson, Governor*, 1917 Leg., 35th Sess. 801-54 (Tex. 1917). The senators debated both policy arguments for or against disqualifying Ferguson and the meaning of the constitutional provision, including the meaning of “only” and the significance of the presence or absence of a comma. The majority rejected efforts to delete the permanent disqualification from the judgment and to substitute a five-year disqualification. *Id.*

124. *See Ferguson v. Wilcox*, 119 Tex. 280, 295-97 (1930).

125. *See S. OF TEX., REC. OF PROCEEDINGS OF THE HIGH COURT OF IMPEACHMENT ON THE TRIAL OF O.P. CARRILLO, JUDGE, 229TH DISTRICT COURT* (1976), at 1561-64, https://rl.texas.gov/scanned/SIRSI/Carrillo%20Impeachment%20Senate%20Proceedings_1975-76.pdf [<https://perma.cc/C84J-8VA9>] (voting to impose disqualification).

126. *See Ingram v. Shumway*, 164 Ariz. 514, 519 (1990) (concluding that “where the Senate has removed an officer but declined to disqualify him, the Arizona Constitution leaves the question of whether the impeached official should again hold public office in Arizona to the will of the people”).

127. *See Smith v. Brantley*, 400 So. 2d 443, 450 (1981) (describing the effect of the 1968 amendment); FLA. CONST. REVISION COMM’N, COMM’N MINUTES: COMM. MINUTES & PROPOSALS, Jan. 1966 - June 1966 (1966), at 58.

Probably the best conclusion to draw is that there may be some states where disqualification could be mandatory and where the question is not settled.

B. Total or Limited Disqualification

The requirement that the consequence “shall not extend further than” disqualification from all federal offices could be understood as authorizing a broad range of disqualification options, among which the Senate could choose. On this reading, the Senate could disqualify the individual forever, or for a limited time.¹²⁸ It could disqualify the individual from a particular category of offices but from not others. It might limit the disqualification in both ways at once.

Instead, tradition has followed a less flexible practice, treating disqualification from federal office as a single unified option. Either the Senate imposes full disqualification or it imposes none. That dichotomous choice already arose in the 1862 Humphreys impeachment. Although a dispute arose in the Senate on whether removal and disqualification should be the subject of separate votes, there was no disagreement about voting on full disqualification as a unit.¹²⁹ That practice has become a Senate precedent.¹³⁰

The all-or-nothing choice has the virtue of simplicity. Senate convictions are rare, and after resolving the question of removal, the full Senate may be ill-suited to exploring a complex matrix of disqualification options with an eye to consistency and proportionality. Thus far, disqualification has been sparingly applied: after eight convictions, all of federal judges, only three have been disqualified, in 1862, 1913, and 2010.¹³¹

128. See GERHARDT, *supra* note 3, at 80 (mentioning this interpretation).

129. See CONG. GLOBE, *supra* note 120.

130. See S. DOC. No. 99-33, at 93–98 (1998) (describing voting procedure in Senate parliamentarians’ handbook of procedures for impeachment trials); ELIZABETH B. BAZAN, CONG. RSCH. SERV., CRS REPORT 98-186, IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE AND PRACTICE (2009), at 10 (“[S]hould an individual be convicted on any of the articles, the Senate must determine the appropriate judgment: either removal from office alone, or, alternatively, removal and disqualification from holding further offices of ‘honor, Trust, or Profit under the United States.’”).

131. See United States House of Representatives, *List of Individuals Impeached by the House of Representatives*, <https://history.house.gov/Institution/Impeachment/Impeachment-List/> [<https://perma.cc/FC8R-D8KU>] (listing all impeachments and outcomes). These included the unanimous disqualification of

Without disputing this settled practice, it may be observed that attention to state impeachment outcomes could have supported a different interpretation. States had imposed more limited forms of disqualification, applying impeachment clauses both like and unlike the federal provision, in the years before the Humphreys impeachment. In 1791 the Georgia Senate, acting under the open-ended language of its 1789 state Constitution, imposed a thirty-year disqualification on superior court judge Henry Osborne for falsifying the vote count in an election.¹³² Thereafter, applying clauses that mirrored the federal clause, state senates imposed limited disqualifications of seven years (South Carolina, 1793), two years (Tennessee, 1807), five years (South Carolina, 1807), four years (South Carolina 1812), three months (South Carolina, 1814), and five years (Indiana 1826).¹³³ The Pennsylvania Senate imposed permanent disqualification from any office “in the judiciary” on the notoriously partisan Federalist judge Alexander Addison in 1803.¹³⁴

Judge Humphreys, who had joined the Confederacy but had not resigned; the closely divided disqualification of Judge Archbald for corruption; and the near-unanimous disqualification of Judge Porteous for corruption in office and for misrepresentation in the process that led to his appointment. *Id.*

132. *Extracts From the Proceedings of the Senate*, THE AUGUSTA CHRON. AND GAZETTE OF THE STATE, Dec. 24, 1791, at 1, 2 (reporting the Senate trial of Osborne, and his conviction and disqualification for state office for thirty years); HOFFER & HALL, *supra* note 7 at 130–33. The disqualification was later cut short by Article IV, section 8 of Georgia’s 1798 Constitution, which “released” all convictions under previous impeachments and “restored to citizenship” those convicted. Osborne was apparently the only such person. See FOSTER, *supra* note 108, at 677 (“Apparently for his sole benefit, the following clause was inserted in the Georgia constitution of 1798: ‘Convictions on impeachments which have heretofore taken place are hereby released, and persons lying under conviction, restored to citizenship.’”).

133. See HOFFER & HALL, *supra* note 7, at 136 (discussing impeachment and disqualification for seven years of Alexander Moultrie); Cortez A.M. Ewing, *Early Tennessee Impeachments*, 16 TENN. HIST. Q. 291, 298–99 (1957) (discussing impeachment and disqualification for two years of Isaac Philips); South Carolina Senate Journal, December 18, 1807 (reporting disqualification of Daniel D’Oyley for five years); James W. Ely, Jr., “*That No Office Whatever Be Held During Life or Good Behavior*”: *Judicial Impeachments and the Struggle for Democracy in South Carolina*, 30 VAND. L. REV. 167, 171, 192, 198 (1977) (discussing impeachment of Daniel D’Oyley, impeachment and disqualification for four years of John Clark, and impeachment and disqualification for three months of Matthew O’Driscoll); Journal of the Senate of the State of Indiana 136 (Indianapolis, 1826) (reporting impeachment and disqualification for five years of Nathaniel Marks).

134. THOMAS LLOYD, THE TRIAL OF ALEXANDER ADDISON, ESQ. 153–54 (1803). Addison had submitted a letter, arguing: “Removal and disqualification is the extremity of punishment which the senate can inflict on any impeachment. The

In addition to actual practice in impeachment cases, state interpretations of the scope of disqualification could be found in legislation structuring the impeachment process. For New York, David Dudley Field's proposed code of criminal procedure included rules for the state "court of impeachments," and provided:

§ 111. The judgment may be, that the defendant be suspended and removed from office, or that he be removed from office and disqualified to hold and enjoy a particular office or class of offices, or any office of honor, trust or profit in this state.¹³⁵

An annotation observed:

The provisions of the last four sections are, in the main, new, but are believed to be in accordance with the powers conferred upon this court by the constitution. By *art. 6, sec. 1*, of that instrument, it is provided that "judgment in case of impeachment *shall not extend further* than removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust or profit under this state," &c. The constitution does not undertake to define the different subordinate degrees, but only the utmost extent, of the punishment. Everything but the latter, therefore, is in the discretion of the court as limited or defined by legislation¹³⁶

Although proposed in 1850, this provision was not enacted in New York until 1881, when a version of the criminal procedure code was finally adopted.¹³⁷ Meanwhile, the proposed code had supplied Field's brother

punishment may be as much less as they judge proper. It may be removal and disqualification to hold only certain offices." *Id.* at 152. Addison also stated that "[t]he senate will no doubt proportion the punishment to their ideas of guilt, for if they proceed to the extremity in cases that may be mere mistake, what means would they have to mark their detestation of gross corruption, and the worst kind of misdemeanor in office." *Id.* Pennsylvania had adopted a provision similar to the federal removal and disqualification clause in 1790. PENNSYLVANIA CONST. OF 1790, art. IV, § 3.

135. COMMISSIONERS ON PRACTICE AND PLEADINGS, *THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW-YORK* 55 (1850). On Field's famous codification efforts, see Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 17-54 (1949).

136. COMMISSIONERS, *supra* note 135, at 56. The "last four sections" are §§ 109-12.

137. Reppy, *supra* note 135, at 36.

Stephen with the model for the California criminal procedure act of 1851, which included the equivalent of section 111 of New York's proposed code.¹³⁸ The California act in turn had influenced the laws of Nevada, Idaho and Montana. The Idaho version of section 111 remains in force,¹³⁹ and New York statutory law still contemplates either office-limited or total disqualification.¹⁴⁰ This approach does not, however, mention time-limited disqualification, and the 1850 annotation to section 111 does not explain why.¹⁴¹ Moreover, when the opportunity to apply the New York provision arose in 1913, during the famous impeachment trial of Governor William Sulzer, the Rules adopted for the Court of Impeachments permitted only a vote on total disqualification.¹⁴²

Some other states with clauses like the federal one continued to recognize the possibility of limited disqualification after the Civil War.¹⁴³ In 1881, the Minnesota Senate removed a judge for repeated

138. An Act to regulate Proceedings in Criminal Cases, ch. 121, § 65 (Cal. 1851).

139. IDAHO CODE § 19-4013. The current statutes in California (Cal. Gov't Code § 3035), Nevada (Nev. Rev. Stat. § 283.250) and Montana (Mont. Code § 5-5-431) refer only to disqualification from all state office.

140. N.Y. JUD. LAW § 425 (allowing a judgment upon conviction that a public official be "disqualified to hold and enjoy a particular office or class of offices, or any office of profit, trust or honor whatever under this state").

141. COMMISSIONERS, *supra* note 135.

142. See STATE OF NEW YORK, 1 PROCEEDINGS OF THE COURT FOR THE TRIAL OF IMPEACHMENTS, PEOPLE V. WILLIAM SULZER 15-16 (1913). The impeachment and removal of Sulzer, on charges including financial irregularities in his gubernatorial campaign, have been widely understood as the reaction by the Tammany Hall machine against his reform efforts once in office. See, e.g., Matthew L. Lifflander, *The Only New York Governor Ever Impeached*, 85 N.Y. STATE BAR ASSN. J. 11 (2013) (describing the historical circumstances of the impeachment of Governor Sulzer). In the event, there were no votes in favor of disqualification. *Id.*

143. In 1876, the West Virginia Senate convicted state treasurer John S. Burdett of financial wrongdoing, and disqualified him only from the office of treasurer for the remainder of his term. FOSTER, *supra* note 108 at 668-69. In 1867, the Missouri Senate convicted Judge Walter King on grounds including his refusal to enforce the state's post-Civil War test oath and disqualified him from state office for two years only. Joseph Fred Benson, *A Brief Legal History of Impeachment in Missouri*, 75 UMKC L. REV. 333, 345-46 (2006); *Impeachment of Judge King*, DAILY MISSOURI REPUBLICAN, June 4, 1867, at 2 (noting also that the Senate refused to publish the records of the trial). Judge King, a member of a prominent political family, was elected to the state legislature as a Democrat in 1874. *Missouri Legislature: Senators and Representatives Elect to the Twenty-Eighth General Assembly*, ST. LOUIS REPUBLICAN, Nov. 6, 1874, at 2; *The House Committees*, ST. LOUIS REPUBLICAN, Jan. 14, 1875, at 4.

drunkenness but disqualified him only for three years and only from judicial office.¹⁴⁴ One senator quoted the constitutional language and explained: "It shall not extend any further than that. Now I conceive it to be a proposition of law that where the maximum is given anything included within that maximum may be made the degree of punishment."¹⁴⁵

In 1895, a New Jersey senator described the sanctions available in the impeachment proceeding as including, among other options, both time-limited and permanent disqualification. He explained:

You have at least five things that you can do. You may first suspend your sentence if you please; you can suspend it as any other Court can. Second, you may suspend the officer from the exercise of his office for a limited time. Third, you may remove him from the office of Justice of the Peace. Fourth, you can disqualify him from holding any office whatever forever. Fifth, you may disqualify him from holding any office for a limited time. You cannot go beyond removing him and forever disqualifying him, but any of those five things you may do. This seems to me to be perfectly obvious.¹⁴⁶

As late as 1934, that choice was accepted by both the defending and prosecuting counsel in another New Jersey impeachment trial.¹⁴⁷ On

144. 3 JOURNAL OF THE SENATE OF MINNESOTA, SITTING AS A HIGH COURT OF IMPEACHMENT, FOR THE TRIAL OF HON. E. ST. JULIEN COX, 2984-89 (1882).

145. *Id.* at 2969 (remarks of Sen. Castle). The Cox impeachment is the latest example I have found of the actual imposition of limited disqualification by a state senate.

146. N.J. S. JOURNAL, 119th Sess. at 1062 (1895) (remarks of Sen. Corbin). The Senate convicted justice of the peace Patrick Connelly of assaulting an attorney and ordered him removed. *Id.* at 1068.

147. STATE OF NEW JERSEY COURT OF IMPEACHMENT, TRIAL OF THE IMPEACHMENT OF JOHN MCCUTCHEON, FORMERLY COMPTROLLER OF THE TREASURY OF THE STATE OF NEW JERSEY, AND WILLIAM B. HARLEY, JR., FORMERLY JUDGE OF THE COURT OF COMMON PLEAS 447-49 (1934) (remarks of Mr. Hobart, counsel for Judge Harley); *id.* at 500, 533 (remarks of Mr. Stryker, counsel for the House Managers). The Senate convicted Judge William Harley for obtaining his office by bribery; his term had already expired, so he was not removed, and the Senate chose not to disqualify him as he had been sufficiently disgraced.

As mentioned in *supra* note 123, in the 1917 impeachment trial of Texas governor Jim Ferguson, a proposal for a five-year disqualification was also made and rejected.

neither occasion, however, did the Senate actually impose disqualification.

Alabama, in contrast, has a unique provision, first adopted in its post-Reconstruction Constitution of 1875, that *requires* that disqualification be limited in time, restricting its duration to the term for which the impeached officer was elected or appointed.¹⁴⁸ The state supreme court has described the provision as enabling re-election to operate as a condonation of the previous misconduct.¹⁴⁹ I have found no explanation of why this limitation was adopted, but one might speculate that it expressed the reaction of the former Confederates against efforts to prevent their return to power. In practice, the Alabama impeachment procedure has rarely been initiated, and there are other processes outside the legislature for removing many state officials.¹⁵⁰

C. Subsequent Lifting of Permanent Disqualification

Given the ECtHR's insistence that permanent disqualification should be subject to later reviews, one might ask what opportunities exist in U.S. practice for restoration of eligibility in the jurisdiction where an officer was impeached. It turns out that state experience provides several incidents that shed an equivocal light on the revision of impeachment judgments.

The federal constitution, and the vast majority of state constitutions, expressly exclude impeachments from the executive's

148. ALA. CONST. of 1875, art. VII, § 4; ALA. CONST. art. VII, § 176.

149. State ex rel. Attorney General v. Hasty, 184 Ala. 121, 125 (1913).

150. See Bryan Lyman, *Alabama House Creates Impeachment Process*, MONTGOMERY ADVERTISER (Apr. 16, 2016), <https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2016/04/26/alabama-house-debates-possible-impeachment-process/83546330/> [<https://perma.cc/SDK2-2K74>]; David C. Steelman, *The Dwindling Scope of Legislative Power to Remove State Court Judges from Office in Alabama Constitutional History*, NAT'L CTR. FOR STATE CTS. (2020), nsc.contentdm.oclc.org/digital/collection/judicial/id/567 [<https://perma.cc/R8JM-ELPU>]. An effort to impeach Governor Robert Bentley for using state funds to conceal an affair was abandoned after Bentley resigned and accepted a plea bargain in a related criminal prosecution that bound him never to seek state office. See Amber Phillips, *Alabama Governor Resigns, Pleads Guilty to Charges Tied to Allegations He Tried to Cover Up Affair With a Top Aide*, WASH. POST (Apr. 10, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/04/10/brought-down-by-an-affair-alabama-gov-robert-bentley-expected-to-resign-today-according-to-news-reports/> [<https://perma.cc/P4SP-K2VJ>].

pardon power.¹⁵¹ This exclusion was founded on the traditional concern in England that the King should not be able to prevent impeachment of his agents.¹⁵² One might then ask whether the legislature possesses a residual power to terminate the disqualification imposed in an earlier impeachment.

Absent an express constitutional provision, the curative authority of the legislature may depend on general assumptions about the separation of powers, exclusivity of executive pardon power, and particular inferences from the nature of impeachment.¹⁵³ The perception of these factors may vary from state to state, and from historical period to historical period.

Five of the earliest state constitutions coupled the prohibition of executive pardons for impeachment with clauses that instead contemplated pardon or remission of punishment by the legislature, or by its lower house.¹⁵⁴ None of these five states had limited the consequences of impeachment to removal and disqualification, and thus more serious punishments could have been imposed. Pennsylvania, Delaware, and Virginia deleted the legislative pardon option when they adopted such a limit (in 1790, 1792, and 1830 respectively).¹⁵⁵ North Carolina restructured impeachment and adopted the usual limit on consequences in 1835, and finally

151. In Illinois, North Dakota, and Washington, impeachment can lead to disqualification, but there is no explicit prohibition in the state constitution on the governor's power of pardon. ILLINOIS CONST., Art. V, § 12; N.D. CONST. Art. V, § 7; WASH. CONST. Art. III, § 9. In Georgia, the pardon power is currently vested in the Board of Pardons and Parole, without this limitation since 1983. GA CONST. Art IV, § 2; Melvin B. Hill Jr. & G. LaVerne Williamson Hill, THE GEORGIA STATE CONSTITUTION 135 (2d ed. 2018).

152. See Maurice Taylor van Hecke, *Pardons in Impeachment Cases*, 24 MICH. L. REV. 657, 660-62 (1926) (this essay, nearly 100 years old, remains the best discussion of its subject).

153. See, e.g., JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 39-52 (2009); Todd David Peterson, *Congressional Power Over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225 (2003).

154. See van Hecke, *supra* note 152 at 665-66. In a different manner, the 1798 Georgia constitutional convention cut short the thirty-year disqualification of Henry Osborne in 1791 by adopting a retrospective constitutional provision that terminated all previous disqualifications, of which his was the only example. See *supra* note 132; cf. HOFFER & HALL, *supra* note 7, at 130-33.

155. See van Hecke, *supra* note 152, at 666.

eliminated the reference to legislative relief in its 1868 Constitution.¹⁵⁶ Vermont restricted the consequences of impeachment to removal and disqualification in 1836, but its Constitution still contains the earlier language contemplating remission or mitigation of punishment on impeachments “by act of legislation.”¹⁵⁷

Even without such authorization, some state legislatures have taken it upon themselves to overturn a previous impeachment after political control, or public attitudes, had shifted. California judge James Hardy was impeached and removed for disloyalty to the Union in 1862, and then in 1870, after the Democrats gained control of the legislature, they enacted a statute purporting to annul the judgment and have it and the proceedings expunged from the Senate journal.¹⁵⁸ His supporters argued that the impeachment was unjustified and “influenced by a spirit of partisan feeling and unhealthy excitement in the popular mind,”¹⁵⁹ and that California had no authority to punish treason against the Union.¹⁶⁰ Opponents defended the propriety of the impeachment on the facts alleged, and denied that the legislature had the power to reverse or erase a judgment entered by the Senate in its capacity as a court. In a less bellicose setting, Nebraska’s first governor David Butler was impeached and removed for financial malfeasance in 1871, but after the scandal faded, the legislature adopted a joint resolution in 1877, expunging the records of his impeachment from the House and Senate journals.¹⁶¹ Neither Hardy nor Butler had been disqualified, and the effect of these enactments was perhaps mainly symbolic or reputational.

A more consequential example occurred in Tennessee in the 1860s. In 1866, county judge Thomas Frazier intervened in the state’s

156. N.C. CONST. of 1776, § 23; N.C. CONST. 1835 amends. art. III, § 1; N.C. CONST. of 1868, art. III, § 6.

157. VT. CONST. ch. II, § 20 (provision on pardon power).

158. Frank M. Stewart, *Impeachment of Judge James H. Hardy, 1862*, 28 CAL. L. REV. 61, 69 (1954).

159. An Act to Expunge From the Journal the Judgment of the Senate, Entered Against James H. Hardy, on the Fourteenth Day of May, Eighteen Hundred and Sixty Two, ch. 77, p.mbl. (Feb. 16, 1870).

160. CALIFORNIA SENATE, THE JOURNAL OF THE SENATE DURING THE EIGHTEENTH SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA, 1869-70, 92 (resolution proposed by Sen. Comte).

161. RONALD C. NAUGLE, JOHN J. MONTAG & JAMES C. OLSON, HISTORY OF NEBRASKA 127-30 (4th ed. 2015); Joint Resolution, Feb. 15, 1877, in LAWS, JOINT RESOLUTIONS, AND MEMORIALS PASSED AT THE FOURTEENTH SESSION OF THE LEGISLATIVE ASSEMBLY OF THE STATE OF NEBRASKA 257 (1877).

ratification of the Fourteenth Amendment by ordering the release on habeas corpus of two reluctant representatives who had been arrested by the House to complete a quorum.¹⁶² The legislature impeached and removed Frazier for this action in 1867, with disqualification from future state office.¹⁶³ In 1869, after the Democrats prevailed in an election, they passed a statute to remove the effects of the “unjust impeachment and conviction.”¹⁶⁴ The following year, in the constitutional convention called to roll back the reforms of Reconstruction,¹⁶⁵ a committee was tasked with solidifying the support for the restoration of Frazier’s rights. Although the committee majority “believe[d] that the Legislature possess the constitutional power to remove disabilities imposed by the judgment of a court of impeachment,” yet “as this power is not expressly given by the existing Constitution, and as there is conflict of opinion on this point,” it proposed an amendment that became part of the 1870 Constitution, expressly confirming the legislature’s power to undo disqualification: “The Legislature now has, and shall continue to have, power to relieve from the penalties imposed, any person disqualified from holding office by the judgment of a Court of Impeachment.”¹⁶⁶ Frazier later ran for re-election to his prior judgeship and served another eight years.¹⁶⁷ This unusual provision remains in the Tennessee Constitution to this day.¹⁶⁸

The most significant contention on the issue of legislative reconsideration occurred in Texas in the 1920s. As part of the long saga of Governors James and Miriam Ferguson, the Texas Supreme Court held that statutory reversal of disqualification was unconstitutional.¹⁶⁹

162. THOMAS B. ALEXANDER, *POLITICAL RECONSTRUCTION IN TENNESSEE* 110-11 (1950).

163. See ALEXANDER, *supra* note 162, at 111 (discussing the impeachment of Judge Frazier); *PROCEEDINGS IN THE HIGH COURT OF IMPEACHMENT, IN THE CASE OF THE PEOPLE OF THE STATE OF TENNESSEE VS. THOMAS N. FRAZIER* 116 (1867).

164. Act for the Relief of Thomas N. Frazier, Nov. 11, 1869, ch. XVI.

165. See ALEXANDER, *supra* note 162, at 230.

166. *JOURNAL OF THE PROCEEDINGS OF THE CONVENTION OF DELEGATES ELECTED BY THE PEOPLE OF TENNESSEE, TO AMEND, REVISE, OR FORM AND MAKE A NEW CONSTITUTION FOR THE STATE ASSEMBLED IN THE CITY OF NASHVILLE JANUARY 10, 1870*, at 204 (1870).

167. See W.W. CLAYTON, *HISTORY OF DAVIDSON COUNTY, TENNESSEE, WITH ILLUSTRATIONS AND BIOGRAPHICAL SKETCHES OF ITS PROMINENT MEN AND PIONEERS* 460 (1880).

168. TENN. CONST. art. V, § 4.

169. *Ferguson v. Wilcox*, 119 Tex. 280, 299 (1930).

In 1917, Jim Ferguson was impeached, removed, and disqualified as a result of his retaliatory defunding of the University of Texas.¹⁷⁰ Ferguson sought to run for governor again in 1924, but when he challenged his impeachment as invalid the Texas Supreme Court upheld it.¹⁷¹ Instead, his wife Miriam Ferguson won the Democratic primary and became governor, whereupon she arranged for the passage of a 1925 amnesty act granting full and unconditional release from all past impeachment convictions and overturning the disqualifications (Jim Ferguson being the sole example).¹⁷² The amnesty act asserted that “the relief of persons from further operation of penalties and punishments inflicted under or by judgments in impeachment cases rendered by the Senate of the State of Texas is a Christian function to be exercised by the Legislature of Texas”¹⁷³ Under her successor as governor, from a rival Democratic faction, the amnesty act was itself repealed as unconstitutional.¹⁷⁴ Undaunted, Jim Ferguson tried to run for governor again in 1930, relying on the amnesty and challenging its repeal. The Texas Supreme Court found that the amnesty act violated the finality of the Senate’s judgment on impeachment, and that the legislature had no implicit pardon power in cases of impeachment.¹⁷⁵ Like the federal Constitution and most state constitutions, the Texas Constitution made impeachment an exception to the executive pardon power, in order to prevent unfit officials from returning to office; the exception did not merely shift pardon authority from the governor to the legislature but precluded any pardon.

170. See John R. Lundberg, *The Great Texas “Bear Fight”: Progressivism and the Impeachment of James E. Ferguson*, in *IMPEACHED: THE REMOVAL OF TEXAS GOVERNOR JAMES E. FERGUSON* 38-45 (Jessica Brannon-Wranosky, Bruce A. Glasrud & John R. Lundberg eds., 2017) (recounting the political fight over the control of the University of Texas which led to the impeachment).

171. *Ferguson v. Maddox*, 114 Tex. 85, 94-95 (1924).

172. Cortez A.M. Ewing, *The Impeachment of James E. Ferguson*, 48 POL. SCI. Q. 184, 209 (1933).

173. Act Granting “Full and Unconditional Pardon” to Any Person Impeached by Senate; Including that of Disqualification to Hold any Public Office or Honor of Trust of March 31, 1925, TEX. LAWS 39th R.S. at 454, ch. 184, S.B. NO. 252.

174. An Act Repealing Ferguson Amnesty Act, March 31, 1927, TEX. LAWS 40th R.S. at 360, ch. 242, S.B. NO. 9. In that period, Texas governors were elected for two-year terms. Janice C. May, *THE TEXAS STATE CONSTITUTION* 198 (2011).

175. See *Ferguson*, 119 Tex. at 300 (1930). The court’s reasoning may have been influenced by the argument that the state Constitution mandated disqualification after an impeachment conviction:

It is unreasonable, if not unbelievable, in our opinion, that the convention, after providing for the disqualification of a convicted officer in impeachment to thereafter hold any office of honor, trust, or profit under the state, and after excepting from the pardon power granted to the Executive those convicted of impeachment, ever intended that the Legislature by mere implication could wholly abrogate and render nugatory the plain provisions of the Constitution providing for such disqualification.¹⁷⁶

The court also observed that the American practice of prohibiting pardons for impeachment reflected the more limited range of punishments authorized than in England, and that an appeal to the divine attribute of mercy was misplaced because disqualification was intended to protect the public and not primarily to punish.¹⁷⁷

On a symbolic level, in 1991 the Montana Senate gave posthumous exoneration for a judge who had been impeached, removed, and permanently disqualified for alleged pro-German leanings in the censorious atmosphere of World War I.¹⁷⁸ A Senate resolution provided that “the conviction of impeachment of Judge Charles Liebert Crum be overturned,” and that copies of the resolution be sent to his grandchildren.¹⁷⁹ Significantly, the preamble to the resolution asserted that “the Senate as a court of impeachment may, sua sponte, in light of historical evidence and in the absence of the emotionalism of the time, reconsider the verdict rendered on March 22, 1918.”¹⁸⁰ That asserted power might also be available in cases where the individual was still alive and capable of benefiting from the reversal of a disqualifying judgment.

176. *Id.* at 296-97; *see also* OPINION OF THE ATTORNEY GENERAL, OP. NO. 2584 (Feb. 12, 1925), *reprinted in* BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS 199, 210 (1926) (advising that the amnesty bill would be unconstitutional) (“[W]hen brought into operation, the disqualification is of a constitutional character. The provision could not be given effect if it should be held that the Legislature may, by statute, set aside a judgment or destroy its effect.”).

177. *Ferguson*, 119 Tex. at 301.

178. DAVE WALTER, MONTANA CAMPFIRE TALES: FOURTEEN HISTORICAL NARRATIVES (2d ed., 2011); *see* HOUSE AND SENATE JOURNALS OF THE EXTRAORDINARY SESSION OF THE FIFTEENTH LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA 57-76 (1918).

179. 1991 Mont. Laws 3437.

180. *Id.*

All the preceding examples involve objections to particular past impeachments rather than discomfort with the duration of an otherwise justified disqualification. In contrast, the drafters of the Hawai'i Constitution included a clause designed to deal with excessive length. The section on the governor's pardon power provides that the "legislature may, by general law, authorize the governor . . . to grant pardons for impeachment."¹⁸¹ The discussion of this issue at the 1950 constitutional convention focused primarily on avoiding lifelong deprivation of a civil right, without enabling the governor to nullify impeachments.¹⁸² The parameters were left to the legislature to supply, but the legislature was not itself permitted to make decisions about individual pardons. Thus far no such statute has been adopted,¹⁸³ nor has the Hawai'i legislature impeached any official.

Thus, the U.S. experience is largely hostile to subsequent revision of judgments of impeachment. The few examples of legislative reversal tended to result from the resurgence of factions defeated not long before, rather than a demonstration of rehabilitation or repentance. Defiant return to power is a kind of danger that disqualification was intended to prevent.

III. Reciprocal Reflections

Comparing this broadened view of U.S. impeachment practice with the European human rights opinion, what lessons can be drawn for the United States, for the European regional system, and for international human rights systems more generally? Of course, the ECtHR opinion has no legal force for the United States, although its reasoning could have persuasive power for U.S. thinking, and it may also influence human rights regimes in which the United States does

181. HAW. CONST. art. V, § 5. More fully the sentence reads, "The legislature may, by general law, authorize the governor to grant pardons before conviction, to grant pardons for impeachment and to restore civil rights denied by reason of conviction of offenses by tribunals other than those of this State." *Id.*

182. See PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII, vol. II, 302-06, 352-56 (1950).

183. In 2022, the legislature did enact a statute that minimally regulated the procedures for impeachment proceedings, but neither the version enacted nor a longer Senate bill included any provision relating to pardon. See 2022 Haw. Sess. Laws 12; S. 217, 31st Legislature (Haw. 2021).

participate, either at the global level or within the Organization of American States.¹⁸⁴

The fundamental message of the ECtHR advisory opinion on impeachment is its insistence that disqualification decrees must be proportionate. More specifically, lifelong disqualification measures must be subject to review of their continuing necessity, at least when they bar the former official from legislative office. The idea that restrictions on the right to stand for office should be proportionate is shared by international human rights analysis more generally.

How proportionate is U.S. disqualification practice in impeachment? Impeachment talk is common in the United States, but impeachment convictions are very rare, and judgments of disqualification are even rarer. Resignations leading to abandonment of impeachment proceedings may be more frequent, but if the proceeding is abandoned, no one is disqualified. The federal government has seen eight convictions, with three disqualifications, in 230 years. State-level proceedings are harder to count, but it seems safe to say that there have been considerably fewer than two convictions per state over the same period, and less than one disqualification per state. Limiting attention to the states with *any* convictions, there have been slightly more than two per state, resulting in slightly more than one disqualification.

The usual practice in the states treats disqualification as a second, discretionary decision after the decision on conviction, as it is in the federal government. The earlier state practice of partial disqualification seems to be largely forgotten, and all actual disqualifications since 1900 have been total. In that period, the author is aware of 21 convictions leading to ten total disqualifications, all of elected officials, including elected judges.¹⁸⁵ Or, since six of the

184. The United States is a party to the ICCPR, and subject to monitoring by the Human Rights Committee, and as a member of the OAS it is subject to monitoring by the Inter-American Commission on Human Rights under the American Declaration of the Rights and Duties of Man. It is not directly subject to the jurisdiction of the Inter-American Court of Human Rights, but that court's interpretations of the American Convention on Human Rights (not ratified by the United States) are highly influential for the Inter-American Commission. *See, e.g.*, Inter-American Commission on Human Rights, Human Mobility: Inter-American Standards, paras. 87-88 (2015) (explaining the use of the American Convention in construing the American Declaration).

185. Some nineteenth century state impeachment convictions involved appointed officials, e.g., New Jersey state prison keeper Patrick Lavery (impeached and disqualified in 1886) (*See* FOSTER, *supra* note 108, at 658) and all

convictions occurred in states where the constitution excludes disqualification, the ratio might be considered ten out of fifteen.

To say that the disqualification practice is selective does not mean that there have never been abuses. The post-Reconstruction disqualification of North Carolina governor Holden, for example, was an incident in an oppressive political struggle.

Moreover, total disqualification is very broad, although not truly “total” given the system of federalism. Assuming that it covers legislative elections, it raises the central concern of the ECtHR advisory opinion.¹⁸⁶ Even without that, total disqualification undoubtedly reaches trivial offices of “honor, trust or profit” where the practical opportunities for the holder to inflict harm may be insignificant.¹⁸⁷ Thus US practice could be criticized because it permanently bars the impeached individual from offices that are too important, or from too many offices that are unimportant. In federal impeachment and in most states the ineligibility is permanent and apparently irreversible, certainly not by the kind of independent review that the advisory opinion contemplates. Total disqualification is also undifferentiated, that is, it does not try to match the scope of disqualification to the office from which the individual was removed, or to the wrongdoing for which the individual was removed, unless the particular choice to disqualify rests on a conclusion that the individual is comprehensively unfit for government service.

The breadth of total disqualification may, however, have compensating virtues of clarity and foreseeability. It avoids difficult line-drawing problems about which positions a removed official should be precluded from, in an ever-changing landscape of government structure. It also decreases the opportunity for arbitrariness in case-

federal convictions have involved appointed judges with life tenure. *See* United States House of Representatives, *supra* note 131.

186. Some authors argue that federal disqualification does not cover congressional elections, for reasons of history or democratic theory. *See, e.g.,* Brian C. Kalt, *The Application of the Disqualification Clause to Congress*, 33 QUINNIPIAC L. REV. 7 (2014). This question has never been tested. Some even argue that federal disqualification does not cover presidential elections, which to the present author seems absurd. *See* Seth Barrett Tillman, *Originalism & The Scope of the Constitution's Disqualification Clause*, 33 QUINNIPIAC L. REV. 59, 63 (2014).

187. U.S. CONST. art. I § 3 (mandating that judgment in cases of federal impeachment will “not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States”).

by-case imposition of partial disqualifications, although it raises the stakes in the binary decision whether to disqualify at all.

Strictly speaking, the ECtHR advisory opinion addressed only disqualification from the legislature, and possibly the court itself would consider different factors relevant to disqualification from high or low executive office. Although these offices do not come within the European formulation of the right to stand for office, which relates to the legislature, the ECtHR has also required proportionality in wide disqualifications from other kinds of public office or employment, under the rubric of the right to respect for “private life.”¹⁸⁸ At the global level, the right to stand for elective office is more broadly defined and the right of equal access to appointive public service positions is expressly protected. But the global human rights system has not yet articulated limits on disqualification as strict as those in the ECtHR advisory opinion. There is some risk that the ECtHR’s fuller exposition, not tied to the peculiar facts of the *Paksas* case, would influence regional courts or global bodies that are prone to borrow European interpretations of human rights.¹⁸⁹

Article 25 ICCPR permits reasonable restrictions designed to protect genuine democracy. With regard to presidential and semi-presidential systems in particular, term limits are very common, including both limits on consecutive terms and limits on total numbers of terms.¹⁹⁰ Needless to say, limits on total terms result in a lifetime disqualification for a president who has served the maximum, even impeccably, for the good of the system. Human rights institutions have described nondiscriminatory limits on the right to elect incumbent or former presidents as important protections for responsive representative democracy, violating the rights of neither the candidate nor the voters.¹⁹¹ Term limits have been justified because they avoid

188. See *supra* note 88 and accompanying text.

189. Cf. Laurence Burgorgue-Larsen, “Decomartmentalization”: *The Key Technique for Interpreting Regional Human Rights Treaties*, 16 INT’L J. CONST. L. 187 (2018) (discussing the borrowing of external interpretations by regional human rights courts).

190. VENICE COMM’N, REPORT ON TERM-LIMITS, CDL-AD(2018)010, (2018); Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1833-43 (2011).

191. See VENICE COMM’N, REPORT ON TERM-LIMITS, CDL-AD(2018)010, (2018). The Inter-American Court of Human Rights has gone so far as to interpret its regional human rights convention as forbidding a third consecutive presidential term, in order to protect democracy. *presidential Reelection Without Term Limits*

concentration of power, ensure political pluralism, decrease incentives for abuse of power, and increase the voters' opportunities to choose.¹⁹² If presidents who have led their country honorably can be precluded from a later additional term, then surely so can presidents whose abuses have necessitated the extraordinary steps of impeachment and disqualification.

Most U.S. impeachments have been for corruption and/or abuse of power, often localized and only sometimes linked to larger threats to the constitutional order. Petty corruption and self-dealing may not require the heavy artillery of lifelong disqualification, even on the rare occasions when it becomes notorious enough to attract legislative attention. The imposition of total disqualification may at times result more from a sense that the official does not *deserve* ever to hold office again, rather than a sense that it would be too dangerous for the official to remain eligible for any office, no matter how lowly. Nonetheless, the option of lifelong disqualification can provide an important defense against officials who truly undermine democracy and the rule of law. Such officials may have their loyalists and their appeals, and even after removal circumstances may revive their support. The U.S. examples of return after impeachment include examples of resurgence rather than chastened reformation.

The ECtHR's insistence that lifelong disqualification should always be subject to review seems to rest on excessive confidence in the ability of a threatened democracy to maintain the independence of a politically salient court or other adjudicatory body. The ECtHR's own extensive experience with the takeover of the judiciary in Poland (to name only one example) would have justified more caution, let alone observation of other parts of the world.¹⁹³ The United States, with its tolerance for highly partisan adjudicative appointments and state judicial elections, is no safe counterexample.

in the Context of the Inter-American Human Rights System, Advisory Opinion OC-28/21 Inter-Am. Ct. H.R. (ser. A) (June 7, 2021).

192. VENICE COMM'N, REPORT ON TERM-LIMITS, CDL-AD(2018)010, (2018); Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System, Advisory Opinion OC-28/21 Inter-Am. Ct. H.R. (ser. A) (June 7, 2021).

193. See *Grzęda v. Poland*, App. No. 43572/18 (Eur. Ct. H.R. Mar. 15, 2022) (Grand Chamber); *Xero Flor w Polsce v. Poland*, App. No. 4907/18 (Eur. Ct. H.R. May 7, 2021); Press Release, Eur. Ct. H.R., Interim Measure in Cases Concerning Charges Brought Against Polish Judges, ECHR 104 (2022).

Clearly, U.S. impeachment procedures do not ensure that lifetime disqualification from all federal office or, respectively, all office in the particular state, will always be proportionate in the cases where it is imposed. Nonetheless, permanent disqualification from high political office is sometimes a necessary protection, and lifetime exclusion from exercising great power over others does not really amount to a severe imposition on the human rights of an ex-official who has seriously abused power. There are reasons for having that judgment made at the time of removal, and not leaving it to future governments to revise. It may be that the U.S. impeachment practice is too episodic and harsh, leading to too few impeachments and convictions, and some unnecessary disqualification. Disqualification is already selective and infrequent; perhaps better outcomes would be reached if the judgment of partial disqualification (by scope or by time) were revived as an intermediate option. Nonetheless, the coarseness of the practice does not justify an absolute principle prohibiting irreversible lifetime disqualification.

CONCLUSION

The advisory opinion of the ECtHR provides a useful occasion for reexamining U.S. understandings of impeachment. Conversely, U.S. impeachment practice, at both the federal and state levels, offers a useful perspective on the human rights analysis. The human rights systems' insistence on proportionality in the consequences of impeachment resonates with concerns that have been expressed in the past in the United States as well, particularly at the state level. But even assuming that proportionality is required, the European Court's approach to achieving it may be too rigid for wider application.