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The Impeachment Trials of Donald John Trump: How Senate Jurors Strengthened the Case Against Federal Felon-Juror Exclusion

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THE IMPEACHMENT TRIALS OF DONALD JOHN TRUMP: HOW SENATE JURORS STRENGTHENED THE CASE AGAINST FEDERAL FELON-JUROR EXCLUSION

James M. Binnall†

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INTRODUCTION

In our federal court system, prospective jurors who have been convicted of a felony are statutorily excluded from jury service for life.¹ In support of this categorical exclusion, lawmakers and courts allege that those convicted of a felony, threaten the jury process principally

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¹ 28 U.S.C. § 1865(b)(5); *see generally* United States v. Hefner, 842 F.2d 731 (4th Cir. 1988); Viverito v. Levi, 395 F. Supp. 47 (N.D. Ill. 1975) (suggesting no automatic restoration of civil rights); *but see* United States v. Green, 532 F. Supp. 2d 211 (D. Mass. 2005) (suggesting that automatic restoration under state law will satisfy the restoration of civil rights under federal law); Walker v. United States, 800 F.3d 720 (6th Cir. 2015) (suggesting that unless civil rights have been restored, then the right to serve on a jury can be lost).

because they lack character.² Federal courts have suggested that our federal jury system permanently excludes citizens with a felony criminal record for fear that if allowed to serve, they would undermine the functioning and integrity of the federal jury process.³ Or, stated differently, those with a felony conviction assumedly cannot meet the standard for juror fitness set by the juror's oath used in federal criminal proceedings.⁴ Accordingly, the argument goes, only permanent exclusion can truly protect the federal jury system,⁵ though critics question whether exclusion actually insulates the jury from corrupting influence.⁶

Legal challenges to federal record-based juror exclusion have never met with success.⁷ Cross-section claims routinely fail because courts refuse to classify prospective jurors with a felony conviction as a distinct class.⁸ Additionally, no court has struck down the practice of

² See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 73-74 (2003); James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service*, 36 L. & POL'Y 1 (2014) [hereinafter *A Field Study of the Presumptively Biased*]; see also *Hale v. Shoop*, No. 1:18-cv-504, 2021 WL 1215793, at *19 (N.D. Ohio, Mar. 31, 2021) (citing *United States v. Green*, 995 F. 2d 793 (8th Cir. 1993) (noting “the exclusion from juror eligibility of persons charged with a felony is rationally related to the legitimate governmental purpose[s] of guaranteeing the probity of jurors . . . [and] of creating a pool of jurors likely to give unbiased consideration to the evidence presented.”)).

³ See Kalt, *supra* note 2, at 74 (“[F]elon exclusion is meant to define and protect juries rather than to punish or degrade felons.”).

⁴ See FED. JUD. CTR., *BENCHBOOK FOR U.S. DISTRICT COURT JUDGES* 247 (4th ed. 1996) (listing the recommended juror oath in federal criminal trials as, “Do each of you solemnly swear [or affirm] that you will well and truly try, and a true deliverance make in, the case now on trial, and render a true verdict according to the law and the evidence, so help you God?” and listing the recommended juror oath in federal civil proceedings as, “Do each of you solemnly swear [or affirm] that you will well and truly try the matters in issue now on trial and render a true verdict according to the law and the evidence, so help you God?”).

⁵ See Kalt, *supra* note 2, at 169 (characterizing the exclusion of those with a felony conviction from jury service as an attempt by “those who distrust felons to achieve perfect moral cleansing”).

⁶ Kalt discusses the under-inclusiveness charge against record-based juror exclusion: Assume hypothetically that 95% of felons lack probity, that just 10% of non-felons do, and that only felons—all felons—are excluded from juries. If 6.5% of the jury-age population are felons, then over 60% of those who are unfit to serve would be non-felons who are not excluded. If anything, this hypothetical is extremely conservative.

See *id.* at 102.

⁷ See Kalt, *supra* note 2, at 70; see also JAMES M. BINNALL, *TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM* 58-64 (2021) (providing a comprehensive examination of prior legal challenges to record-based juror exclusion statutes).

⁸ See Kalt, *supra* note 2, at 75 n.34 (compiling cases in which cross-section challenges to record-based juror exclusion failed); James M. Binnall, *Sixteen Million Angry Men: Re-*

excluding those with felony conviction from jury service on equal protection grounds.⁹ Record-based juror exclusion statutes must meet only the state-deferential rational basis standard, as jury service is not a fundamental right and individuals with a felony criminal history are not a protected class.¹⁰ Though a smattering of other potential legal claims have been proposed, none have prevailed.¹¹ In sum, federal courts have been entirely unreceptive to legal challenges to record based juror exclusion. As one court recently put it, “the reasons for movants’ challenge to this provision are beyond our comprehension.”¹²

While litigants have been unsuccessful challenging record-based juror exclusion, the policy case against the practice is strong. Empirical research undermines the character justification,¹³ and suggests that exclusion is likely to have negative impacts on excluded jurors,¹⁴ juries,¹⁵ and communities.¹⁶ Moreover, federal record-based juror

living a Dead Doctrine to Challenge the Constitutionality of Excluding Felons from Jury Service, 17 VA. J. SOC. POL’Y & L. 1, 18 (2009) [hereinafter *Sixteen Million Angry Men*] (“Establishing felons as a ‘distinctive group’ for the purpose of supporting a fair cross-section claim has proven impossible for litigants . . . though felons almost certainly meet the ambiguous legal interpretation of ‘distinctiveness,’ no litigant has prevailed in a fair cross-section claim.”); see also *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (establishing the distinctiveness test for cross-section claims).

⁹ See Kalt, *supra* note 2, at 88 n.101 (compiling cases in which cross-section challenges to record-based juror exclusion failed); see BINNALL, TWENTY MILLION ANGRY MEN, *supra* note 7, at 62-64.

¹⁰ See also *United States v. Conant*, 116 F. Supp. 2d 1015, 1022 (E.D. Wis. 2000) (holding that jury service is not a fundamental right and those with a felony conviction are not a protected class).

¹¹ See Kalt, *supra* note 2, at 70; see also Binnall, *Sixteen Million Angry Men*, *supra* note 8.

¹² *Hale*, 2021 WL 1215793, at *19.

¹³ See generally BINNALL, TWENTY MILLION ANGRY MEN, *supra* note 7, at ch. 2; James M. Binnall, *Jury Diversity in the Age of Mass Incarceration: An Exploratory Mock Jury Experiment Examining Felon-Jurors’ Potential Impacts on Deliberations*, 25 PSYCH., CRIME & L. 345 (2018) [hereinafter *Jury Diversity in the Age of Mass Incarceration*]; James M. Binnall, *Summoning Criminal Desistance: Convicted Felons’ Perspectives on Jury Service*, 43 L. & SOC. INQUIRY 4 (2018) [hereinafter *Summoning Criminal Desistance*]; James M. Binnall, *A Jury of None: An Essay on the Last Acceptable Form of Civic Banishment*, 34 DIALECTICAL ANTHROPOLOGY 533 (2010) [hereinafter *A Jury of None*]; James M. Binnall, *A ‘Meaningful’ Seat at the Table: Contemplating Our Ongoing Struggle to Access Democracy*, 73 S. M. U. L. REV. F. 35 (2020) [hereinafter *A Meaningful Seat at the Table*]; James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379 (2010) [hereinafter *Convicts in Court*].

¹⁴ See Binnall, *Summoning Criminal Desistance*, *supra* note 13, at 7-8.

¹⁵ See Binnall, *Jury Diversity in the Age of Mass Incarceration*, *supra* note 13, at 347-48.

¹⁶ See James M. Binnall, *Exorcising Presumptions: Judges and Attorneys Contemplate ‘Felon-Juror Inclusion’ in Maine*, 39 JUST. SYS. J. 378 (2018) [hereinafter *Exorcising Presumptions*]; James M. Binnall, *Felon-Jurors in Vacationland: A Field Study of Transforma-*

exclusion is inconsistent with how the law employs character assessments in a host of other contexts.¹⁷ While those with a felony criminal conviction are forever barred from federal jury service because their conviction assumedly signals an irreparable flaw of character, in many other contexts the law accommodates the possibility that character is alterable, such that those with a felony criminal history are able to demonstrate character rehabilitation.¹⁸ These inconsistent conceptualizations of character strongly suggest that the primary purpose for excluding those with a felony criminal history from the federal jury pool is largely pretense—possibly disguising a more insidious motive for banishment.

On January 16, 2020, former President Donald John Trump’s (hereinafter “former President Trump”) first impeachment trial began.¹⁹ Twenty days later, the U.S. Senate acquitted former President Trump of abuse of power and obstruction of Congress. This was in connection with his alleged efforts to sway Ukrainian President Zelensky to investigate possible criminal wrongdoings of his political opponent’s family member.²⁰ The final vote tally split almost exactly along party lines, with only one Republican Senator, Mitt Romney (R) of Utah, voting to convict.²¹ Roughly a year later, on February 13, 2021, former President Trump’s second impeachment trial came to a close.²² In that case, decided after President Biden assumed office, the Senate acquitted former President Trump on the charge of incitement of insurrection,

tive Civic Engagement in Maine, 71 ME. L. REV. 71 *passim* (2019) [hereinafter *Felon-Jurors in Vacationland*]; James M. Binnall, *Cops and Convicts: An Exploratory Field Study of Jurymanhandling*, 16 OHIO ST. J. CRIM. L. 221, 226, 232-33 (2018) [hereinafter *Cops and Convicts*]; see also James M. Binnall & Nick Petersen, *Building Biased Jurors: Exposing the Circularity of the Inherent Bias Rationale for Felon-Juror Exclusion*, 27 PSYCHIATRY, PSYCH. & L. 110, 120 (2020) [hereinafter *Building Biased Jurors*].

¹⁷ See *infra* Part II.A; see generally BINNALL, TWENTY MILLION ANGRY MEN, *supra* note 7, at ch. 2.

¹⁸ See Binnall, *Convicts in Court*, *supra* note 13, at 1388-89 (cataloguing jurisdictions in which a person with a felony conviction is permanently excluded from jury service but is permitted to join the bar and practice law).

¹⁹ See Jeremy Herb, *Senate Impeachment Trial of Donald Trump Officially Begins*, CNN POL. (Jan. 16, 2020, 5:05 PM), <https://perma.cc/UT6J-3W4N>; Jennifer Haberkorn et al., *Chief Justice, Senators Sworn in as Senate Begins Historic Impeachment Trial of Trump*, L.A. TIMES (Jan. 16, 2020, 3:52 PM), <https://perma.cc/N6TM-DE8Y>.

²⁰ See Philip Ewing, *President Trump Impeached by the House in Historic Rebuke*, NPR (Dec. 18, 2019, 8:34 PM), <https://perma.cc/5APV-CBXJ>.

²¹ See Ian Millhiser, *Mitt Romney Just Did Something that Literally No Senator Has Ever Done Before*, VOX (Feb. 5, 2020, 4:25 PM), <https://perma.cc/X5KP-JRMG> (noting that Senator Romney voted to convict only on Article I – Abuse of Power, but also voted to acquit on Article II – Obstruction of Congress).

²² See Caroline Linton et al., *Senate Votes to Acquit Trump in Historic Second Impeachment Trial*, CBS NEWS (Feb. 14, 2021, 7:41 AM), <https://perma.cc/J8DE-NFQN>.

stemming from his alleged contributions to the attack on the U.S. Capitol on January 6, 2021.²³ Once again, the Senate vote was largely a partisan exercise, as only seven Republican Senators voted to convict.²⁴

Ahead of each impeachment trial for former President Trump, a number of U.S. Senators expressly stated their intended verdict preference.²⁵ For Senate Minority Whip Dick Durbin (D) of Illinois, the Senators' statements seemed to undermine their role as neutral arbiters of facts in impeachment proceedings.²⁶ Similarly, as Senator Susan Collins (R) of Maine noted, "At the very beginning of the trial we take an oath to render impartial justice. If you announce ahead of time how you're going to vote, I don't see how you can render impartial justice before you've heard the evidence."²⁷ Nonetheless, all were permitted to cast a ballot. No exclusions or sanctions were levied against those Senators who, through their statements and actions, outwardly ignored their oath to render impartial justice in an impeachment trial.²⁸

This article argues that by predetermining their verdict preference prior to the presentation of evidence—thereby publicly flouting the impeachment process—a number of U.S. Senators strengthened the contextual case for lifting the lifetime exclusion on federal jurors with a felony criminal history. In particular, their actions and words seem to make clear that a lack of character (the principal rationale cited in support of federal record-based juror exclusion) has little to do with

²³ *Id.*; see also Zachary Cohen et al., *Senate Report Reveals New Details About Security Failures Ahead of January 6 Attack but Omits Trump's Role*, CNN POL. (June 8, 2021, 8:45 AM), <https://perma.cc/8HKU-CFCR>; Katelyn Polantz, *Former Top Capital Riot Prosecutor Says 'Maybe the President is Culpable' When Asked About Trump*, CNN POL. (Mar. 22, 2021, 12:29 AM), <https://perma.cc/BW9T-TEMG>.

²⁴ Barbara Sprunt, *7 GOP Senators Voted to Convict Trump. Only 1 Faces Voters Next Year*, NPR (Feb. 15, 2021, 5:00 AM), <https://perma.cc/W8N4-EZKM> (noting that Republican Senators who voted to convict were: Senators Burr–NC, Cassidy–LA, Collins–ME, Murkowski–AK, Romney–UT, Sasse–NE, and Toomey–PA).

²⁵ See *infra* Part III; see, e.g., Elex Michaelson, *Sen. Warren Says She'd Vote to Convict President Trump*, FOX 11 L.A., <https://perma.cc/LY8J-DXUS> (last modified Oct. 5, 2019); Naomi Lim & Joseph Simonson, *Elizabeth Warren Says She's Seen Enough Evidence to Convict Trump in Senate Impeachment Trial*, WASH. EXAM'R (Oct. 4, 2019, 6:56 PM), <https://perma.cc/75NN-U59F>.

²⁶ See, e.g., Veronica Stracqualursi, *Durbin: Senators Have 'Gone Too Far' in Saying How They Will Vote Before Impeachment Trial Has Begun*, CNN POL. (Dec. 22, 2019, 11:55 AM), <https://perma.cc/Z3UB-93GX>.

²⁷ Jon Chrisos, *'Senate Must Do Its Constitutional Duty': Sen. Collins Expects Impeachment Trial*, WGME (Jan. 20, 2021), <https://perma.cc/D3YF-7Z64>.

²⁸ See RULES OF PROC. & PRACT. IN THE S. WHEN SITTING ON IMPEACHMENT TRIALS, S. DOC. NO. 116-1, at 218 (2d Sess. 2020) ("I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of _____, now pending, I will do impartial justice according to the Constitution and laws: So help me God."); see also *infra* Part III.

juror fitness or the appearance of impropriety. Accordingly, Parts I and II further consider the concept of character, detailing the law's inconsistent view of character that is wholly context specific. Part III discusses the impeachment trials of former President Trump, focusing on the role of U.S. Senators as jurors and how many openly disregarded their oath to do impartial justice in advance of those trials. Finally, Part IV concludes by suggesting that federal record-based juror exclusion laws ought to be lifted, as they adhere to an antiquated conception of character that is contradicted by empirical evidence and made nonsensical when considered in other contexts—namely in impeachment proceedings.

I. THE CONTOURS OF THE CHARACTER JUSTIFICATION

All but one U.S. jurisdiction (Maine) restricts juror eligibility for those citizens with a felony criminal history.²⁹ In some jurisdictions, record-based juror exclusion is temporary, allowing for the possibility that an individual with a felony criminal conviction can, at some point, serve as a juror.³⁰ For example, in 13 states, those with a felony conviction are ineligible for jury service until the completion of their sentence (including any term of probation or parole).³¹ An additional eight states (and the District of Columbia) enforce hybrid exclusions that can turn on penal status, charge category, type of jury proceeding, and/or a term of years since conviction,³² while two states allow for lifetime challenges-for-cause for any prospective juror with a felony criminal history.³³

Conversely, in 27 jurisdictions, record-based juror restrictions are permanent, barring prospective jurors with a felony criminal conviction from serving for life.³⁴ One such permanent exclusion jurisdiction is our federal court system.³⁵ Under 28 U.S.C.A. § 1865(b)(5), a prospective

²⁹ BINNALL, TWENTY MILLION ANGRY MEN, *supra* note 7, at app. A.

³⁰ *See id.*

³¹ *Id.* The 13 states are Alaska, Idaho, Indiana, Minnesota, Montana, New Mexico, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Washington, and Wisconsin.

³² *Id.* The eight states are Arizona, California, Colorado, Connecticut, District of Columbia, Kansas, Massachusetts, Nevada, and Oregon.

³³ *Id.* The two states are Illinois and Iowa. A challenge-for-cause is one made by either party to litigation claiming that prospective jurors cannot execute their duties faithfully and impartially.

³⁴ *Id.* The jurisdictions are Federal, Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming.

³⁵ *See* 28 U.S.C. § 1865(b)(5).

federal juror is qualified to serve on a grand or petit jury, “[U]nless he . . . has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.”³⁶ Like many record-based juror exclusion statutes, 28 U.S.C.A. § 1865(b)(5) does not distinguish felony or litigation type.³⁷ Thus, in the federal system, anyone convicted of any prior felony is categorically ineligible to serve on either a criminal or civil jury for life.³⁸

A) Defining the Character Rationale: Two Perspectives

In support of this permanent exclusion, federal courts consistently cite a perceived lack of character as the primary purpose for the practice.³⁹ Still, courts are less consistent in their explanations as to how character makes one unfit for jury service. Two possible interpretations of the character rationale exist.⁴⁰

Under the first, a lack of character impacts the functioning of the jury, such that one with a conviction would presumably somehow undermine the jury process. And while courts have been vague as to the exact mechanism by which character makes one unfit for service, one

³⁶ *Id.*

³⁷ Binnall and Davis state:

Across jurisdictions, the application of felon-juror exclusion statutes is relatively consistent. Only four jurisdictions tailor felon-juror exclusion statutes, distinguishing first-time offenders from repeat offenders (Arizona), violent offenders from non-violent offenders (Nevada), grand juries from petit juries (Colorado), and civil cases from criminal cases (Oregon). In all remaining jurisdictions, felon-juror exclusion statutes are categorical, applying to all prospective jurors with a prior felony conviction in all types of proceedings.

James M. Binnall & Lauren M. Davis, *Californians with a Felony Conviction Are Now Eligible for Jury Service: How Would They Know?*, 32 STAN. L. & POL’Y REV. 1, 6 (2020).

³⁸ *Id.*

³⁹ The court notes here:

The important point is, though, that simply being charged with a crime says something about a person, something which is material to his ability to serve as a juror It is rational to believe that such a person may not take seriously his obligation to follow the law as a juror is sworn to do.

See United States v. Barry, 71 F.3d 1269, 1273 (7th Cir. 1995); *see also* United States v. Boney, 977 F.2d 624, 637 (D.C. Cir. 1992) (“It is not their ‘bias’ that disables them. The Jury Selection and Service Act of 1968 (the Act), 28 U.S.C. §§ 1861–1878, excluded felons to preserve the ‘probity’ of the jury.”).

⁴⁰ *See* Kalt, *supra* note 2, at 74 (“[C]ourts have been less clear as to whether the threat that felons pose to jury probity stems from their degraded status or from their actual characteristics.”); *see also* BINNALL, TWENTY MILLION ANGRY MEN, *supra* note 7, at 76 (referring to these two perspectives as the “instrumental” and “taint” perspectives respectively).

possible concern is the refusal to abide by the juror's oath.⁴¹ As one federal court noted, “[Si]mply being charged with a crime says something about a person, something which is material to his ability to serve as a juror . . . it is rational to believe that such a person may not take seriously his obligation to follow the law as a juror is sworn to do.”⁴²

A second perspective holds that the inclusion of those with a felony conviction would delegitimize the jury process.⁴³ This “taint argument”⁴⁴ seemingly suggests that those with a felony criminal conviction would undermine the public's confidence in the jury system and would lead to skepticism of resulting verdicts.⁴⁵ As one state court held, “[It] would be a strange system, indeed, which permitted those who had been convicted of anti-social and dissolute conduct to serve on its juries.”⁴⁶ Similarly, the Southern District of Iowa ruled that federal record-based juror exclusion is “rationally related to the purpose of trying to achieve a reputable and reliable jury . . . whose judgment society can respect.”⁴⁷

Despite the ambiguity regarding the true purpose of the character justification for federal record-based juror exclusion, the underlying assumptions of the rationale are clear. By premising record-based juror exclusion on a supposed lack of character, a jurisdiction presumes (1) that a felony conviction uniformly reveals bad character, such that those with a felony criminal conviction possess a character flaw that makes them unfit for jury service.⁴⁸ In turn, when excluding based on a supposed character flaw, a jurisdiction must also presume (2) that character is a fixed concept, such that the character of an individual with a felony criminal history is forever marred and unchanging—warranting exclusion as a prophylactic measure to protect our jury system.⁴⁹ These

⁴¹ See *Barry*, 71 F.3d at 1273.

⁴² *Id.* (emphasis added).

⁴³ Kalt writes:

The other possibility broached above is that felons threaten the probity of the jury because of their degraded status; whether or not individual felons are “bad,” the idea of having tainted people on juries might undermine the integrity of the institution. That this is anyone's intention is belied by the fact that jurisdictions speak of probity rather than the appearance of probity. Nevertheless, it is an argument worth considering.

See Kalt, *supra* note 2, at 104.

⁴⁴ *Id.* (labeling this argument the “taint” argument).

⁴⁵ *Id.*

⁴⁶ *People ex rel. Hannon v. Ryan*, 34 A.D.2d 393, 398 (4th Dep't 1970).

⁴⁷ *Greene*, 995 F.2d at 796.

⁴⁸ See BINNALL, TWENTY MILLION ANGRY MEN, *supra* note 7, at 75-76.

⁴⁹ *Id.*

assumptions adhere to an outdated concept of character that is contradicted by empirical research and other character requirements employed in the law.⁵⁰

B) Two Conceptions of Character: Conventionalists vs. Empiricists

The concept of character and its role as a barometer for assessing the quality or fitness of an individual has been the topic of extensive debate.⁵¹ On one hand, conventional Aristotelian conceptualizations suggest that character is fixed, revealed through actions freely taken.⁵² On the other hand, a modern, empirical view suggests that character is malleable, shaped in part by our surroundings and our interactions with those surroundings.⁵³ Federal record-based juror exclusion takes a decidedly pre-modern view of character development and character consistency.⁵⁴

The conventional view of character aligns with Aristotle's view that human beings decide their character and reveal their character through their actions. In describing this conceptualization of character, one commentator notes, "[E]very person chooses to develop good or bad character through autonomous actions . . . [and] [o]nce a person [chooses] their character . . . he or she [is] not free to simply undo the choice."⁵⁵ In this way, the traditionalist's perspective deemphasizes social and contextual determinants of one's character.⁵⁶ Described as "globalism" by philosophers,⁵⁷ such a position proposes not only that

⁵⁰ See *infra* Part II.A.

⁵¹ See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 *passim* (1985) [hereinafter Rhode, *Moral Character as a Professional Credential*]; see also Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 L. & SOC. INQUIRY 1027 *passim* (2018) [hereinafter Rhode, *Virtue and the Law*].

⁵² Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1028 (2004).

⁵³ The empirical challenge to conventional or traditional views (views assumed by virtue ethicists) of character is sometimes termed the Harman-Doris thesis. See generally Gilbert Harman, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error*, 99 PROC. ARISTOTELIAN SOC'Y 315 (1999); Gilbert Harman, *The Nonexistence of Character Traits*, 100 PROC. ARISTOTELIAN SOC'Y 223 (2000); Gilbert Harman, *Skepticism About Character Traits*, 13 J. ETHICS 235 (2009); JOHN M. DORIS, LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR 22 (2002).

⁵⁴ See BINNALL, TWENTY MILLION ANGRY MEN, *supra* note 7, at 89.

⁵⁵ Yankah, *supra* note 52, at 1028.

⁵⁶ *Id.*

⁵⁷ DORIS, *supra* note 53, at 22-23 (defining globalism as a theory that "construe[s] personality as more or less coherent and integrated with reliable, relatively situation-resistant, behavioral implications").

character is intrinsically formed, but also that character is consistent and predictable.⁵⁸ Clarifying this position, philosopher John Doris explains, “If a person possesses a trait, that person will engage in trait-relevant behaviors in trait-relevant eliciting conditions with markedly above chance probability.”⁵⁹ In this way, character assessments can be useful, as “[k]nowing something about a person’s character is supposed to render their behavior intelligible and help observers determine what behaviors to expect.”⁶⁰

Unlike the traditionalist view of character, the empirical view places appropriate weight on situational factors when evaluating the development of character.⁶¹ Under this view, human beings do not possess a global “dispositional structure.”⁶² Rather, character is shaped by human experiences.⁶³ In this way, many commentators argue, “[P]hilosophical explanations referencing character traits are generally inferior to those adduced from experimental social psychology . . . [because] [t]hey presuppose the existence of character structures that actual people do not very often possess.”⁶⁴

The social psychological evidence of character determinants is compelling. An extensive line of research now demonstrates that our character is largely a byproduct of context.⁶⁵ For example, in the now famous Milgram Experiment and Stanford Prison Project, researchers were able to manipulate experimental environments to elicit incredible behaviors from respondents otherwise not predisposed to cruelty or violence.⁶⁶ Multiple additional studies have found similar effects.⁶⁷ As law professor Anders Kaye explains:

Because we are so vulnerable to situational influences, our characters cannot be as consistent as we generally imagine they

⁵⁸ *See id.*

⁵⁹ *Id.* at 23.

⁶⁰ *Id.* at 5.

⁶¹ *See* Jonathan Webber, *Character, Common-Sense, and Expertise*, 10 *ETHICAL THEORY & MORAL PRAC.* 89, 90 (2007) (“Philosophical talk of character should be grounded in the findings of experimental psychology, critics argue, but is instead usually based ultimately only on common-sense intuitions.”).

⁶² DORIS, *supra* note 53, at 26.

⁶³ *Id.*

⁶⁴ *Id.* at 6.

⁶⁵ *See* Anders Kaye, *Does Situationist Psychology Have Radical Implications for Criminal Responsibility?*, 59 *ALA. L. REV.* 611, 637 (2008).

⁶⁶ *See generally* Stanley Milgram, *Behavioral Study of Obedience*, 67 *J. ABNORMAL & SOC. PSYCH.* 371 (1963); Craig Haney & Phillip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-five Years After the Stanford Prison Experiment*, 53 *AM. PSYCH.* 709 (1998); Stanley Milgram, *The Perils of Obedience*, 247 *HARPER’S MAG.* 62 (1973).

⁶⁷ *See* Kaye, *supra* note 65 for a review of additional studies.

are . . . [t]he story of my act shifts from being a story about me to being a story about my surroundings, so that my acts belong, in some significant way, to forces beyond myself.⁶⁸

Unlike conventional views of character, this empirically informed conceptualization accommodates the possibility of reformation and rehabilitation.⁶⁹ A traditional perspective of character does not.⁷⁰ On this note, empirical evidence tends to show that those who have committed a serious criminal offense can perform admirably as jurors.⁷¹ Moreover, a closer look at how the law uses character assessments reveals an inconsistent conception of character, calling into question the law's dedication to character as an apt measure of juror fitness.⁷²

II. THE CASE AGAINST THE CHARACTER JUSTIFICATION

As noted, the character justification for federal record-based juror exclusion presumes preliminarily that those who commit a criminal offense reveal themselves to be of unacceptable character. In this way, a single deviation from recognized law is seen as a window into one's moral composition.⁷³

A) *The Empirical Evidence: A Clear Lack of Support*

No empirical evidence supports the character justification.⁷⁴ As to the "instrumental" perspective, evidence makes clear that jurors with a felony criminal conviction pose little threat to the jury's function.⁷⁵

In the only mock jury experiment to include both jurors with a felony criminal history and jurors with no criminal convictions, results revealed that such jurors approached service thoughtfully and

⁶⁸ *Id.* at 639.

⁶⁹ See Nisigandha Bhuyan, *The Role of Character in Ethical Decision-Making*, 41 J. VALUE INQUIRY 45, 49 (2007).

⁷⁰ *Id.* at 45-46 ("Character concerns an appropriate inner state of an individual, which gives rise to an appropriate response in terms of behavior, action, and decision to any given situation. Hence, a character trait is a broad-based disposition to respond in a relevant manner to situations of corresponding sort.").

⁷¹ See Binnall, *Jury Diversity in the Age of Mass Incarceration*, *supra* note 13; Binnall, *Summoning Criminal Desistance*, *supra* note 13.

⁷² See *infra* Part II. B. See generally BINNALL, TWENTY MILLION ANGRY MEN, *supra* note 7, at ch. 2.

⁷³ See DORIS, *supra* note 53, at 20 ("Moreover, attribution of negatively valanced traits may require very little in the way of behavioral consistency; perhaps one does not have to reliably falter, but only sporadically falter, to be counted a coward.").

⁷⁴ See Binnall, *Felon-Jurors in Vacationland*, *supra* note 16, at 3.

⁷⁵ See generally Binnall, *Criminal Desistance*, *supra* note 13; Binnall, *Exorcising Pre-summptions*, *supra* note 16.

conscientiously.⁷⁶ On theoretically derived measures of deliberation quality, participants with a felony conviction outperformed their non-conviction counterparts. They raised more novel case facts during deliberations and spoke for a greater proportion of their jury's total deliberation time.⁷⁷ In this way, participants with a felony criminal history added value to their jury's deliberative process, drawing on their past to impartially assess evidence and to evenhandedly apply the law. These findings support a number of prior studies on juries,⁷⁸ and outside of the jury context,⁷⁹ suggesting that diverse work groups tend to engage in higher quality deliberations than homogeneous groups.

Similarly, in a study of former jurors with a felony criminal conviction in Maine, all reported approaching jury service in a thoughtful way, placing a tremendous amount of importance on the role of the juror and their ability to fulfill that role.⁸⁰ Study respondents reported taking an active role in deliberations, striving to live up to the trust placed in them by the state.⁸¹ Many spoke of serving as a "corroboration of their reformation,"⁸² in their eyes creating a tremendous responsibility that they felt a duty to fulfill.⁸³ These findings squarely contradict presumptions that a criminal conviction forever

⁷⁶ See Binnall, *Juror Diversity in the Age of Mass Incarceration*, *supra* note 13, at 13.

⁷⁷ *Id.*

⁷⁸ See generally Nancy S. Marder, *Juries, Justice & Multiculturalism*, 74 UNIV. S. CAL. L. REV. 659 (2002); Samuel R. Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597 (2006); see, e.g., Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 L. & HUM. BEHAV. 53 (1984).

⁷⁹ See generally Warren Watson et al., *Cultural Diversity's Impact on Interaction Process and Performance: Comparing Homogeneous and Diverse Task Groups*, 36 ACAD. MGMT. J. 590 (1993); Poppy McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GRP. RSCH. 248 (1996); Victor Valls et al., *Linking Educational Diversity and Team Performance: Team Communication Quality and Innovation Team Climate Matter*, 89 J. OCCUPATIONAL & ORG. PSYCH. 751 (2016).

⁸⁰ See Binnall, *Summoning Criminal Desistance*, *supra* note 13, at 36.

⁸¹ See, e.g., *id.* at 11 ("I figured, you know, they gave me the trust enough to sit on this jury, to do what had to be done, whether it was guilty or not guilty.")

⁸² *Id.* at 15.

⁸³ This was reflected in the following study respondent's comment:

I mean [felon jury inclusion] kinda sends a message that . . . the courts . . . won't always exclude you from . . . sitting on, you know, civic duty. They may not always select you and you may not always be needed, but . . . you can say you tried. You showed up when you got served. [T]his side, you know, always having, again, having looked at things from the unlawful side and then the court says, "Well, we need you to, we need your help to make some of the right decisions." And it's kinda cool . . . They said, "We're gonna hand you this responsibility. Do you what you need to do with it."

See, e.g., *id.* at 16.

renders one unfit to serve. Rather, participants demonstrated both the willingness and fitness to appropriately serve as a neutral trier of fact.⁸⁴

As to the “taint argument,” again, no evidence supports this claim. Rather, evidence tends to reveal that juror diversity actually leads to improvements in the public’s perceptions of the jury process.⁸⁵ In several prior studies, the public rated the fairness and legitimacy of the jury and its resulting verdict more favorably when the jury was comprised of racially or gender diverse jurors.⁸⁶ In the only study of juror diversity accounting for jurors’ prior criminal histories, preliminary findings similarly suggest that the inclusion of those with a felony conviction improved the public’s view of the jury and any resulting verdict.⁸⁷

In sum, empirical evidence does not support either interpretation of the character or probity rationale for record-based federal juror exclusion. Nonetheless, federal courts continue to cite the character rationale as the primary purpose for the practice, even though conceptions of character in the law vary wildly by context.

B) *The Contextual Case: A Series of Inconsistencies*

The law uses character as a barometer for access to various institutions and processes.⁸⁸ In virtually all instances, the law recognizes

⁸⁴ This was reflected in the following study respondent’s comment:

I just said . . . “you gotta go from what you really see.” Cause, there was like two ladies that had never been on a jury, and they were like, “We’re not gonna make no decisions.” And, I said, “You have to go with what you see. The evidence. Everything that you get, that we’ve already been through, you have to weigh that out. You can’t just say yes or no” I even got up and put all this stuff on the chalkboard that, the pros and cons.

See, e.g., id. at 10.

⁸⁵ *See generally* Leslie Ellis & Shari S. Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033 (2003); Joshua Wilkenfeld, *Newly Compelling: Reexamining the Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 COLUM. L. REV. 2291 (2004); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens’ Perceptions of the Criminal Jury*, 12 L. & HUM. BEHAV. 333 (1989); NEIL VIDMAR & VALERIE HANS, *AMERICAN JURIES: THE VERDICT* (2007).

⁸⁶ *See* Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 VA. J. SOC. POL’Y & L. 645, 663 (1997) (noting that in a telephone poll of California residents, 67.3% of respondents felt that a jury verdict rendered by a racially diverse jury is fairer than one rendered by a single race jury); *see generally* Wilkenfeld, *supra* note 85.

⁸⁷ *See* James Binnall et al., *Is the Taint Real? The Perceived Legitimacy of Verdicts Rendered by Felon-Jurors*, (forthcoming 2021) (on file with authors).

⁸⁸ *See* Rhode, *Moral Character as a Professional Credential*, *supra* note 51, at 496; Rhode, *Virtue and the Law*, *supra* note 51, at 1027.

the potential that character is malleable and at least in part context specific. But in the case of federal record-based juror exclusion—and record-based juror exclusion generally—character is ostensibly conceptualized as fixed—forever marred once one has “chosen” to commit a crime. Though a closer look at how the law treats character in several other contexts calls into question the necessity of categorically excluding those with a felony conviction from jury service for a supposed lack of character.

If a criminal act consistently reveals flaw of character that makes one forever unfit for jury service, then jurisdictions serious about protecting their jury system would assuredly seek to exclude *all* prospective jurors with potential character issues. This includes misdemeanants. But that is not the case.⁸⁹ Rather, misdemeanants are permitted to serve as jurors in the vast majority of jurisdictions,⁹⁰ though as Kalt points out, a conviction for a misdemeanor infraction surely says something about character: “While the taint from felons might be more significant, who is to say that misdemeanants do not discredit the institution of the jury as well? Arguing that ‘felons are felons’ is the difference may have historical or metaphysical importance, but it may also just be a bootstrap.”⁹¹

Similarly, if those with a felony criminal conviction would jeopardize the jury—to the point that their outright banishment is necessary—one would assume that verdicts rendered by juries that include those with a felony criminal history cannot stand. But again, that is not typically the case.⁹² As Kalt notes, courts are reluctant to overturn verdicts rendered by a jury that included a juror with a felony conviction (an “illicit” jury).⁹³ This lack of serious remedial action in response to a

⁸⁹ See Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 *YALE L. & POL’Y REV.* 387, 388-89 (2016).

⁹⁰ See Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 *MINN. L. REV.* 592, 597 (2013) (“[S]tatutory provisions in thirteen states make those with certain misdemeanor convictions vulnerable to disqualification.”). These states are Alabama, Connecticut, Florida, Illinois, Maryland, Mississippi, Montana, New Jersey, Oregon, Tennessee, Texas, and West Virginia. While California was listed in Roberts’ original list, the record-based juror exclusion provision was amended in 2021, making clear that exclusion does not include misdemeanants.

⁹¹ Kalt, *supra* note 2, at 104.

⁹² Molly McDonough, *Rogue Jurors*, 92 *A.B.A. J.* 39, 43 (2006).

⁹³ Kalt writes:

Some felons who, under the law, should be barred from jury service are not excluded, and some non-felons who should be allowed to serve are not permitted. Many courts are surprisingly ambivalent about rectifying these sorts of errors, allowing verdicts that ‘illicit’ juries rendered to stand despite supposed concerns about felons’ inherent bias or the threat they pose to jury probity.

verdict rendered by those who are allegedly unfit to even take part in jury selection begs the question, is record-based juror exclusion really about character?

The Federal Rules of Evidence also call the character justification into question. Under the Federal Rules of Evidence § 404(b), “Evidence of any other crime, wrong, or act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”⁹⁴ The section also provides, “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”⁹⁵ Record-based juror exclusion uses character to predict how one may perform as a juror – seemingly an impermissible exercise in the evidentiary context.

Perhaps the most damning contextual argument against record-based juror exclusion involves the licensure of attorneys.⁹⁶ Today, in 24 states and in the federal court system, a citizen with a felonious criminal history may be permitted to practice law, but is forever barred from serving as a juror.⁹⁷ Thus, those individuals who supposedly lack the character to decide even, say, a minor property dispute in a civil matter apparently possesses the requisite character to defend a fellow citizen in the most grievous of criminal matters—a death penalty case.⁹⁸ This illogical contradiction highlights the law’s inconsistent conception of character and arguably undermines the use of character as the basis for a categorical exclusion from jury service.

In sum, what empirical evidence and contextual comparisons demonstrate are that the underlying presumptions of the character justification lacks support, while the use of character in other contexts calls into question the true purpose of felon-juror exclusion. The impeachment trials of former President Trump provide yet another context that undermines the character justification and indirectly, the policy of felon-juror exclusion in its entirety.

Kalt, *supra* note 2, at 162 (citing as an example *State v. Neal*, 550 So. 2d 740 (La. Ct. App. 1990)).

⁹⁴ FED. R. EVID. 404(b).

⁹⁵ *Id.* at 404(a).

⁹⁶ See Binnall, *Convicts in Court*, *supra* note 13.

⁹⁷ *Id.*; BINNALL, *TWENTY MILLION ANGRY MEN*, *supra* note 7, at app. B.

⁹⁸ See Binnall, *A Field Study of the Presumptively Biased*, *supra* note 2, at 8-9 (noting that Oregon is the only jurisdiction that distinguishes civil from criminal litigation for the purposes of record-based juror exclusion, the federal court system does not).

III. THE TRUMP IMPEACHMENT TRIALS: CHARACTER IN ANOTHER CONTEXT

While federal criminal proceedings differ in fundamental ways from Senate impeachment trials,⁹⁹ they are similar in certain respects. They both involve the use of jurors as triers of fact.¹⁰⁰ Moreover, they both involve the admonishment of those jurors prior to rendering a decision in a given case.¹⁰¹

In a federal criminal trial, jurors are selected from the federal jury pool and summoned to appear in federal court.¹⁰² On their day of service, federal jurors must demonstrate their eligibility before partaking in the jury selection process.¹⁰³ If a prospective juror survives jury selection, they will be seated on an empaneled jury and the presentation of evidence will begin.¹⁰⁴ Once the trial has concluded, the trial judge will then ask each juror to swear an oath: “Do each of you solemnly swear [or affirm] that you will well and truly try, and a true deliverance make in, the case now on trial, and render a true verdict according to the law and the evidence, so help you God?”¹⁰⁵

In an impeachment trial, the U.S. Senate determines the contours of the proceedings. Under Article I of the U.S. Constitution, “The Senate shall have the sole Power to try all Impeachments.”¹⁰⁶ Article I continues, “When sitting for that Purpose, they [the Senate] shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.”¹⁰⁷ Accordingly, at the start of all impeachment trials, Senators swear an oath as jurors in the matter.¹⁰⁸ That oath, first established in 1798,¹⁰⁹ reads: “I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of _____, now

⁹⁹ See John Kruzell, *Five Ways Trump’s Impeachment Differs from a Court Trial*, HILL (Nov. 5, 2021, 10:00 AM), <https://perma.cc/3A8V-T92K>; see also Vikram D. Amar et al., *The Power to “Try” “Cases of Impeachment”* 95 CHI.-KENT L. REV. 455, 467-68 (2021).

¹⁰⁰ See PROC. AND GUIDELINES FOR IMPEACHMENT TRIALS IN THE S., S. Doc. No. 93-33, 99th Cong., 2d Sess. 25-26 (1986); ABA, *Trial by Jury*, in CRIMINAL JUSTICE STANDARDS, pt. 4, § 15-4.1, <https://perma.cc/6FA8-TUFP>.

¹⁰¹ S. Doc. No. 93-33 at 26; ABA, *Trial by Jury*, *supra* note 100.

¹⁰² See *Learn About Jury Service*, U.S. CTS., <https://perma.cc/NF9G-C55E> (last visited Jan. 11, 2022).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ FED. JUD. CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 269 (6th ed. 2013).

¹⁰⁶ U.S. CONST. art. I, § 3, cl. 6.

¹⁰⁷ *Id.*

¹⁰⁸ See S. JOURNAL, 5th Cong., 2d Sess. 438-39 (1798).

¹⁰⁹ *Id.*

pending, I will do impartial justice according to the Constitution and laws: So help me God.”¹¹⁰

Not only is the juror’s oath in federal criminal trials similar to that employed in impeachment proceedings, so too are the purposes for the pledge in each context.¹¹¹ As the Tenth Circuit notes, in federal criminal trials, “[T]he principle behind the exercise is sound: A juror impressed with the seriousness of his charge is more likely to be attentive at trial and, in turn, more likely to carry out his duty faithfully, with due respect for the ideals underlying the criminal process.”¹¹² Similarly, in impeachment proceedings:

In mandating that the senators swear an oath before “sitting” in trial, the Constitution signals a shift in their status. When senators try impeachments, they are no longer legislators deliberating on bills, but rather judges and jurors. The Senate’s own requirement of “impartial justice” underscores the significance of the changed role. Legislators engage in all manner of partisan activity in order to achieve their preferred political outcomes. As impartial judges and jurors, by contrast, senators are meant to set their partisan inclinations aside.¹¹³

Taken together, the juror oath—in the federal criminal trial and impeachment contexts—rests on a central principle that sworn jurors will faithfully do their duty.¹¹⁴ The respective oaths then are simply a “promise to carry out their charge—to render a verdict in accordance with the evidence—conscientiously and impartially.”¹¹⁵ Speaking to the role of senate jurors and differences/similarities between traditional criminal trials and an impeachment trial, one scholar surmises:

Many historians treated the impeachment trials of US Presidents in the Senate both as a trial and at the same time they insisted that the trial was a political proceeding. It was political since the Senate determines for itself the meaning given to what will constitute a “high crime and misdemeanor.” Yet, it was still a trial because, like jurors in criminal trials, the Senators take an

¹¹⁰ RULES OF PROC. & PRACT. IN THE S. WHEN SITTING ON IMPEACHMENT TRIALS, *supra* note 28.

¹¹¹ *See id.*; ADMIN. OFF. OF THE U.S. CTS., HANDBOOK FOR TRIAL JURORS SERVING U.S. DIST. CTS. (2012).

¹¹² *United States v. Turrietta*, 696 F.3d 972, 978 (10th Cir. 2012) (citing *United States v. Martin*, 740 F.2d 1352, 1358 (6th Cir. 1984)).

¹¹³ Amar et al., *supra* note 99, at 466.

¹¹⁴ *See* RULES OF PROC. & PRACT. IN THE S. WHEN SITTING ON IMPEACHMENT TRIALS, *supra* note 28, at 182; ADMIN. OFF. OF THE U.S. CTS., *supra* note 112, at 6.

¹¹⁵ *Turrietta*, 696 F.3d at 978.

oath to try the President fairly. Presumably this at least means that Senators are finally responsible to their constituents for making factual findings that support whether a President has committed a “high crime and misdemeanor.” While conducting a political trial has always been a difficult balancing act for the world’s “most famous deliberative body,” following the two Trump impeachment trials, the Senate’s processes for impeachment are now in shambles, and its integrity has been substantially damaged.¹¹⁶

A) *Senate Jurors Speak: Trump Impeachment #1*

On January 16, 2020, the first impeachment trial of former President Trump began.¹¹⁷ It was the first since the impeachment trial of former President Clinton in 1999.¹¹⁸ The trial concerned two counts: abuse of power and obstruction of Congress.¹¹⁹

Prior to the start of the first Trump impeachment trial, a number of Senators expressed their feelings about the charges, the process, and their role in that process.¹²⁰ For some, these statements also included a stated verdict preference, arguably in direct conflict with their oath to render “impartial justice.”¹²¹ For example, when asked about the impeachment process in the lead up to the start of the trial, Senator Lindsay Graham (R) of South Carolina stated, “This thing will come to the Senate, and it will die quickly, and I will do everything I can to make it die quickly.”¹²² When he was asked whether he felt it appropriate to voice his verdict preference prior to the start of trial he noted, “Well, I must think so because I’m doing it. I am trying to give a pretty clear signal I have made up my mind. I’m not trying to pretend to be a fair juror here. What I see coming, happening today is just a partisan nonsense.”¹²³ Graham made these statements on December 14,

¹¹⁶ Paul J. Zwier, *Impeachment Trials After Trump: More Trial and Less Politics* 1-2 (May 20, 2021), <https://perma.cc/LCN2-7TFY>.

¹¹⁷ *Timeline: The Long Road to Trump’s Impeachment and Trial*, REUTERS (Feb. 5, 2020, 11:47 AM), <https://perma.cc/L73P-S3DU>.

¹¹⁸ Sarah D. Wire, *A Look Back at How Clinton’s Impeachment Trial Unfolded*, L.A. TIMES (Jan. 16, 2020, 5:28 PM), <https://perma.cc/6RBD-S4CB>.

¹¹⁹ *Timeline: The Long Road to Trump’s Impeachment and Trial*, *supra* note 117.

¹²⁰ Veronica Stracqualursi, *‘I’m Not Trying to Pretend to be a Fair Juror Here’: Graham Predicts Trump Impeachment will ‘Die Quickly’ in Senate*, CNN POL. (Dec. 14, 2019, 2:48 PM), <https://perma.cc/NG8T-77VE>; Kelsey Snell, *McConnell: ‘I’m Not Impartial’ About Impeachment*, NPR (Dec. 17, 2019, 3:06 PM), <https://perma.cc/X8UP-MHHQ>.

¹²¹ *See* Stracqualursi, *supra* note 120.

¹²² *Id.*

¹²³ *Id.*

2019, a full month before the start of the first Trump impeachment trial.¹²⁴

The Senate Majority Leader, Mitch McConnell (R) of Kentucky, similarly suggested that he had decided the case and intended to work with the President's legal team to move toward a swift conclusion to the impeachment trial he viewed as unnecessary: "Everything I do during this, I'm coordinating with White House Counsel. There will be no difference between the President's position and our position as to how to handle this."¹²⁵ McConnell went on to seemingly implore members of his caucus to likewise discount their oath and predetermine their preferred outcome: "We know how it's going to end. There's no chance the president's going to be removed from office. My hope is that there won't be a single Republican who votes for either of these articles of impeachment"¹²⁶ These statements were made in mid-December 2019, nearly four weeks prior to the start of trial.¹²⁷

Other Senators took actions and made statements that again appear to contradict their oath.¹²⁸ Senator Mike Lee (R) of Utah worked with former President Trump's impeachment lawyers in their preparation for trial. "Lee has been coordinating with Trump and his legal team for weeks and told the publication that he started thinking about how to handle an impeachment trial as soon as Democrats won the House majority."¹²⁹ Lee went on to predict how the Senate would vote, flatly characterizing acquittal as a foregone conclusion: "And you know what we're going to do? We're going to embarrass the heck out of the Democratic Party because they've been an embarrassment in the way they've handled this. The president's going to win and win in a big way."¹³⁰

Ahead of the first Trump impeachment trial, statements indicating an intention to flout the Senate juror's oath were not confined by political party membership.¹³¹ Senator Elizabeth Warren (D) of Massachusetts, an attorney, former law professor, and then-presidential

¹²⁴ *Id.* Trump's impeachment trial began on January 16, 2020, nearly one month after Graham's statements. Meg Wagner, at al., *The Senate Impeachment Trial Has Officially Started*, CNN POL. (Jan. 19, 2020, 9:27 PM), <https://perma.cc/2DT4-XDU6>.

¹²⁵ Savannah Behrman, *McConnell: In 'Total Coordination' with White House for Impeachment Trial*, USA TODAY (Dec. 12, 2019, 11:55 PM), <https://perma.cc/9YQB-WA84>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Denis Romboy, *Sen. Mike Lee Quietly Working to Clear Trump in Senate Impeachment Trial*, DESERT NEWS (Dec. 27, 2019, 11:05 AM), <https://perma.cc/JK5L-J3SL>.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See Lim & Simonson, *supra* note 25.

candidate indicated that she had already come to a conclusion on the case:

I think the evidence is clear. When Donald Trump released the transcript in which he solicited a foreign government to interfere in the 2020 elections, he broke the law and he did that in context of already having interfered with an investigation into the 2016 elections and Russia being invited to interfere in our elections.¹³²

These Senator's statements—a sampling of those made ahead of the 2019 presidential impeachment trial—strongly suggest that a number of Senators failed to take seriously their commitment to rendering “impartial justice.” Nonetheless, former President Trump was acquitted in his first impeachment trial—with Senator Mitt Romney (R) of Utah, the only Republican Senator to convict.¹³³

B) Senate Jurors Speak: Trump Impeachment #2

In January 2021, former President Trump was once again impeached, this time for inciting an insurrection.¹³⁴ The Senate impeachment trial for this matter began on February 3, 2021, again with a number of Senators publicly acknowledging their verdict preference ahead of trial.¹³⁵

On January 21, 2021, ahead of trial, the New York Times began surveying Senate jurors' likely verdict preferences.¹³⁶ Of the 100 Senate jurors, 36 Democrats indicated an intention to convict, while 36 Republicans indicated an intention to acquit.¹³⁷ Twenty-seven Senate jurors, a bipartisan group, did not express their verdict preference prior to the proceedings.¹³⁸ Senator Ben Sasse (R) of Nebraska was one such Senator, stating “[a]s a juror, I'm not announcing anything now and I'm going to be limited on what I say in advance”¹³⁹ Likewise, a spokesperson for Senator Jon Tester (D) of Montana noted, “Senator Tester takes seriously his role as a juror in the Senate trial and will

¹³² *Id.*

¹³³ See Millhiser, *supra* note 21.

¹³⁴ See Linton et al., *supra* note 22.

¹³⁵ See Weiyi Cai & Kenan Davis, *Full List: Where Every Senator Stands on Convicting Trump*, N.Y. TIMES, <https://perma.cc/N2QL-9YKS> (Feb. 14, 2021).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Ben Sasse Issues Statement on Impeachment of Trump, KHGI (Jan. 14, 2021), <https://perma.cc/U3RW-XVQU>.

consider all the evidence before making a final decision about conviction.”¹⁴⁰

Still, most Senators felt it appropriate to indicate how they would eventually vote, prior to the start of the presentation of evidence.¹⁴¹ Senator Ed Markey (D) of Massachusetts stated flatly, “We must convict Donald Trump.”¹⁴² He made this declaration on February 9, 2021 at 7:45 p.m. via Twitter.¹⁴³ The impeachment trial officially began at 1:00 p.m. with a 4-hour debate about the constitutionality of the proceedings—no evidence had been presented at the time of his tweet.¹⁴⁴ Senators Ben Ray Luján (D) of New Mexico and Debbie Stabenow (D) of Michigan made similar declarations prior to trial. Luján stated, “The Senate now has the constitutional duty to act, and I will stand up for our republic, defend our democracy, and vote for removal.”¹⁴⁵ Stabenow stated, “When the article of impeachment comes before the Senate, I intend to support removing Donald Trump from office.”¹⁴⁶

Of the Republican Senators who foreshadowed their verdict ahead of trial, all suggested that they disagreed with the legality of the proceedings, arguing that impeachment ought to be reserved solely for those still in elected office.¹⁴⁷ In this way, all seemingly delegitimized the proceedings before they began. Consider this statement by Senator John Thune (R) of South Dakota: “Our members, irrespective of what they might think about the merits, just believe that this is an exercise that really isn’t grounded constitutionally and, from a practical standpoint, just makes no sense.”¹⁴⁸ Senator Marco Rubio (R) of Florida succinctly summed up his intentions this way: “The first chance I get to vote to end this trial, I will do it, because I think it’s really bad for America.”¹⁴⁹

¹⁴⁰ Cai & Davis, *supra* note 135.

¹⁴¹ *Full List: Where Every Senator Stands on Convicting Trump*, N.Y. TIMES (Jan 25, 2021), <https://perma.cc/Y9U4-SV9U>.

¹⁴² Ed Markey (@SenMarkey), TWITTER (Feb. 9, 2021, 7:45 PM), <https://perma.cc/4KJ9-VRYX>.

¹⁴³ *Id.*

¹⁴⁴ Kyle Schultz, *Verify: Everything You Need to Know About Former President Donald Trump’s Second Impeachment Trial*, WUSA 9 (Feb. 12, 2021, 6:42 PM), <https://perma.cc/X4PA-9WDY>.

¹⁴⁵ Press Release, Ben Ray Luján, Senator, Luján Statement on Impeachment of Donald J. Trump (Jan. 13, 2021), <https://perma.cc/5E3D-AN97>.

¹⁴⁶ Press Release, Debbie Stabenow, Senator, Senator Debbie Stabenow Statement on the Impeachment of Donald Trump (Jan. 13, 2021), <https://perma.cc/TXL6-T98Z>.

¹⁴⁷ Andrew Desiderio, *Senate Republicans Uniting Behind Impeachment Defense*, POLITICO (Jan. 21, 2021, 7:50 PM), <https://perma.cc/U3Z6-A6S5>.

¹⁴⁸ *Id.*

¹⁴⁹ Kelly Hooper, *Marco Rubio: It’s Arrogant to Impeach Trump*, POLITICO (Jan. 24, 2021, 10:38 AM), <https://perma.cc/U8AZ-3DLZ>.

For Republicans, statements regarding the upcoming impeachment trial were perhaps not even their most egregious deviation from the Senate juror's oath. A number of Republican Senators appeared to pay little attention to the impeachment manager's case against former President Trump.¹⁵⁰ Additionally, some Senators went so far as to appear slightly disruptive during the proceedings.¹⁵¹ One report indicated that Senator Rand Paul (R) of Kentucky "wasn't seen on the floor for most of the first hour and a half of arguments though he was spotted in the cloakroom raising up his arms and appearing to speak loudly."¹⁵² Summing up the behavior of Republican Senators during the impeachment trial, NBC reporter Garrett Haake noted "the intractable nature of trying to get some of the folks in the room to actually engage with the material and be present and take this seriously."¹⁵³

C) *The Problem with Assuming*

Jurors in both federal criminal and impeachment trials take an oath to behave conscientiously and impartially.¹⁵⁴ Their fidelity to this oath is obviously a personal choice. Still, absent additional evidence, we must assume that having taken the oath, a juror is aware of their responsibilities and plans to fulfill those in pursuit of truth and justice. As the Ninth Circuit has noted, "When a jury is sworn, it is entrusted with the obligation to apply the law, and we in turn presume that juries follow instructions given to them throughout the course of the trial."¹⁵⁵ The Eighth Circuit has taken a similar approach, "[T]his court should and does assume that a jury, sworn by oath to follow the law, did, in fact, do so."¹⁵⁶ Similarly, in January 2020, former Senator Tom Udall

¹⁵⁰ Bolton states:

Sen. Rand Paul (R-Ky.) was spotted tracing the watermark of the Capitol on a legal pad while Sen. Tim Scott (R-S.C.) appeared to read a magazine article and Sen. Cindy Hyde-Smith (R-Miss.) gazed at a 2021 calendar. Sen. Rick Scott (R-Fla.) was studying what appeared to be a map of Southeast Asia. Sen. Mike Braun (R-Ind.) was described by one reporter in the chamber as appearing to struggle to stay awake while Sen. Marsha Blackburn (R-Tenn.) didn't seem to pay much attention.

Alexander Bolton, *GOP Senators Criticized for Appearing to Pay Half-Hearted Attention to Trial*, HILL (Feb. 10, 2021, 4:46 PM), <https://perma.cc/J7HN-8VWA>.

¹⁵¹ *Id.* ("Sen. Richard Burr (R-N.C.) popped snacks into his mouth under his mask and at one point walked into the cloakroom, emerging moments later with a glass of milk.").

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See FED. JUD. CTR., *supra* note 4, at 269 (trial juror's oath); RULES OF PROC. & PRACT. IN THE S. WHEN SITTING ON IMPEACHMENT TRIALS, *supra* note 28 (Senate juror's oath).

¹⁵⁵ *United States v. Padilla*, 639 F.3d 892, 897 (9th Cir. 2011).

¹⁵⁶ *United States v. Beckman*, 222 F.3d 512, 519 (8th Cir. 2000).

(D) of New Mexico made clear his interpretation of the senate juror's oath, noting "[t]o uphold our oath, we must hear all the information before we give judgment. It's what we owe to the American people."¹⁵⁷

Still, when a juror makes their intention public—their intention to abandon their oath to remain impartial—we would err in assuming that they will behave otherwise. In excluding citizens with felony criminal convictions from federal jury service, we assume that those citizens will not fulfill their obligation to abide by their oath—to assess the case evenhandedly and to render the appropriate verdict. On the other hand, we also assume that U.S. Senators, who swear as jurors to deliver impartial justice in impeachment trials, will act in accordance with their own oath, rather than “gearing up their usual political alliances.”¹⁵⁸ And ultimately, while we assume the worst of those individuals who have perhaps deviated from recognized law only once, we ostensibly trust those Senators who—on the record—tell us that they plan to flout their oath and then behave accordingly.

The actions of Senate jurors—from both parties—in the impeachment trials of former President Trump, add to the growing list of contextual discrepancies that undermine the character justification for federal record-based juror exclusion. In an impeachment trial—the most public of all trials—Senate jurors behaving improperly threatens the legitimacy of the proceedings. The exact concern expressed by federal courts in upholding record-based federal juror exclusion, which is based on the presumption that the inclusion of those with a felony conviction will somehow de-legitimize our jury system and resulting verdicts. In this way, exclusion based on assumptions about character and the appearance of impropriety is illogical and inconsistent.

IV. CONCLUSION: A PLEA FOR CONSISTENCY

Though impeachment trials differ from federal criminal trials in fundamental ways, the lessons of the Trump impeachment trials are no less valuable. While some readers may cite the behavior of Senate jurors as reason to re-examine the efficacy of impeachment proceedings, that is not the central thrust of this essay. Instead, I argue simply that the impeachment trials of former President Trump demand reflection about the use of character assessments in decisions of access to democratic institutions—namely the jury. The character justification for exclusion fails when pressed empirically—it also fails when considered alongside a variety of contexts in which we either assume that character is

¹⁵⁷ Patrick Hayes, *US Senators Discuss Impartiality During Impeachment Trial*, KOB (Jan. 23, 2020, 10:31 PM), <https://perma.cc/KQ2D-4KRJ>.

¹⁵⁸ Amar et al., *supra* note 99, at 467.

redeemable or, in the case of U.S. Senators, that character exists by default.

To be clear, Senate jurors and trial jurors are dissimilar. For Senate jurors, they are not part of an expansive jury pool, they are not subject to jury selection procedures, and they cannot be dismissed for cause or peremptorily. Still, both swear an oath to conscientiously and thoughtfully approach their duties. In the case of felon-jurors—proponents of exclusion argue that a prior bad act (often only one) is dispositive of a lack of character and an inherent bias, but in the case of U.S. Senators who indicate an unwillingness to abide by their oath *in the matter at bar*, we seemingly assume that these are politically necessary statements that have no bearing on how Senate jurors will ultimately conduct themselves. I only wish my fellow citizens with a felony criminal history were afforded that same courtesy in federal criminal trials.