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Michael J. Gerhardt

*University of North Carolina School of Law*, [gerhardt@email.unc.edu](mailto:gerhardt@email.unc.edu)

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# THE HISTORICAL AND CONSTITUTIONAL SIGNIFICANCE OF THE IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON

*Michael J. Gerhardt\**

## I. INTRODUCTION

The impeachment and trial of President William Jefferson Clinton are not over. To be sure, roughly two months after the House of Representatives had impeached the President for perjury and obstruction of justice,<sup>1</sup> the Senate fully acquitted the President.<sup>2</sup> The challenge remains, however, for historians, constitutional scholars, political scientists, and others to assess the reasons for, and ramifications of, the President's impeachment proceedings.

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\* Professor of Law, The College of William & Mary; Visiting Professor, Duke Law School (Spring 2000). I am grateful to have had the chances to refine my thinking about the subject matter of this Essay in conversations over the past eight months with Alex Aleinikoff, Akhil Reed Amar, Michael Les Benedict, Susan Low Bloch, David Broder, Robert Dallek, Walter Dellinger, Neal Devins, Father Robert Drinan, Michael Fitts, Deborah Gerhardt, Jeff Greenfield, Thomas Griffith, Ron Kahn, Neil Kinkopf, Mike Klarman, Alan Meese, John McGinnis, Thomas Merrill, Glenn Reynolds, Michael Remington, Michael Stokes Paulsen, Chris Schroeder, Paul Schwartz, and Laurence Tribe. I am also grateful for the comments on this Essay made by faculty participants in programs held at St. Louis University, Wake Forest, and the University of Wisconsin Law Schools.

1. On December 19, 1998, the House of Representatives approved two articles of impeachment against President Clinton. The first article, charging the President with giving "perjurious, false and misleading testimony to the grand jury," 145 CONG. REC. S40 (daily ed. Jan. 7, 1999), passed by a vote of 228-206. *See* 144 CONG. REC. H12,040 (daily ed. Dec. 19, 1998). The second article, charging that the President, through at least one or more of seven acts, had obstructed the sexual harassment lawsuit filed against him by Paula Jones, *see* 145 CONG. REC. S40 (daily ed. Jan. 7, 1999), passed by a vote of 221-212. *See* 144 CONG. REC. at H12,041-42.

2. On February 12, 1999, the Senate acquitted the President on both of the articles approved by the House. By a vote of 55-45, the Senate rejected and therefore found the President not guilty of the misconduct charged in the first article. *See* 145 CONG. REC. S1458 (daily ed. Feb. 12, 1999). In a split 50-50 vote, the Senate found the President not guilty of the misconduct alleged in the second article. *See id.* at S1458-59.

The purpose of this Essay is to undertake this challenge. In doing so, it takes a different path than that which has been taken in recently published (and anticipated) books and articles or commentary on the President's impeachment and acquittal.<sup>3</sup> The common problem that all impeachment studies must confront is the vagueness of the constitutional standard of impeachment,<sup>4</sup> a vagueness that is widely regarded as impeding principled decision-making in this area. The typical response of commentators to this vagueness has been to search for some principle to rigidly govern or direct impeachment proceedings. Typically, this quest leads interpreters to apply to the impeachment process norms derived from outside of the constitutional framework for impeaching and removing high-ranking federal officials. Yet, this Essay suggests that perhaps the most helpful perspective for explaining and predicting the ramifications or lessons of the Clinton impeachment proceedings is historical, i.e., examining the degree to which the Clinton impeachment proceedings followed or deviated from patterns and practices of, including the norms reflected in, impeachment history. This perspective reveals aspects of the proceedings, including some of its consequences, that have been missed in the burgeoning literature on the President's impeachment and trial. This perspective reveals, for instance, that the President's impeachment fits quite easily within a disturbing pattern over the last two decades<sup>5</sup> in which Congress' inertia in initiating impeachment inquiries has allowed federal prosecutors to trigger such investigations by making referrals to Congress.<sup>6</sup> Indeed, of the six officials who were the subjects of such referrals, President Clinton is the only to have remained in office.<sup>7</sup> Moreover, the Clinton impeachment proceedings themselves demonstrated that, contrary to conventional

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3. See, e.g., BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* 9-14 (1999); ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY* 211-58 (1999); RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* (1999); BOB WOODWARD, *SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE 457-517* (1999); see also *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. III (1998) [hereinafter *House Hearing*] (testimony of 19 law professors, including this Essay's Author); Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 637-638 (1999); John O. McGinnis, *Impeachable Defenses*, POL'Y REV., June-July 1999, at 27, 27; Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 650-51 (1999); Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 281 (1998).

4. See POSNER, *supra* note 3, at 100, 170.

5. See *infra* note 34 and accompanying text.

6. See *infra* notes 34-40 and accompanying text.

7. See *infra* notes 41-43 and accompanying text.

wisdom, the system worked, though by no means perfectly. Those seeking the removal of a President or some other high-ranking official must run through a gauntlet of constitutional and procedural impediments designed to make impeachment, and particularly removal, difficult, as confirmed by the fact that of the sixteen officials impeached by the House, only seven have been removed from office.<sup>8</sup> These obstacles include, among others, getting not just a majority of the House but also (the all-important requirement of) a supermajority in the Senate to consent to the removal;<sup>9</sup> vesting the impeachment and removal powers in authorities that must make their judgments with the knowledge or awareness that they will likely be held politically accountable for them (an outcome that is especially likely after the ratification of the Seventeenth Amendment,<sup>10</sup> which made Senators directly elected by the voters of their respective states); the unique finality of any judgment (for it is not subject to presidential veto or in all likelihood to judicial review<sup>11</sup>); and the ensuing knowledge of House members and particularly Senators that any judgments must withstand the test of time. Those obstacles ensure that the impeachment process is not a substitute for civil or criminal proceedings but rather exists to address the most serious charges of misconduct that have seriously injured the constitutional system of government and are linked to an official's public duties or that have robbed the official of all moral authority to continue to discharge the duties of his office.

The purpose of this Essay is to assess fully these and other explanations for and likely consequences of the impeachment and acquittal of President Clinton. Part I examines several possible explanations for the President's impeachment and acquittal. These explanations include the increasing influence of federal prosecutors (in this case, the Independent Counsel<sup>12</sup>) to trigger the impeachment process; the degree to which President Clinton's popularity became a major obstacle to his removal; the institutional advantage of a President over his political foes to spread his message throughout the media; the ways in which the media's coverage of the President's impeachment proceedings turned the public off and hastened the end of the proceedings; and the relative dis-

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8. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 23 (2d ed. 2000).

9. See U.S. CONST. art. I, § 3, cl. 6.

10. See *id.* amend. XVII.

11. See GERHARDT, *supra* note 8, at 118-46.

12. See Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (codified at 28 U.S.C. §§ 591-99 (1994)).

advantages of an independent counsel, as compared with a special prosecutor appointed by the President, to engage in a public relations battle with the White House.

Part III examines almost a dozen possible consequences of the President's impeachment and acquittal, many of which parallel or re-confirm the lessons of past impeachment proceedings. First, President Clinton's acquittal confirms the aptness of House Judiciary Chairman Henry Hyde's prediction at the outset of House impeachment proceedings against President Clinton that impeaching or removing the President could not be done "without bipartisan support."<sup>13</sup> In every impeachment proceeding, the burden is on those seeking the impeachment and removal of some official to establish the seriousness and nonpartisan basis of their charges.<sup>14</sup> Those seeking to remove the President ultimately failed to carry this burden in the Senate.<sup>15</sup>

Second, the President's impeachment and acquittal confirm the important distinction between constitutional and political legitimacy. It demonstrated that something might be constitutional (such as the House and the Senate's unreviewable discretion to conduct impeachment proceedings as they each see fit) but still be politically problematic (such as the House's decisions to render its final impeachment judgment in a lame duck session and to forego independent fact finding, decisions that became the basis for attacking the House's procedural choices as partisan or unfair in the Senate trial).<sup>16</sup>

Third, the President's impeachment proceedings demonstrated that, contrary to the warnings of many Democrats, a presidential impeachment trial does not necessarily paralyze the executive branch or the national economy. Most work of the executive branch is done not by the President but by his subordinates, and much of the paralysis that preceded and followed the President's impeachment trial is not a direct consequence of the misconduct that gave rise to his impeachment proceedings. Even though Congress did little else during the few months in

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13. Ronald Brownstein, *A Hard Lesson in Partisan Politics*, L.A. TIMES, Feb. 13, 1999, at A18.

14. See generally WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 114-34 (1992) (suggesting different reasons for the acquittal of Justice Chase, including the absence of any serious abuse of power that was otherwise nonredressable).

15. See Published Closed Door Statements of Senators Edwards, 145 CONG. REC. S1576 (daily ed. Feb. 12, 1999); Lautenberg, *id.* at S1506; Levin, *id.* at S1543.

16. See Bruce Ackerman, *Lame-Duck Impeachment? Not So Fast*, N.Y. TIMES, Dec. 8, 1998, at A27.

which the impeachment proceedings lasted, it also had not done much for most of the two years preceding it.

Fourth, President Clinton's impeachment and acquittal exposed several fatal flaws in the Independent Counsel Act<sup>17</sup> that led to bipartisan support for its dismantlement at the end of June 1999. Not the least of these flaws was the complete inability of an independent counsel to maintain the impartiality or credibility of his or her investigation in the face of full-scale political attacks waged by a President or his defenders.

Fifth, the President's impeachment and acquittal sent mixed signals on which, if any, alternatives to impeachment (such as censure) are constitutionally legitimate. Though neither the House nor the Senate issued a censure resolution and the Senate failed to issue findings of fact in the course of the impeachment trial, these failures are not necessarily attributable to constitutional defects in these possible alternatives or supplements to impeachment.

Sixth, the Clinton impeachment proceedings clouded the important question about whether there are different standards for impeaching Presidents and judges. Though the President's lawyers and some academic commentators insisted that this difference was crucial for not making the President impeachable for misconduct (such as lying under oath) that has led to the impeachments and removals of a few federal judges,<sup>18</sup> most members of Congress never explicitly addressed this question. Indeed, a majority of neither the House nor the Senate ever endorsed this argument, and the few members who did rejected it.<sup>19</sup> Moreover, the President's acquittal is not inconsistent with a uniform standard for impeaching Presidents and judges.

Seventh, the President's acquittal is likely to have strengthened the office of the presidency. The President's acquittal raises serious questions about whether or to what extent Congress will have the resolve to conduct lengthy investigations of misconduct by popular Presidents. In contrast, the Clinton impeachment proceedings might have exposed the vulnerability of the federal judiciary to political retaliation. For some of the most important things that helped President Clinton to survive the threat of removal—i.e., his public support and the comprehensive media scrutiny—are absent from lower federal judges' impeachment proceed-

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17. 28 U.S.C. §§ 591-99.

18. See *infra* note 113 and accompanying text.

19. See Published Closed Door Statements of Senators Frist, 145 CONG. REC. S1528 (daily ed. Feb. 12, 1999); Gorton, *id.* at S1464; Inhofe, *id.* at S1662; Thompson, *id.* at S1551; Charles T. Canady, *The Argument for When a President Should Be Removed From Office*, N.Y. TIMES, Jan. 17, 1999, at 30.

ings. Whatever defects one might have identified in the Clinton impeachment proceedings would clearly be exacerbated in a hearing of which there is no media coverage and about which the public is largely indifferent.

Eighth, the Clinton impeachment proceedings demonstrated the extraordinary social costs of around-the-clock news coverage on cable and broadcast television (as well as on radio) and increasing opportunities for spreading rumors and information on the Internet. These developments have led to a sharp increase in news programs substituting speculation and focus on scandal for traditional news coverage of facts and figures.<sup>20</sup> The increased media focus on speculation and scandal have turned off much of the public, which has responded by developing the ability to cut through the morass of information spilled on it to determine the information that it wants or needs.<sup>21</sup>

The proliferation of news outlets has led to an increase in the opportunities for law professors to comment on public events such as the President's impeachment and trial. In providing their commentary on the President's impeachment proceedings, many academics risked, however, their professional stature and credibility. In fact, many academics claimed to be acting as neutral or nonpartisan commentators while maintaining (undisclosed) contacts with the President or his political foes. Many other academics did not hesitate to offer public pronouncements on the impeachment proceedings, though such proceedings did not fall within their areas of expertise. The possibility that legal commentators might have sacrificed some of their or their profession's credibility in the public's mind underscores the need for such commentators to take more seriously, in the future, their obligations to disclose more candidly political ties and professional credentials.

Finally, the Clinton impeachment proceedings serve as a dramatic reminder that an impeachment is not a substitute for civil and criminal proceedings, but a special political proceeding in which there are uniquely political punishments to redress political crimes that are committed by high-ranking officials. The President's acquittal signifies that presidential misconduct can be dealt with in a variety of means other than impeachment, including civil and criminal proceedings, the court of public opinion, the judgment of history, and perhaps even censure. The President's acquittal does not signify that Congress in any

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20. See Caryn James, *One Screen Could Not Capture It All*, N.Y. TIMES, Dec. 20, 1998, at 33.

21. See Jacob Heilbrunn, *Whatever Happened to the Moral Majority? Moderates are Making Rebellious Noises, But Far Right is Firmly in Control*, L.A. TIMES, Feb. 28, 1999, at M2.

way condoned his misconduct. To the contrary, no President in history has been subjected to such widespread condemnation by Congress. Such condemnation should not be taken lightly as an alternative to formal impeachment and removal.

## II. EXPLAINING THE IMPEACHMENT AND ACQUITTAL OF PRESIDENT CLINTON

There has been a lot of speculation about the reasons for President Clinton's impeachment and acquittal, but the most likely explanations are those that put the President's impeachment proceedings in historical perspective. The first, most obvious explanation of the outcome in President Clinton's impeachment trial consists of the stated reasons that Senators have given for casting their acquittal votes. The most serious problem with relying on such statements is that not all Senators produced them. Only seventy-two Senators published such statements.<sup>22</sup> These seventy-two included only thirty-four of the forty-five Democratic Senators who voted not guilty on both articles of impeachment, four of the five Republicans who voted not guilty on both impeachment articles, and three of the five Republicans who voted not guilty on the first but guilty on the second article of impeachment.<sup>23</sup> Of those thirty-eight Senators who published statements on their reasons for voting not guilty on both articles, more than half—twenty-seven—explained that they did not regard the misconduct alleged in either article of impeachment approved by the House as constituting an impeachable offense.<sup>24</sup> Sixteen of the thirty-eight—all Democratic Senators—explained that the partisan zeal of the House Managers in the Senate proceedings and of the Republican leadership in the House affected their votes,<sup>25</sup> while fif-

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22. See Published Closed Door Statements 145 CONG. REC. S1471-1637 (daily ed. Feb. 12, 1999) (statements of 72 Senators).

23. See *id.* at S1458 (noting that by a vote of 55-45, the Senate found the President not guilty of the misconduct charged in the first article); *id.* at S1459 (noting that in a 50-50 split vote the Senate found the President not guilty of the misconduct in the second article of impeachment).

24. See Published Closed Door Statements of Senators Akaka, 145 CONG. REC. S1576-77 (daily ed. Feb. 12, 1999); Biden, *id.* at S1476-77; Boxer, *id.* at S1512; Breaux, *id.* at S1501; Bryan, *id.* at S1610; Cleland, *id.* at S1542; Collins, *id.* at S1568; Dorgan, *id.* at S1619; Durbin, *id.* at S1532; Graham, *id.* at S1560-61; Harkin, *id.* at S1573; Hollings, *id.* at S1628; Jeffords, *id.* at S1597; Johnson, *id.* at S1474-75; Kennedy, *id.* at S1567; Kerry, *id.* at S1620; Kohl, *id.* at S1547; Leahy, *id.* at S1579; Levin, *id.* at S1543; Lieberman, *id.* at S1601; Lincoln, *id.* at S1626; Mikulski, *id.* at S1498; Moynihan, *id.* at S1560; Reid, *id.* at S1574; Sarbanes, *id.* at S1504; Snowe, *id.* at S1546; Wellstone, *id.* at S1597; and Wyden, *id.* at S1629.

25. See Published Closed Door Statements of Senators Akaka, *id.* at S1576; Biden, *id.* at S1476; Boxer, *id.* at S1512; Bryan, *id.* at S1609; Dodd, *id.* at S1593; Dorgan, *id.* at S1619; Durbin, *id.* at S1531; Harkin, *id.* at S1573; Hollings, *id.* at S1628; Kennedy, *id.* at S1566; Lautenberg, *id.*



teen Democratic Senators (joined by Republican Arlen Specter) explained that the House Managers had not proven the misconduct alleged in either article of impeachment.<sup>26</sup> Two Republican Senators indicated that they had voted not guilty on the first article of impeachment (and guilty on the second article) even though they believed that all the charges against the President had been proven,<sup>27</sup> while another Republican Senator, Fred Thompson, explained that he had voted not guilty on the first article (but guilty on the second) based on his belief that the former was impossible to defend against because it was vague and did not specify the statements in which the President had allegedly perjured himself.<sup>28</sup>

These numbers do not tell the full story of the President's impeachment and acquittal. Consequently, one could try to explain the event further in partisan terms. Notably, all thirty-five votes to convict the President on the first article and all fifty votes to convict him on the second article were cast by Republicans.<sup>29</sup> Well over 95% of the votes

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at S1506-07; Leahy, *id.* at S1578; Moynihan, *id.* at S1560; Sarbanes, *id.* at S1503; Wellstone, *id.* at S1597; and Wyden, *id.* at S1629. Interestingly, one of the reasons often cited as a basis for President Johnson's acquittal is overreaching or overzealousness on the part of some of the House Managers who prosecuted him. See REHNQUIST, *supra* note 14, at 247.

26. See Published Closed Door Statements of Senators Akaka, 145 CONG. REC. S1577 (daily ed. Feb. 12, 1999); Biden, *id.* at S1480; Dodd, *id.* at S1594; Durbin, *id.* at S1531; Edwards, *id.* at S1575-76; Feingold, *id.* at S1465; Kennedy, *id.* at S1567; Kerry, *id.* at S1620; Lautenberg, *id.* at S1560; Levin, *id.* at S1543; Mikulski, *id.* at S1498; Murray, *id.* at S1472; Rockefeller, *id.* at S1632; Sarbanes, *id.* at S1503; Specter, *id.* at S1539; and Wyden, *id.* at S1629. Senator Robb explained that he voted not guilty on the first article because he did not believe that the House Managers had proven beyond a reasonable doubt that the President had committed perjury in his grand jury testimony; but he voted not guilty on the second article because it illegitimately bundled so many charges together that defending against it was a virtual impossibility. See *id.* at S1510. In Senator Robb's opinion, the second article was drafted to allow at least two-thirds of the Senate to vote in favor of it though most would have disagreed over the specific misconduct for which they were voting to remove the President. See *id.* at S1510-11.

27. See Published Closed Door Statements of Senators Gorton, *id.* at S1462; and Stevens, *id.* at S1599-1600.

28. See Fred Thompson, *Senate Trial of Clinton Is Over, and It's Time to Move On*, KNOXVILLE NEWS-SENTINEL, Feb. 15, 1999, at A11.

29. See Alison Mitchell, *Censure is Barred: But Rebuke from Both Sides of Aisle Dilutes President's Victory*, N.Y. TIMES, Feb. 13, 1999, at A1 [hereinafter Mitchell, *Censure is Barred*]. Only 19 of the Senate's 55 Republican members (who participated in the impeachment trial) are up for reelection in the year 2000, but 13 of the 19 come from states that President Clinton carried in the 1996 presidential election. See Fred Brown, *Senators to Watch*, DENVER POST, Feb. 10, 1999, at 11B. Of these 13, the following nine Senators voted to convict the President on both articles of impeachment: Spencer Abraham from Michigan, John Ashcroft from Missouri, Mike DeWine from Ohio, Bill Frist from Tennessee, Rod Grams from Minnesota, John Kyl from Arizona, Connie Mack from Florida, William Roth from Delaware, and Rick Santorum from Pennsylvania. See 145 CONG. REC. S1458-59 (daily ed. Feb. 12, 1999). Shortly after the trial, Connie Mack announced that he would not run for reelection. See Carl Hulse, *Senator Mack, a Florida*

cast in the House to impeach the President were cast by Republicans.<sup>30</sup> Yet, Democrats arguably acted throughout the proceedings in at least as partisan a fashion as their Republican counterparts. In the House, over 95% of the votes cast in opposition to the President's impeachment were cast by Democrats.<sup>31</sup> Moreover, at the outset of the impeachment trial, it was clear that if the forty-five Senate Democrats were to vote as or close to a block in opposition to the President's removal it would be numerically impossible for him to be convicted. In fact, no Democratic Senator bolted from his or her party to vote for either article of impeachment,<sup>32</sup> while ten bolted from the Republican contingent to vote

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*Republican, Will Retire*, N.Y. TIMES, Mar. 6, 1999, at A8. Of the 13, three voted to acquit the President on both articles of impeachment—Olympia Snowe from Maine, Jim Jeffords from Vermont, and John Chafee from Rhode Island. See 145 CONG. REC. S1458-59 (daily ed. Feb. 12, 1999). Chafee announced shortly before the end of the trial that he would not run for reelection. See Alison Mitchell, *Senator Chafee Plans to Leave At End of Term*, N.Y. TIMES, Mar. 16, 1999, at A21. One of the thirteen—Slade Gorton from Washington—split his vote on the articles, finding the President not guilty on the first, but guilty on the second article of impeachment. See 145 CONG. REC. S1458-59 (daily ed. Feb. 12, 1999).

30. Interestingly, more than one-third of Republicans who voted for the first article of impeachment (88 of the 223) represent districts that President Clinton carried in the 1996 presidential election. See Chuck Raasch, *Votes to Impeach Could Haunt House GOP*, USA TODAY, Dec. 29, 1998, at 7A. Nevertheless, the 223 Republicans who voted to impeach President Clinton on the first article represented districts that, on average, gave President Clinton only 43% of their vote in 1996 (six percentage points less than he received nationwide). See *id.* Moreover, President Clinton's share of the 1996 vote averaged only 40% in the districts of Republican members of the House Judiciary Committee. See *id.* Only two of the 13 House Managers won reelection in 1998 by close margins. See David Von Drehle, *At the End, Prosecutors Defend Their Own Convictions*, WASH. POST, Feb. 9, 1999, at A4; *State-By-State House Results*, WASH. POST, Nov. 5, 1999, at A37. In contrast, four of the five Republicans who voted against both impeachment articles represent districts that Clinton won in 1996. See Raasch, *supra* at 7A.

31. Only 14 of the 201 Democrats who voted against the first impeachment article represent districts that Republican presidential nominee Bob Dole carried in 1996. See Raasch, *supra* note 30, at 7A. The latter 201 Democrats represented districts in which President Clinton received an average of 59% of the vote in the 1996 presidential election. See *id.* Four of the five Democrats who voted for impeachment came from districts that Republican presidential nominee Dole carried in 1996. See *id.* The fifth, Paul McHale, was the only one of the five who did not stand for reelection in November 1998. See *id.*

32. Fourteen of the Senate's 45 Democrats who voted to acquit the President on both articles of impeachment occupy seats that are up for reelection in the year 2000. See Norah M. O'Donnell, *Few Democrats in Peril: Republicans Aim to Keep Majority in 2000 Cycle*, ROLL CALL, Jan. 25, 1999, at 7. Eleven of the 14 come from states that the President had carried in the 1996 presidential election—Akaka (Hawaii), Bingaman (New Mexico), Bryan (Nevada), Feinstein (California), Kennedy (Massachusetts), Kohl (Wisconsin), Lautenberg (New Jersey), Lieberman (Connecticut), Moynihan (New York), and Sarbanes (Maryland). See *The 1996 Elections: State By State*, N.Y. TIMES, Nov. 6, 1996, at B8. Three of the 14 come from states that Republican presidential candidate Bob Dole carried in 1996—Conrad (North Dakota), Kerrey (Nebraska), and Robb (Virginia). See *id.* Three of the 14—Bryan, Lautenberg, and Moynihan—have announced that they would not run for reelection. See B. Drummond Ayres Jr., *Senate Democrats Reach Outside Party*, N.Y. TIMES, May 7, 1999, at A24.

against the first article and five Republicans voted against the second article of impeachment.<sup>33</sup>

The President's impeachment and acquittal could also be explained in light of a disturbing trend in the federal impeachment process—the increasing influence of federal prosecutors in triggering impeachment investigations and proceedings.<sup>34</sup> One telling but overlooked fact regarding President Clinton's impeachment proceedings is that they marked the sixth occasion in the past three decades in which Congress exercised or contemplated seriously using its impeachment power.<sup>35</sup> No other comparable period of time in American history has featured as much impeachment activity. One important factor linking all six of these impeachment efforts is that they were each triggered by a referral to Congress from an external investigative authority. Four of the six impeachment efforts—involving Judges Claiborne, Hastings, Nixon, and Collins—were referred to the House by the Judicial Conference of the United States.<sup>36</sup> The other two began with referrals to Congress from two specially appointed federal prosecutors—Leon Jaworski, who, as a

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33. See Mitchell, *Censure is Barred*, *supra* note 29, at A1.

34. Several related factors helped to explain this trend, including but not limited to the expansions of the federal judiciary, federal criminal law, and numbers and resources of federal prosecutors. See GERHARDT, *supra* note 8, at 58-60.

35. Besides the impeachment and removal attempt against President Clinton, other impeachment efforts were undertaken against: President Richard Nixon (who resigned from office in 1974 shortly after the House Judiciary Committee had approved three articles of impeachment against him); Harry Claiborne (impeached and removed from a federal district judgeship for tax evasion in 1986); Alcee Hastings (impeached and removed from a federal district judgeship in 1989 for perjury and bribery); Walter Nixon (impeached and removed from a federal district judgeship in 1989 for making false statements to a grand jury); and Robert Collins (who resigned from a federal district judgeship in 1993 after having been convicted and imprisoned for bribery and threatened with impeachment). See *id.* at 25, 36, 39, 54-55; see also *United States v. Collins*, 972 F.2d 1385, 1395 (5th Cir. 1992) (stating that convictions of federal judges are proper since the Executive Branch may target federal judges even without reasonable suspicion). A seventh official, Robert Aguilar, had his conviction for illegally disclosing a wiretap and attempting to obstruct a grand jury investigation overturned by the U.S. Court of Appeals for the Ninth Circuit *en banc* but resigned from his federal district judgeship as part of a deal to avoid being re-prosecuted. See David Dietz, *No Retrial but No Job for Aguilar: Judge Resigns to Get Last Charge Dropped*, S.F. CHRON., June 25, 1996, at A1. In the early 1970s, then-Representative Gerald Ford introduced an impeachment resolution in the House against Justice William O. Douglas, but the House decided not to initiate formal impeachment proceedings against the Justice. See GERHARDT, *supra* note 8, at 29, 54.

36. See ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS* 294 (1992) (Claiborne); *id.* at 309 (Hastings); *id.* at 314 (Walter Nixon); see also Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, 1993 U. ILL. L. REV. 809, 828 (stating that Collins resigned after he was referred to the House for impeachment).

special prosecutor appointed by the Attorney General,<sup>37</sup> referred to the House several boxes of materials relating to the possible impeachable misconduct of President Nixon;<sup>38</sup> and former judge and Solicitor General Kenneth Starr, who, as an independent counsel appointed pursuant to the Independent Counsel Act,<sup>39</sup> referred, pursuant to a special provision of the Act,<sup>40</sup> evidence that, his office believed, demonstrated President Clinton's commission of possible impeachable offenses. Only one of these referrals resulted in a Senate acquittal (President Clinton); three of the referrals culminated in the formal removals of the targeted officials (Harry Claiborne, Walter Nixon, and Alcee Hastings);<sup>41</sup> and two culminated in forced resignations (President Richard Nixon<sup>42</sup> and Judge Robert Collins).<sup>43</sup>

President Clinton's impeachment is distinctive not only because it is the only referral to Congress that resulted in the subject's remaining in office. It is also distinctive because of the House's failure to undertake any independent fact finding.<sup>44</sup> Indeed, President Clinton's impeachment proceedings in the House are one of only three in which the House undertook no independent fact finding.<sup>45</sup> The first was the House's impeachment of President Andrew Johnson.<sup>46</sup> The House failed to take evidence because it had previously undertaken limited fact finding in two prior unsuccessful efforts to impeach Johnson<sup>47</sup> and required little provocation to initiate another. By firing Stanton, Johnson gave the proponents of his ouster something that they had not previously had—an act that, in their view, clearly violated the Tenure in Office Act,<sup>48</sup> and as an illegal act was, therefore, impeachable.<sup>49</sup> Moreover,

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37. See KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 19 (1992).

38. See STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 482 (1990).

39. See Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (codified at 28 U.S.C. §§ 591-99 (1994)).

40. See 28 U.S.C. § 595(c).

41. See *House Hearing*, *supra* note 3, app. at 368-71.

42. See KUTLER, *supra* note 38, at 527-50.

43. See *supra* note 35 and accompanying text.

44. See CONG. REC. S1582 (daily ed. Feb. 12, 1999) (introducing a brief offered by Senator Leahy, *Procedural and Factual Insufficiencies in the Impeachment of William Jefferson Clinton*, noting the failure on the part of the House Judiciary Committee to conduct its own independent fact finding inquiry).

45. See BUSHNELL, *supra* note 36, at 134-37, 293-94.

46. See *id.* at 134-137.

47. See *id.*

48. The Tenure in Office Act, which passed over Johnson's veto, provided in essence that all federal officials whose appointment required Senate confirmation could not be removed by the

Johnson's impeachment for having fired Stanton has been widely regarded as one of the most intensely partisan impeachments rendered by the House (thereby making it a dubious precedent to follow).<sup>50</sup> Similarly, the failure of the House to undertake any independent fact finding prior to impeaching President Clinton provided a basis (largely absent in the five other referred impeachment matters in the last few decades) upon which the House's impeachment judgment could be attacked as partisan or unfair.

The second instance in which the House failed to undertake any independent fact finding was the impeachment of Harry Claiborne.<sup>51</sup> The full House impeached Claiborne within a month of the House Judiciary Committee's formal recommendation of impeachment articles against Claiborne.<sup>52</sup> The Committee unanimously voted to recommend impeachment articles within three weeks of the House's formal initiation of an impeachment inquiry against Claiborne.<sup>53</sup> Unlike President Johnson before him and President Clinton after him, Claiborne did not complain about the House's proceedings (including its failure to undertake any independent fact finding); he welcomed a quick impeachment, because he believed the sooner he had a full trial in the Senate the sooner he would be fully vindicated.<sup>54</sup>

No doubt, another institution that had an enormous impact on the President's impeachment proceedings was the media. First, the media's increasing splintering or fragmentation into countless outlets (including newspaper, network and public television, cable, the Internet, and radio) has intensified competition to get news, particularly breaking news, to engage in speculation or commentary, rather than report facts, and to keep or increase audiences.<sup>55</sup> This splintering or fragmentation has made it much more difficult for a single force or group to dominate the news.

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President without the Senate's approval. *See Myers v. United States*, 272 U.S. 52, 166-67 (1926). The Supreme Court declared that act unconstitutional. *See id.* at 176.

49. *See* BUSHNELL, *supra* note 36, at 137; REHNQUIST, *supra* note 14, at 216-18.

50. *See* REHNQUIST, *supra* note 14, at 251-52.

51. *See* BUSHNELL, *supra* note 36, at 293-94.

52. *See id.* at 294.

53. *See id.* at 293.

54. *See id.* at 292.

55. *See generally* BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA* vi (1999); Symposium, *Just the Facts?*, WASH. MONTHLY, Jan.-Feb. 1999, at 22 (explaining objectivity and the obligations of journalists to their readers); David A. Anderson, *Democracy and the Demystification of Courts: An Essay*, 14 REV. LITIG. 627 (1995) (explaining the media's influence on the courts); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133 (1992) (exploring changes in the media and its effect on the right to privacy).

Nevertheless, the President as an institution has several important advantages over Congress in being covered by and in spreading messages through the media.<sup>56</sup> It is much easier to cover a single individual than it is to cover many people who are all acting at once but not in concert. It is thus easier to cover a President, who as a single person is the embodiment and leader of an entire institution, whereas covering Congress institutionally is difficult because it operates through the actions of several hundred individuals. Moreover, the President has considerably more resources to gain media attention or access than any given member of Congress; he has more agents available to spread his messages, and he has more media permanently attached to and covering his activities than any other governmental official.<sup>57</sup> Consequently, President Clinton's (and his defenders') criticisms of the Independent Counsel's investigation and of the House's case against him received much more widespread and consistent coverage than any of the counter-attacks.

To be sure, the splintering of the media has made it much easier for critics of a President to find an outlet to publicize their charges against him. Such public attacks can service several ends, including deflecting a President's attention or energy and thereby hampering or impeding his achievement of certain preferred objectives.<sup>58</sup> In this sense, the media has wreaked havoc by facilitating the destruction of or damage to a President's reputation by a thousand little cuts or attacks.<sup>59</sup> The President can lose popularity or some degree of public support from these assaults, but in the end his office allows him a decisive advantage over his political foes or attackers because of the unique resources available to him to gain easy access to and spread his message through the national media.<sup>60</sup> Moreover, recourse to the bully pulpit and the national media enables a President to go over the heads of his political opposition in Congress (or elsewhere) to urge the American people to support either him personally or his agenda.<sup>61</sup>

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56. See SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* 179-80 (1986); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 186-89 (1987).

57. See TULIS, *supra* note 56, at 186-89.

58. See Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. SCH. ROUNDTABLE 143, 165 (1998).

59. See *id.* at 165-66.

60. See *id.* at 166.

61. See Harry W. Reynolds, Jr., 544 ANNALS 223 (1996) (reviewing FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* (1994)); Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 3 (1995); Tiefer, *supra* note 58, at 165.

Second, the media helped to make the Clinton impeachment proceedings the first in which the public's preferences helped to drive the final outcome. Throughout the President's impeachment trial, his approval ratings held steady at or near 67%.<sup>62</sup> Similarly, a majority of Americans throughout the proceedings steadily opposed the President's removal from office.<sup>63</sup> (In contrast, the Senate's acquittal of President Johnson opposed the public's preferences.)<sup>64</sup> Yet, by a plurality of 44% to 37%, the American people believed that the President was guilty of the misconduct charged in the first article,<sup>65</sup> and 67% believed that he had violated various laws.<sup>66</sup> These statistics can be reconciled on the ground that, as one poll found, 76% of the American people believed that the case against the President involved purely private misconduct that should not have been made the basis for his impeachment.<sup>67</sup> Another poll found most of the public did not regard the charges made against the President as constituting appropriate grounds for his removal.<sup>68</sup> In other words, most of the public did not regard the President's conduct as impeachable. The Democrats' steady opposition to the President's removal plainly tracked the preferences of most Americans.

The media's coverage might have had various other effects on the public (or at least the 61% of the public that regularly followed the hearings) and through public opinion on the members of Congress.<sup>69</sup> First, it might have constantly reminded the public, as well as members of Congress, particularly Senators, of the House Managers' difficulty in arguing convincingly that the President had breached the public trust—a classic prerequisite for impeachment—as long as the public did not regard its trust with the President as having been breached.

Second, the media's constant airing of bashing of Clinton's integrity throughout his presidency (particularly for the more than nine months that preceded the formal impeachment inquiry against the President) might have lowered the public's expectations regarding the President's integrity.<sup>70</sup> New allegations of presidential misconduct would not

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62. See Mark Z. Barabak, *Public Calls Trial Partisan, Wants It to End Quickly*, L.A. TIMES, Jan. 31, 1999, at A1.

63. See *id.*

64. See REHNQUIST, *supra* note 14, at 242.

65. See Barabak, *supra* note 62, at A1.

66. See Josh Getlin, *The Truce Behind the Culture Wars*, L.A. TIMES, Feb. 7, 1999, at A1.

67. See *id.*

68. See Kenneth T. Walsh, *The Price of Victory*, U.S. NEWS & WORLD REP., Feb. 22, 1999, at 26, 30.

69. See Barabak, *supra* note 62, at A1.

70. See KOVACH & ROSENSTIEL, *supra* note 55, at 81, 87.

have surprised much of the public or shifted its basic opinion of the President.<sup>71</sup>

Third, the media's apparent obsession with finding the next Watergate might have increased the public's skepticism about the neutrality or accuracy of news coverage. The rhetoric with which the media characterized every new scandal of the Clinton White House—e.g., Filegate,<sup>72</sup> Travelgate,<sup>73</sup> Monicagate,<sup>74</sup> Whitewater,<sup>75</sup> Chinagate,<sup>76</sup> Koreagate<sup>77</sup>—had been phrased to liken President Clinton's scandals to those of Richard Nixon, but the public found the comparisons wanting. The repeated attempts to liken the President's scandals to Watergate, particularly before full investigations had been launched, might have led much of the public to conclude that the President's harshest critics and the proponents of his impeachment were akin to the boy who cried wolf.

Fourth, the media's coverage might have turned off or alienated the public. The pro-prosecution bias of the media might have turned off some people, while prolonging the hearings held little, if any, prospect that anything new would happen.<sup>78</sup> In virtually every poll, the vast majority of Americans indicated their opposition to the impeachment proceedings almost from the beginning and that they were sick and tired of the trial by the time it was over.<sup>79</sup> As reported by the media (and reflected in phone calls, faxes, and e-mails to members of Congress), the public's exasperation, if not boredom, with the coverage of the trial, as well as with the trial itself, coupled with the public's steady opposition to the removal of the President, intensified pressure to end the hearings.<sup>80</sup>

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71. Indeed, one new book, by Bill Kovach and Tom Rosenstiel, suggests, based on an empirical study of all of the radio, television, and cable stories during the proceedings, that the media's coverage had a pro-prosecution bias that turned off much of the public. *See id.* at 77.

72. *See, e.g.,* Jerry Nachman, *The Watchdog, Now Grown Rabid*, N.Y. TIMES, Aug. 22, 1999, § 4, at 13.

73. *See, e.g., id.*

74. *See, e.g., id.*

75. *See, e.g., id.*

76. *See, e.g.,* William Safire, *Essay, Two Men, Walking*, N.Y. TIMES, July 1, 1999, at A19.

77. *See, e.g.,* Nicholas Confessore, *Gateman*, AM. PROSPECT, Jan.-Feb. 1999, at 13.

78. *See infra* note 79.

79. The most recent empirical studies of the news coverage of the Clinton impeachment proceedings indicate that the media's penchant for scandal and speculation led much of the public to discount the media's interpretation and make up its own mind about events. *See KOVACH & ROSENSTIEL, supra* note 55, at 77-78. Once the public had made up its mind about the impeachability of the President's misconduct, it did not waiver throughout the remainder of the proceedings.

80. For two excellent descriptions of the Clinton impeachment proceedings as both cause and effect of a culture war, see *id.* at 77-86, and POSNER, *supra* note 3, at 196-216.



### III. THE POSSIBLE LESSONS OF PRESIDENT CLINTON'S IMPEACHMENT AND ACQUITTAL

As one moves from possible reasons for the President's impeachment and acquittal to the likely lessons that will be drawn from the experience, the focus of the inquiry shifts. This step requires a shift from relying primarily on inferences from empirical data to determining how subsequent generations, particularly subsequent Congresses, have understood the significance of each previous grand inquest. Obviously, we can only speculate about the range of possible lessons or consequences of the President's impeachment and acquittal, based on some of the spin that already is being applied to the event (by those for and against the President's removal) and the consequences that roughly similar events have had in the past. Of course, it remains to be seen which lessons will withstand the test of time and which possible consequences do in fact arise.

#### A. *The Importance of Party Unity*

The first likely lesson is that the Democrats' uniform opposition to the President's conviction highlights the enormous difficulty (if not the impossibility) of securing a conviction in a presidential impeachment trial as long as the Senators from the President's party unanimously stand by him. Rarely does a political party dominate more than two-thirds of the seats in the Senate. Hence, the solidity of the Democratic ranks in President Clinton's impeachment trial dramatically illustrated that removal of a President is possible only if the misconduct is sufficiently compelling to draw support from both sides of the aisle for a conviction. In the absence of bipartisan support for removal, acquittal is virtually guaranteed. (The likelihood of this result is also an obvious consequence of the constitutional requirement that at least two-thirds of the Senate must vote to convict in order for a removal to occur.<sup>81</sup> The supermajority requirement makes conviction and removal highly unlikely, for it is no easy task to get such a high degree of consensus among Senators, particularly when the stakes are so high. When such consensus is achieved, it is likely to be the result of a very compelling, credible case for conviction and removal.)

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81. See U.S. CONST. art. I, § 3, cl. 6.

*B. The Difficulty of Impeaching a  
Popular President*

The second consequence of the President's acquittal is that it shows that impeachment is a relatively ineffective check against the misconduct of a popular President. The President's acquittal might leave subsequent generations unsure about whether Congress will have the resolve in the future to conduct impeachment proceedings against a President with high approval ratings. The congressional investigation into Watergate took more than two years, before the discovery of the "smoking gun"—the tapes of certain conversations in the White House—that led to President Nixon's resignation.<sup>82</sup> The Clinton impeachment proceedings took roughly six months from start to finish.<sup>83</sup> As such, they were among the shortest in American history, with the shortest having been the impeachment proceedings against Andrew Johnson, which lasted roughly three months from start to finish.<sup>84</sup> Even so, the relative shortness of President Clinton's impeachment proceedings was too long for most people. While it is true that most people did not believe President Clinton's case involved legitimately impeachable offenses, some investigations might not uncover seriously problematic misconduct (insofar as the public is concerned) for some time. Future members of Congress might think several times before engaging in a relatively prolonged investigation of a President's misconduct, for fear that they might alienate the public. (In this respect, the Clinton impeachment proceedings could be viewed as strengthening rather than weakening the office of the presidency.) The Clinton impeachment proceedings raise a question about just how serious must the misconduct of a popular President be to convince a majority of Americans to support his removal from office. It is possible that impeachment will be effective only for the kinds of misconduct that can galvanize the public to set aside its approval of a President's performance to support resignation or formal removal. Indeed, a future Congress might support removal *only* if it has direct evidence of very serious wrongdoing *and* unambiguous consensus (in Congress and among the public) on the gravity of such wrongdoing.

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82. See KUTLER, *supra* note 38, at 187-527.

83. See Bill Miller, *Starr Spent \$7 Million During Impeachment Period*, WASH. POST, Oct. 1, 1999, at A15.

84. See BUSHNELL, *supra* note 36, at 137-59.

*C. The Greater Vulnerability of Judges and  
Unpopular Presidents to Impeachment*

President Clinton's impeachment proceedings might also have underscored the greater vulnerability to impeachment and removal of those officials who lack a President's resources (such as recourse to the bully pulpit) or popularity. It is conceivable that an unpopular President such as Andrew Johnson might meet a different fate in an age in which the media constantly applies pressure to investigate a President's misconduct (or actions that have made him unpopular) and in which daily polls can dramatize a loss of popularity and increase in support for removal. In this circumstance, removal or resignation might be extremely likely. (To date, the only instance like this occurred during the final days of Richard Nixon's presidency, when the public for the first and only time during the Watergate investigation expressed support for the President's ouster based on information revealed in the Watergate tapes.<sup>85</sup>) The dynamic is likely to be even more problematic for a federal judge, perhaps even a Supreme Court Justice, whose hearings are not likely to get anything near the widespread media coverage that President Clinton's proceedings got, or the outpouring of public support (or the public's opposition to the prolongation of hearings). In the absence of these factors, a federal judge or other low-profile official simply lacks the resources available to a President (particularly a popular one) in defending against political retaliation in the form of an impeachment.

*D. The Burden in an Impeachment Proceeding*

The fourth lesson of the Clinton impeachment proceedings is that the burden in an impeachment proceeding is on the advocates or proponents of impeachment to show that the charges have not been based on or motivated by partisanship.<sup>86</sup> No doubt, a proponent of President Clinton's impeachment and removal might claim the charges were not based on partisanship but rather the needs to protect the integrity of the judicial system and to ensure the President's compliance with his oath of office (even in a civil lawsuit whose focus is unrelated to his official duties). Yet, those charging Justice Chase<sup>87</sup> and President Johnson<sup>88</sup> with impeachable misconduct argued the very same thing; they claimed that

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85. See KUTLER, *supra* note 38, at 531-32.

86. See THE FEDERALIST NO. 65, at 396-97 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

87. See REHNQUIST, *supra* note 14, at 74-76.

88. See *id.* at 226-27.

the charges against those officials were based on those officials' respective abuses of authority and not on partisanship.<sup>89</sup> Ultimately, those seeking the removals of President Johnson and Justice Chase failed to carry their burdens (for a critical mass of Senators and for posterity).<sup>90</sup> Similarly, those seeking President Clinton's removal from office have failed (thus far) to convince most Americans (as well as any Democrat in the Senate) that their charges against the President were not based or motivated to a significant degree on partisan dislike for the President.

The latter failure increases the chances that subsequent generations will look unfavorably upon the House's impeachment of President Clinton. There have been similar failures in the past (most notably, in the impeachment attempts against Justice Chase in 1805 and President Johnson in 1868), and the majority vote cast in favor of convicting both officials did not preclude either's impeachment from being subsequently viewed as lacking political legitimacy by subsequent generations and Congresses. Johnson's and Chase's acquittals have each had the effect of dissuading subsequent Congresses from bringing or initiating impeachments based on similar misconduct. Subsequent Congresses have been able to take such postures in part because the outcomes in Chase's and Johnson's trials did not turn on disputes about the underlying facts.<sup>91</sup> Virtually everyone at the times of those respective impeachments agreed on the facts, but they disagreed over the significance of the facts.<sup>92</sup> Unencumbered with having to resolve factual disputes, subsequent generations and members of Congress have been free to make their own assessments of the legal and constitutional significance of the facts (and thus of Chase's and Johnson's misconduct). They have concluded that the misconduct targeted in each impeachment did not warrant removal from office.<sup>93</sup>

By similar reasoning, the Clinton acquittal could be construed by subsequent members of Congress as rejecting the House's judgment on the impeachability of the President's misconduct. For one thing, the vote to impeach the President was (as it was in Chase's and Johnson's cases) largely cast along party lines, while there has been relatively widespread perception (at least among the public) that the proceedings generally were conducted and resolved on partisan grounds.<sup>94</sup> Moreover,

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89. *See id.* at 74-76, 226-28.

90. *See infra* notes 155-56 and accompanying text.

91. *See* REHNQUIST, *supra* note 14, at 88-89, 226-28.

92. *See id.*

93. *See id.* at 277-78; *infra* notes 154-55 and accompanying text.

94. *See infra* note 120 and accompanying text.

most people (including most members of Congress) do not disagree much, if at all, about the underlying facts in President Clinton's case; they disagree over the legal significance of the facts. Subsequent Congresses might conclude that if such misconduct could not merit a conviction in one case (i.e., Clinton's), it would be inconsistent or unfair to allow it to become the basis for a conviction in another case. In addition, subsequent members of Congress could conclude that if a majority vote by the Senate to convict both Chase and Johnson could not save either's impeachment from being regarded as illegitimate, the absence of a majority vote in the Senate for either article of impeachment against President Clinton (coupled with other criticisms of it) could be viewed as an even rounder rejection of the legitimacy of the House's case than were the Senate votes in Chase's and Johnson's trials.<sup>95</sup>

*E. The Distinction Between Constitutional and  
Political Legitimacy*

The fifth possible lesson to be derived from President Clinton's impeachment and trial is that it affirmed the House's and the Senate's final, nonreviewable discretion to conduct its respective impeachment

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95. This rejection could be construed as the Senate's performing, as expected by the Framers, an important checking or balancing function. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 513-17 (1969) (suggesting that the Framers expected that the Senate would function with more coolness, more system, and more wisdom, than the popular branch because its members would be drawn from the elite of society and as a result of its longer term and insulation from direct public pressure). One might counter this assertion in at least two ways. One might argue that the balancing was achieved in President Clinton's trial only because of the uniform partisanship of the Democrats in opposing removal. See *supra* notes 24-25 and accompanying text. It is, however, always possible in an impeachment trial that the Senators from a President's political party might be inclined to oppose his removal. This possibility, coupled with the constitutional requirement of supermajority support among the Senators for removal, makes it incumbent upon those seeking the President's removal to bring charges and otherwise make a case against him that could draw bipartisan support. In President Clinton's trial, they failed to do so. See *supra* notes 9, 81 and accompanying text.

Another counter to the claim that the Senate performed a balancing function in President Clinton's impeachment trial is that some of the Framers' expectations regarding such a checking function might no longer be valid in light of the Twelfth and Seventeenth Amendments. See U.S. CONST. amend. XII, XVII. By reducing the importance of the Electoral College to the election of a President, the Twelfth Amendment and other electoral reforms have transformed the presidency into a popularly elected office. Moreover, the Seventeenth Amendment changed the system for selecting Senators from election by their respective state legislatures to popular election in their respective states. The alterations effected by the Twelfth and Seventeenth Amendments at the very least have increased sensitivity in the impeachment process to the attitudes of the electorate regarding the necessity for either impeachment or removal as well as toward the President who might be the subject of the proceedings and the Representatives or Senators who sit in judgment of him. See *id.*

proceedings. In the course of President Clinton's impeachment proceedings, both the House and the Senate followed the holding in *Nixon v. United States*,<sup>96</sup> in which the Supreme Court unanimously ruled that challenges to the constitutionality of Senate impeachment trial procedures are nonjusticiable.<sup>97</sup> The Court recognized in the Senate final, non-reviewable authority to devise impeachment trial procedures as it saw fit.<sup>98</sup> Consequently, the House and the Senate took great liberties in fashioning their respective impeachment proceedings against President Clinton as each saw fit. For example, in relatively controversial decisions, the House decided not to call any live witnesses or otherwise undertake any independent fact finding,<sup>99</sup> to hold a final vote on the impeachment articles in a lame duck session,<sup>100</sup> and to forego defining or adopting a uniform standard for defining the impeachability of certain misconduct. In the House, the members also decided for themselves such questions as the applicability of the Fifth Amendment due process clause, the appropriate burden of proof, and the propriety of allowing three of their colleagues to cast votes on the articles even though each had already been elected to the Senate and would have the opportunity

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96. 506 U.S. 224 (1993).

97. *See id.* at 238.

98. *See id.*

99. *See supra* notes 49, 51-52 and accompanying text.

100. In his testimony before the House Judiciary Committee, Yale Law Professor Bruce A. Ackerman made the provocative argument that by impeaching the President in a lame duck session the House had violated the Twentieth Amendment. *See Impeachment Inquiry: William Jefferson Clinton, Presentation on Behalf of the President: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 37 (1998) [hereinafter *Impeachment Inquiry*] (testimony of Bruce A. Ackerman). The argument received much attention from the media but for several reasons won no support in Congress. *See id.* at 47. First, the text of the amendment does not clearly forbid such actions. *See* U.S. CONST. amend. XX. Second, Professor Ackerman's argument is undercut by the fact that several earlier impeachments (including Alcee Hastings' in 1988-89) had been carried over from one Congress to the next. *See Impeachment Inquiry, supra*, at 42, 69. These two factors led Professor Ackerman to shift his argument to maintaining (1) that lame duck impeachments are generally a bad idea, *see id.*, and (2) a lame duck impeachment might be legitimate only if, like a piece of legislation passed in an earlier Congress, the House were to reaffirm it in a subsequent Congress prior to the Senate's acting upon it. *See id.* at 43. The second argument is also undercut by the fact that several impeachment trials involved "carryover" impeachments. Moreover, impeachment is a more complete act than legislation passed only by a single house. Last but not least, Thomas Jefferson, in his influential manual on parliamentary practice drafted while he was Vice-President, maintained that the American system followed the British practice in which impeachments carried over from one Parliament to the next. *See* Thomas Jefferson, *Jefferson's Manual of Parliamentary Practice*, Section 620, *reprinted in* H.R. DOC. NO. 104-272, at 13 (1997). Nevertheless, Ackerman's argument served as a reminder that by impeaching the President in a lame duck session the House had arguably put at risk some of the political (as opposed to constitutional) legitimacy of its impeachment judgment.

to sit in judgment on the President in his impeachment trial.<sup>101</sup> In the latter proceeding, Senators decided for themselves such procedural questions as the appropriate burden of proof, the applicable rules of evidence (including the need for live testimony), the appropriate standard for determining the impeachability of the President's misconduct, and the propriety of holding closed door hearings on a variety of issues (including the final debates on the President's guilt or innocence).

*F. The Increasing Importance of External Referrals in the Impeachment Process*

A sixth possible lesson to be derived from President Clinton's impeachment proceedings is that they underscored Congress' inertia in initiating impeachment proceedings in the absence of an external referral from an independent authority to initiate an impeachment inquiry.<sup>102</sup> Generally, members of Congress have little incentive to put aside other pressing business to conduct impeachment proceedings. This reluctance has left a vacuum that prosecutors have filled for several decades.<sup>103</sup> The problem with this trend is that criminal prosecutions or convictions that do not result in resignations put enormous pressure on Congress not just to impeach the targeted official(s) but also to defer to the external authority's findings in the course of a belated rush to judgment in impeachment proceedings.

*G. Obscuring Whether the Standards for Presidential and Judicial Impeachments are Similar or Different*

The Clinton impeachment proceedings also could be construed as confirming that there are different standards for impeaching Presidents and judges. A popular argument made on behalf of the President in the House and the Senate was that there are different standards for impeaching Presidents and judges based on the officials' different tenure and responsibilities. Judges serve only "during Good Behavior"<sup>104</sup> and thus arguably could be removed for misbehavior that includes but is not

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101. The three Representatives that were elected to the Senate were Jim Bunning, Michael D. Crapo, and Charles E. Schumer. See James Dao, *Schumer, in Unique Role, May Get 3 Impeachment Votes*, N.Y. TIMES, Nov. 20, 1998, at B1.

102. See GERHARDT, *supra* note 8, at 29-30.

103. See *id.* at 58-59.

104. See U.S. CONST. art. III, § 1.

necessarily limited to impeachable offenses.<sup>105</sup> Moreover, Presidents are popularly elected, and thus the electoral process arguably operates as the primary check against a President's abuse of power.<sup>106</sup> "Since a President presumably will return to private life after his term, he is available in a way a judge will not be to be held accountable for both civil and criminal misconduct at a time when it will not interfere with his official duties."<sup>107</sup>

Several factors cut against inferring that Congress endorsed different standards for impeaching different officials from the President's acquittal. First, the constitutional language is uniform.<sup>108</sup> Second, the assertion is counter-historical.<sup>109</sup> It conflicts with the Founders' obvious intention to adopt the phrase "during Good Behavior" to distinguish judicial tenure (life) from the tenure of elected officials (such as the President) rather than to establish the particular terms of judicial removal.<sup>110</sup> Moreover, the argument that the Constitution establishes different standards for impeaching Presidents and judges is a relatively new one in the annals of impeachment history.<sup>111</sup> For instance, President Johnson never made such a claim, though his impeachment had been preceded by four judicial impeachments, including Associate Justice Samuel Chase's. The most plausible precedents for this point of view are the impeachments and removals of Judges John Pickering (for drunkenness and insanity)<sup>112</sup> and Harry Claiborne (for income tax evasion),<sup>113</sup> because in each the Judges were removed for misconduct ar-

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105. For a more elaborate articulation of this argument (and the counter-argument), see GERHARDT, *supra* note 8, at 83.

106. See *House Hearing*, *supra* note 3, at 232, 236 (testimony of Professor Susan Low Bloch); *id.* at 243 (testimony of Professor Jack Rakove).

107. Michael J. Gerhardt, *William H. Rehnquist's Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*, 16 CONST. COMMENTARY 433, 453 (1999) (book review).

108. See U.S. CONST. art. II, § 4 ("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.").

109. See Gerhardt, *supra* note 107, at 453.

110. See GERHARDT, *supra* note 8, at 83-84.

111. See Published Closed Door Impeachment Statement of Senator Paul Sarbanes, 145 CONG. REC. S1503 (daily ed. Feb. 12, 1999).

Judges must be held to a higher standard of conduct than other officials. As noted by the House Judiciary Committee in 1970, Congress has recognized that Federal judges must be held to a different standard of conduct than other civil officers because of the nature of their position and the tenure of their office.

*Id.* (quoting H.R. REP. NO. 101-36, at 9 (1989) (House Judiciary Committee majority report accompanying recommended articles of impeachment against Walter Nixon)).

112. See *House Hearing*, *supra* note 3, app. at 358.

113. See *id.* at 368.



guably unrelated to their official duties and thus for basic misbehavior as opposed to official misconduct or the abuse of official power. Yet, neither precedent supports a looser standard for impeaching federal judges. In fact, Pickering was impeached and removed on the basis that he could no longer function as a federal judge (because of mental instability and drinking) and because there was no other alternative for dealing with a federal judge who had, in the estimation of Congress, become completely dysfunctional.<sup>114</sup> This same reasoning led to the ouster of Harry Claiborne, for the House Report on Claiborne indicates that a central concern was that he had become completely disabled from functioning as a federal judge because of his criminal conduct (and conviction).<sup>115</sup>

A third reason for not construing President Clinton's acquittal as signaling that there are different standards for impeaching Presidents and judges is that allowing judges to be removed for misbehavior that falls short of an impeachable offense undercuts the constitutional safeguards against political retaliation against judges for doing their jobs.<sup>116</sup> The constitutional structure ceases to make much sense if judges may be removed either through the cumbersome, difficult process of impeachment for impeachable offenses, *or* an easier, looser process (administered by Congress or by others such as judges) for misbehavior that does not rise to the level of an impeachable offense.<sup>117</sup>

Moreover, the fact that the consequences that might ensue from an attempt to impeach a President might be different from those that might result from the removal of a judge is not a basis for finding different constitutional standards for impeaching Presidents and judges.<sup>118</sup> Rather,

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114. See 13 ANNALS OF CONG. 320-22 (1804).

115. See HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE, H.R. DOC. NO. 99-688, at 23 (1986); 132 CONG. REC. H30,251-58 (1986).

116. See Gerhardt, *supra* note 107, at 454.

117. See *id.*

118. Judge Richard Posner and Yale Law School Professor Akhil Amar have advanced other possible arguments why there must be a higher standard for impeaching Presidents than for judges. Judge Posner contends that because a President is elected and a judge is not, the former stands a much greater chance of having purely partisan or personal animus drive impeachment efforts against him. See POSNER, *supra* note 3, at 103-05. The reason this argument is not compelling is because a President has considerably more resources than a judge to protect himself against political retaliation in the form of an impeachment. A President can more easily counter-attack or respond to the likelihood of greater partisanship in impeachment efforts directed against him than can a judge. Moreover, the Posnerian argument discounts the extent to which judges might provoke political or partisan animus by virtue of controversial rulings.

Professor Amar suggests that Presidents require a higher standard of impeachment than judges to reflect adequate congressional respect for their popular election. See Akhil Reed Amar, *An(Other) Afterword on The Bill of Rights*, 87 GEO. L.J. 2347, 2359 (1999). Some judges are con-

the consequences of an impeachment of any official are plainly relevant as factors to be taken into account in the course of applying the operative standard.<sup>119</sup> The vesting of impeachment authority in political branches necessarily implies the discretion to take various factors (including possible) consequences into consideration in the course of exercising such authority.<sup>120</sup> In addition, of the seventeen Senators who expressed an opinion about this issue in the Clinton impeachment trial, eleven (ten Republicans and one Democrat) took the position that the same standard applies for impeaching Presidents and federal judges.<sup>121</sup>

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firmed by the Senate, so that, as Professor Amar contends, Senators are asked in a judicial impeachment to reconsider their own prior judgments about the fitness of some individual to sit as a judge or justice. Consequently, judges can expect that they will likely benefit from an inertia in the Senate to second-guess itself or to admit publicly that it made a mistake in initially confirming the impeached judge. In contrast, because members of Congress have had no (direct) hand in electing Presidents, they might be less inclined to respect the process by which Presidents were elected. To ensure greater deference to the public will in the choice of Presidents the latter requires a higher standard for impeachability. *See id.* My disagreement with this clever argument is that none of the factors that Professor Amar suggests should support a different impeachment standard for judges and Presidents necessarily does so. Instead, they constitute no more than what they purport to be—factors that Congress will consider in the course of rendering impeachment judgments. It is no different than a judge who is asked to pass judgment on an individual for breaking the law; the applicable law and the standards for determining guilt or innocence are the same, regardless of who the defendant is. Yet, for the sake of fairness or justice, the judge is likely to consider the circumstances under which the alleged commission of some criminal act occurred. In the impeachment context, these circumstances include the official's special duties and tenure.

119. *See* Gerhardt, *supra* note 107, at 454.

120. *See generally* ALEX SIMPSON, JR., A TREATISE ON FEDERAL IMPEACHMENTS 71-77 (1916) (explaining that impeachment is an adequate remedy when judges fail to uphold the principle of "good Behaviour"); Albert Broderick, *Citizens' Guide to Impeachment of a President: Problem Areas*, 23 CATH. U. L. REV. 205, 229-34 (1973) (discussing the constitutional limits on impeachment). *Cf. Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, Comm. on the Judiciary House of Representatives*, 93d CONG. 4 (1974) (stating that Parliament developed the impeachment process as a means to exercise control over the King); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 780, at 252 (rev. ed. 1991); *id.* § 744, at 218.

121. For the Senators who publicly supported a different standard for impeaching Presidents and judges, see Published Closed Door Statements of Senators Biden, 145 CONG. REC. S1476 (daily ed. Feb. 12, 1999); Breaux, *id.* at S1500; Kerry, *id.* at S1620; Kohl, *id.* at 1547; Robb, *id.* at S1509; and Sarbanes, *id.* at S1502. For Senators who published statements opposing the latter view, see Published Closed Door Statements of Senators Allard, *id.* at S1561; Bond, *id.* at S1507; Brownback, *id.* at S1605; Fitzgerald, *id.* at S1507; Frist, *id.* at S1526; Gorton, *id.* at 1462; Grams, *id.* at S1500; Kerrey, *id.* at S1505; Kyl, *id.* at 1532; Mack, *id.* at S1512; and McConnell, *id.* at 1562.

*H. Clarifying the Importance of Case-by-Case  
Analysis in Impeachment*

Regardless of whether subsequent generations will construe the Clinton impeachment proceedings as confirming that there are different standards for impeaching Presidents and judges, they will surely ponder what particular standard, if any, the Clinton proceedings endorsed for determining the impeachability of the President's misconduct.<sup>122</sup> To be sure, neither the House nor the Senate formally endorsed a specific standard of impeachment.<sup>123</sup> Instead, it appears that there were almost as many standards for determining the impeachability of the President's misconduct as there were members of both chambers voting on the articles of impeachment.<sup>124</sup>

Nevertheless, the Clinton impeachment is a dramatic reminder of the Framers' expectations that Congress is empowered to determine on a case-by-case basis the misconduct that constituted "other high Crimes and Misdemeanors."<sup>125</sup> The constitutional standard was designed to narrow the range of impeachable offenses from that which was available in England (where there were no restrictions on the scope of impeachable offenses),<sup>126</sup> but the standard still remains rather broad. The Constitution contemplates that an impeachable offense is a political crime about whose essential elements the Framers agreed only in the abstract (including such general preconditions as serious injury to the Republic).<sup>127</sup> Consequently, every impeachment (including the most recent one) has featured a debate over whether the misconduct charged constitutes a political crime.<sup>128</sup> As these debates have shown, it is practically impossible to get the House or the Senate to adopt a uniform standard for determining the impeachability of misconduct. The resolution of these debates track the historic practice in which each member decides for himself or herself the proper resolution of a series of procedural issues.<sup>129</sup> The debates over the proper definition of impeachable offenses in Congress have thus featured tugs of war in which those seeking impeachment defend relatively broad, amorphous standards that they can

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122. See Gerhardt, *supra* note 107, at 454.

123. See *id.*

124. See *id.* at 454-55.

125. U.S. CONST. art. II, § 4.

126. See *House Hearing*, *supra* note 3, at 46-49 (prepared Statement of Professor Michael J. Gerhardt).

127. See *id.* at 49-51.

128. See GERHARDT, *supra* note 8, at 103.

129. See *id.* at 115-16.

show have been easily met in a given case, and those opposing impeachment support very narrow standards that they claim have not been met in the specific circumstances of the case before them.

While the debates over the scope of impeachable offenses in particular cases have not produced consensus among Senators on any standards, the Senate's judgments in impeachment trials do reveal an interesting pattern. The seven federal officials whom the Senate has convicted and removed from office (all federal judgeships) have had in common misconduct that (1) has caused a serious injury to the Republic and (2) has had a nexus between the official's misconduct and the official's formal duties.<sup>130</sup> In assessing the latter, members of Congress have taken into account the degree to which certain misconduct has been either so outrageous or so thoroughly disabling or incompatible with an official's duties as to give Congress no choice but to remove an official.<sup>131</sup> In President Clinton's impeachment trial, several Senators explained their acquittal votes on the absence of one or more of these elements.<sup>132</sup>

### I. Lowering the Quality of Constitutional Discourse

Yet another possible consequence of President Clinton's impeachment is they might have left much of the public with the impression that impeachment is just another political event. Indeed, over 70% of the American people believed that the President's impeachment trial had been resolved largely on partisan grounds.<sup>133</sup> This outcome is not consistent with the Framers' expectations. For instance, in *Federalist Number 65*, Alexander Hamilton expressed the hope that Senators in an impeachment trial would rise above the passions of the moment to do what is in the best interests of the Constitution or the nation.<sup>134</sup> Arguably,

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130. See *id.* at 54-56.

131. See *House Hearing*, *supra* note 3, at 55-56 (written statement of Professor Michael J. Gerhardt).

132. See Published Closed Door Statements of Senators Cleland, 145 CONG. REC. S1524-26 (daily ed. Feb. 12, 1999); Dorgan, *id.* at S1601-20; Jeffords, *id.* at S1594-96; Johnson, *id.* at S1474-75; Kerrey, *id.* at S1504-05; Kohl, *id.* at S1547-48; Lautenberg, *id.* at S1506-07; Lieberman, *id.* at S1600-01; Lincoln, *id.* at S1625-26; Mikulski, *id.* at S1498-99; and Reid, *id.* at S1574.

133. See ABC News Poll (Feb. 12, 1999) [hereinafter Poll] (indicating that 71% of those polled believed that the Senate voted on the basis of partisan politics rather than the facts); *Nightline: The Trial—Fighting to the Bitter End* (ABC television broadcast, Feb. 8, 1999) (reporting on an ABC poll, indicating that 74% of Americans expected Senators not to vote their consciences but rather on the basis of partisan politics).

134. See THE FEDERALIST NO. 65, at 396-97 (Alexander Hamilton) (Clinton Rossiter ed.,

Johnson's acquittal is an example of such altruism. In contrast, the Clinton impeachment proceedings posed a different dynamic from the one that Hamilton explained the Founders had tried to guard against. The Founders were primarily concerned with a circumstance in which the public pressured Congress to remove a President (and Senators resisted), but the Founders did not foresee (or, at the very least, discuss) a situation in which the public largely opposed, while many members of Congress intensely supported, removal. Interestingly, the Senate's failure to convict President Clinton followed popular sentiment, but it did not win the respect of the American people. The proceedings generally weakened the public's confidence in Congress.<sup>135</sup>

It is possible that one facet of the Clinton impeachment proceedings that reduced most people's confidence in government to operate in a neutral manner is the fate of censure. Censure was blocked for several reasons put forward by Republicans in both the House and the Senate. Censure opponents claimed, *inter alia*, that it constituted either a bill of attainder or an illegitimate bypass of the only constitutionally authorized means—impeachment—for dealing with a President's misconduct.<sup>136</sup> Neither of these arguments is sound. To begin with, a bill of attainder is a legislative action that seeks to impose a punishment on an individual in the absence of—indeed, as a substitute for—a judicial proceeding.<sup>137</sup> A censure could qualify as a bill of attainder only if it actually imposed tangible punishment. If a censure consisted only of the verbal expression of critical condemnation of a President's conduct, the only conceivable damage that would ensue is to a President's reputation. Yet, reputation is not something that the prohibition of bills of at-

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1961).

135. See Poll, *supra* note 133.

136. See, e.g., 144 CONG. REC. H12,009-010 (daily ed. Dec. 19, 1998) (statement of Representative McIntosh); Guy Gugliotta & Juliet Eilperin, *Judiciary Panel Shows Signs of Partisan Split*, WASH. POST, Sept. 15, 1998, at A8 (quoting Representative F. James Sensenbrenner, Jr.); Charles Krauthammer, *The Case for a Two-Part Judgment*, WASH. POST, Feb. 2, 1999, at A15; Eric Pianin & John F. Harris, *Opposition to a Censure Builds Among Senate GOP*, WASH. POST, Jan. 7, 1999, at A9 (quoting House Judiciary Committee Chairman Henry J. Hyde); see also Robert H. Bork, *Read the Constitution: It's Removal or Nothing*, WALL ST. J., Feb. 1, 1999, at A21 (stating that no conflict exists within the Constitution and that removal and disqualification are the only punishments the Senate may inflict); Eric Pianin & Joan Biskupic, *Senators Exploring a Form of Censure Are Bumping into Obstacles*, WASH. POST, Jan. 28, 1999, at A17 (noting that many conservative Republicans opposed censure as unconstitutional).

137. See *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-47 (1984); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468-69 (1977); *United States v. Lovett*, 328 U.S. 303, 315 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 356, 357 (1867); *Ex Parte Garland*, 71 U.S. (8 Wall.) 366, 367 (1867); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810).

tainer was designed to protect;<sup>138</sup> the prohibition has had the narrower purpose of precluding fines or physical punishment or imprisonment imposed by a legislature as a substitute for or instead of a judicial proceeding. Moreover, even if there were damage to a President's reputation, it is likely to have resulted from expression on a political subject, expression undoubtedly protected by the First Amendment<sup>139</sup> and the speech or debate clause.<sup>140</sup>

The argument that censure is illegitimate because impeachment is the only constitutionally authorized means for Congress to punish a President might have struck many people as disingenuous (indeed, most Americans supported censure as an alternative to impeachment throughout the proceedings<sup>141</sup>). First, the argument that impeachment is the only means for dealing with a President's misconduct is misguided. A major argument for censure was that it was a legitimate option for dealing with a President's misconduct that did not rise to the level of an impeachable offense.<sup>142</sup> Impeachment has no bearing whatsoever on what Congress may do with respect to the latter category of misconduct, for it exists as the exclusive mechanism available to Congress for removing a President for impeachable misconduct.<sup>143</sup> Second, the constitutional text can easily be read as allowing rather than restricting censure. In particular, Article I, Section 3 provides: "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."<sup>144</sup> This clause apparently leaves open the possibility of punishments that fall short of removal of office, such as censure. Third, the Constitution clearly allows Senators individually (by virtue of the First Amendment and the speech or debate clause) to announce publicly their condemnation of a President's misconduct.<sup>145</sup> If the Senators may engage in such expression individually, it is not clear why constitutionally they may not do so collectively. There is also nothing in the Constitution that bars a Senator from getting a list of her

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138. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 6.2.2 (1997); Thomas B. Griffith, Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 476 (1984).

139. See U.S. CONST. amend. I.

140. See *id.* art. I, § 6, cl. 1.

141. See, e.g., ABC News Poll (Feb. 6-7, 1999); ABC News Poll (Jan. 8-10, 1999).

142. See Carroll J. Doherty, *Senate Gropes for Another Way to Record Disapproval of Clinton*, 57 CONG. Q. WKLY. 326, 326, 329 (1999).

143. See U.S. CONST. art. I, § 2, cl. 5.

144. *Id.* art. I, § 3, cl. 7.

145. See *id.* amend. I; *id.* art. I, § 6, cl. 1.

colleagues' signatures on a document castigating the President and then entering that document into the Congressional Record. A censure is the functional equivalent of the latter action. While one could object that censure might be either a futile act politically or could be overused to frustrate or harass a President (or some other official), these are prudential, not constitutional, objections. The calculation of whether a censure is constitutional is separate and distinct from whether it makes political sense in any given case to use.<sup>146</sup>

Another option that clearly seems to have been a casualty in the Clinton impeachment proceedings is the so-called finding of fact that the Senate ultimately refused to approve formally in President Clinton's impeachment trial. The proposal was a variation on an intriguing reading of the impeachment clauses given by University of Chicago Law School Professor Joseph Isenbergh.<sup>147</sup> Professor Isenbergh had suggested that the Constitution allowed the House to impeach and the Senate to convict certain kinds of officials for misconduct that did not rise to the level of impeachable offenses.<sup>148</sup> According to Professor Isenbergh, only removal (as opposed to conviction) constitutionally required a two-thirds vote of the Senate and proof or evidence of impeachable offenses.<sup>149</sup> Professor Isenbergh based this reading of the Constitution on the fact that the textual provisions setting forth the House and Senate's respective authorities regarding impeachment do not contain within them any express limitations,<sup>150</sup> such as that the powers must be confined to the scope of impeachable offenses or, in the case of the Senate, to removal. In addition, the argument for the finding of fact relies on the

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146. Prior to the House's vote to impeach President Clinton, Representative William Delahunt (D-MA) sought opinions regarding the constitutionality of censure from the 19 constitutional scholars and historians who testified about the background and history of impeachment in the special hearing held by the House Subcommittee on the Constitution on November 9, 1999. See Letter from Representative William D. Delahunt to Representative Henry J. Hyde, Chair, House Judiciary Committee (Dec. 4, 1998) (on file with Author). Fourteen of the nineteen constitutional scholars indicated that they thought censure was constitutional. See Letter from Representative William D. Delahunt & Frederick C. Boucher to Members of the U.S. House of Representatives (Dec. 15, 1998) (on file with Author).

147. See Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, University of Chicago School of Law Occasional Paper No. 39 (Dec. 31, 1998) [hereinafter Isenbergh, *Impeachment and Presidential Immunity*]; Joseph Isenbergh, Note, *The Scope of the Power to Impeach*, 84 YALE L.J. 1316 (1975).

148. See Isenbergh, *Impeachment and Presidential Immunity*, *supra* note 147, at 14.

149. See *id.*

150. Cf., e.g., U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall . . . have the sole Power of Impeachment."); *id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); *id.* ("And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

fact that in the earlier impeachment trials of John Pickering in 1803, West Humphreys in 1862, and Robert Archbald in 1913, the Senate took separate votes on guilt and removal, i.e., once the Senate had found the official guilty of at least one of the articles of impeachment it then voted on removal.<sup>151</sup> This analysis provoked interest among some Senators to find the President guilty of misconduct without removing him from office.<sup>152</sup> This vote would have occurred before and would have been separate from a formal vote of conviction or removal. In the views of its supporters, the finding of fact would have been indistinguishable from censure, for it would have embodied nothing more than an expression of opinion about whether an official had done something. As such, a finding of fact conceivably would have been constitutional for the same reasons as censure would have been.

The proposed finding of fact proved problematic for several reasons, not the least of which is that it rested on a flawed reading of the impeachment clauses. It is mistaken to read the impeachment clauses in a disjointed or disconnected fashion. Instead, they should be read together, as a coordinated and coherent whole. When read in this fashion, it is clear that the impeachment clauses all have in common the obvious—impeachment—and impeachment is necessarily defined by its scope. The point of enumerated powers is that powers have inherent limitations, and impeachment has its limits in the constitutional language, “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>153</sup> To disconnect either the House or the Senate’s impeachment power from the scope of impeachable offenses not only does damage to the coherence of the constitutional text and constitutional structure, it also opens the door to extraordinary abuse on the part of either the House or the Senate, for each would then be completely unchecked and unbounded from impeaching or convicting on whatever basis struck its fancy. The debates on impeachment in the constitutional and ratifying conventions<sup>154</sup> clearly demonstrate that one of the Framers’ most impor-

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151. See *House Hearing*, *supra* note 3, app. at 358 (Pickering); *id.* at 360 (Humphreys); *id.* at 364-65 (Archbald).

152. See, e.g., Douglas W. Kmiec, *Convict, But Don't Remove, Clinton*, WALL ST. J., Jan. 29, 1999, at A14; Gary M. Osen & Patrick Morrissey, *Finding of Fact Is Constitutional*, WALL ST. J., Feb. 1, 1999, at A20; see also *Censure and the Constitution*, WASH. POST, Dec. 16, 1998, at A30 (arguing that censure is constitutionally permissible); Benjamin Wittes, *Congress Can Censure Anything*, WASH. POST, Dec. 2, 1998, at A29 (stating that there is no constitutional barrier to a properly crafted resolution of censure).

153. U.S. CONST. art. II, § 4.

154. See generally GERHARDT, *supra* note 8, at 3-21 (detailing the impeachment debates in the constitutional and ratifying conventions).



tant objectives in designing the impeachment process was to define narrowly—certainly, much more narrowly than Great Britain had ever done—the scope of the impeachment power.<sup>155</sup> The idea was to narrow or circumscribe the discretion of Congress in exercising the impeachment power while providing clear notice to impeachable officials the grounds on which they could be removed from office.

Another major problem with the finding of fact had to do with the uncertainty that it was meant only to be an expression of negative opinion about the President. Indeed, its timing—prior to the adjournment of the impeachment trial—made its status as an expression of opinion (or something else) dangerously ambiguous. As long as the Senate's vote on the finding of fact occurred as part of the impeachment trial, it could easily have been confused with a vote of conviction, and no doubt some Senators understood it as tantamount to the latter. Undoubtedly, many Senators who supported the finding of fact were motivated in part by their desire to prevent the President from claiming vindication or acquittal if the Senate failed to convict him for perjury or obstruction of justice. The finding of fact would have allowed these Senators to suggest that the President had in fact been found guilty of certain misconduct by whatever number of Senators had voted in favor of the finding of fact. Consequently, the finding of fact seemed to have represented for some Senators a device to bring about a conviction (or its equivalent) without the requisite vote. If the finding of fact were the same as or tantamount to a vote of conviction, then at least two-thirds of the Senators would have had to vote in favor of it in order for it to have had the effect of a conviction. If at least two-thirds of the Senators had voted in favor of it, it almost certainly would have served as a conviction, and its subject—the President—would have been removed from office. If two-thirds of the Senators had not voted in favor of the finding of fact, then the President almost certainly would have been entitled to have claimed that the vote should have counted as an acquittal. Otherwise, he would have been prone to removal more than once in the trial.

Indeed, if Senators had been required to take another vote on whether to convict (or remove) the President after having voted on the finding of fact, the President would probably have had good reason to claim a violation of fundamental fairness. For a vote on conviction following a vote on the finding of fact would have appeared to have allowed some Senators the chance to try to convict the President on more than one vote—through the vote on the finding of fact and through the

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155. *See id.* at 8-11.

subsequent vote on conviction or removal. Subjecting the President more than once to a vote of conviction would simply have subjected him to a dubious and arguably spiteful process, and the result surely would have been perceived to have been unfair.

Moreover, the fact that the Senate took separate votes on guilt and removal in some earlier proceedings<sup>156</sup> does not necessarily show that the Senate may convict for a non-impeachable offense. First, in each of the earlier trials in which the Senate took such separate votes, it removed the official from office.<sup>157</sup> It is significant that in each of these proceedings, the Senate took a single vote on whether to remove the official only after the latter had been found by more than a two-thirds vote to have been guilty on the charges set forth in any single article.<sup>158</sup> For instance, the Senate voted nineteen to seven to find Pickering guilty on each of four articles, and then, in a single twenty to six vote, decided to remove him from office (with Senator William Wells from Delaware deciding to switch sides for the final vote to go with the supermajority because the outcome was "a fait accompli").<sup>159</sup> Similarly, after a supermajority had found Humphreys guilty on each of seven articles of impeachment (with the exception of one of the three specifications of misconduct set forth in the sixth article), the Senate voted unanimously to remove Humphreys.<sup>160</sup> In Archbald's trial, the Senate took a voice vote to remove him once a supermajority had found him guilty of the misconduct charged in five of the thirteen articles of impeachment passed by the House.<sup>161</sup> These sequences suggest that as long as two-thirds or more of the Senate had found an official guilty of the misconduct charged in at least one article, removal was inevitable.

In contrast, the Senate failed to take any vote on removal in each of the impeachment trials in which at least two-thirds of its members had failed to find the impeached official guilty of the misconduct charged in any impeachment article.<sup>162</sup> This trend (particularly coupled with the se-

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156. See generally *House Hearing*, *supra* note 3, app. at 357-71 (listing the articles of impeachment adopted in each of the prior fifteen impeachments in U.S. history, as well as the Senate votes on each of those articles).

157. See *id.*

158. See *id.* at 358-360.

159. See BUSHNELL, *supra* note 36, at 52.

160. See *id.* at 121-123.

161. See *id.* at 237-39.

162. In the trials for each of the following impeached officials, the Senate did not take separate removal votes after having failed to have two-thirds or more of its members vote in favor of guilt: William Blount (1798-99); Samuel Chase (1804-05); James H. Peck (1830-31); Andrew Johnson (1868); William W. Belknap (1876); Charles H. Swayne (1905); and Harold Louderback (1933). See *House Hearing*, *supra* note 3, app. at 357-67. In short, in every trial in which two-

quence above) further confirms that a supermajority vote in favor of guilt was a prerequisite to a separate removal vote and that once this prerequisite was met a separate removal vote was a mere formality. Indeed, in the 1936 impeachment trial of Halsted Ritter, the Senate took the position that it was not constitutionally obliged to take separate votes on guilt and removal. It concluded then (and has taken the position consistently since) that a single vote to convict is all that it is required to do constitutionally.<sup>163</sup>

### J. *The Death of the Independent Counsel Act*

Yet another obvious casualty of President Clinton's impeachment and acquittal is the Independent Counsel Act.<sup>164</sup> President Clinton's tangles with the Office of Independent Counsel Kenneth Starr unleashed widespread reappraisals and criticism of the Independent Counsel Act,<sup>165</sup> and at the end of June 1999 the Independent Counsel Act was laid to rest with little fanfare.<sup>166</sup>

The Clinton impeachment proceedings demonstrated two major defects in the Independent Counsel Act (apart from any lingering ques-

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thirds or more of the Senate failed to find the impeached official guilty of the misconduct charged in any impeachment article, the Senate acquitted and did not proceed with a separate vote on removal. *See id.*

163. *See id.* at 368.

164. Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (codified at 28 U.S.C. §§ 591-99 (1994)).

165. *See, e.g.,* Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L.J. 2011 (1998) (with articles by Jerome J. Shestack, Michael R. Bromwich, George D. Brown, Samuel Dash, Katy J. Harriger, Philip B. Heymann, Brett M. Kavanaugh, Norman J. Ornstein, Julie R. O'Sullivan, Cass R. Sunstein, Arthur H. Christy, Joseph E. diGenova, Donald C. Smaltz, and Lawrence E. Walsh); Symposium, *The Independent Counsel Statute*, 49 MERCER L. REV. 427 (1997) (with contributions from James P. Fleissner, Katy J. Harriger, John Q. Barrett, Judge Griffin B. Bell, Archibald Cox, Lloyd N. Cutler, Judge Lawrence E. Walsh and Kathleen Clark); *Sixty-Seventh Judicial Conference of the Fourth Circuit: The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 WASH. & LEE L. REV. 1515 (1997) [hereinafter *Judicial Conference of the Fourth Circuit*]; *see also* Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 329-355 (1999) [hereinafter *Gormley, Impeachment and the Independent Counsel*] (proposing that the most efficient solution to the difficulties created by the entanglement of the Independent Counsel statute and the Constitution's impeachment provision is the elimination of § 595(c)); Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 639-92 (1998) (discussing the defects in the Independent Counsel statute generally, and the radical reforms that Congress should implement to correct those defects).

166. *See* Ethan Wallison, *Starr Testimony May Seal Fate of Counsel Law*, ROLL CALL, Apr. 15, 1999 at 1; Penny Bender, *Reno Supports Dismantling Independent Counsel Act*, GANNETT NEWS SERVICE, Mar. 18, 1999; Marc Lacey & Eric Lichtblau, *Independent Counsel Law Faces Reform—Or Demise*, L.A. TIMES, Feb. 24, 1999, at A1.

tions about its constitutionality). The first was evident in the Act's failure to provide adequate safeguards against the aggressive efforts of an independent counsel—Ken Starr—to influence the course of the impeachment proceedings.<sup>167</sup> Starr attempted such influence through a series of actions, including but not limited to the strong characterizations and brief-like quality of his office's referral,<sup>168</sup> aggressive advocacy on behalf of the wording or characterizations of the referral in his testimony before the Judiciary Committee,<sup>169</sup> submissions to the Committee in response to White House attacks on the eve of the impeachment vote,<sup>170</sup> public response to criticisms of his testimony from his former ethics adviser (who had quit in protest to the tenor of the testimony),<sup>171</sup> and assisting the House Managers to meet informally with Monica Lewinsky to determine her feasibility as a witness in the impeachment trial.<sup>172</sup> These actions separately, and particularly together, undermined Starr's claims of impartiality or neutrality. The more Starr tried to interject his office into the impeachment fray, the less independent and the more partisan he appeared to be.<sup>173</sup> At the very least, such actions highlighted the need to revise the Independent Counsel Act radically to constrain or preclude such actions in the future.<sup>174</sup>

The impeachment hearings also exposed one largely overlooked pragmatic justification for abandoning the Independent Counsel Act (apart from any lingering questions about its constitutionality). The problem is that an independent counsel has no means by which to de-

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167. See *Judicial Conference of the Fourth Circuit*, *supra* note 165, at 1546.

168. See Referral from Independent Counsel Kenneth W. Starr, H.R. Doc. No. 105-310 (1998).

169. See *Independent Counsel Kenneth Starr's Prepared Testimony for Delivery Before the House Judiciary Comm.*, Nov. 19, 1998, available in 1998 WL 801023 (F.D.C.H.).

170. See Letter from Independent Counsel Kenneth W. Starr to Henry J. Hyde, Chair of the House Judiciary Comm., and John Conyers, Jr., Ranking Minority Member of the House Judiciary Comm. (Dec. 11, 1998) (on file with Author).

171. See *Letter of Resignation from Ethics Adviser, and Starr's Letter in Response*, N.Y. TIMES, Nov. 21, 1998, at A10; see also Samuel Dash, *Sam Dash Replies*, WASH. POST, Nov. 24, 1998, at A18 (responding to the November 22, 1998 *Washington Post* Editorial, "... And Mr. Dash's Resignation").

172. See, e.g., Bob Hohler, *Lewinsky Summons Ignites a Firestorm: House Managers Shake Up Clinton Trial*, BOSTON SUNDAY GLOBE, Jan. 24, 1999, at A1; Knut Royce & Shirley E. Perlman, *Scholars Criticize Starr Move*, NEWSDAY, Jan. 26, 1999, at A20.

173. See Alison Mitchell, *Inquiry Defended: Long Day of Questions Ends With a Display of Frayed Nerves*, N.Y. TIMES, Nov. 20, 1998, at A1.

174. For two excellent articles critiquing the inadequacies of the Independent Counsel Act's provisions regarding the relationship between independent counsel and the impeachment process, see Gormley, *Impeachment and the Independent Counsel*, *supra* note 165, and Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193 (1998).

fend effectively the integrity of his investigation in a public relations battle with the White House.<sup>175</sup> In such a skirmish, the President has unparalleled means to undermine the so-called independence of the independent counsel's investigation. In contrast, the system that preceded the Independent Counsel Act provided a strong disincentive for a President to attack a special prosecutor, because the latter would have been appointed by the President's own Attorney General and thus a President's attack on such a special prosecutor would appear to be an attack against himself.<sup>176</sup> Such was the case with President Nixon's firing of Archibald Cox, a decision that backfired against Nixon.<sup>177</sup> Firing Cox only made Nixon look guilty. The prospect of such backfiring has left most other special prosecutors who have been appointed by Presidents or attorneys general immune to a President's public attacks or retaliation.<sup>178</sup>

### K. *Impeachment's Paralyzing Effects*

The credibility of one argument that was used to stem the tide of impeachment against the President—that it would paralyze the national government and do serious harm to national security and to the national economy—was another important casualty of the hearings. First, most of the work of the executive branch is done by subordinates (particularly by personnel below the level of cabinet secretaries and chiefs of staff). Yet, the likelihood of some paralysis in the national government has been inevitable over the past few years, apart from the impeachment, because of the division in our government between a Congress dominated by one party and a lame-duck President of the other party. Moreover, Congress helped to demonstrate the fallacy of this argument (at least symbolically) by allowing the President to give his annual State of the Union address in the evening of the very same day in which his lawyers had begun his defense in his impeachment

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175. Cf. Roberto Suro, *Starr Blames His Accusers, Expresses Some Regret*, WASH. POST, Apr. 15, 1999, at A1 (noting that in his testimony before the Senate Governmental Affairs Committee on the future of the Independent Counsel law, Independent Counsel Starr lamented the difficulties of an independent counsel who is "subject to attack" politically).

176. See Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2317-2320 (1998).

177. See *id.*

178. Six Presidents appointed 10 special prosecutors from 1875 until Archibald Cox's appointment in 1973. See *id.* at 2311. Of these 10, two were fired—one by President Grant in 1875, see *id.* at 2312 (lending further credence to the widespread perception of corruption in the Grant administration), and the second by President Truman in 1952, see *id.* at 2316-17 (because the President believed that the special prosecutor had become a nuisance to his Justice Department).

trial.<sup>179</sup> In addition, the stock market remained quite strong throughout the proceedings.<sup>180</sup>

Indeed, the only sign of possible damage done to the functioning of the national government or to the presidency because of the impeachment hearings was the distrust expressed by some members of Congress over the timing of the President's decision to authorize military action against Iraq on the day before the final House debates on his impeachment.<sup>181</sup> One problem with these concerns is that the public did not share them, for the public treated the expressions of these concerns (by the very same people who led the movement to remove the President) with the same disdain with which they regarded most of the arguments made in favor of removing the President from office.<sup>182</sup> To put the point somewhat differently, all of the people who questioned the timing of the President's military activities during his trial were people who were already questioning the credibility of his political decisions long before the impeachment proceedings had begun (including the particular circumstances that had given rise to them).

#### L. *The Relevance of Fora for Redressing Nonimpeachable Offenses*

There is no chance that President Clinton's acquittal will ever qualify as a personal vindication. During the hearings, virtually every Senator published or made public comments that included very strong condemnation of the President's misconduct. Those supporting the President's conviction condemned the President in the harshest of terms.<sup>183</sup> With only one apparent exception (Senator Tom Harkin<sup>184</sup>), the

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179. See Francis X. Clines, *A Double-Edged Day Ends on a Note of Hopefulness*, N.Y. TIMES, Jan. 20, 1999, at A19.

180. See Jonathan Fuerbringer, *Nasdaq Leads Advances on All Markets: Profit Outlook Improves for Technology Stocks*, N.Y. TIMES, Dec. 19, 1998, at C1.

181. The attack ended only a few hours after the House impeached the President. See John M. Broder, *The Evolution of a President: From a Protesting Dove to a Hesitant Hawk*, N.Y. TIMES, Mar. 28, 1999, at 19.

182. See KOVACH & ROSENSTIEL, *supra* note 55, at 77.

183. See, e.g., 145 CONG. REC. S1501 (daily ed. Feb. 12, 1999) (statement of Senator Domenici) ("How can anyone . . . not conclude that this President has committed acts which are clearly serious, which corrupt or subvert the political and government process, and which are plainly wrong to any honorable person or to a good citizen?"); *id.* at S1568 (statement of Senator Collins) ("The question before us is not whether President Clinton's conduct was contemptible or utterly unworthy of the great office he holds. It was."); *id.* at S1590-91 (statement of Senator Grassley) ("The true tragedy in this case is the collapse of the President's moral authority."); *id.* at S1522 (statement of Senator Roth) ("The President must be removed before the corrosive effect of his conduct eats away at the rule of law and undermines the legal system."); *id.* at S1523

President's defenders strongly condemned his behavior.<sup>185</sup> His defenders contended repeatedly throughout the impeachment proceedings that his acquittal should not be construed as foreclosing other fora in which to hold him accountable for his misconduct.<sup>186</sup> This widespread condemnation of the President is likely to have some historical if not some constitutional significance (beyond the damage to the President's personal reputation and legacy). For example, it might confirm that in our constitutional system impeachment exists only for a very small or rare set of misdeeds, while there are other, more appropriate fora for holding Presidents accountable for their nonimpeachable misconduct. Indeed, one popular lesson to be derived from Justice Chase's acquittal is that impeachment is an inappropriate device for retaliating against a federal judge's official rulings.<sup>187</sup> The appropriate forum for dealing with a judge's mistaken rulings is the judicial system, particularly through the appeals process. A popular lesson drawn from President Johnson's acquittal is that impeachment is an inappropriate mechanism for redressing a President's mistaken policy judgments.<sup>188</sup> Appropriate fora for

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(statement of Senator Inhofe) ("The other thing that concerns me is the reprehensible, consistent attitude this president has displayed over the years against women.").

184. *See id.* at S1569 (statement of Senator Harkin) ("This case should never have been brought before the Senate. I think it is one of the most blatant partisan actions taken by the House of Representatives since Andrew Johnson's case was pushed through by the radical Republicans of his time.").

185. *See, e.g., id.* at S1504 (statement of Senator Kerrey) ("Nebraskans, including me, are angry about the President's behavior. We find it deplorable on every level."); *id.* at S1524 (statement of Senator Cleland) ("President Clinton has committed serious offenses. His personal conduct in this matter was, as I have said before, wrongful, reprehensible and indefensible."); *id.* at S1560 (statement of Senator Graham) ("Mr. Chief Justice, the President's self-indulgent actions were immoral. Disgraceful. Reprehensible. History should—and, I suspect, will—judge that William Jefferson Clinton dishonored himself and the highest office in our American democracy."); *id.* at S1575 (statement of Senator Edwards) ("I think this President has shown a remarkable disrespect for his office, for the moral dimensions of leadership, for his friends, for his wife, for his precious daughter. It is breathtaking to me the level to which that disrespect has risen."); *id.* at S1579 (statement of Senator Leahy) (stating that when the President shook his finger defiantly denying the allegations, "it was intended to mislead the American people. That statement was wrong.").

186. *See, e.g., id.* at S1500-01 (statement of Senator Breaux):

For wrongful acts that are not connected with the official capacity and duties of the President of the United States, there are other ways to handle it. There is the judicial system. There is the court system. There are the U.S. attorneys out there waiting. There may even be the Office of Independent Counsel, which will still be there after all this is finished.

187. *See* REHNQUIST, *supra* note 14, at 114, 277-78.

188. *See id.* at 251, 260-61, 277-78. To be sure, the view set forth, for example, by Chief Justice Rehnquist of the significance of President Johnson's impeachment as a thoroughly partisan effort by some members of Congress to increase congressional power at the expense of the presidency is not one on which all historians would agree. For instance, Michael Les Benedict, in his

dealing with such erroneous judgments include the court of public opinion, elections, and the judgment of history. A critical lesson for subsequent generations to draw from President Clinton's acquittal is that his misconduct did not have a sufficiently public dimension (nor harm) to warrant his removal from office.<sup>189</sup> The appropriate fora hold-

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well-regarded study of the Johnson impeachment, suggested that the effort to impeach and remove Johnson from office was not necessarily illegitimate because of Johnson's repeated violations of statutes that had been passed by the Congress over his veto and Johnson's efforts to weaken the enforcement of the Fourteenth Amendment. See MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 75-76* (1973).

189. To the extent that President Clinton's acquittal turns on the belief of a critical mass of Senators that his misconduct did not rise to the level of an impeachable offense, see *supra* note 24 and accompanying text, the outcome of his trial dovetails with an important strain in the discourse of the Framers that a President is impeachable for his abuses of uniquely Presidential powers (that could not be easily redressed in other legal proceedings). This strain was evident in several different ways. For instance, it was apparent in suggestions that impeachment was designed to deal with abuses of public privileges or breaches of the public trust. See, e.g., 2 JONATHAN ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION: THE FEDERAL CONVENTION OF 1787* 480 (1987) (quoting from the records of the Pennsylvania ratifying convention James Wilson's comment in reference to the President that "far from being above the laws, he is amenable to them in his private character as a citizen, and his public character by impeachment"). The strain was also evident in the examples given by leading Framers of the kinds of offenses for which the President could be impeached—every example involved an abuse of official power. See, e.g., *id.* at 550 (quoting James Wilson's assurance that "pardon is necessary in cases of treason, and is best placed in the hands of the executive. If he be himself a party to the guilt he can be impeached and prosecuted"); *THE FEDERALIST* NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The subjects [of the Senate's] jurisdiction [in an impeachment trial] are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.

*Id.*; see 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 428-33 (John P. Kaminski & Gaspare J. Saladino eds., 1988) ("An Impartial Citizen V").

[S]hould the President pardon in common cases *before* conviction, or *afterwards* forgive notorious villains, or persons who should be unfit objects of mercy, this would be such a misfeasance of his office, as would subject himself to be personally impeached. He is as responsible for transactions in one part of his office as another.

*Id.*; see 3 JONATHAN ELLIOT, *supra*, at 500 ("Were the President to commit anything so atrocious [as summoning the Senators of only a few states to ratify a treaty] he would be impeached and convicted, as a majority of states would be affected by his misdemeanor."); 4 JONATHAN ELLIOT, *supra*, at 127 (Iredell).

[T]he President must certainly be punishable for giving false information to the Senate . . . If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them—in this case, I ask whether upon an impeachment for a misdemeanor upon such an account, the Senate would probably favor him.

*Id.*; see 1 *ANNALS OF CONG.* 427 (Joseph Gales ed., 1834) (Representative Vining).



ing him (or others who might engage in similar misconduct) accountable include not only public opinion and the judgment of history but also civil proceedings<sup>190</sup> (such as Chief District Judge Susan Webber Wright's contempt citation against and subsequent fining of the President),<sup>191</sup> criminal prosecution, and possibly censure.<sup>192</sup>

*M. The Institutional Deficiencies of the  
Media and the Legal Academy*

The media and law professors (or at least many of those who commented publicly on the Clinton impeachment proceedings) are not likely to emerge from the Clinton impeachment proceedings as winners. On the one hand, the hearings demonstrated the media's increasing penchant to substitute speculation and scandal reportage for coverage of actual facts and figures. In a recent empirical study of the media's coverage of the Clinton impeachment proceedings, it appears as if the media were not only biased in favor of the prosecution<sup>193</sup> but also that this bias led much of the public to turn away from the media for guidance through the historic event of the President's impeachment. This development is both good and bad. It is good in that it reflects a demise in the media's supposed ability to lead or shape public opinion—it flatly failed to do so in the Clinton impeachment proceedings. Instead, the public demonstrated its penchant for cutting through the morass of information

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What are [the President's] duties? To see the laws faithfully executed; if he does not do this effectually, he is responsible. To whom? To the people. Have they the means of calling him to account, and punishing him for neglect? They have secured it in the Constitution, by impeachment, to be presented by their immediate representatives; if they fail here, they have another check when the time of election comes around.

*Id.*; see *id.* at 379 (Madison) (“[I]f the President should join in a collusion with [an executive] officer, and continue a bad man in office, the case of impeachment will reach the culprit, and drag him forth to punishment.”).

190. See Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 35 (1999).

191. See Neil A. Lewis, *Judge Orders Clinton to Pay \$90,000 to Jones's Lawyers*, N.Y. TIMES, July 30, 1999, at A13; see also *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1120 (E.D. Ark. 1999). In her contempt citation of President Clinton, Chief Judge Susan Webber Wright concluded that “the President's deposition testimony regarding whether he had ever been alone with Ms. Lewinsky was intentionally false, and his statements regarding whether he had ever engaged in sexual relations with Ms. Lewinsky likewise were intentionally false.” *Id.* at 1130. Consequently, Judge Wright fined the President for the reasonable expenses incurred by the plaintiffs' attorneys as a result of his testimony and by the judge in attending to the deposition. See *id.* at 1134. She also referred the matter “to the Arkansas Supreme Court's Committee on Professional Conduct for review and any [disciplinary] action it deems appropriate.” *Id.* at 1135.

192. See Gerhardt, *supra* note 190, at 35.

193. See KOVACH & ROSENSTIEL, *supra* note 55, at 77.

dumped on it to find the data that it wants or needs. Yet, it is not a good development for the media to be abdicating or risking its traditional function to inform the public about important news events.

On the other hand, law professors hardly distinguished themselves as positive forces in shaping or influencing public discourse throughout the proceedings. First, many law professors fell prey to the media's push towards speculation and scandal rather than the reporting of actual events or even-handed coverage.<sup>194</sup> More than a few professors could be found engaging in hyperbole both for and against the President's removal from office. The hyperbole undermined the quality of public discourse on the President's impeachment.

Second, many professors professed to be acting neutrally or without a political, personal, or partisan agenda though in fact they had been acting at the request of the President, his friends, House members, Senators, interest groups, or the President's political foes. There are no governing standards for measuring or guiding legal commentary on public events, but common sense suggests that more than a few professors risked their credibility (at least with their colleagues if not also their students and members of Congress) by not being more forthcoming about their allegiances or biases.

Third, the extraordinary proliferation of news outlets increased exponentially the chances for legal commentators to pontificate on the federal impeachment process. More than a few professors professed or exhibited expertise about a field or process in which they were not experts.<sup>195</sup> At the very least, law professors need, if for no other reason than the preservation of their credibility with their colleagues, students, and the general public, to disclose or to be more candid about their personal and political ties and about their professional limitations and credentials.

### III. CONCLUSION

The ultimate significance of President Clinton's acquittal will depend on its meaning to future Congresses and generations. The most

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194. I should acknowledge that during the President's impeachment proceedings, I served as CNN's full-time, resident expert on the federal impeachment process. I leave it to others to determine whether I was able to avoid the pitfalls described here.

195. To compound the problem, the networks turned to so-called expert commentary on the impeachment proceedings from more than a few lawyers who had gained prominence in the news coverage of the O.J. Simpson murder trial. It defies common sense to believe that some knowledge about civil or criminal trials makes one an expert on the federal impeachment process (and vice versa). In all likelihood, this fact was not lost on much of the viewing or listening public.

likely prospects for enduring lessons are those that the Clinton impeachment proceedings reaffirmed. One such lesson is that it is not possible to remove a President from office without bipartisan support. In other words, a successful presidential impeachment requires making charges against a President and proving misconduct whose seriousness or gravity is sufficiently compelling to draw support from both of the major parties in Congress. Moreover, what was true about the impeachment process in the 19th century still seems true at the end of the 20th century—that impeachment is not a substitute for criminal or civil proceedings but rather a special mechanism for dealing with abuses or breaches of uniquely presidential powers or privileges and in so doing serves the very limited function of restoring the constitutional order to full health.<sup>196</sup> Moreover, foreclosing one fora of presidential accountability—impeachment—does not necessarily mean that others, such as civil and criminal proceedings, the court of public opinion, history, and perhaps censure, are unavailable.<sup>197</sup>

Another conceivable lesson is that impeachment proceedings are about more than the fate of a particular impeached official. Impeachment proceedings, like few if any other political and constitutional events in our system of government, test every institution with whom they come into contact. Consequently, President Clinton's impeachment proceedings, like those against President Johnson and President Nixon, revealed a great deal about the institutions of the presidency and Congress. There is little or no question that the office of the presidency saved Johnson from removal in spite of his widespread unpopularity.<sup>198</sup> In the end, enough Senators refused to convict Johnson at least in part because of the repercussions such an outcome would have had on the presidency itself.<sup>199</sup> The office did not save Richard Nixon, partly because his conduct was widely regarded as constituting serious abuses of

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196. See O'Sullivan, *supra* note 174, at 2206 n.53 (citing and quoting from a wide variety of primary and secondary sources on the unique functioning of impeachment as a means not of punishment, but rather of protecting the integrity and well-being of the constitutional order).

197. See Gerhardt, *supra* note 190, at 35.

198. See REHNQUIST, *supra* note 14, at 243.

199. See, e.g., *id.* at 248.

Whether Andrew Johnson should be removed from office, justly or unjustly, was comparatively of little consequence—but whether our government should be Mexicanized, and an example set which would surely, in the end, utterly overthrow our institutions, was a matter of vast consequence. To you and Mr. Grimes it is mainly due that impeachment has not become an ordinary means of changing the policy of the government by a violent removal of the executive.

*Id.* (quoting letter from Senator Dixon to Senator Fessenden).

uniquely presidential trusts.<sup>200</sup> In contrast, President Clinton's misconduct, however disreputable, was not perceived by most Senators as having a sufficiently public dimension or serious injury to the constitutional system to warrant his removal from office. As such, his misconduct is most similar to the income tax fraud for which the House Judiciary Committee refused to pass an impeachment article against President Nixon.<sup>201</sup> Thus, Congress is likely to treat a relatively wide range of private misconduct by Presidents as inappropriate subject matter for the impeachment process.

Moreover, no one seriously questions that in Johnson's impeachment trial and Nixon's impeachment hearings in the House there were at least a few members of Congress who rose above party politics to make a principled judgment about the political and constitutional issues raised in those proceedings. In President Clinton's case, it is harder to identify such actors or to conclude that Congress as an institution performed on a predominantly neutral or nonpartisan basis. Certainly, most people have not yet been convinced that many, or perhaps any, members of the House or the Senate rose above partisan politics to make principled judgments about the impeachability of President Clinton's misconduct, while the virtual party-line votes in the House and the Senate reinforce the public's conclusions about the intense partisanship driving the proceedings.<sup>202</sup> Consequently, a major question left open by the Clinton impeachment proceedings is not about the presidency at all. Rather, it is about whether President Clinton's impeachment proceedings will have heightened or lowered the confidence of subsequent generations in the capacity of members of Congress to rise above partisanship to make principled constitutional judgments in the course of impeachment proceedings.

At least one piece of relevant data has generally been overlooked in the rush to criticize Congress for its handling of the Clinton impeachment proceedings—that a remarkably large number of Representatives and Senators had had substantial prior experiences with impeachment,<sup>203</sup>

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200. See Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 921 (1999).

201. See The U.S. House of Representatives Comm. on the Judiciary Hearing on the Impeachment of the President, 105th Cong. (1998), available in 1998 WL 846820 (statements of former Representatives Elizabeth Holtzman (D-NY), Robert J. Drinan (D-MA), and Wayne Owens (D-UT)) (noting that because it was personal rather than official misconduct, President Nixon's tax evasion was not impeachable).

202. See *Polls Find Support for Verdict*, BOSTON GLOBE, Feb. 14, 1999, at A31.

203. Of the Representatives who participated in the House impeachment proceedings in the 1980s, over 140 participated in President Clinton's House proceedings and at least 17 in his im-

so that they cannot fairly be described as either naive or unqualified in this arena. The substantial familiarity of many members of Congress with prior impeachment practices almost certainly means that many of the risks undertaken in the Clinton impeachment proceedings, such as foregoing independent fact finding by the House or allowing a lame duck House to impeach the President, were calculated, even though they undermined the legitimacy of the House's judgment in the eyes of many Senators. By the same token, the choices of most Senators to expedite rather than prolong the President's impeachment trial was similarly calculated, designed with the likely awareness that it would cost the proceedings some prestige in the views of subsequent historians.

Moreover, there are other institutions for which the Clinton impeachment proceedings is likely to exact some serious consequences in the future. They revealed, for instance, the vulnerability of federal judges or unpopularly elected officials who might have to stand in judgment in the impeachment process. In addition, both the media and the legal academy lost some prestige and credibility in the public estimation because of their predilection for speculation and hyperbole. Hence, the difficulty of identifying much positive from the institutional ramifications from the Clinton impeachment proceedings makes it far from clear the extent to which the proceedings will have set a model for future generations to follow or avoid.

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peachment trial. At least 51 Senators who participated in the latter trial participated in the Hastings and Nixon impeachment trials. Sixty-seven Representatives who voted on President Clinton's impeachment served in the House during its investigation of President Nixon's misconduct, and seven members of the House Judiciary Committee that approved impeachment articles against President Nixon participated in either the House or Senate impeachment proceedings against President Clinton. Eleven Senators who participated in the Senate's investigation of President Nixon's misconduct participated in the Clinton trial. At least two members of Congress who participated in the Clinton proceedings (Zoe Lofgren in the House and Fred Thompson in the Senate) served as staffers in Congress' investigations of President Nixon's misconduct.