

THE STORY ABOUT CLINTON'S IMPEACHMENT

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I

WHAT WAS THE STORY?

In the oral version of their presentations, the participants in this symposium generally prefaced their remarks with descriptions of their service in government. They wished to acknowledge their biases and to admit how the jobs they held had shaped their perspectives. So perhaps I should also state how my experience has shaped my views of impeachment, especially because my perspective on impeachment differs from that of my co-participants. Generally speaking, the other participants served in high government positions, and so they think in terms of policy, but I served as a trial lawyer, so I come to impeachment asking the trial lawyer's question: What is the story?

In the debate over impeachment, the prosecutors thought that President Clinton's actions represented a threat to the rule of law. The defenders denied this charge. Both sides agreed that the story was about the rule of law, and the articles to which I am responding employ the same metaphors. My thesis is that the prosecutors, the defenders, and those who spoke at the symposium all chose the wrong story; had I been the prosecutor, I would have told a story about breach of trust. As events transpired, the defenders were delighted to be telling the wrong story. The prosecutors were incompetent enough to choose the rule of law as their theme, and the defenders were glad to join issue on this favorable terrain. One wonders why the prosecutors made such a bad choice.

Perhaps the prosecutors avoided the breach-of-trust issue because this theme would have acted as a double-edged sword. They might have thought it easy to demonstrate that President Clinton was not worthy of our trust, but perhaps they did not wish to call attention to their own untrustworthiness. The Republicans, who comprised a majority of the House Judiciary Committee, failed to earn our trust because of their irresponsible behavior. They released the report by Independent Counsel Kenneth Starr ("Starr Report") without editing out irrelevancies; they compromised the tradition of grand jury confidentiality by releasing transcripts; they failed to adopt a clear set of procedures before beginning the process; and they failed to conduct an independent inquiry. They then compounded these mistakes by sending

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thirteen Members of the House of Representatives to the Senate to manage their presentation. The thirteen Members made the Keystone Kops look efficient.

Because the House Republicans failed to demonstrate that they deserved our trust, it is no surprise that they also failed to show that President Clinton did not. One would have thought that it would have been easy, that making the case that President Clinton was untrustworthy would not have been beyond their competence. But it was. Their mistake seems to have been twofold. First, they focused on sex by releasing the unedited Starr Report, which distracted public attention from President Clinton's acts of perjury and obstruction of justice.¹ Second, when they tried to switch the topic away from sex, and back to perjury and obstruction of justice, they chose to describe President Clinton's acts as a threat to the rule of law rather than as a breach of trust. Their misplaced emphasis on the rule of law crippled their attempts at persuasion by making them sound rigid, dogmatic, and abstract.

If the story of President Clinton's perjuries and his obstructions of justice had been told as a story about breach of trust, the Republican House Managers would have had several advantages; most importantly they could have shed the handicap of abstractness. Their talk about the rule of law was necessarily abstract because to argue that President Clinton's perjuries were a threat, they had to generalize. The House Managers had to argue the theme "what if everybody . . .," which ultimately led away from what President Clinton did. By moving the argument away from the details, their rhetoric became ever less incisive, and ever more pompous.

One possible response to my assertion—the House Republicans were foolish to have cast their charges as a story about the rule of law—is to gasp in astonishment, "What could be more important than the rule of law?" When I made my remarks at the symposium on September 24, 1999, a member of the audience stated, "I find it rather disturbing that anyone would suggest that perjury is not a serious enough threat to the rule of law to warrant impeachment and removal from office."² I responded that this astonishment is natural and understandable, indeed inevitable, to anyone who has been educated into the legal imagination. However, this line of thinking assumes that the legal imagination should govern. We all know that the public did not judge President Clinton's perjuries to be serious, and I surmise that they did not judge him harshly because they sympathized with his motives for lying—to conceal sexual trespasses. The public could forgive those motives. To be sure, by the standards of the law, President Clinton's motives for his perjuries were irrelevant, but one must remember that our Constitution begins, "We, the

1. There was, and continues to be, much obfuscation on this point, but anyone who wishes to confirm the fact that President Clinton committed perjury and obstructed justice need only consult RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON* 36-56 (1999).

2. This is not an exact quote, but it accurately sets forth the gist of the query.

People, . . .” One should also remember what President Lincoln did not say: President Lincoln did not hold out government “of the lawyers, by the lawyers, for the lawyers” as a worthy ideal.³ If we judge President Clinton by the standards of legal justice, then of course he should have been impeached and convicted, but if we judge him by the standards of popular justice, then the outcome is rather more doubtful.

II

THE REASON FOR TALKING ABOUT BREACH OF TRUST

Judge Posner, in his wonderful book on the affair, points out the contrast between judging by legal justice and judging by popular justice, and he illustrates the contrast by presenting different narratives of the event.

Even after unsubstantiated conjectures (such as Starr’s being obsessed with sex, or Clinton’s having tried to get Lewinsky a job so that she wouldn’t tell the truth in the Paula Jones case) are put to one side, there are two diametrically opposed narratives to choose between. In one, a reckless, lawless, immoral President commits a series of crimes in order to conceal a tawdry and shameful affair, crimes compounded by a campaign of public lying and slanders. A prosecutor could easily draw up a thirty-count indictment against the President. In the other narrative, the confluence of a stupid law (the independent counsel law), a marginal lawsuit begotten and nursed by political partisanship, a naïve and imprudent judicial decision by the Supreme Court in that suit, and the irresistible human impulse to conceal one’s sexual improprieties, allows a trivial sexual escapade (what Clinton and Lewinsky called “fooling around” or “messing around”) to balloon into a grotesque and gratuitous constitutional drama. The problem is that both narratives are correct.⁴

Posner is surely right that both narratives are true, and he also gives us some valuable clues about the differences between the two narratives. Note that the second narrative—the narrative of popular justice—is longer than the first narrative.⁵ This difference in relative length is no accident; legal narratives are always shorter than such popular narratives as novels or biographies. A legal narrative’s relative brevity is caused by the legal system’s attempt to narrow and focus the issues in a dispute. As Posner puts it: “[T]he law . . . tries to narrow the focus of disputes and [to] exclude much that gives a legal dispute its color and urgency and emotional impact.”⁶ The law’s attempt “to narrow . . . and exclude” is admirable, particularly because it makes the process more manageable. In addition to such practical considerations, there are moral and normative advantages to the law’s attempt to limit its focus. If the issues are few and narrow, then there is some hope that they can be decided objectively, and objectivity is a virtue in the law. Furthermore, narrowing the focus can enable other virtues that are even more important than objectivity. When the law succeeds in limiting its focus, which it does not always do, lawyers and

3. Compare Abraham Lincoln, *Address at Gettysburg, Pennsylvania*, in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859-1865, at 536 (Don E. Fehrenbacher ed., 1989).

4. POSNER, *supra* note 1, at 92-93.

5. The passage “a reckless . . . slanders” contains 29 words, whereas the passage “the confluence . . . drama” contains 65 words.

6. POSNER, *supra* note 1, at 93.

judges can be more modest in their claims to knowledge, which is a considerable virtue. Because lawyers and judges regularly overestimate their knowledge and intelligence, narrowing the focus has the considerable advantage of reducing the excess of false pretensions that mar our legal discourse.

Yet, it is surely implausible to believe that we can narrow the scope of an impeachment proceeding so as to exclude everything that gives it “color and urgency and emotional impact.” One should remember the philosopher’s dictum that “ought” implies “can,” that is, it makes no sense to say that we “ought to do” what we “cannot do.” If we cannot exclude popular instincts from an impeachment inquiry, if we cannot narrow the focus, then we must find ways to include popular virtues while excluding popular vices. Posner is correct that “popular justice” has its dangers,⁷ but the remedy is not to retreat to some form of legal justice.

If one uses the metaphor of breach of trust to tell the story, then there is some hope that one can unite legal virtues with the popular virtues. If breach of trust is the issue, then violations of law are relevant, but not decisive; one can focus on the law while insisting that there are also larger issues at stake. One can begin the inquiry with the commonplace notion that public officials hold the power of their office in trust for the public. The authority of the trustee, the terms of the trust, is specified by law,⁸ but we can use our understanding about the purposes of the trust to argue over the circumstances in which a violation of law is justified because the trustee is trying to serve the purpose of the trust.

III

HOW DOES ONE TALK THE LANGUAGE OF TRUST?

If one wishes to think about the comparative advantage of discussing impeachment with the language of trust, then it is desirable to have some particulars. To be particular, one can compare the presidencies of Nixon and Clinton with Lincoln’s. To be sure, this exercise compares two pygmies with a giant, and it may be difficult to draw such a comparison. However, the difficulty is itself illuminating.

In President Nixon’s case, a burglary led to obstruction of justice. In President Clinton’s case, a sexual affair led to obstruction of justice. Both of these cases of obstruction of justice resembled rowdy boys at a Sunday school picnic, compared to the magnitude of the illegalities that marked Lincoln’s presidency. Scholars disagree about which of President Lincoln’s official actions went beyond his scope of authority and outside the law. James Randall,

7. *See id.* at 92, 94.

8. There is one caveat: The positive law may be unclear about the scope of authority. As a general matter, there is a mix of both clarity and vagueness, but constitutional law generally has this defect. Article II is certainly vague. The only explicit duty is the duty to faithfully execute the law, which can be supplemented by the terms of the prescribed oath, wherein the President promises to faithfully execute the office and to defend the Constitution.

who is rather traditional in his views, offers the following as a summary of controversial acts that were probably illegal:

He carried his executive authority to the extent of freeing the slaves by proclamation, setting up a whole scheme of state-making for the purpose of reconstruction, suspending the *habeas corpus* privilege, proclaiming martial law, enlarging the army and navy beyond the limits fixed by existing law, and spending public money without congressional appropriation.⁹

President Lincoln also acted in ways that offend our beliefs about freedom of the press. To quote Randall again, his measures against the press included “the suppression of certain newspapers, the military control of the telegraph, the seizure of particular editions, the withholding of papers from the mails, and the arrest of editors.”¹⁰ In light of President Lincoln’s acts, imagine the following colloquy between a skeptic (“Q”) and myself (“A”):

Q.—Do you agree that Randall was correct in his judgments on illegality?

A.—I quibble here and there, and it is important to note that there have been changes in constitutional theory since Randall’s time. Under modern law, the legality of President Lincoln’s actions would require more analysis. Overall, however, Randall’s judgments are sound, and especially so if one judges President Lincoln by the law of his day.

Q.—You also agree that the scope and magnitude of President Lincoln’s illegalities far exceed those of Presidents Nixon or Clinton?

A.—Of course.

Q.—Then how can you condemn my man, who has done so much less?

A.—Your man is no Lincoln.

In light of this hypothetical colloquy, one should consider whether Presidents Nixon and Clinton can be barred from citing President Lincoln for reasons other than that they are not President Lincoln. The Civil War was unique; President Lincoln was unique; and so the rejoinder—“Your man is no Lincoln”—is rational, albeit the rationality of the rejoinder does not seem particularly legal in its overtones. If one can use the concepts of trusts, then one can distinguish the cases by noting that President Lincoln’s illegalities were intended to benefit the nation, whereas Presidents Nixon’s and Clinton’s were not. I hope that I need not, at this late date, argue the case for President Lincoln.¹¹ As for the case against President Nixon, I am in print and will rest with a citation to my book.¹² What about President Clinton?

President Clinton did breach his trust, in that his perjuries and obstructions of justice were for his personal benefit and not for the benefit of the nation. One might suppose that there were three categories of personal benefits: First, he wished to enjoy his sensual pleasures without risk or challenge; second, he

9. JAMES RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 514 (1951).

10. *Id.* at 520.

11. Randall himself was willing to defend the justice and propriety of President Lincoln’s actions, even though he doubted their legality.

12. See L.H. LARUE, *POLITICAL DISCOURSE: A CASE STUDY OF THE WATERGATE AFFAIR* (1988).

wanted to preserve a relationship with his wife; and third, he wanted to preserve a relationship with his daughter. Each of these three types of benefits inured to his personal benefit; none inured to the benefit of the nation. In short, there is no doubt that he committed an illegal act for personal benefit. Did he use the power of his office to commit these acts? He did not need the power of his office to lie under oath, but the power of his office did, in fact, impede the investigation, not least by a well-organized campaign of vilification.¹³

Given the breach of trust, the question remains whether the breach warranted his removal from office. In other words, the question that follows upon identifying the breach is a question of “how much is too much.” One need not hold a President to standards of perfection, but if one were to say that every breach of trust, however singular, were grounds for removal from office, one would be requiring perfection. To move from perfection to reality requires one to analyze the details of his offenses. One needs to ask whether the breach is characteristic of this presidency. Is it part of a pattern? Is it likely to recur? What sort of harms were caused? What extenuating circumstances are relevant? These more detailed questions must be asked if one believes that a breach alone is insufficient to warrant removal.

When asking these more detailed questions, we have moved the topic beyond the boundaries of a strictly legal justice; we are now trying to combine legal justice with popular justice by way of the metaphors of a breach of trust. When combining the legal and the popular, getting the proper mix of substance and procedure right can be especially tricky. If the substance is breach of trust, what should be the forum, and who should have jurisdiction? Because the nation is the beneficiary of the President’s trusteeship, then perhaps “We, the People” should act as the ultimate judge.

There are two salient questions in impeachment. In addition to asking a substantive question—what standard should govern?—one must also ask a procedural and jurisdictional question—who should have authority to define and apply the standard? Does the community of lawyers have any special expertise? When a matter falls within the strictly legal realm, lawyers can knowingly depart from public opinion; it is our responsibility to do so. In this realm of impeachment, however, lawyers cannot claim any special authority. The people did not want President Clinton removed from office, and the people have a legitimate jurisdiction that lawyers lack. It is also true that our representatives and senators will normally believe that it is in their self-interest to cast votes that reflect their constituents’ wishes. In the end, the impeachment trial seems to have worked out that way, and because I am willing to concede that the people should have the final say, I have no grounds for asserting that injustice was committed.

13. See POSNER, *supra* note 1, at 27, 141.

IV

AN ASSESSMENT BY WAY OF A CONCLUSION

Were my personal views relevant—and I have argued above that they are not—I would have to confess that my judgment on President Clinton would be far harsher than the public's. Yet, even though I was repulsed by his sniveling self-pity and by the campaign of slanders against his accusers, I would not have voted to remove him from office. To my mind, his sexual affairs should not be public business, and furthermore, I am old-fashioned enough to believe that any man who has been fortunate enough to enjoy a woman's favors is duty bound to keep his privilege secret and even, if necessary, to lie to do so. To be sure, there is a difference between lying and lying under oath. Given the seriousness of lying under oath, I am forced to balance my disgust with his perjury against my disgust with the legal system that investigates sexual matters and drives people to lie about them.¹⁴

A reasonable judgment is that both President Clinton and those who pursued him breached their public trust: Both used the legal and constitutional powers granted to them in ways that were not directed toward the nation's benefit. Given these two sets of breaches of trust, which breach threatens to cause the greater long-term damage to the commonweal? Fortunately, we need not rest our judgments about harm on uncertain predictions about the future; we have historical experience to use as a guide. Since Watergate, numerous investigations of public officials, under both Democratic and Republican Presidents, have been conducted that resemble the investigation that ensnared President Clinton. The historical record of these investigations has been dismal.¹⁵ The historical lesson has seemed so self-evident that the law empowering the independent counsel investigations was permitted to expire.¹⁶

Given the history, one can make a judgment. If having this sort of investigation has been more harmful than the acts investigated, then the breaches of trust in conducting the impeachment were worse than the acts impeached. Consequently, the refusal to convict was just.

14. Consider the case of Secretary of Housing and Urban Development Henry Cisneros. An investigation by an independent counsel drove him from office; his offense was lying to the FBI about how much money he had paid and was paying to his mistress. This was not perjury, but it was one of the many statutory offenses that fall under the general umbrella of obstruction of justice. I regard the hounding of Cisneros from office as a true national disgrace. See Bill Miller, *Cisneros Pleads Guilty to Lying to FBI Agents, \$9 Million Probe Yields Fine, No Jail*, WASH. POST, Sept. 8, 1999, at A1.

15. Different people will have different estimates of exactly what has been dismal about the history of these investigations. The most general objection has been that ordinary politics has been criminalized. From my perspective as a lawyer, what seems objectionable is the "bait and switch" aspect. The investigation starts with regard to an alleged offense; witnesses and targets panic; they thrash about foolishly; in their folly, they commit obstructions of justice; the original charge is dropped, and the prosecution goes forward on the obstructions. In short, the investigation generates the very offenses that it prosecutes. See, e.g., LAWRENCE E. WALSH, *FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP* (1997).

16. See Roberto Suro, *As Special Counsel Law Expires, Power Will Shift to Reno*, WASH. POST, June 20, 1999, at A6.