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## Assessing the Impeachment of President Bill Clinton from a Post 9/11 Perspective

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**ASSESSING THE IMPEACHMENT OF PRESIDENT BILL CLINTON  
FROM A POST 9/11 PERSPECTIVE**

**by  
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The impeachment of President Clinton was more a circus than a serious effort to remove the President of the United States. The reason is simple: Few people—in the Congress or the country – wanted to remove him or believed the impeachment effort would actually result in his removal. Instead, it was a partisan political effort to embarrass Clinton and “send a message” of disapproval. Congress was attaching a “scarlet letter.” But this was an indulgence that posed considerable danger that few in Congress considered. In particular, few tried to assess the potential impact this use of the process would have on the President’s ability to govern and be Commander in Chief. This article will argue that such a frivolous use of the impeachment process is inappropriate and dangerous, especially in a post 9/11 world. The framers of the Constitution had it right; impeachment is a drastic remedy to be invoked only as last resort. This article will compare the Clinton impeachment with the two prior efforts to impeach a president: Andrew Johnson in the 1860's and Richard Nixon in the 1970's. In that comparison, it will note that, unlike the Clinton impeachment, those were serious efforts to remove a president from office, not merely attach a “scarlet letter.” Finally, it will assess what factors allowed this misuse of the impeachment process and how we can avoid it in the future. It will suggest that the exuberance of the 1990s, the apparent absence of outside enemies at the time, and the security of seats in the House of Representatives (so-called “safe legislative seats”) contributed to this nonchalant – and dangerous – attitude toward impeachment. September 11, 2001 changed some of those factors, but not all.

April 14, 2006

**ASSESSING THE IMPEACHMENT OF PRESIDENT BILL CLINTON  
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**I. INTRODUCTION**

The atmosphere surrounding the impeachment of President Clinton was more a circus than a serious effort to remove the President of the United States. The reason for that is simple: Very few people—either in the Congress or in the country—really wanted to remove him or thought the impeachment effort would actually result in his removal. Instead, it was a political effort to embarrass Clinton and “send a message” of disapproval: to attach a scarlet letter. But few seemed to assess the potential costs and dangers inherent in such an approach. This article will address whether that is an appropriate use of the impeachment process, whether we can afford such frivolous treatment of the Commander in Chief, and, if not, what reforms are possible.

The article begins by examining the only prior serious attempts to impeach and remove a President of the United States— that of Andrew Johnson in the 1860s and of Richard Nixon in the 1970s. It will show that the approach to impeachment during those efforts was notably different from that exhibited during the Clinton impeachment. Those impeachments were serious efforts to remove the president from office; impeachment was not being used simply to send a message.

The first impeachment of a president occurred with Andrew Johnson in the 1860s. The times were notably different from the exuberance of the 1990s. The country had just experienced the trauma of the Civil War and the assassination of President Abraham Lincoln. Thus, members of Congress and the public presumably understood the need for a full-time, undistracted Commander in Chief and the perils inherent in blithely impeaching and removing him. But the public had little love for Lincoln’s successor and his apparent willingness to tolerate the South’s newly enacted “Black Codes.” Ironically, President Lincoln, a Republican, had asked Johnson, a Democrat, to join his presidential ticket in the 1864 election to unite the country. Suddenly, after Lincoln’s assassination, Vice President Johnson, a member of the minority party, had, under the most unfortunate circumstance, become President and seemed to

be undermining the opportunities the Civil War had been fought to achieve.<sup>1</sup> Whether it was appropriate for Congress to impeach Andrew Johnson for what could be described as essentially policy differences is debatable.<sup>2</sup> But there is no question that Congress was engaged in a serious effort to remove him from office—this was not a frivolous gesture to slap him on the wrist. It was a bipartisan effort that almost succeeded; the Senate’s vote to convict and remove President Johnson from office failed by only one vote.

The second effort to impeach and remove a president involved the challenge to Richard Nixon. Here, too, the times were distinctly different from the 1990s. The country was in the final throes of the trauma of the Vietnam War. Memories of assassination were fresh—President John F. Kennedy, Robert Kennedy, Martin Luther King had all been brutally murdered.<sup>3</sup> The public understood the need for a strong, focused president but they no longer wanted Richard Nixon as their President. They believed Nixon had committed serious abuses of power and earnestly wanted him out of office. Impeachment was the appropriate tool and would probably have succeeded had Nixon not short-circuited the process by resigning. Indeed, it was the likelihood of a successful impeachment, conviction, and removal that led Nixon to resign. Like the impeachment of Andrew Johnson, this effort was a serious, popularly supported endeavor to remove the President. No one was simply using impeachment to teach Nixon a lesson.

After studying these precedents, the article will examine the Clinton impeachment. It will note that it was a highly partisan effort on the part of the House of Representatives and not truly reflective of public sentiment. It will also note that few members of the House either expected the Senate to convict and remove him or considered the impact impeachment would have on the country. Virtually no one asked whether, or to what extent, the ordeal would affect the President’s ability to govern and to be Commander in Chief. This silence is not surprising. President Clinton’s impeachment occurred during a period of considerable prosperity and security. We had won the Cold War. The Berlin Wall had fallen, Eastern Europe was free, and the United States appeared to be safe and secure. We had no obvious enemies. Wall Street was “exuberant.”<sup>4</sup> There seemed to be little, if any, cost to using the impeachment process simply to

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<sup>1</sup> See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992).

<sup>2</sup> See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 103-08 (2d ed. 2000).

<sup>3</sup> President John Kennedy was assassinated in Dallas, Texas on November 22, 1963. Martin Luther King was shot on April 4, 1968 in Memphis, Tennessee. Two months later, Robert Kennedy was fatally shot in Los Angeles, California on June 5, 1968. 12 *AMERICAN NATIONAL BIOGRAPHY* 570, 578, 703 (John A. Garraty & Mark C. Carnes eds., 1999).

<sup>4</sup> Alan Greenspan coined the phrase “irrational exuberance” to apply to Wall Street investors in a speech in 1996: “But how do we know when irrational exuberance has unduly

send the President a message, not to remove him from office.

It is hard to imagine such nonchalance in today's post 9/11 world. Today, we are very aware that a substantial percentage of the world's population wishes us ill. We know we need a fully-engaged Commander in Chief. But have we learned enough to avoid a comparable partisan misuse of impeachment in the future?

This article will argue that the nonchalance displayed by members of Congress, especially the House of Representatives, during the Clinton impeachment was wrong then and remains wrong today. The framers of the Constitution had it right—impeachment is a drastic remedy that should be invoked only rarely.<sup>5</sup> As Professor Charles Black noted in his widely-quoted book on impeachment:

The election of the president (with his alternate, the vice-president) is the only political act that we perform together as a nation.... No matter, then, can be of higher political importance than our considering whether, in any given instance, this act of choice is to be undone, and the chosen president dismissed from office in disgrace. Everyone must shrink from this most drastic of measures . . . . [Removal is] high-risk major surgery, to be resorted to only when the rightness of diagnosis and treatment is sure.<sup>6</sup>

In short, impeachment is a drastic measure to be contemplated *only* as a last resort.

Until recently, the country understood the gravity of the procedure. Impeachment has been utilized sparingly; the first two times the country seemed to appreciate the magnitude of the

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escalated asset values, which then become subject to unexpected and prolonged contractions as they have in Japan over the past decade?" Alan Greenspan, *The Challenge of Central Banking in a Democratic Society*, Remarks at the Annual Dinner and Francis Boyer Lecture of the American Enterprise Institute for Public Policy Research (Dec. 5, 1996), <http://www.federalreserve.gov/boarddocs/speeches/1996/19961205.htm>.

<sup>5</sup> See Lori Fisler Damrosch, *Impeachment as a Technique of Parliamentary Control Over Foreign Affairs in a Presidential System?*, 70 U. COLO. L. REV. 1525, 1528 (1999) (impeachment as a final safeguard, not to be used to resolve disagreements over foreign policy); JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT* 110 (1978) (impeachment process requires serious wrongdoing; removal is too drastic to be used in doubtful instances); Lawrence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 723 (1999) (Constitution recognizes the seriousness of impeachment by requiring the Chief Justice to preside over the trial. Impeachment is the only constitutional means by which one branch can overthrow another).

<sup>6</sup> CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 1-2 (1974).

weapon and did not invoke it frivolously merely to send a message.<sup>7</sup> It was only in the 1990s that Congress used it too casually. But we can no longer afford to make that mistake. In this post 9/11 world, the Presidency is too important and the world too dangerous for us to utilize this weapon frivolously. The President's term is only four years. While that is not a trivial amount of time, it is far from life tenure. So, unless the alleged wrong is really an abuse of the public trust—really constitutes “treason, bribery, or other high crimes and misdemeanors”—impeachment is the wrong tool. It is certainly not the appropriate mechanism by which to send a message: Congress can express its disapproval in less disruptive ways and the public can express its view at the next election.

## II. PRIOR EFFORTS TO IMPEACH THE PRESIDENT

### A. PRESIDENT ANDREW JOHNSON

The first serious effort to impeach a President occurred in the trauma after the Civil War and the assassination of Abraham Lincoln. The public had little love for Lincoln's successor, Andrew Johnson. A Jacksonian Democrat, Johnson had been asked by President Lincoln, a Republican, to join his ticket as Vice President to present a united front in the 1864 election. Now that Johnson had become president, Republicans in Congress feared that Johnson would undermine Lincoln's efforts to help the newly-freed slaves. In short order, Johnson was in open conflict with Congress over the extension of the Freedman's Bureau and the Civil Rights Act of 1866, two acts Congress hoped would give the newly-freed slaves significant protections.<sup>8</sup>

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<sup>7</sup> This article will not discuss the impeachment of judges but it is interesting to note that, since the early days of the republic, the impeachment of judges, fortunately a rare event, has generally been used only for criminal acts and abuses of power, not simply for political differences. When Chief Justice Samuel Chase was impeached in 1803 on grounds that most thought were political, the Senate refused to convict. That Senate's acquittal of Chase has been taken to mean that impeachment should not be used simply for political differences. REHNQUIST, *supra* note 1, at 114; *see also* RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 110 (1999). But that does not mean such use of impeachment has never been discussed. In 1970, House Minority Leader Gerald Ford led a brief effort to impeach four-time married, liberal Supreme Court Justice William O. Douglas during which Ford famously opined: “An impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.” 116 CONG. REC. 11,913 (1970); *see* GERHARDT, *supra* note 2, at 27, 29. It is likely that, after Representative Ford became President Ford, his views on impeachment changed; it is unlikely he continued to believe impeachments should be invoked so casually.

<sup>8</sup> Congress originally created the Freedman's Bureau within the War Department in March 1865, one month before Lincoln's assassination. REMBERT W. PATRICK, THE RECONSTRUCTION OF THE NATION 66 (1967); CONG. GLOBE, 38th Cong., 2nd Sess. 1360 (1865).

President Johnson vetoed both;<sup>9</sup> Congress overrode his veto of the Civil Rights Act, but allowed the Freedman's Bureau to expire.

By December of 1866, buoyed by significant victories in the mid-term election, Radical Republicans in the House of Representatives began to discuss impeachment. At the same time, Congress passed several measures designed to tie Johnson's hands before it adjourned on March 4, 1867.<sup>10</sup> In addition to the Reconstruction Act, which imposed military rule over the South, and the Army Appropriations Act, which required that all presidential orders to the army had to go through the General of the Army, Ulysses S. Grant, Congress also enacted the Tenure of Office Act, which provided that all federal officials whose appointments required Senate approval "could be removed only with Senatorial consent."<sup>11</sup> Johnson vetoed both the Reconstruction Act and the Tenure of Office Act, believing them to be unconstitutional, but Congress overrode his

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The Bureau's mission was to assist former slaves in adjusting to their new lives, in part by administering lands that had been confiscated by law from Southern Confederates. JOHN W. BURGESS, *RECONSTRUCTION AND THE CONSTITUTION* 44 (1902). The Civil Rights Act of 1866 defined national citizenship to include blacks and gave them the right to acquire and hold property, make contracts, engage in ordinary occupations, and testify in court. The purpose of the Act was to render inoperative the Black Codes that were popping up in some of the Southern States. REHNQUIST, *supra* note 1, at 205. I also plan to work with Vicki Jackson on a book on Federalism to be published by the Greenwood Press as part of their series on Constitutional Law.

<sup>9</sup> In vetoing the extension of the Freedman's Bureau, Johnson said that he doubted the authority of Congress to legislate for the seceded states, at least not while they were not yet represented in Congress. Moreover, he said, the federal government had no authority to provide for indigents of any race. Andrew Jackson, Veto Message (Feb. 19, 1866), *in* 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 3596 (James D. Richardson ed., 1897).

In his veto of the Civil Rights Act, Johnson said it represented an unwarranted centralization of authority in the federal government, a position ultimately adopted by the Supreme Court when it found the Act unconstitutional in the *Civil Rights Cases*, 109 U.S. 3 (1883). See LLOYD PAUL STRYKER, *ANDREW JOHNSON: A STUDY IN COURAGE* 288-90 (1936).

<sup>10</sup> REHNQUIST, *supra* note 1, at 209-10.

<sup>11</sup> Tenure of Office Act, ch. 154, 14 Stat. 430 (1867); see generally, JAMES E. SEFTON, *ANDREW JOHNSON AND THE USES OF CONSTITUTIONAL POWER* 149 (1980).

vetoes in both cases.<sup>12</sup> Johnson also questioned the constitutionality of the Army Appropriations Act, but signed it nonetheless to avoid leaving the military without funds.<sup>13</sup>

After a year of considering a motion to impeach, the House Judiciary Committee voted, 5 to 4, to impeach the President.<sup>14</sup> But, in the next month, December 1867, the full House rejected the motion by a vote of 108 to 57.<sup>15</sup> Given that Republicans constituted a majority of the House, this vote indicates that the rejection was non-partisan. A majority of the House apparently did not believe that policy differences, albeit substantial, with the President constituted “treason, bribery, or other high crimes and misdemeanors.”

But when, on February 21, 1868, President Johnson defied the Tenure of Office Act and fired Secretary of War Edwin Stanton without Senatorial consent, Congress was incensed. Stanton was a Lincoln appointee who was often at odds with Johnson and Johnson wanted him removed; Johnson knew the Senate objected but he was determined to proceed even though the Tenure of Office Act appeared to prohibit removal without Senatorial consent. Johnson believed two arguments supported his action: first, that the Act did not apply to Stanton and second, that the Act was an unconstitutional intrusion on the President’s Article II powers.

The Senate disagreed and immediately adopted a resolution specifically denying the President’s power to remove the Secretary of War.<sup>16</sup> They received Johnson’s nomination of his

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<sup>12</sup> MILTON LOMASK, *ANDREW JOHNSON: PRESIDENT ON TRIAL* 239 (1960).

<sup>13</sup> The Act included a rider making it a misdemeanor for a military officer to take orders directly from the President. The rider was drafted by General Stanton and Congressman Boutwell. *Id.*

<sup>14</sup> November 25, 1867; CONG. GLOBE, 40th Cong., 1st Sess. 791-92 (1867). The five voting to impeach were all Republican, but there were also two Republicans voting with the Democrats to reject impeachment. CONG. GLOBE, 40th Cong., 1st Sess. 791-92 (1867); *see also* DAVID MILLER DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 235 (special ed. 1992) (1903).

<sup>15</sup> CONG. GLOBE, 40th Cong., 2nd Sess. 68 (1867).

<sup>16</sup> *Id.* at 1354; *see also* MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 102 (1973). The vote was twenty-eight to six, with twenty Senators not voting. The twenty-eight voting for the resolution were all Republicans; in dissent were two Republicans and four Democrats. *See* REHNQUIST, *supra* note 1, at 216; JAMES E. SEFTON, *ANDREW JOHNSON AND THE USES OF CONSTITUTIONAL POWER* 172 (1980).



proposed replacement of Stanton, but took no action. Stanton, for his part, refused to leave office and armed volunteers stationed themselves outside his office to prevent his forcible ouster.<sup>17</sup>

The House offered a resolution to impeach and, within a few days of Stanton's firing, the full House passed the Impeachment Resolution by a vote of 126 to 47, essentially along party lines.<sup>18</sup> The moderate and conservative Republicans, who had opposed impeachment just two months earlier, had finally become convinced by Johnson's firing of Stanton.<sup>19</sup> James Wilson, who chaired the House Judiciary Committee and had opposed impeachment in December, observed:

Guided by a sincere desire to pass this cup from our lips, determined not to drink it if escape were not cut off by the presence of a palpable duty, we at last find ourselves compelled to take its very dregs.<sup>20</sup>

The House Resolution to impeach was not specific; only after the vote did the House set up a special committee to draft specific articles of impeachment. On February 29, 1868, the committee reported ten articles to the House.<sup>21</sup> Seven articles were based on Johnson's alleged violation of the Tenure of Office Act.<sup>22</sup> One asserted that Johnson's appointment of Stanton's successor on an interim basis was a "high crime or misdemeanor."<sup>23</sup> Another charge was based on a conversation Johnson had concerning the constitutionality of the provision limiting the

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<sup>17</sup> GENE SMITH, *HIGH CRIMES AND MISDEMEANORS: THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 230 (1977).

<sup>18</sup> The firing of Stanton occurred on Friday, February 21, 1868, and the vote to impeach was on Monday, February 24. The Resolution contained no details, providing simply:

*Resolved:* That Andrew Johnson, President of the United States, be impeached of crimes and misdemeanors in office.

CONG. GLOBE, 40<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1542-43 (1868).

<sup>19</sup> REHNQUIST, *supra* note 1, at 217. Johnson had tried to remove Stanton earlier, but then he did so in compliance with the Office of Tenure Act. When the Senate refused to approve, Stanton was allowed to continue in office.

<sup>20</sup> BENEDICT, *supra* note 16, at 105.

<sup>21</sup> CONG. GLOBE, 40<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1542-43 (1868).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* At 1542 (Article II).

president's removal power contained in the Army Appropriations Act of March 2, 1867.<sup>24</sup> The tenth article, based on Johnson's speech criticizing the Army Appropriations Act, was originally rejected but subsequently adopted.<sup>25</sup> Congressman Thaddeus Stevens introduced an eleventh article which he claimed had been offered in committee and mistakenly omitted.<sup>26</sup> This article, which Stevens described as "the gist of the vital portion of this whole prosecution,"<sup>27</sup> described the suspension of Stanton and the reasons offered by Johnson. It went on to accuse Johnson of intending to prevent Stanton from regaining his post in the event that the Senate should decide in Stanton's favor. The article was adopted along with the other ten.<sup>28</sup>

The trial began on March 30, 1868 and lasted for more than a month. When the Senate finally began to deliberate on May 16, it was clear that the essence of the case turned on Johnson's firing of Stanton in alleged violation of the Tenure of Office Act.<sup>29</sup> The Senate consisted of 54 members, 42 Republicans and 12 Democrats. That meant that 36 votes were needed to convict. As the Senate began to vote on the articles, it became apparent that those voting to convict were one vote short. Voting first on the article that seemed most likely to pass, Article XI, the House failed to reach the requisite two-thirds. Only 35 Republicans voted to convict; 7 Republicans, joined by all 12 Democrats, voted to acquit. After waiting ten days, they voted on Articles II and III but still failed to get two-thirds. On May 16, having failed to reach the requisite two-thirds majority needed to convict on those three Articles of Impeachment (Articles XI, II, and III), the Senate voted to adjourn. Johnson had been acquitted, without having had a formal vote taken on the other eight articles of impeachment.<sup>30</sup>

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<sup>24</sup> CONG. GLOBE, 40th Cong., 2nd Sess. 1542-43 (1868); DEWITT, *supra* note 14, at 380.

<sup>25</sup> CONG. GLOBE, 40th Cong., 2nd Sess. 1543 (1868).

<sup>26</sup> *Id.* at 1612.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> BENEDICT, *supra* note 16, at 173-74.

<sup>30</sup> REHNQUIST, *supra* note 1, at 235. The Radical Republicans knew they were one vote short of the two-thirds needed to convict and concluded that, if they voted on Article XI first, they might get Senator Edmund G. Ross of Kansas as the necessary additional vote. But when they voted, they were still one vote short; they had not gotten Ross. They then postponed additional voting for ten days. On May 16<sup>th</sup>, Republican John Sherman of Ohio informed his colleagues that he could not vote to convict on Article I. Republicans thus dropped Article I and began voting on Article II. Again, the Senate voted to acquit on Articles II and III. Defeated, the Radical Republicans decided to drop the remaining articles and adjourn. NOEL B. GERSON, *THE TRIAL OF ANDREW JOHNSON* 110-18 (1977).

Thirty of the fifty-four senators who participated in the trial wrote opinions explaining their votes, including three of those Chief Justice Rehnquist called “the ablest and most respected”<sup>31</sup> of the seven Republicans who voted to acquit Johnson. One, William Pitt Fessenden from Maine, explained that removing the president for his actions with respect to the Office of Tenure Act was inappropriate:

To depose the constitutional chief magistrate of a great nation, elected by the people, on grounds so slight, would, in my judgment, be an abuse of the power conferred upon the Senate, which could not be justified to the country or the world. To construe such an act as a high distant misdemeanor, within the meaning of the Constitution, would, when the passions of the hour have had time to cool, be looked upon with wonder, if not with derision.<sup>32</sup>

With respect to the tenth article, which was based on speeches made by Johnson, Fessenden wrote:

To deny the President a right to comment freely upon the conduct of co-ordinate branches of government would not only be denying him a right secured to every other citizen of the republic, but might deprive the people of the benefit of his opinion of public affairs, and of his watchfulness of their interests and welfare. That under circumstances where he was called upon by a large body of his fellow-citizens to address them, and when he was goaded by contumely and insult, he permitted himself to transcend the limits of proper and dignified speech, such as was becoming the dignity of his station, is a matter of deep regret and highly censurable. But, in my opinion, it can receive no other punishment than public sentiment alone can inflict.<sup>33</sup>

Finally, Fessenden rejected the House Managers’ urging that the Senate should heed the clamor of public opinion demanding Johnson’s conviction:

To the suggestion that popular opinion demands the conviction of the President on these charges, I reply that he is not now on trial before the people, but before the Senate . . . . The people have not heard the evidence as we have heard it. The responsibility is not on them, but upon us. They have not taken an oath to “do impartial justice according to the Constitution and the laws.” I have taken that oath. I cannot render judgment upon their convictions, nor can they transfer to themselves my punishment if I violate my own. And

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<sup>31</sup> REHNQUIST, *supra* note 1, at 240.

<sup>32</sup> 3 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 22 (1868) [hereinafter TRIAL OF ANDREW JOHNSON]; REHNQUIST, *supra* note 1, at 241.

<sup>33</sup> 3 TRIAL OF ANDREW JOHNSON, *supra* note 32, at 28; REHNQUIST, *supra* note 1, at 241.

I should consider myself undeserving of the confidence of that just and intelligent people who imposed upon me this great responsibility, and unworthy of a place among honorable men, if for any fear of public reprobation, and for the sake of securing popular favor, I should disregard the convictions of my judgment and my conscience.<sup>34</sup>

The second “respected” Republican Senator voting to acquit, James Grimes of Iowa, agreed with Senator Fessenden that it was improper to impeach Johnson for firing his Secretary of War. In Grimes’ view, Stanton was not covered by the Tenure of Office Act and Johnson could justifiably treat it as a debatable question.<sup>35</sup> Grimes concluded:

Nor can I suffer my judgment of the law governing this case to be influenced by political considerations. I cannot agree to destroy the harmonious working of the Constitution for the sake of getting rid of an unacceptable President. Whatever may be my opinion of the incumbent, I cannot consent to trifle with the high office he holds. I can do nothing which, by implication, may be construed into an approval of impeachments as a part of future political machinery.<sup>36</sup>

Finally, Lyman Trumbull, a Republican from Illinois, eloquently defended his vote to acquit:

Once set the example of impeaching a President for what, when the excitement of the hour shall have subsided, will be regarded as insufficient causes . . . and no future President will be safe who happens to differ with the majority of the House and two-thirds of the Senate on any measure deemed by them important. . . . In view of the consequences likely to flow from this day’s proceedings, should they result in conviction on what my judgment tells me are insufficient charges and proofs, I tremble for the future of my country. I cannot be an instrument to produce such a result; and at the hazard of the ties of

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<sup>34</sup> 3 TRIAL OF ANDREW JOHNSON, *supra* note 32, at 30-31.

<sup>35</sup> *Id.* at 340.

<sup>36</sup> *Id.* at 328. Another Republican who voted to acquit, Joseph Fowler of Tennessee, also believed that the Tenure of Office Act did not cover Secretary of War Stanton:

The reason for this exception is this: the Senate considered the cabinet officers as the constitutional advisers of the President. They are and have always been regarded as the agents of the Executive. . . . The President has always had the right to select his own cabinet. It is a right guaranteed to him by the Constitution. The legislative department has no power either directly or indirectly to legislate a cabinet minister upon the President, or to remove him save by impeachment. The Senate knew and appreciated this view of the case, and did not desire to touch the long-established doctrine under which the government had flourished.

*Id.* at 195; REHNQUIST, *supra* note 1, at 246.

friendship and affection, till calmer times shall do justice to my motives, no alternative is left me but the inflexible discharge of duty.<sup>37</sup>

Another factor that may have worked in Johnson's favor was the discomfort some Senators felt about the replacement for Johnson. Since Johnson had succeeded Lincoln and there was no existing Vice President, the successor for Johnson would have been the President Pro Tempore of the Senate, Senator Ben Wade of Ohio, an ardent proponent of black suffrage.<sup>38</sup> Also relevant may have been the facts that there were only ten months left in Johnson's term by the time of the trial, that Johnson promised to appoint a successor to Stanton who was acceptable to the Republicans, and that the tactics of the House managers antagonized many Senators.<sup>39</sup>

Senator James Dixon, a Republican from Connecticut, summed up the lessons from the acquittal:

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 [Fessenden] 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.<sup>40</sup>

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<sup>37</sup> 3 TRIAL OF ANDREW JOHNSON, *supra* note 32, at 246.

<sup>38</sup> *Id.* at 211. Until 1886, the line of succession after the Vice President was the President pro tempore of the Senate and then the Speaker of the House. In 1886, Congress amended the law to substitute the cabinet officers for the congressional leadership. In 1947, at the urging of President Truman, Congress amended the statute again to place the Speaker of the House and the President pro tempore (in that order) in the line of succession before the cabinet officers. This is the current succession statute and is embodied in 3 U.S.C. § 19. For more information, see Americo R. Cinquegrana, *Presidential Succession under 3 U.S.C. § 19 and the Separation of Powers: "If at First You Don't Succeed, Try, Try Again"*, 20 HASTINGS CONST. L.Q. 105 (1992).

<sup>39</sup> SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 721 (1965) (quoted in REHNQUIST, *supra* note 1, at 247) (“[The impeachment] was managed by a committee led by Benjamin F. Butler and Thaddeus Stevens, who exhausted every device, appealed to every prejudice and passion, and rode roughshod, when they could, over legal obstacles in their ruthless attempt to punish the President for his opposition to their plans. Ben Butler, now uglier and paunchier than ever, employed a device borrowed from Jenkins’ ear in 1739: he illustrated an oration on the horrors of Presidential reconstruction by waving a bloody shirt which allegedly belonged to an Ohio carpetbagger flogged by klansmen in Mississippi.”).

<sup>40</sup> 3 TRIAL OF ANDREW JOHNSON, *supra* note 32, at 247; REHNQUIST, *supra* note 1, at 248.

The Johnson impeachment and ultimate acquittal established several important principles. Impeachment would be akin to a judicial inquiry, not simply a parliamentary vote of “no-confidence.” Both the House and the Senate rejected the views of those who would have used the impeachment process to turn our system into a parliamentary system. The House members indicated that view in their refusal to impeach in the fall of 1867, when the policy differences were stark but there was nothing that looked like a “high crime or misdemeanor.” The House voted to impeach *only* after Johnson gave them a legally significant wrong in 1868—firing Stanton in defiance of the Tenure in Office Act. But once that threshold was met, the House added other charges, such as Johnson’s criticism of the Army Appropriations Act of 1868 (Article IX) and of Congress itself (Article X).<sup>41</sup> The Representatives seemed not to care that it was somewhat unclear whether the Tenure of Office Act applied to Secretary of War Stanton or whether the Act was constitutional. They voted to impeach even though the statute was ambiguous and constitutionally suspect.<sup>42</sup> But they did insist that the President commit a legal wrong before they impeached.

The Senators revealed their views when they rejected the suggestions of Radical Republicans like Charles Sumner of Massachusetts who described the impeachment proceedings as the “last great battle against slavery.”<sup>43</sup> In Senator Sumner’s view, Andrew Johnson was the

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<sup>41</sup> 1 TRIAL OF ANDREW JOHNSON, *supra* note 32, at 8.

<sup>42</sup> Johnson’s view that the Tenure of Office Act was unconstitutional was ultimately vindicated, but not until many years after the impeachment. *See Myers v. United States*, 272 U.S. 52 (1926). Even though Congress finally repealed the Tenure of Office Act in 1887, it had previously imposed a similar Senate approval requirement for the removal of postmasters in the Act of June 8, 1872, ch. 335, § 63, 17 Stat. 283, 292-93. *See Jonathan L. Entin, The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 723 (1986). When, in 1919, postal inspectors encountered what they believed to be irregularities in the management of the Portland post office and President Wilson fired Postmaster General Frank Myers without seeking Senate approval, Myers challenged the legality of his firing and the constitutionality of the removal restriction finally reached the Supreme Court. In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court found that the restriction on removal unconstitutionally infringed on the President’s executive powers.

President Johnson had considered seeking a Supreme Court ruling on the constitutionality of the Tenure of Office Act, but did not believe time permitted such consideration. As Rehnquist observed: “Given the low esteem in which the Radical Republicans held the Supreme Court of the United States at the time of the Johnson impeachment, and the natural demands for promptness in conducting the trial of the president, it is doubtful that even a prompt effort on [Johnson’s] part to test the law would have changed the minds of those senators who voted to convict him.” REHNQUIST, *supra* note 1, at 268.

<sup>43</sup> REHNQUIST, *supra* note 1, at 244.

personification of slave power.<sup>44</sup> Calling those who had spoken against impeachment “pettyfogging lawyers who did not really understand the meaning of impeachment,”<sup>45</sup> Sumner complained:

The formal accusation is founded on certain recent transgressions, enumerated in Articles of Impeachment, but it is wrong to suppose that this is the whole case. . . . It is unpardonable to higgler over words and phrases when, for more than two years, the tyrannical pretensions of this offender, now in evidence before the Senate, as I shall show, have been manifest in their terrible, heart-rending consequences.

. . . [I]t is important to understand the nature of the proceeding; and here on the threshold we encounter the effort of the apologists who have sought in every way to confound this great constitutional trial with an ordinary case of *Nisi Prius* and to win for the criminal President an Old Bailey acquittal, where on some quibble the prisoner is allowed to go without the day.<sup>46</sup>

In conclusion, Sumner exclaimed: “Next to an outright mercenary, give me a lawyer to betray a great cause.”<sup>47</sup>

As Chief Justice Rehnquist observed, Senator Sumner’s views differed significantly from those of Senators Fessenden, Grimes, and Trumbull:

To the latter, it was an essentially judicial proceeding, in which specific charges were made against the accused, just as charges are made against an indicted criminal defendant, and then the Senate sits in judgment as to whether these charges have been proved to their satisfaction. To Sumner, on the other hand, impeachment was much more like a vote of confidence in the government under a parliamentary system. The overriding issue for him was not whether Andrew Johnson had violated the Tenure of Office Act, but whether Andrew Johnson should continue to be president in view of his repeated obstruction of the reconstruction policies of the Radical Republicans.<sup>48</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 3 TRIAL OF ANDREW JOHNSON, *supra* note 32, at 248.

<sup>47</sup> *Id.*

<sup>48</sup> REHNQUIST, *supra* note 1, at 245. As Chief Justice Rehnquist noted, Sumner’s views were reminiscent of Senator William Giles’s stated view of impeachment at the time of Justice Chase’s trial: “We want your office in order to give it to a better man.” *Id.* But as noted above, that was a minority view rejected in both the Chase and the Johnson trials.

The Senate rejected Sumner's view. It also rejected the House's view that a technical violation of a constitutionally suspect statute warranted removing the President. All the Senate Democrats and some of the Senate Republicans believed Johnson's actions did not constitute "high crimes or misdemeanors" warranting his removal. As will be shown, these conclusions were to be significant for both the Nixon and the Clinton impeachments.

Thus, while Johnson was not convicted and removed, it seems clear that the whole impeachment effort was a serious effort to remove Johnson from office, not simply to attach a "scarlet letter" and signal disapproval. House members in favor of impeachment really wanted Johnson removed from office and seriously believed it could and would be done. They waited until they could find a legal violation and then moved forward. There is no evidence of House members underestimating the significance or seriousness of the impeachment process. Similarly, the Senators understood the significance of their role. While not happy with Johnson, a majority did not believe Johnson's actions constituted a "high crime or misdemeanor" that warranted removal. Even though the public appeared to support his removal,<sup>49</sup> the Senators decided, but only by one vote, not to convict.<sup>50</sup> So even though the vote was close and Johnson remained in office, there is no evidence of anyone—House, Senate, or public—misunderstanding or misusing the impeachment process.

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<sup>49</sup> The newspapers of the time suggested that the public supported the effort to remove Johnson. At the time of the impeachment, the *New York Times* reported: "On the question of impeachment, the public sentiment of the West has heretofore been rather Conservative. But now I hear but one opinion expressed by loyal men, and that is, that Mr. Johnson has forced upon Congress the necessity of vindicating the laws of the land by proceeding against him under the forms prescribed by the Constitution. The President has done what Stevens and Boutwell have failed to do. He has created an almost unanimous sentiment in favor of impeachment among the loyal part of the community." *Popular Feeling in Regard to Impeachment - State Politics - The Season of Fires*, N.Y. TIMES, Feb. 28, 1868, at 2 (correspondence from Chicago); see also *Calm of the Public Mind Regarding Impeachment - Business Men Satisfied*, N.Y. TIMES, Mar. 9, 1868, at 2 ("The people of this country don't want any whirlpools or tornados. They decided Mr. Johnson's case solemnly and deliberately in 1866 [in the midterm elections]. If Mr. Johnson had one iota of common sense, or one sentiment of public decency, he would have submitted to the decision of the people, and at once united with Congress in settling the great question of the day. He did not, and must abide the consequences. His impeachment when he removed Stanton was a matter of course, and the wonder over it did not last as long as a common newspaper sensation. But behind this lies another fact, which every public man should take notice of: it is that the great business public actually felt a relief when impeachment came. It had been recognized as a fact, though not often spoken out, except by men like Wendell Phillips, that Johnson really was an obstruction to the peace, safety and business of the country. Hence, when there was a prospect of removing the difficulty or settling the question, the great business public felt relieved.").

<sup>50</sup> CONG. GLOBE, 40<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Supp. 411 (1868).



## B. PRESIDENT RICHARD NIXON

The effort to impeach and remove Richard Nixon was also a serious, bipartisan endeavor supported by the public. Moreover, it probably would have succeeded if President Nixon had not resigned.<sup>51</sup> To compare the Nixon experience to the Clinton impeachment, we need to recap the events of Watergate. In July 1972, a few months before the presidential election between President Nixon and challenger George McGovern, a burglary took place at the headquarters of the Democratic National Committee, housed in the Watergate complex. The apparent purpose of the break-in was to plant listening devices in the headquarters of the Democratic Party. The burglars were not well known, but one was connected with the Committee to Re-elect the President (CREEP), so the immediate question was whether or not the burglars were directed by or connected to CREEP.

The arrest had little impact on Nixon's reelection efforts; indeed, Nixon was reelected by a resounding majority.<sup>52</sup> However, as the investigation continued, it began to appear that the break-in and the subsequent cover-up may have been organized at a high level in the Nixon Administration. In the summer of 1973, the country, glued to the televised Senate hearings investigating the Watergate affair, learned that the conversations in the White House had been taped by the President. The Special Prosecutor investigating the Watergate affair, Archibald Cox, subpoenaed the tapes. The President refused and ordered Cox fired and ultimately he was.<sup>53</sup> An outraged country dubbed the firing "the Saturday Night Massacre."<sup>54</sup> The House Judiciary Committee announced it would commence an investigation into whether Nixon should be

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<sup>51</sup> FRED EMERY, *WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON* 468 (1994); SAM J. ERVIN, JR., *THE WHOLE TRUTH: THE WATERGATE CONSPIRACY* 292-93 (1980); FRANK MANKIEWICZ, *U.S. v. RICHARD M. NIXON: THE FINAL CRISIS* 141 (1975) ("Nixon decided to resign—having himself delivered to the public what we called 'the smoking howitzer,' the June 23, 1972, tape—rather than face an overwhelming vote in the House and Senate against him.").

<sup>52</sup> Nixon routed Senator George McGovern, winning 60.7% of the popular vote. He won 49 states, losing only Massachusetts and the District of Columbia. Office of the Clerk, U.S. House of Representatives, *Statistics of the Presidential and Congressional Election of November 7, 1972* (1973).

<sup>53</sup> The order went first to Attorney General Elliott Richardson but he refused because he had promised Congress upon his confirmation that he would not fire the Independent Counsel except for cause and no cause was presented. Deputy Attorney General William Ruckelshaus also refused for the same reason. Finally, the next in line, Solicitor General Robert Bork, agreed to fire Cox; he had not made such a promise to Congress. EMERY, *supra* note 51, at 396-99.

<sup>54</sup> MANKIEWICZ, *supra* note 51, at 10.

impeached and Nixon felt compelled to appoint another Special Prosecutor, Leon Jaworski.<sup>55</sup> By July of 1974, the Judiciary Committee had five proposed articles of impeachment on which to vote.

The first article was based on the Watergate burglary and the cover-up.<sup>56</sup> Article II charged that Nixon had abused the power of the presidency by ordering the Internal Revenue Service and the Federal Bureau of Investigation to harass his political enemies.<sup>57</sup> The third article concerned Nixon's refusal to honor the subpoenas served on him by the Senate Judiciary Committee.<sup>58</sup> Article IV alleged that Nixon had made false statements to Congress regarding the Cambodia bombing<sup>59</sup> and Article V charged that he had wrongly used public money to improve his home in San Clemente.<sup>60</sup>

The House Judiciary Committee adopted the first three articles, by votes of 27 to 11, 28 to 10, and 21 to 17, respectively. It rejected the last two: 12 for and 26 against. The Committee was composed of twenty-one Democrats and seventeen Republicans. As these numbers suggest, the votes on all five articles were bipartisan, with Republicans crossing over on the first three articles to give those a majority and with Democrats crossing over to vote against the last two.

Before the Committee could make its report to the full House, the United States Supreme Court ordered Nixon to turn over the secretly recorded White House tapes to the Special

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<sup>55</sup> STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 426 (1990).

<sup>56</sup> “In his conduct of the office of President of the United States, Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice....” Article I, then listed eight ways in which Nixon had obstructed justice. The Article concluded: “In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States.” *IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES*, H.R. REP. NO. 93-1305, at 1 (1974) (Article 1) [hereinafter *H.R. REP. ON NIXON IMPEACHMENT*].

<sup>57</sup> *Id.* at 3 (Article II).

<sup>58</sup> *Id.* at 4 (Article III).

<sup>59</sup> *Id.* at 217 (Article IV).

<sup>60</sup> *Id.* at 220 (Article V).

Prosecutor,<sup>61</sup> incriminating evidence was discovered on the tapes, and President Nixon, sensing what appeared to be a virtually certain impeachment and conviction, resigned on August 9, 1974.<sup>62</sup>

So we do not know what would have happened if the whole process had been allowed to play out. But all the indicators suggest that Nixon would have been impeached by the House and convicted by the Senate. And that is not simply because both were in the hands of Democrats. Many Republicans seemed inclined to vote against him. The Speaker of the House estimated that Nixon's support in the 435 member House was down to 75.<sup>63</sup> Indeed, as noted, it was the likelihood of an impeachment and conviction that led Nixon to resign.<sup>64</sup>

What can we learn from this episode? Once again, the approach to impeachment was based on a judicial inquiry model, not a parliamentary vote of "no confidence." The three articles that the House Committee adopted were all based on presidential abuses of power, some of which were also criminal offenses. The objections to Nixon were based on his wrongful behavior, not on any alleged policy disputes. The articles based on his personal misdeeds, such as using the government for personal favors, were rejected. This was similar to the approach used in the Johnson impeachment. Moreover, the support for impeachment in Congress was essentially bipartisan. Finally, the effort to impeach seemed to be supported by the public.<sup>65</sup>

### III. THE CLINTON IMPEACHMENT

That brings us to the Clinton impeachment. A brief reminder of those events is in order. While it is difficult to know exactly where to start, two events are clearly noteworthy. First, after Clinton became President, Paula Jones filed a sexual harassment suit for actions allegedly taken

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<sup>61</sup> United States v. Nixon, 418 U.S. 683 (1974).

<sup>62</sup> Letter Resigning the Office of President of the United States, 1974 PUB. PAPERS 633 (Aug. 9, 1974); *see* EMERY, *supra* note 51, at 479-80.

<sup>63</sup> EMERY, *supra* note 51, at 467. The Speaker of the House was Carl Alberts. CONGRESSIONAL INDEX (CCH), 93<sup>rd</sup> Cong., 3011 (1973-74). Given that the composition of the House during this period was 248 Democrats and 187 Republicans, *Id.* at 3003, having only 75 members supporting Nixon shows that the impeachment effort was bipartisan.

<sup>64</sup> KUTLER, *supra* note 55, at 544 ("When [Nixon] learned that Republicans and Southern Democrats had banded together to support impeachment, he knew he could not finish his second term. He later wrote that he decided to resign just before the Judiciary Committee voted."). *See supra* p.2.

<sup>65</sup> Frank Newport, *Power to the Polls*, N.Y. TIMES, Sept. 24, 1998, at A27 (stating that by August 1974, more than fifty percent of the American public supported impeaching Nixon and removing him from office).

by Governor Clinton three years earlier. Clinton's lawyers argued that this civil suit should be temporarily suspended until the President was out of office.<sup>66</sup> But the courts disagreed and discovery proceeded.<sup>67</sup> On January 17, 1998, the President was deposed and Paula Jones' lawyers asked him about his relationship with an intern, Monica Lewinsky. Clinton denied having sexual relations with her. Shortly thereafter, in his January 26 press conference, he famously said: "I did not have sexual relations with that woman, Miss Lewinsky,"<sup>68</sup> words that would come to haunt him. Second, also shortly after Clinton took office, an inquiry about a land deal in Whitewater, Arkansas arose. This inquiry led to the appointment of an Independent Counsel, first Robert

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<sup>66</sup> That was the view I had argued earlier in a letter to the Washington Post. See Susan Low Bloch, Letter to the Editor, *Constitutional Balancing Act*, WASH. POST, June 11, 1994, at A20 ("It is not a question of 'whether' the president can be sued for actions he took before becoming president; it is only a question of 'when.' 'Temporal immunity' simply requires that suits against a sitting president be stayed until he or she is no longer president.... It is essential to remember this concept of 'temporal immunity' arises from a balancing test—where the damages inflicted by requiring a sitting president to defend a legal action immediately are balanced against the costs associated with making a plaintiff wait to pursue his or her cause of action. And while no solution is perfect, the flexible nature of the balancing process makes it possible to accommodate both sides of the scale in most cases."); see also POSNER, *supra* note 7, at 7 ("The courts should not have proceeded with it until the end of Clinton's term of office."). I also helped draft briefs urging a temporary delay in the suit, briefs filed first in the Court of Appeals, Brief for Akhil Reed Amar, et al. as Amicus Curiae, *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996) (Nos. 95-1050 and 95-1167), and then later in the Supreme Court, Brief for Law Professors as Amicus Curiae Supporting Petitioner, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853).

<sup>67</sup> The District Court ruled that the trial should be delayed until Clinton left office but that discovery could proceed. *Jones v. Clinton*, 869 F. Supp. 690 (E.D. Ark. 1994). The Eighth Circuit overruled the stay of prosecution and allowed both discovery and the trial to proceed. *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996). Finally, in 1997, the Supreme Court affirmed the Court of Appeals. *Clinton v. Jones*, 520 U.S. 681 (1997).

<sup>68</sup> President William J. Clinton, Press Conference at the White House (Jan. 26, 1998); John F. Harris & Dan Balz, *Clinton More Forcefully Denies Having Had Affair or Urging Lies*, WASH. POST, Jan. 27, 1998, at A1.

Fiske and then Ken Starr.<sup>69</sup> When the Lewinsky matter surfaced, Starr's mandate was expanded to include that investigation as well.<sup>70</sup>

In the course of investigating the Lewinsky affair, Starr subpoenaed Clinton to appear before the grand jury. After much debate, Clinton decided to comply and on August 17, 1998, President Clinton gave four hours of videotaped testimony.<sup>71</sup> The questioning, conducted by Independent Counsel Starr and two of his deputies, took place in the Map Room of the White House.<sup>72</sup> Clinton's testimony was a mixture of regret for his indiscretions and anger at the investigators for relentlessly pursuing details about his personal life. Clinton acknowledged "inappropriate sexual contact" with Lewinsky but also angrily described the entire investigation as a politically motivated attempt to "set me up."<sup>73</sup>

Starr believed that Clinton had lied and committed perjury. Accordingly, he wrote what became known as the Starr Report, detailing the evidence that Starr deemed "substantial and credible information that President William Jefferson Clinton committed acts that may constitute grounds for an impeachment."<sup>74</sup> Delivered to the House on September 9, 1998, the Starr Report

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<sup>69</sup> Fiske was appointed by Attorney General Janet Reno in January 1994, during a period in which the Independent Counsel statute had lapsed. When Congress reenacted the Independent Counsel statute in August 1994, with the support of President Clinton, the judges charged with appointing counsels chose to replace Fiske. The three Special Division judges, David Sentelle, John Butzner, and Joseph Sneed, chose Ken Starr. Order Appointing Independent Counsel, at 1-2, *In re Madison Guar. Sav. & Loan Assn.*, No. 94-1, 1998 WL 472444 (D.D.C. Jan. 16, 1998); POSNER, *supra* note 7, at 65.

<sup>70</sup> *In re Madison Guar. Sav. & Loan Assn.*, No. 94-1, 1998 WL 472444 (D.D.C. Jan. 16, 1998).

<sup>71</sup> Glenn R. Simpson & David S. Cloud, *Clinton Plans to Testify on Lewinsky*, WALL ST. J., July 30, 1998, at A20; Videotaped Grand Jury Testimony of William J. Clinton, Aug. 17, 1998.

<sup>72</sup> Jill Abramson & James Bennet, *Lawyers Say Tape of Clinton Shows Regret and Anger*, N.Y. TIMES, Sept. 20, 1998, at A1.

<sup>73</sup> Peter Baker & Susan Schmidt, *Clinton Decries Attempt to 'Set Me Up'; Videotape of Aug. 17 Testimony Shown to Millions; 3,183 Pages of Evidence Released*, WASH. POST, Sept. 22, 1998, at A1.

<sup>74</sup> H.R. DOC. NO. 105-310, at 1 (1998). Section 595 of the Independent Counsel statute provided that "an independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives...that may constitute grounds for an impeachment." 28 U.S.C. § 595(c) (2000). Starr submitted his report to the House on September 9, 1998. The Office of the Independent Counsel, Referral to the

led the House to launch an impeachment inquiry.<sup>75</sup> Thereafter, without even viewing the video, the House Judiciary Committee decided to release the videotaped grand jury deposition on September 21, 1998, a decision that produced a media frenzy with CNN, MSNBC, and Fox News airing the entire testimony, unedited, at 9 a.m. on September 21.<sup>76</sup>

Many in the House realized that the Senate was unlikely to convict but, nonetheless voted to impeach. They wanted to impeach, they said, to send a message. The comments of Representative Bill McCollum, a Republican from Florida, were typical:

The reality is that however serious these [charges] are, the Senate does not have enough votes over there to convict . . . Even if he weren't convicted, my point has been all along that impeachment is the ultimate censure . . . You can't just slap somebody on the wrist with some piece of paper that we file as a resolution to condemn this . . . . [Impeachment is a more appropriate] response to the awful criminal acts that this president has committed.<sup>77</sup>

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United States House of Representatives Pursuant to 28 U.S.C. § 595©) (Sept. 9, 1998).

<sup>75</sup> H.R. Res. 581, 105th Cong., at 1 (1998).

<sup>76</sup> Peter Baker & John Mintz, *Clinton Team Says Hill May See Backlash; Tape Described as Complex*, WASH. POST, Sept. 21, 1998, at A1.

<sup>77</sup> Tom Hamburger, *This Time Politics Isn't Bowing to Opinion*, MINNEAPOLIS STAR TRIB., Dec. 13, 1998, at 21A. McCullom was later chosen to be one of the House managers. See also the following comments of Republican Representative Marge Roukema, quoted in the *Boston Globe*:

'We are only the grand jury,' said Representative Marge Roukema of Connecticut, one of a number of Republicans who intend to vote for impeachment without regard to possible Senate action. 'The Senate has to make that decision, and I don't think what the Senate does should have any influence on how we do the job.'

Roukema said she takes 'strong exception' to other Republicans, such as Representative Christopher Shays of Connecticut, who have said they won't vote for impeachment unless they feel certain the Senate *should* convict Clinton. The outcome of the House vote could depend on whether undecided Republicans take the Roukema or Shays viewpoint.

Michael Kranish, *Senate Coolness to Oust Clinton Emboldens Some*, BOSTON GLOBE, Dec. 8, 1998, at A25. See also the statement of Representative Ed Bryant of Tennessee, who said he did not regret voting to impeach and then serving as one of the impeachment managers, even though he knew they would never get enough votes in the Senate to convict Clinton. James W. Brosnan, *Congressmen From Mid-South Size Up 106th; Thompson, Lott Voice Satisfaction*, THE COM.

One Republican, Representative James Greenwood of Bucks County, Pennsylvania, found that knowing the Senate would acquit made it even easier to vote for impeachment: “If there were 67 senators over there waiting for this so that they could knock him out of office, this would be a much heavier decision. It’s easier to flip the switch on the electric chair if it is not connected at the other end.”<sup>78</sup> Echoing a similar nonchalance was Representative Clay Shaw, a Republican from Fort Lauderdale: “I will be very surprised if there is a trial in the Senate and, if there is, it will be a very short trial.” It was “easier” to vote for impeachment under these circumstances, Shaw said, because the House was merely passing the charges to the Senate, which, he thought, was unlikely to convict Clinton and remove him from office.<sup>79</sup> Indeed, some moderate Republicans voted to impeach but then turned around and publicly urged the Senate not to convict.<sup>80</sup>

This is not to say there were no Representatives who understood the gravity of the impeachment process and warned the House not to impeach frivolously. Representative Christopher Shays, a Republican from Connecticut, for example, said he would not vote for impeachment unless he felt certain that the Senate *should convict and remove* Clinton.<sup>81</sup> Similarly, Representative Paul McHale from Pennsylvania, one of the Democrats initially inclined to vote for impeachment, decided to abandon the impeachment effort and instead draft a censure resolution once he realized it was not likely to result in removing the President: “If, in

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APPEAL WASH. BUREAU, Nov. 21, 1999, at A17.

<sup>78</sup> Chris Mondics, *He’s Undecided and In Demand: Rep. Greenwood’s Vote on Clinton Is Ever More Crucial*, PHILADELPHIA INQUIRER, Dec. 17, 1998, at A20.

<sup>79</sup> *Id.* As Judge Posner noted: “Some of the moderate Republicans, whose votes to impeach President Clinton were essential, voted so in the hope and expectation that he would not be convicted by the Senate.” POSNER, *supra* note 7, at 97.

<sup>80</sup> The four Republican Representatives who voted for impeachment and urged the Senate not to convict were Sherwood Boehlert (NY), Benjamin Gilman (NY), Michael Castle (DE), and James Greenwood (PA). James Dao, *Impeachment: The Moderates; 2 Votes in House are Defended as not in Conflict*, N.Y. TIMES, Jan. 7, 1999, at A27 (“In explaining his position ..., Mr. Boehlert said that he always felt that Mr. Clinton had committed serious offenses, but not ones that warranted removal from office. He said he would have voted for a strong censure motion in the House, but the Republican leadership had not allowed such a bill to reach the floor. ... A spokesman for Mr. Gilman said the Congressman viewed the House’s role as similar to a grand jury, which can indict but does not convict or sentence. He said Mr. Gilman felt that the President’s behavior deserved some punishment short of removal, but that the Constitution allowed only the Senate to select the penalty.”). Mr. Boehlert’s statement seems to misunderstand that the Senate can only convict and remove, or acquit. His expressed preference that the Senate impose “some punishment short of removal” was appallingly uninformed.

<sup>81</sup> Kranish, *supra* note 77, at A25.

fact, the outcome of the impeachment process is unlikely to affect the President's term in office, it is in the nation's best interest that we conclude the matter quickly and responsibly."<sup>82</sup>

But the effort to impeach prevailed and on December 19, 1998, the House adopted two of the four proposed articles of impeachment. Articles I and III passed the full House and went on to become Articles I and II in the Senate. Article I, as adopted, accused Clinton of perjury, claiming that he had "willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration."<sup>83</sup> It then detailed Clinton's alleged efforts to mislead and derail the Independent Counsel's investigation and was adopted by a vote of 228 to 206.<sup>84</sup> Article III, ultimately Article II in the Senate, accused Clinton of obstruction of justice for attempting to stall the investigation into Paula Jones' sexual harassment charges.<sup>85</sup> It, too, was adopted but by a somewhat closer vote: 221 to 212.<sup>86</sup> The voting on both articles was partisan.<sup>87</sup> Representative Hyde, one of the leaders of the impeachment, had said that an impeachment could only succeed if it were bipartisan<sup>88</sup> and his prediction proved accurate.

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<sup>82</sup> Guy Gugliotta & Juliet Eilperin, *Perjury Charge Faces Close Vote; Clinton Impeachment Uncertain; Censure Movement Gains Ground*, WASH. POST, Nov. 25, 1998, at A1.

<sup>83</sup> H.R. Res. 611, 105th Cong., 145 CONG. REC. 2376 (1999).

<sup>84</sup> 144 CONG. REC. 28,110 (1998).

<sup>85</sup> H.R. Res. 611, 145 CONG. REC. 2376-77 (1999).

<sup>86</sup> 144 CONG. REC. 28,111 (1998). The House rejected what had been called Article II and Article IV in the House. Article II addressed the alleged perjury in the civil deposition in the Paula Jones case and was rejected by a vote of 205 to 229. 144 CONG. REC. 28,110-28,111 (1998). Article IV tried to impeach Clinton for making false and misleading statements to the public, his cabinet, and aides. It further alleged that he "frivolously and corruptly asserted executive privilege." This was more roundly defeated by a vote of 148 to 285. 144 CONG. REC. 28,112 (1998).

<sup>87</sup> On Article I, only five Democrats voted for and five Republicans voted against. The rest of the voting was along party-lines. On Article III, five Democrats voted for and twelve Republicans voted against. The remainder of the votes were along party-lines. Office of the Clerk, U.S. House of Representatives, Final Vote Results for Roll Calls 543 & 545 (Dec. 19, 1998).

<sup>88</sup> Congressman Henry Hyde, Press Conference (Sept. 9, 1998) ("An impeachment cannot succeed unless it is done in a bipartisan or non-partisan way.").



After the House adopted two of the four Articles of Impeachment, it appointed thirteen managers to bring the case to the Senate. Representative Henry Hyde led the managers<sup>89</sup> to the Senate where the trial began on January 14, 1999. The Senate adopted a number of procedures. They decided to conduct a two-week trial based on the documentary record, essentially the Starr Report, and thereafter decide whether to call any live witnesses. Ultimately, they agreed to call three witnesses for videotaped depositions—Monica Lewinsky, Sidney Blumenthal, and Vernon Jordan.<sup>90</sup> On the question of the appropriate burden of proof, the Senate declined to adopt a uniform standard. Instead, each Senator would decide independently on the appropriate burden of proof.<sup>91</sup>

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<sup>89</sup> The group included Rep. Bob Barr (R-GA), Rep. Ed Bryant (R-TN), Rep. Steve Buyer (R-IN), Rep. Charles Canady (R-FL), Rep. Christopher Cannon (R-UT), Rep. Steve Chabot (R-OH), Rep. George Gekas (R-PA), Rep. Lindsey Graham (R-SC), Rep. Asa Hutchinson (R-AR), Rep. Bill McCollum (R-FL), Rep. James Rogan (R-CA), and Rep. James Sensenbrenner (R-WI). 145 CONG. REC. 15 (1999).

<sup>90</sup> 145 CONG. REC. 1929-58 (1999).

<sup>91</sup> “Unlike an ordinary criminal trial, in which a defense lawyer need only convince the jury of a reasonable doubt, individual senators will decide for themselves on the proper burden of proof, and [White House counsel Charles] Ruff’s goal was to convince them to put the prosecution to the highest test, given the magnitude of the consequences.” Ruth Marcus, *Honing Rhetoric, Ruff Jabs at Prosecution Case*, WASH. POST, Jan. 20, 1999, at A7.

During the 1986 trial of Judge Claiborne, the Senate rejected his motion to establish that the House managers had to prove his guilt ‘beyond a reasonable doubt,’ leaving the matter up to the conscience of each individual senator. The Clinton White House argued . . . for the ‘beyond a reasonable doubt’ standard, . . . saying that such a high threshold ‘assures the public that this grave decision has been made with care.’ Senators ranging from conservative Orrin G. Hatch (R-Utah) to liberal Joseph R. Biden Jr. (D-Del.) have in the past endorsed the reasonable-doubt standard. And at least one of the House managers, Rep. Bill McCollum (R-Fla.), said in a recent interview that he believes it is the proper standard. Others have argued for a slightly less stringent burden of proof, ‘clear and convincing’ evidence. And some have even suggested the burden applicable in civil cases, a mere ‘preponderance of the evidence,’ arguing that the purpose of impeachment and conviction is to protect the country from an individual unfit to hold public office and that the higher standards designed to make conviction difficult would interfere with that critical function.

*Id.*

A Nixon-era handbook on impeachment by Yale Law School professor Charles L. Black Jr. detailed the dilemma: “Removal by conviction on impeachment is a stunning penalty, the ruin of a life. Even more important it unseats the person the people have deliberately chosen for the

One of the important questions that arose was whether the Senate could separate the question of guilt from that of removal. Several Senators wanted to do so in order to have the chance to “censure” the president without removing him. On January 27, Senator Lott appointed a group of six Republican Senators (John Ashcroft (MO), Susan Collins (ME), Pete Domenici (NM), Mitch McConnell (KY), Olympia Snowe (ME), and John Warner (VA) to “examine how the Senate could vote to express a view that President Clinton committed perjury and obstruction of justice without removing him from office.”<sup>92</sup> Those advising the Senate reminded the Senators that the Constitution says: “The President . . . *shall be removed* from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”<sup>93</sup> and therefore bifurcation was not permissible.<sup>94</sup> The Senators backed off and on February 12, the Senate took a single vote. By votes of 55 to 45 on Article I and 50 to 50 on Article II, both short of the two-thirds required for a conviction, the President was acquitted.<sup>95</sup> President Clinton was allowed to serve out the rest of his term.

#### IV. LESSONS FROM THIS HISTORY

These three presidential impeachments established several important precedents. First, following the Johnson experience, all presidential impeachments have adopted a “trial” model, rather than a parliamentary “vote of confidence” model. Second, an impeachable offense is generally thought to require an abuse of office, not simply a private wrong and certainly not just a disagreement on policy matters. In the Nixon, Johnson, and Clinton impeachments, the House voted to impeach only when it could find a legal wrong. Simple disagreements with policy were

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office. . . . [Conviction] could occur even though substantial doubt of guilt remained.” BLACK, *supra* note 6, at 17. But the high criminal standard of proof “could mean, in practice, that a man could remain president whom every member of the Senate believed to be guilty of corruption, just because his guilt was not shown ‘beyond a reasonable doubt.’” *Id.* at 17. Black’s suggested standard was “overwhelming preponderance of the evidence.” *Id.* at 17; Ruth Marcus, *With Precedents as a Guide; Senators’ Decisions, as Well as Rules, Will Affect Process*, WASH. POST, Jan. 14, 1999, at A17.

<sup>92</sup> David Rosenbaum, *The President’s Trial: The Rules; Lott Picks Six Scouts to Hunt Exit*, N.Y. TIMES, Jan. 27, 1999, at A19.

<sup>93</sup> U.S. CONST. art. II, § 4 (emphasis added).

<sup>94</sup> See Letter from Professors Susan Low Bloch and Vicki Jackson to Senators Snowe and Collins (INSERT DATE) (on file with the author).

<sup>95</sup> 145 CONG. REC. 2376-77 (1999).

not considered “high crimes or misdemeanors.”<sup>96</sup> Finally, in both the Johnson and Clinton impeachments, the Senate stepped up to its responsibility and refused to convict on what most saw as technical wrongs being used by political enemies to try to oust a president with whom they disagreed. All these principles seem correct to me.

What did we learn about the impact of public opinion? That is a more complicated story. President Johnson was unpopular and the public seemed to want him removed from office. But the Senate decided that popularity should be irrelevant and voted, but only by a one vote margin, to acquit. They were not going to remove the president on a technical violation of the law, especially a constitutionally suspect law. Nixon was also unpopular at the time of his proposed impeachment. But his unpopularity appeared to be attributable to his abuses of power, the basis for his impeachable offenses, not to policy differences. Clinton, by contrast, had the public behind him. Most of the country did not think he should be removed from office for lying about his sexual conduct. As Judge Posner observed:

From the polls that asked specifically whether President Clinton should be impeached, from the exit polls conducted after the November 1998 congressional elections, from the election campaigns and outcomes themselves, from the qualms of a number of Republican members of Congress about impeaching Clinton, and from the efforts of Republican Senators to truncate the Senate trial, it is apparent that a large majority of American did not want him impeached.<sup>97</sup>

The public understood that impeachment and removal is a drastic measure that should be reserved for drastic abuses of power. The Senate wisely agreed.

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<sup>96</sup> In the Johnson and Clinton cases, the legal wrongs were somewhat technical, not the major abuses of power alleged to have been committed by Nixon. But in all three cases, political differences were not sufficient grounds warranting impeachment.

<sup>97</sup> POSNER, *supra* note 7, at 185; see Adam Nagourney & Michael R. Kagay, *Public Support for the President, and for Closure, Emerges Unshaken*, N.Y. TIMES, Dec. 21, 1998, at A23 (“Two out of three Americans now oppose Mr. Clinton’s removal from office, as they did in the weeks before the hearings. Nine out of 10 respondents said they had heard nothing during the two days of televised hearings—in which Republicans painstakingly offered their case against Mr. Clinton—that had shifted their view of the case.”); Richard L. Berke, *Polls Find Most Americans Still Oppose Impeachment and now Frown on the G.O.P.*, WASH. POST, Dec. 15, 1998, at A24 (“Sixty-four percent of Americans, including a majority of independent voters, said they did not want their own Representative to vote for impeachment, according to the Times/CBS News Poll. And 53 percent said they had an unfavorable view of the Republican Party, the highest negative rating since early 1996, shortly after the Federal Government was shut down in a stalemate over the budget.”). In contrast to the midterm election during Johnson’s administration where Johnson’s party lost seats and Lincoln Republican’s gained seats, Clinton’s Democrats gained seats, a rarity in year six of a two-term president.

In my opinion, the House and the Senate may consider public opinion in deciding whether to impeach and remove a president, but they should not do so when deciding the threshold question of whether the president has arguably committed an impeachable offense. The question of whether the alleged acts of the president are impeachable, that is may constitute “treason, bribery, or other high crimes and misdemeanors,” is a legal question that should be addressed without regard to public opinion. But if, and only if, that legal question is answered in the affirmative, public opinion can be considered. Thus, the threshold question should always be whether the president has arguably committed an impeachable offense. If he has not, public opinion is totally irrelevant; without an impeachable offense, the public’s opinion should only be relevant at the next election. But if he has committed an impeachable offense, public opinion may legitimately play a role in the impeachment proceedings. If the public has lost confidence in the President’s ability to preside and be commander in chief, then impeachment and removal may be appropriate. If, on the other hand, the public wants this person to continue to govern, that should be relevant information for the impeachment decision.<sup>98</sup>

The three presidential impeachments we have experienced are consistent with this view. President Johnson’s offenses did not warrant impeachment and removal, so the public’s dislike for him should not have been relevant. And more than one-third of the Senate agreed. Nixon’s offenses, by contrast, were clearly impeachable and public opinion concurred. Thus, he was appropriately subject to impeachment and removal. Finally, with Clinton, the question of the impeachability of his actions was a close call and therefore I think his support by the public was—and should have been—relevant. The public thought he should remain in office—and the Senate was appropriately influenced by that view. The House, unfortunately, was not listening.

All three experiences confirmed what Representative Henry Hyde asserted early in the Clinton impeachment: Impeachment cannot and should not be a partisan effort. Andrew Johnson’s impeachment by the House was partisan and the Senate, in a bipartisan manner, refused to convict. Nixon’s aborted impeachment and conviction would likely have been bipartisan. Clinton’s impeachment by the House was highly partisan and the Senate fell far short of the necessary two-thirds vote to convict. Representative Hyde’s view was clearly vindicated; indeed, reflecting upon the impeachment when he announced his retirement from the House in 2005, Representative Hyde indicated that, in hindsight, he was not sure he would repeat pursuing the impeachment.<sup>99</sup>

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<sup>98</sup> Judge Posner agrees: “Given that the bodies responsible for making the impeachment decision are now populist organs, and the impeachment target (in the case of Presidential impeachment) a populist figure, and given the disarray in the elite, it is hard to argue that public opinion should have played *no* role in the decision whether to impeach President Clinton.” POSNER, *supra* note 7, at 186.

<sup>99</sup> Asked whether, if he had to do it again, he would pursue the Clinton impeachment, Hyde replied: “That is a very good question. I’m not sure. I might not.” Interview by Andy Shaw, ABC-7 Chicago (Apr. 22, 2005).

Did we learn anything specifically from the Clinton impeachment? We clearly became acutely aware of the dangers of the Independent Counsel statute. In an earlier article, I evaluated the performances of all the actors in the impeachment drama and was particularly critical of the Office of the Independent Counsel.<sup>100</sup> In my view, the institution of Independent Counsel was seriously flawed, as Justice Scalia perspicaciously noted in his 1988 dissent in *Morrison v. Olson*.<sup>101</sup> A single-focused investigator with no budgetary or institutional constraints, especially one with no prosecutorial experience, is a misguided institution. Moreover, such an institution undermines executive power by limiting the President's ability to control a prosecutor.<sup>102</sup> As Justice Scalia noted:

An independent counsel is selected, and the scope of her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment? There is no remedy for that, not even a political one....<sup>103</sup>

Fortunately, Congress finally allowed the law to lapse on June 30, 1999.<sup>104</sup>

But even without an independent counsel statute, we still may have occasion to appoint an ad-hoc independent counsel, as we did with Archibald Cox (for the Nixon investigation) and Robert Fiske (for the Whitewater inquiry) during periods in which there was no independent counsel statute. Thus, it is prudent to address some of the questions raised during the Starr investigation. In particular, we should consider whether Independent Counsel Starr's Report should have been so explicit about the sexual details. In addition, we should ask, given that the Report was telling Congress that an impeachable offense may have been committed, whether it should have included a discussion of what is an impeachable offense? Then there are questions about whether the House should have relied so heavily on the report of the Independent Counsel or should instead have done more of its own investigation.

What about the behavior of the two houses of Congress? While I hope we never have to face another presidential impeachment, this wish may not come true and therefore, to be prudent, we should try to learn from these experiences. Both houses are to be faulted for making up the

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<sup>100</sup> Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions that Judged President Clinton*, 63 LAW & CONTEMP. PROBS. 143 (2000).

<sup>101</sup> 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> The Independent Counsel Statute expired on June 30, 1999. See 28 U.S.C. § 599 (2000); *Independent Counsel Law Expires Today*, L.A. TIMES, June 30, 1999, at A14.

rules as they went along. There was time for both to have devised rules before the actual impeachment was before them.<sup>105</sup> Certainly there is time now to adopt neutral rules for any future impeachment. Moreover, we should try to ascertain what standards the House should use. While the analogy is imperfect, the fact is that the House is acting like a prosecutor, deciding whether or not to indict the president and send its indictment to the Senate for trial. And like a prosecutor, the House has discretion. Virtually all the constitutional experts testifying before the House Judiciary Committee agreed on that.<sup>106</sup> So what should the standard for impeachment be? What should the House do if it knows with reasonable certainty that the Senate will not convict? In my opinion, the House should impeach only if it believes (1) that the President has committed “treason, bribery, or other high crimes and misdemeanors,” (2) that the President should be removed from office, and (3) that the Senate is likely to convict. Impeachment is a device by which to remove an official; it should not be used simply to register disapproval or send a message.<sup>107</sup>

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<sup>105</sup> POSNER, *supra* note 7, at 93-94 (stating that eight months passed between the outbreak of the scandal and the submission of the Starr Report but neither the House nor the Senate adopted any comprehensive procedural rules to govern the impeachment proceedings).

<sup>106</sup> 144 CONG. REC. 28,048-28,053 (1998); *see e.g.*, *Background and History of Impeachment: Hearing before the H. Comm. on the Judiciary*, 105<sup>th</sup> Cong. 235 (1998) (testimony of Susan Low Bloch) (“[T]he House has discretion in deciding whether or not to impeach. Like a prosecutor’s decision whether or not to indict, the House has discretion to decide, even it believes the alleged conduct might be an impeachable offense, whether or not it should impeach.”); *id.* at 230 (statement of Lawrence Tribe) (“Just as ordinary prosecutors have discretion not to push their power to the outer limits, and not to take to trial someone they believe it would serve no useful purpose to pursue further, so too the House of Representatives, entrusted by Article I, Section 2, clause 5, with the “sole Power of Impeachment,” has discretion—even more clearly than does the average prosecutor—to cease and desist rather than pressing on.”); *id.* at 268 (statement of Jonathan Turley) (“The House does have a discretionary role in defining high crimes and misdemeanors to exclude minor criminal infractions which do not raise legitimacy concerns....The suggestion, however, that a threshold test can be articulated to exclude criminal acts due to their subject matter (as opposed to such issues as gravity or premeditation) is dangerous and unnecessary.”); *see also* POSNER, *supra* note 7, at 117.

<sup>107</sup> The standard for impeaching a president should be at least as rigorous as that suggested by the American Bar Association (ABA) for instituting a prosecution. ABA Standard 3-3.9(a) suggests that “a prosecutor ‘should’ refrain from prosecuting when the evidence is insufficient to convict.” AM. BAR ASSN., AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 3-3.9 (a) (3d ed. 1993) (“A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”). The existing standard for initiating federal prosecutions is similar. The U.S. Attorney’s Manual provides that “The attorney for the government should commence or recommend Federal prosecution if he/she believes that . . . the admissible evidence will probably be sufficient to obtain and sustain a conviction.” U.S. DEPT.

What about impeachments by a lame-duck House, as was the case in Clinton's impeachment? Professor Bruce Ackerman has suggested, by analogy to the process for enacting legislation, that a bill of impeachment should lapse when the Congress that issued it expires.<sup>108</sup> Obviously, the action of the Senate shows that the Senators rejected this view. And that is correct. While one may question the wisdom of a lame-duck impeachment, especially one that comes on the heels of an election where many of the incumbents lost and the public seemed to disapprove of impeaching the president,<sup>109</sup> I agree with the Senate and Judge Posner that a lame-duck impeachment has legal significance and does not lapse at the end of the House term. Unlike legislation which requires both houses ultimately to concur in the same piece of legislation, the House's act of impeaching is separate from the Senate's conducting a trial. The two actions need not be done by the same Congress.<sup>110</sup>

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OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-27.220 (2002). *See also* POSNER, *supra* note 7, at 120 ("Because the trial of a president before the Senate is such a costly and disruptive process, it seems clear that the House ought to believe that the President is guilty, not merely that he may be, before it votes to impeach...").

It is interesting to note that the panel of prosecutors testifying before the House Judiciary Committee agreed that they would not prosecute someone who had done what Clinton was alleged to have done. *See e.g., Impeachment Inquiry, William Jefferson Clinton, President of the United States, Presentation on Behalf of the President: Hearing Before the House Comm. on the Judiciary, 105th Cong. 285 (1998)* [hereinafter *Impeachment Inquiry*] (statement of Thomas Sullivan) ("It is my opinion that the case set out in the Starr report would not be prosecuted as a criminal case by a responsible Federal prosecutor."); *id.* at 295 (statement of Richard Davis) ("I do not believe that a case involving this kind of conflict between two witnesses would be brought by a prosecutor since it would not be won at trial."); *id.* at 314 (statement of Edward S.G. Dennis, Jr.) ("The circumstances simply would warrant bringing of criminal prosecution and a criminal prosecution would most likely fail.").

<sup>108</sup> *Impeachment Inquiry, supra* note 107, at 37-38 (statement of Bruce Ackerman).

<sup>109</sup> *See supra* note 97.

<sup>110</sup> POSNER, *supra* note 7, at 128-29 ("Legislation to be valid requires the concurrence of both houses of Congress; that is bicameralism. The impeachment process is not legislative, but adjudicative, and does not require concurrence. The houses are assigned different tasks: the House of Representatives to determine whether the President (or other official) should be tried; the Senate to conduct the trial. The Senate doesn't have to agree with the House to put the President on trial, and the House doesn't have to agree with the Senate for him to be convicted, whereas both houses must agree on the text of a bill for it to be enacted into law.")

Turning to the Senate’s performance, Judge Posner called the Senate trial “truncated and anticlimactic—indeed, a parody of legal justice.”<sup>111</sup> Judge Posner was particularly critical of the Senators’ publicly commenting on their views before and during the trial. In his view, they should have imposed a gag order on themselves.<sup>112</sup> My assessment of the Senate’s performance is more generous.<sup>113</sup> In my view, the Senate performed the safety-valve function for which it was designed: to make sure that it was appropriate to remove the democratically elected President of the United States. In both the Clinton and Johnson trials, the Senate cautiously decided that burden had not been met. That was the role given the Senate and one which it appropriately exercised in both cases.

Overall, evaluating the Clinton impeachment from a post-September 11, 2001 perspective should teach us how much we need a full-time, undistracted Commander in Chief. Even though President Clinton’s remarkable ability to “compartmentalize” might lead some to underestimate the level of distraction most Presidents would experience during an impeachment, we should not be so misled. Impeachment is a drastic remedy and should be reserved for serious abuses of power.

Fortunately, as noted, we got rid of the Independent Counsel statute when Congress allowed it to sunset in 1999. Thus, we are unlikely to see a repeat convergence of a “Paula Jones” type suit intersecting with a “Whitewater” type independent counsel investigation.<sup>114</sup> Further, with some luck, we may be spared another “Paula Jones” type suit altogether. But that will require not only better behavior by presidents and would-be presidents, but a reconsideration of the Supreme Court’s decision to allow the Paula Jones’ case to proceed while the president was still in office. Surely the Supreme Court justices must have had some second thoughts about the wisdom of that decision in which they let the suit go forward because, in their words, “properly managed” the suit would not take that much of the president’s time.<sup>115</sup> Judge Posner certainly got it right:

An important lesson is the inability of a Supreme Court, none of whose members has substantial political experience, to deal adequately with cases that have a

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<sup>111</sup> *Id.* at 1-2, 127.

<sup>112</sup> *Id.* at 128 (comparing the Senate trial to that in Alice in Wonderland—verdict first, then hearing.)

<sup>113</sup> See Bloch, *A Report Card on the Impeachment*, *supra* note 100, at 155-58.

<sup>114</sup> For a discussion of the danger created by that intersection, see Susan Low Bloch, *Laws Made for a President’s Foes*, WASH. POST, Feb. 24, 1998, at A21.

<sup>115</sup> *Clinton v. Jones*, 520 U.S. 681, 702 (1997) (“As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner’s time.”).



heavy political charge. In retrospect the Court's decisions upholding the constitutionality of the independent counsel law and allowing Paula Jones's suit against the president to go forward before he left office appear as naive, unintended, unpragmatic, and gratuitous body blows to the Presidency. Had either decision gone the other way—or even if the decision had been written more narrowly . . . —Clinton's affair with Monica Lewinsky, an affair intrinsically devoid of any significance to anyone except Lewinsky, would have remained a secret from the public. The public would not have been the worse for not knowing about it. There would have been no impeachment inquiry, no impeachment, no concerns about the motives behind the President's military actions against terrorists and rogue states in the summer and fall of 1998, no spectacle of the United States Senate play-acting at adjudication. The Supreme Court's decision created a situation that led the President and his defenders into the pattern of cornered-rat behavior that engendered a constitutional storm and that may have embittered American politics, weakened the Presidency, distracted the federal government from essential business, and undermined the rule of law.<sup>116</sup>

In my opinion, the Senate's ultimate acquittal of Clinton was the correct outcome. But I also believe the country should have been spared the whole impeachment ordeal: The House should never have impeached him.

Is there anything more we can do now to avoid another abuse of the impeachment mechanism? Would a constitutional amendment help? I don't think so. I'm not sure what such an amendment would say. The constitutional mechanism appears to be good—and has worked well for most of our 200-plus years of experience. I think our best approach is education—educating the public, the media, and members of Congress. We should reflect on the purposes of the impeachment device and how it can be abused. Congress should also consider adopting some neutral standards to be used in the event of future impeachments. That is the best way to learn from history—in the calm *before* the next storm.

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<sup>116</sup> POSNER, *supra* note 7, at 13.