

THE IMPEACHMENT OF PRESIDENT CLINTON: AN UGLY MIX OF THREE POWERFUL FORCES

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I

INTRODUCTION

President Clinton should not have been impeached by the House of Representatives and, once impeached, was properly acquitted by the Senate. Thus, it should come as no surprise that I agree with much of what Professor Susan Low Bloch has written in her article, *A Report Card on the Impeachment: Judging the Institutions That Judged President Clinton*.¹ As Professor Bloch indicates, it is essential for us to assess how Congress arrived at the point of impeaching President Clinton, how the impeachment process itself worked, and what we can learn from it.² Indeed, much has already been written and said on these topics, and these issues will no doubt continue to be debated and analyzed for years to come.

So, how do I rate the impeachment process of President Clinton? I would give it a failing grade. Although the Senate reached the right result by acquitting the President, the fact that the Senate voted as it did is cold comfort. The impeachment process should have never gone that far. In effect, the second parachute finally opened, just before the impeachment process hit the ground. One nevertheless wonders, “Why did the first parachute fail?”

As the events were unfolding, it appeared that the 1998-99 impeachment debacle resulted in large part from an ugly mix of three extremely powerful forces: an independent counsel who abused his virtually unlimited power; extreme congressional partisanship that was motivated by the desire to gain control of the government; and media outlets that continuously sought to profit from the sensationalism of it all and consistently flouted standards of professional journalism along the way. These three forces appear all the more

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The views expressed here are the author's alone. The author would like to thank Joseph Miller for research and drafting assistance and Kristin Graham Koehler for research and editing assistance in the preparation of this article.

1. See generally Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions that Judged President Clinton*, 63 LAW & CONTEMP. PROBS. 143 (Winter/Spring 2000).

2. See *id.* at 143.

responsible for the impeachment now, with the benefit of hindsight. Each of these forces, standing alone, was powerful in its own right. Together, they were insurmountable.

Before delving into an analysis of the combined effect of these forces, I must acknowledge that other factors—including the President—played key roles in the events that led to the impeachment. There can be no doubt that President Clinton's reckless and careless personal conduct with Monica Lewinsky contributed to the events of 1998 and 1999. Indeed, there could not have been a "Lewinsky matter" without that conduct. The President's conduct was wrong and regrettable, and he has acknowledged this.³

The general public also played a role, at least in the beginning. Many people were mesmerized by the events that began to unfold in January 1998 and hence contributed to the media frenzy as cheering spectators. However, as 1998 wore on, the majority of Americans had grown tired of the exhaustive coverage of the Lewinsky matter.⁴ Most people, although angry about the President's behavior, did not believe that he should be removed from office.⁵ Unfortunately, the public's opinion did nothing to deflect the House Republicans from their chosen path—impeachment.

The impeachment itself, which did not occur until eleven months after the story was first reported, however, would not have occurred at all but for the three forces indicated above—the independent counsel, the House Republicans, and the media. Those three forces are the focus of the remainder of my comments. It also is appropriate, for context, to describe briefly the constitutional backdrop against which the players waged the Clinton impeachment debate.

II

THE CONSTITUTIONAL STANDARD

One may well ask whether the Constitution itself played some role in the wrongful impeachment of President Clinton. Does the Constitution set the

3. For example, in his August 17, 1998, statement to the grand jury, the President unequivocally stated as follows: "When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong." IMPEACHMENT OF PRESIDENT WILLIAM JEFFERSON CLINTON: THE EVIDENTIARY RECORD PURSUANT TO S. RES. 16, S. DOC. NO. 106-3, vol. XIII, at 95 (1999) [hereinafter EVIDENTIARY RECORD XIII]. Similarly, in the preface to his November 27, 1998, response to the House Judiciary Committee's set of 81 requests for admission, the President stated that "the fact that there is a legal defense to the various allegations cannot obscure the hard truth, as I have said repeatedly, that my conduct was wrong. It was also wrong to mislead people about what happened, and I deeply regret that." Response of William J. Clinton, President of the United States, To Questions Submitted by Congressman Henry Hyde, Chairman of the House Judiciary Committee, *reprinted in* IMPEACHMENT OF PRESIDENT WILLIAM JEFFERSON CLINTON: THE EVIDENTIARY RECORD PURSUANT TO S. RES. 16, S. DOC. NO. 106-3, vol. XI, at 251 (1999).

4. See *infra* note 63 and accompanying text.

5. Consistent poll results from early December 1998 to the end of January 1999 showed that nearly two-thirds of those interviewed were opposed to the removal of the President from office. See Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 654 n.84 (1999) (reviewing poll results).

standard for impeachment of a President too low? Although it may be too soon to know for sure, I would submit that the Constitution sets a sufficiently high bar for the impeachment of a President, but that bar was disregarded in the impeachment of President Clinton.

The Framers established the standard for impeachable offenses in language that is now quite familiar. Article II, Section 4 provides, in its entirety, as follows:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.⁶

The Framers selected this “high crimes and misdemeanors” formulation, drawing on 400 years of well-understood English parliamentary practice, to further their objective of creating a strong and independent executive.⁷ The standard is one of many features of the Constitution that make the President independent and coequal with, rather than subservient to, the Congress. The Framers took steps, directly and indirectly, to create a strong and independent executive. Acting directly, the Framers created a structure that separately vests “[a]ll legislative Powers . . . in a Congress”⁸ and at the same time vests the national government’s “executive Power . . . in a President.”⁹ Acting indirectly, the Framers distributed the power over one general subject between these two branches, for example, by making the President “Commander in Chief of the Army and Navy of the United States,”¹⁰ while giving Congress the power “[t]o declare War” and “[t]o make Rules for the Government and Regulation of the land and naval Forces.”¹¹ The impeachment standard is best understood within the framework of a single government comprising separate and coequal powers.

Many have elaborated on the history of the “high crimes and misdemeanors” standard in England and on the Framers’ debates about this standard for our own Constitution.¹² There is no need to recount that

6. U.S. CONST. art. II, § 4

7. See generally STAFF OF THE IMPEACHMENT INQUIRY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 4-17 (Comm. Print 1974) [hereinafter CONSTITUTIONAL GROUNDS] (analyzing the history and adoption of the “high crimes and misdemeanors” standard).

8. U.S. CONST. art. I, § 1.

9. *Id.* art. II, § 1.

10. *Id.* § 2, cl. 1.

11. *Id.* art. I, § 8, cls. 11, 14. Peacetime foreign affairs present the same picture: Congress has the power “[t]o regulate Commerce with foreign Nations,” *id.* cl. 3, but it is the President who has the “Power, by and with the Advice and Consent of the Senate, to make Treaties,” *id.* art. II, § 2, cl. 2. There are numerous other examples of the principle in various areas, but these suffice to make the point.

12. See, e.g., CONSTITUTIONAL GROUNDS, *supra* note 7, at 4-17; Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 605-15 (1999); Cass R. Sunstein, *Impeachment and Stability*, 67 GEO. WASH. L. REV. 699, 700-04 (1999); Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”*: *Basic Principles*, 67 GEO. WASH. L. REV. 712, 716-21 (1999). Articles based upon recent congressional testimony of several constitutional law and history scholars have been collected in *The George Washington Law Review*. See generally Symposium, *Background and History of Impeachment*, 67 GEO. WASH. L. REV. 600 (1999). The testimony itself was made part of the

scholarship here. One key event in the Constitutional Convention, however, clearly demonstrates just how high the presidential impeachment standard is meant to be.¹³ As the Convention drew to a close, the draft standard was “treason or bribery.”¹⁴ George Mason objected on the ground that the standard was too narrow and moved to add the word “maladministration” to the list of bases for impeachment.¹⁵ James Madison then objected, protesting that “so vague a term [as ‘maladministration’] will be equivalent to a tenure during the pleasure of the Senate.” Mason then withdrew “maladministration” in favor of “high crimes and misdemeanors against the State,” which carried by a vote of eight to three.¹⁶ The final three words—“against the State”—were first changed to “against the United States,” and then dropped from the final draft by the Committee of Style and Arrangement.¹⁷ As Professor Gerhardt explained in his November 1998 congressional testimony,

[t]he Committee of Style and Arrangement, which was responsible for reworking the resolutions without substantive change, eliminated the phrase “against the United States,” presumably because it was thought to be redundant or superfluous. The convention accepted the shortened phrase without any further debate on its meaning.¹⁸

In this way, the Constitution came to incorporate a high standard for impeachment—namely, treason, bribery, or other high crimes and misdemeanors against the United States.

After surveying this material and a great many other sources during the Nixon impeachment inquiry, the staff of the House Judiciary Committee summarized the nature of the impeachment standard as follows:

Impeachment is a constitutional remedy addressed to *serious offenses against the system of government*. . . . It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that *subvert the structure of government*, or undermine the integrity of office and even the Constitution itself, and thus are “high” offenses in the sense that word was used in English impeachments. . . . Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct *seriously incompatible* with either the *constitutional form and principles of our government* or the *proper performance of constitutional duties* of the presidential office.¹⁹

evidentiary record in the President’s Senate trial. *See generally* IMPEACHMENT OF PRESIDENT WILLIAM JEFFERSON CLINTON: THE EVIDENTIARY RECORD PURSUANT TO S. RES. 16, S. DOC. NO. 106-3, vol. XX 28-311 (1999) [hereinafter EVIDENTIARY RECORD XX] (statements of law and history scholars before the House Judiciary Committee’s Subcommittee on the Constitution) (Nov. 9, 1998).

13. The adoption of the “other high Crimes” language at the Constitutional Convention is discussed in detail in the staff report on the impeachment standard from the Nixon impeachment inquiry, *see* CONSTITUTIONAL GROUNDS, *supra* note 7, at 11-13, as well as in the testimony received by the House Judiciary Committee’s Subcommittee on the Constitution in November 1998, *see* EVIDENTIARY RECORD XX, *supra* note 12, at 48 (statement of Michael Gerhardt, law professor); *see also id.* at 84-85 (statement of Cass Sunstein, law professor).

14. *See* CONSTITUTIONAL GROUNDS, *supra* note 7, at 11.

15. *Id.*

16. *Id.* at 12.

17. *Id.* at 12 n.48.

18. EVIDENTIARY RECORD XX, *supra* note 12, at 48.

19. CONSTITUTIONAL GROUNDS, *supra* note 7, at 26-27 (emphasis added).

Nothing in the twenty-five years that have elapsed since that staff report was written should alter the conclusions it reached.²⁰ And there is broad support, indeed, for the view that an attack on the state itself is the hallmark of an impeachable offense, as the two open letters to the House signed by 430 law professors²¹ and 400 historians,²² respectively, demonstrate.

Applying the constitutional standard to the facts posed by the impeachment process of 1998, one can reasonably conclude that the President did not commit impeachable offenses. First, the President did not perjure himself before the grand jury and did not obstruct justice,²³ the matters charged in the two impeachment articles that passed the House.²⁴

Second, even if one were to disagree with the foregoing assessment, as many have, impeachment still would not be appropriate because none of the misconduct alleged was an attack on or subversion of our form of government. It cannot seriously be disputed that the entire controversy arose from a private matter—William Clinton’s intimate relationship with Monica Lewinsky—rather than a public or official act of the President. Indeed, the fundamental premise of the Supreme Court’s misguided 1997 decision to allow Paula Corbin Jones’ private suit against Mr. Clinton to go forward was that Jones’ allegations about purported events in an Arkansas hotel room had no connection to, and did not arise from, any official act on the President’s part.²⁵ As Professor Sunstein cogently stated in his testimony to the Subcommittee on the Constitution, “it does not diminish the universal importance of telling the truth under oath to say that whether perjury or a false statement is an *impeachable offense depends on*

20. See generally MINORITY STAFF OF THE IMPEACHMENT INQUIRY, 105TH CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS MINORITY VIEWS 8-10, 19-23 (Comm. Print 1998) (discussing President Nixon’s impeachment inquiry and the post-Nixon judicial impeachments).

21. See EVIDENTIARY RECORD XIII, *supra* note 3, at 105 (letter from law professors to Speaker Gingrich et al. stating that treason and bribery create a paradigm case for an impeachable offense, the “distinctive feature” of which is “grossly derelict exercise of official power”).

22. *Id.* at 128 (open letter from historians) (“The Framers explicitly reserved [impeachment] for high crimes and misdemeanors in the exercise of executive power. Impeachment for anything else would, according to James Madison, leave the President to serve ‘during the pleasure of the Senate,’ thereby mangling the system of checks and balances that is our chief safeguard against abuses of public power.”).

23. The brief that the President’s lawyers submitted to the House Judiciary Committee on December 8, 1998, painstakingly details the merits of this position. See EVIDENTIARY RECORD XIII, *supra* note 3, at 27-79 (sections VI and VII).

24. The House Judiciary Committee approved four articles of impeachment and presented them to the full House as House Resolution 611. See H.R. Res. 611, 105th Cong. (1998); 144 CONG. REC. H11,774-75 (daily ed. Dec. 18, 1998) (setting forth the full text of articles). After two days of debate, the House passed Article I (grand jury perjury) by a vote of 228 to 206, 144 CONG. REC. H12,040 (daily ed. Dec. 19, 1998), and Article III (obstruction of justice) by a vote of 221 to 212, *id.* at H12,041. Article II (deposition perjury) and Article IV (abuse of office) failed by votes of 205 to 229 and 148 to 285, respectively. *Id.* at H12,041-42.

25. See *Clinton v. Jones*, 520 U.S. 681, 686 (1997) (“It is perfectly clear that the alleged misconduct of petitioner [with the exception of Jones’ defamation claim, which ‘arguably may involve conduct within the outer perimeter of the President’s official responsibilities’] was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office.”).

what it is a false statement about."²⁶ Because none of the President's conduct—even if it were found to constitute an indictable crime—was a direct attack on or subversion of our government, impeachment was not appropriate.

The best precedent for this conclusion is the fate of the proposed article of impeachment regarding tax fraud against President Nixon. This impeachment article was rejected by the House Judiciary Committee by a bipartisan vote of twenty-six to twelve.²⁷ The article alleged that President Nixon had committed tax fraud on his federal income tax returns for the years 1969 through 1972. The charge, moreover, was for a substantial amount: Estimates of his unreported income for those years ran from \$760,000 to \$960,000. Further, his tax returns were filed under penalty of perjury. Why did Chairman Rodino's Judiciary Committee reject this tax-fraud impeachment article? The primary reason was that it related to President Nixon's private conduct, not an abuse of his authority as the President. During the debate on the article, both Republican and Democratic Members of Congress alike emphasized that personal misconduct could not give rise to an impeachable offense.²⁸

In President Clinton's case, as with the proposed article of impeachment against President Nixon dealing with alleged tax evasion, there was no abuse of distinctly presidential power, no nexus between the misconduct (however one describes it) and the President's official duties. Because there was no high crime, there should not have been an impeachment of President Clinton.

III

THE FORCES THAT DROVE THE IMPEACHMENT PROCESS

If the constitutional impeachment standard is both so high and so clear, one has to ask, "What happened, then? How did we get here?" The answer can be found in the ugly mix of three forces: the abuses by Independent Counsel Kenneth Starr and his staff; the bitterly partisan politics of the House Republicans; and the voracious appetite of ratings-hungry media outlets. This toxic combination resulted in a pure party-line vote in favor of two impeachment articles against the President, despite the public's outcry to the contrary. Each of these three forces is discussed below, in turn.

A. The Independent Counsel

The Special Division²⁹ expanded Independent Counsel Starr's jurisdiction to

26. EVIDENTIARY RECORD XX, *supra* note 12, at 90 (emphasis in original) (testimony of Cass Sunstein, law professor).

27. The details and rejection of this tax-fraud article are taken from MINORITY STAFF OF THE IMPEACHMENT INQUIRY, *supra* note 20, at 8-10.

28. *Id.* at 10 (quoting members' statements driving debate on the articles).

29. The "Special Division" is a creature of the Ethics in Government Act, Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867-73 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)). The Special Division, "a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit," is responsible for "select[ing] and appoint[ing] the independent counsel to investigate the allegations referred by the Attorney General." Benjamin J. Priester et al., *The Independent Counsel*

include the Lewinsky matter on January 16, 1998, pursuant to 28 U.S.C. § 593(c)(1) (1994).³⁰ Specifically, the Special Division gave Starr jurisdiction to investigate “whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . . in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*.”³¹ Starr should have neither sought nor received this expanded jurisdiction. Indeed, Starr now admits that he should not have sought to expand his jurisdiction beyond the Whitewater matter and, at the very least, that the Lewinsky matter should have been investigated by someone else.³²

We know—although only in retrospect—that Starr’s request for an expansion of his jurisdiction to include the Lewinsky matter was tainted from the outset. The “hook” for Starr’s request—the link to his existing investigations—was Vernon Jordan’s supposed role in buying Lewinsky’s silence by finding her a job, which allegedly was similar to the investigation into Jordan’s assistance to Webb Hubbell.³³ Starr, however, failed to disclose what he knew from the Linda Tripp tapes: that Jordan had started to help Lewinsky at least one month before she was subpoenaed in the *Jones* case, and that going to Jordan had been Tripp’s idea.³⁴ This lack of candor on the part of Starr and

Statute: A Legal History, 62 LAW & CONTEMP. PROBS. 5, 12, 16 (Winter 1999) (providing a comprehensive review of the history, structure, and operation of the independent counsel law). As of June 30, 1999, that law has expired. See 28 U.S.C. § 599 (1994) (sun-setting provision “five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1994”); Independent Counsel Reauthorization Act of 1994, 28 U.S.C. § 594 (expired June 30, 1999).

30. See OFFICE OF THE INDEPENDENT COUNSEL, APPENDICES TO THE REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 595(C) SUBMITTED BY THE OFFICE OF INDEPENDENT COUNSEL, SEPTEMBER 9, 1998, PART 1, H.R. DOC. NO. 105-311, at 6-7 (1998) [hereinafter APPENDICES].

31. *Id.* at 6.

32. See John Rogers, *Starr Has Mixed Feelings For Clinton*, AP ONLINE, Sept. 16, 1999, available at 1999 WL 22044792 (“‘I think in retrospect I made a serious mistake,’ he told some 550 people at a public forum here Wednesday. ‘I think it would have been much better for the country for the Lewinsky matter to have been handled by another independent counsel.’”) (quoting Kenneth Starr); Kenneth Starr, *What We’ve Accomplished*, WALL ST. J., Oct. 20, 1999, at A26, available at 1999 WL-WSJ 24918398 (“We should not have sought or accepted additional jurisdiction from the Justice Department. . . . Moving beyond Whitewater/Madison slowed our progress, increased our costs, and fostered a damaging perception of empire building.”).

33. See OFFICE OF THE INDEPENDENT COUNSEL, REFERRAL FROM INDEPENDENT COUNSEL KENNETH W. STARR IN CONFORMITY WITH THE REQUIREMENTS OF TITLE 28, UNITED STATES CODE, SECTION 595(C), H.R. DOC. NO. 105-310, at 3 (1998) [hereinafter REFERRAL]:

The OIC was also informed that Ms. Lewinsky had spoken to the President and the President’s close friend Vernon Jordan about being subpoenaed to testify in the *Jones* suit, and that Vernon Jordan and others were helping her find a job. The allegations with respect to Mr. Jordan and the job search were similar to ones already under review in the ongoing Whitewater investigation.

See also *id.* at 7-9 (describing the jurisdictional basis for the “scope of the referral”).

34. See Steven Brill, *Pressgate*, BRILL’S CONTENT, Aug. 1998, at 123, 127:

Getting more about Jordan on tape was crucial for Starr. Because his office had been established to investigate Whitewater, his people had already concluded that extending their jurisdiction to the Lewinsky affair required their arguing that Jordan’s role with Lewinsky paralleled his suspected but unproven role in helping disgraced former Associate Attorney General Webster Hubbell obtain lucrative consulting assignments in exchange for Hubbell’s remaining silent about the Clintons and Whitewater. . . . [T]heir hook to Whitewater was

his deputies violated the spirit, if not the letter, of the independent counsel law.

Expansion of jurisdiction is potentially available where an independent counsel “discovers or receives information about possible violations of criminal law” by persons who are covered by the statute.³⁵ Under this portion of the independent counsel law, the Special Division can, upon the Attorney General’s request, “expand the prosecutorial jurisdiction of an independent counsel . . . in lieu of the appointment of another independent counsel.”³⁶ The Attorney General’s request is, moreover, the lynchpin of the expansion procedure. If the Attorney General determines “that there are *no* reasonable grounds to believe that further investigation is warranted, [the Special Division] shall have *no* power to expand the jurisdiction of the independent counsel or to appoint another independent counsel with respect to the matters involved.”³⁷ If, on the other hand, the Attorney General “determines that there *are* reasonable grounds to believe that further investigation is warranted, [then the Special Division] *shall* expand the jurisdiction of the appropriate independent counsel to include the matters involved or shall appoint another independent counsel to investigate such matters.”³⁸ The statute does not define “reasonable grounds,” but the standard has been interpreted to be a low one.³⁹ Most importantly, the statute favors expansion of jurisdiction. In making the determinations required by the preliminary investigation provisions of section 592, “the Attorney General shall give great weight to any recommendations of the independent counsel.”⁴⁰

It is clear that the expansion jurisdiction mechanism cannot operate properly if an independent counsel is not completely candid with the Attorney General. The “reasonable grounds” standard has been interpreted to be low, and the independent counsel’s recommendations are statutorily entitled to “great weight.” In the case of the President, an investigation—once triggered—may lead to a Section 595(c) referral to the House and, ultimately, an impeachment of the Chief Executive. Under such a regime, where the stakes are of constitutional magnitude and the balance is already tipped heavily in favor of further investigation, the Attorney General deserves an independent counsel’s neutrality and candor. Indeed, the Attorney General cannot hope to

Jordan’s supposed role.

See also RICHARD A. POSNER, AN AFFAIR OF STATE 68 (1999) (“. . . Jordan had begun helping Lewinsky with her job search before she was identified as a possible witness in the Jones case.”); APPENDICES, *supra* note 30, at 1393 (7/27/98 FBI interview of Monica Lewinsky) (“LINDA TRIPP suggested to LEWINSKY that the President should be asked to ask VERNON for assistance.”).

35. 28 U.S.C. § 593(c)(1994).

36. *Id.* § 593(c)(1).

37. *Id.* § 593(c)(2)(B) (emphasis added).

38. *Id.* § 593(c)(2)(C) (emphasis added).

39. See Priester et. al., *supra* note 29, at 30-32 & n.191 (“Because the preliminary investigation serves a screening function, and because the Attorney General’s appointment determination is not reviewable, the reasonable grounds standard must be low, allowing the Attorney General to request an independent counsel appointment as he or she sees fit.”) (discussing cases interpreting the “reasonable grounds” standard).

40. 28 U.S.C. § 593(c)(2)(A).

make an informed determination of reasonable grounds if an independent counsel reveals information tending to suggest criminal activity while at the same time concealing information that overwhelmingly negates the core theory of that very criminal activity. Thus, to avoid abuse of the broad powers conferred by this law, it is essential that the independent counsel remain fair-minded. Unfortunately, Starr acted neither candidly nor responsibly.

Starr's lack of candor at the critical opening moments of his foray in the Lewinsky matter is especially troubling in light of this overwhelming tilt of the independent counsel law in favor of granting expansion jurisdiction. Given a statutory framework that permitted the independent counsel to "expand his jurisdiction almost at will," it is no exaggeration to say that "[o]nce independent counsel Starr set the process in motion by requesting permission to expand his jurisdiction into the Lewinsky case, the statute almost guaranteed that the Attorney General and the court would authorize it."⁴¹ In the face of these statutory mechanisms favoring expansion jurisdiction, it was more, not less, important that Starr fully and fairly disclose to the Attorney General all of the information he had about a supposed Jordan/Lewinsky job-search connection to previous investigations—especially information tending strongly to negate the existence of any such connection or pattern.

It appears, however, that the Lewinsky matter was simply too enticing to a man who already had spent millions of dollars and thousands of hours trying to get the President, to no avail.⁴² In short, it had become personal for Starr and his supporters. This motivation is illustrated by, among other things, the fact that, without seeking expanded authority, Starr had already attempted to obtain evidence of alleged extramarital affairs involving the President.⁴³ Further, in the week leading up to the President's deposition in the *Jones* case, Starr and his deputies essentially used Linda Tripp as their agent, arming her with information to turn over to Jones' lawyers on the eve of the deposition.⁴⁴

Starr continued to use highly aggressive prosecutorial tactics during 1998. He subpoenaed the President's lawyers, the President's Secret Service detail, and the President himself.⁴⁵ In the process of pressing these subpoenas, Starr

41. Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 662-63, 665 (1998).

42. See John Gibeaut, *In Whitewater's Wake*, A.B.A. J., Nov. 1998, at 36, 37 (noting that Starr's September 1998 report to Congress came after "[m]ore than 4 years and \$40 million").

43. See Bob Woodward & Susan Schmidt, *Starr Probes Clinton Personal Life*, WASH. POST, June 25, 1997, at A1, available at 1997 WL 11162845:

FBI agents and prosecutors working for Independent Counsel Kenneth W. Starr's Whitewater investigation have questioned Arkansas state troopers in recent months about their knowledge of any extramarital relationships Bill Clinton may have had while he was Arkansas governor The troopers said investigators asked about 12 to 15 women by name, including Paula Corbin Jones, a former Arkansas state employee who has filed a civil lawsuit against Clinton alleging he sexually harassed her in 1991.

44. See Brill, *supra* note 34, at 127-28 (detailing Starr's work with Tripp and Tripp's work with Jones' lawyers on the eve of the President's deposition).

45. See Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 312 & n.7 (1999) ("The President avoided the 'indignity' of a personal appearance

precipitated the substantial erosion of the law of attorney-client privilege as applied to government lawyers.⁴⁶ Starr's office also brought dozens of witnesses before three different grand juries, as the voluminous attachments to his September 1998 report to Congress memorialize. Finally, Starr and his office engaged in a public relations campaign for no other purpose than to increase public support for his investigation of the President.⁴⁷ Of course, Starr had at his disposal a media circus eager to report any leak.⁴⁸

Independent Counsel Starr's September 1998 referral to Congress also illustrates numerous abuses. First, Starr chose to make the delivery of his report to Congress as dramatic and public as possible. As shown on television screens across the country, boxes and boxes of materials—including a 453-page summary, 3,000-plus pages of appendices to the summary, and 60,000 pages of additional related materials—were carried into the Capitol Building. The report and its supporting materials were full of salacious sexual details calculated to embarrass the President to the greatest extent possible.⁴⁹ The

when the White House worked out a deal with Starr: The subpoena was withdrawn and the President agreed to give his testimony by closed-circuit television.”).

46. Although the Supreme Court rejected Starr's efforts to pierce the attorney-client relationship in the case involving deceased White House lawyer Vincent Foster and his own attorney, *see Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the Court also refused to review two cases that sharply limit the scope of the attorney-client privilege with respect to government lawyers and their clients. In one case, the Supreme Court let stand a lower court ruling that appears to have made new law with respect to at least two aspects of privilege previously considered settled. *See In re Lindsey*, 158 F.3d 1263 (D.C. Cir.), *cert. denied*, 119 S. Ct. 446 (1998). Forging a new rule for government agencies and their lawyers that diverges from the general rule applying to all other attorney-client relationships, the D.C. Circuit held that the scope of a government agency's attorney-client privilege is narrower in criminal cases than in civil cases. *See id.* at 1272-74. The *Lindsey* court also held that, at least in criminal cases, the very existence of the attorney-client privilege depends on the subject of the legal advice for which the client asserts protection. *See id.* at 1266 (holding that communication is not privileged if it contains “information of possible criminal offenses”). In another case, the Supreme Court declined to review a decision of the Eighth Circuit holding discoverable the notes taken by government lawyers in attendance at meetings with First Lady Hillary Clinton and her personal lawyers. *See In re Grand Jury Subpoena Duce Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 521 U.S. 1105 (1997). Similar to the D.C. Circuit's holding in *Lindsey*, the Eighth Circuit held that the government's attorney-client privilege may not be used to shield communications from disclosure to a federal grand jury. *See id.* at 915-18. For a comprehensive discussion of privilege case law resulting from independent counsel investigations, see Priester et al., *supra* note 29, at 74-109.

47. *See Brill, supra* note 34, at 132 (quoting Starr explaining, with respect to purported leaks from his office, that “I think it is our obligation to counter that kind of misinformation . . . and it is our obligation to engender public confidence in the work of this office. We have a duty to promote confidence in the work of this office.”).

48. *See id.* at 151:

Many now agree that it is hard to imagine that a powerful independent counsel under no real checks and balances is what the Founding Fathers had in mind when they wrote the Constitution. It is harder still to imagine that a press corps helping that prosecutor in his work by headlining whatever he leaks out—instead of remaining professionally suspicious of him and his power—is what the founders had in mind when they wrote the First Amendment.

49. Even Judge Posner, who is generally supportive in his evaluation of Starr's work, acknowledged that “[t]he most compelling criticism of the Starr Report is that there was no need to put so much sex into it.” POSNER, *supra* note 34, at 80; *see also id.* at 88 (describing “the mountain of ‘evidence’ assembled by” Starr as “an astonishing farrago of scandal, hearsay, innuendo, libel, trivia, irrelevance, mindless repetition, catty comments about people's looks, and embarrassing details of private life”). Judge Posner was moved to observe that

report was also extremely adversarial, directly advocating the impeachment of the President. It was not simply a straightforward presentation of the facts that would, as the independent counsel statute had authorized, “advise the House of Representatives of any substantial and credible information . . . that may constitute grounds for an impeachment.”⁵⁰ Rather, it was essentially a legal brief arguing that the President had committed impeachable offenses.⁵¹ Starr continued to act as the President’s personal accuser both by testifying for a full day before the House Judiciary Committee as part of its impeachment inquiry in November 1998⁵² and by forcing Lewinsky to meet with the House Managers during the Senate trial under threat of losing her immunity from prosecution.⁵³

The year-plus impeachment effort conducted by Independent Counsel Starr and his staff, combined with the forces of congressional partisanship and the media, helped to assure that the President would be impeached, regardless of what the Constitution required and what the vast majority of the American people wanted.

B. The Partisan Congress

In turning to a discussion of the partisanship that characterized the House’s handling of the impeachment, it is useful to focus on the period from September to November 1998, recalling, again, that the majority of the American people were opposed to impeachment.

Two days after Starr made the dramatic delivery of his report, the House voted to release it to the public—including an on-line version on the World

[t]here is something a little crazy about turning the White House upside down in order to pin down the details of Clinton’s extramarital sexual activities so that Paula Jones might have a shot at winning her longshot suit for redress for an offensive but essentially harmless advance made (maybe) by Clinton before he became President.

Id. at 91.

50. 28 U.S.C. § 595(c).

51. First, the report began with a lengthy narrative that supplemented facts learned from grand jury proceedings with Starr’s own theory of the case for impeachment. *See* REFERRAL, *supra* note 33, at 11-128. Second, the report set forth a detailed legal argument that “[t]here is substantial and credible information supporting . . . eleven possible grounds for impeachment” of the President. *Id.* at 129, 129-210. For a compelling argument that the referral mechanism of section 595(c) is unconstitutional as applied to an investigation of the President, *see* Gormley, *supra* note 41, at 324-52.

52. *See Impeachment Inquiry Pursuant to H. Res. 581: Appearance of Independent Counsel Before the Committee on the Judiciary, House of Representatives*, 105th Cong., Serial No. 66, at 14-204 (1998) (statement of Kenneth Starr, Independent Counsel). Starr’s ethics adviser resigned in protest over this testimony. *See* Juliet Eilperin & Peter Baker, *Judiciary Committee GOP Determined to Impeach*, WASH. POST, Nov. 21, 1998, at A1 (“Ethics adviser Samuel Dash quit yesterday to chastise Starr for taking sides on impeachment in an ‘abuse of your office.’”).

53. *See* Peter Baker, *Judge Orders Lewinsky To Cooperate; House Team’s Plan to Interview Former Intern Roils Senate Trial*, WASH. POST, Jan. 24, 1999, at A1, available at 1999 WL 2195646:

With Lewinsky at the top of their list, prosecutors won the right to prepare for her possible testimony by enlisting Starr to enforce an immunity agreement requiring her cooperation. Chief U.S. District Judge Norma Holloway Johnson ruled in the morning that Lewinsky must submit to a meeting with House prosecutors or “forfeit her protections under the immunity agreement” she struck with Starr last July to avoid prosecution.

Wide Web—effectively “sight unseen.”⁵⁴ By September 28, 1998—less than three weeks later—all of the report, except for a small amount of redacted material, was published.⁵⁵ Even though the summary was published “with a degree of bipartisan comity, . . . [the] subsequent release of Clinton’s videotaped grand jury testimony and 3,183 pages of appendices to the summary report was accompanied by two days of bitter wrangling ending in a straight party-line vote.”⁵⁶ Moreover, the publication of the summary report on the Internet drew a massive audience across the country, setting records for traffic on many media websites.⁵⁷

However, neither these materials nor the release and subsequent televising of the President’s grand jury testimony created the Republicans’ desired impeachment groundswell: “Billed in advance as a potential political earthquake, President Clinton’s videotaped testimony before independent counsel [Starr’s] grand jury hit Washington . . . with only a fraction of the force Democrats had feared and Republicans had anticipated.”⁵⁸ Polls taken soon after the President’s grand jury testimony was released showed that the release did not have its intended effect, but, rather, had the opposite effect. For example, one week after the release, one “survey found that rather than further damag[ing] Clinton, as Republicans had hoped, the airing of the [P]resident’s testimony in the White House sex scandal may have hurt Congress instead.”⁵⁹ According to this poll, “the Republican-led Congress’ approval rating dropped to 54% from 63% since the tape ran on national television last Monday, while the Democratic [P]resident’s approval rating remained strong, at more than

54. Guy Gugliotta & Juliet Eilperin, *Hyde Panel to Review More Data; Hearing Planned in Early October to Debate Opening Inquiry*, WASH. POST, Sept. 25, 1998, at A17.

55. See POSNER, *supra* note 34, at 16 n.1. Judge Posner, for example, described the size of the published record as follows:

The House Judiciary Committee published five volumes of testimony and other evidence (including some materials that are not really evidentiary, such as the Independent Counsel’s legal analysis of obstruction of justice law), amounting to some 8,000 pages. Because the published volumes use a condensed format for much of the grand jury testimony, a format in which each published page contains four to six pages of the original transcript, 8,000 is an underestimate of the total number of pages; but I would be surprised if the total normal page equivalents in the published volumes exceed 30,000 pages. The other 30,000 pages, I surmise, are phone company records, visitor logs, and other documents . . .

Id. at 125 n.61.

56. Gugliotta & Eilperin, *supra* note 54, at A17.

57. See Frank Houston, *What I Saw in the Digital Sea*, COLUM. JOURNALISM REV., July-Aug. 1999, at 34, 36:

Each new development—Monica’s immunity deal with Ken Starr, the DNA test, and so on corresponds to a boost, or ‘spike,’ in traffic [at <www.foxnews.com>]. The definition of a big day for a major news story at Fox, in terms of page views, moves from 20,000 to 30,000, even 40,000 to 600,000 for the release of the Starr report on the Internet on September 11.

See also Linton Weeks & Leslie Walker, *Required Reading*, WASH. POST, Sept. 12, 1998, at E1 (“In the brief history of news on the Net, yesterday broke all records.”). Some of the other websites that set traffic records were <msnbc.com>, <washingtonpost.com>, and <foxnews.com>. See *id.*

58. Dan Balz & Ceci Connolly, *For Political Pros, Explosive Moment Was A Dud*, WASH. POST, Sept. 22, 1998, at A19.

59. *Clinton Probe Partisan, Poll Says*, L.A. TIMES, Sept. 28, 1998, at A11, available at 1998 WL 18878428.

60%.”⁶⁰ The wide reporting of Republicans’ frustration and disappointment with the reverse effect of the airing of the President’s testimony confirms that their motive for releasing the tape was to score political points in advance of the election, not simply to establish a full and fair public record of events.⁶¹

Unfazed, and on the basis of Starr’s report, the House Republicans approved an open-ended impeachment inquiry on October 8, 1998, the day before adjourning to return home to campaign for the November elections, then less than a month away.⁶² Is it too cynical to suppose that the Republicans were motivated by purely partisan politics when they chose to release Starr’s entire referral into the public record, to air the President’s testimony on TV, and to launch an impeachment inquiry on the eve of an election? This sequence of events—the arrival of the Starr report in the House, the Republicans’ hasty and sensationalized publication and posting of that report on the World Wide Web, and the vote in favor of an open-ended impeachment inquiry just before Congress adjourned to campaign—contains every element of the toxic mix of media and politics that, with the help of Starr, led to the President’s impeachment.

As presidential historian Michael Beschloss has noted, “[a]fter Election Day 1998, when Republicans nearly lost the House of Representatives and did more poorly than expected in the Senate, many supposed that the steam had gone out of impeachment. Polls showed that a majority of Americans thought the sanction was out of proportion to Clinton’s alleged offenses.”⁶³ This supposition proved incorrect. After the Republican losses in the November 1998 election, and with Speaker Gingrich’s resignation from the House, Congressman DeLay of Texas filled the leadership vacuum. With Chairman Hyde’s help, he drove the House Republicans forward to an impeachment vote.⁶⁴ The strong national consensus against impeachment simply did not matter.

60. *Id.*

61. See, e.g., Dick Polman, *Impeachment Holds Traps for Both Sides*, ARIZ. REPUBLIC, Oct. 4, 1998, at A1, available at 1998 WL 7801256 (“In fact, conservative activists are keeping close tabs on the GOP, looking for any signs of weakness. Last week, when some Republicans were disappointed that Clinton’s grand jury video failed to sink him, conservative commentator David Tell scolded them in a magazine piece entitled ‘Grow Up—and Impeach.’”); Richard Whittle, *Lack of Public Outrage Takes GOP By Surprise*, DALLAS MORNING NEWS, Sept. 24, 1998, at 1A, available at 1998 WL 13105055 (“The outrage some Republicans expected to grip the public after President Clinton’s grand jury testimony was televised hasn’t materialized—just the opposite. And that’s driving Mr. Clinton’s foes crazy.”).

62. See Peter Baker & Juliet Eilperin, *Impeachment Inquiry Approved; 31 House Democrats Back GOP; Proposal to Limit Probe Is Rejected*, WASH. POST, Oct. 9, 1998, at A1.

63. Michael R. Beschloss, *Introduction to THE IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON* ix, xv (Merrill McLoughlin ed., 1999); see also Juliet Eilperin & John F. Harris, *Impeachment Hearings May Be Scaled Back*, WASH. POST, Nov. 5, 1998, at A1 (“In exit polls, most voters expressed impatience with the controversy; 63 percent opposed impeachment and 58 percent said Congress should drop the matter without hearings.”).

64. See Eric Pianin & Guy Gugliotta, *Likelihood of Impeachment Grows in House; Republicans See Clinton as Arrogant, Unrepentant*, WASH. POST, Dec. 6, 1998, at A1 (“But Hyde and the Judiciary Republicans—notable for their conservatism—pressed on, and with the House GOP leadership largely in disarray, the private debate within the party has been largely controlled by House Majority Whip Tom DeLay (R-Tex.), one of Clinton’s most outspoken critics.”).

One might argue that the Republicans viewed the impeachment issue as one that could help the party spring back from the defeat in the November elections. Indeed, if the November elections had gone differently, we may not have had an impeachment vote—that is, the congressional Republicans might have been more willing to bow out gracefully from the box within which they found themselves in mid-November, had they retained a larger majority in the House. Instead, they chose to plow ahead toward impeachment, knowing the Senate provided a safety net to stop the impeachment train.

The bitter partisanship that plagued efforts to resolve the Lewinsky matter short of impeachment is exemplified by the House Judiciary Committee's failure to begin its impeachment inquiry with a determination of the proper legal standard for presidential impeachment. When the House debated whether to launch an impeachment inquiry, the Democrats offered a resolution that would have required the Judiciary Committee to first determine the presidential impeachment standard.⁶⁵ The proposal was rejected, however, in favor of a grant to pursue an unstructured, open-ended impeachment inquiry.⁶⁶ Indeed, it was not until two months after the Starr report arrived in Congress that the Subcommittee on the Constitution took testimony from historians and law professors on the proper interpretation of "other high Crimes and Misdemeanors," and this issue was never taken up by the full House Judiciary Committee.⁶⁷ One suspects that the committee did not determine a standard in advance because to have done so would have exposed the partisan nature of the inquiry.⁶⁸

The Committee, in fact, never agreed upon a standard during the entire impeachment process.⁶⁹ Nor did the House as a whole. This is not surprising, for, to have done so, the Republican majority would have had to publicly abandon the typically conservative constitutional methodology known as

65. See Baker & Eilperin, *supra* note 62, at A1 (Democrats argued that the House resolution "should also require the committee first to determine standards for impeachable offenses and then decide whether the allegations against Clinton, even if true, are serious enough to reach that threshold.").

66. See *id.* ("The resolution Hyde pushed through empowers his committee to conduct a wide-open inquiry modeled after the impeachment proceedings that led to President Richard M. Nixon's resignation in 1974.").

67. See EVIDENTIARY RECORD XIII, *supra* note 3, at 7:

To date, the Judiciary Committee has declined to articulate or adopt standards of impeachable conduct. Its inquiry has proceeded and (it appears) its vote will occur with no consensus among Committee members as to the constitutional meaning of an impeachable act. That is regrettable. For even if the constitutional standard against which the Referral must be measured lacks the precision of a detailed statute, it nonetheless has a determined and limited content.

68. See *id.* ("The Committee's failure to define the applicable standard has necessarily created the perception that an *ad hoc* 'standard' is being devised to fit the facts. A constitutional standard does in fact exist, and were the Committee to confront the question directly, it would be evident that the Constitution's rigorous showing has not been made here.").

69. See Neal Kumar Katyal, *Impeachment as a Congressional Constitutional Interpretation*, 63 LAW & CONTEMP. PROBS. 169 (Winter/Spring 2000).

“originalism.”⁷⁰ Professor Katyal has noted the Republicans’ disregard for originalism in their pursuit of the President.⁷¹ Moreover, he may even be right to suggest that one can, as a theoretical matter, justify a constitutional methodology that prescribes originalism for judges but a more “flexible and nuanced” approach in the legislature.⁷² In the impeachment inquiry, however, the House Republicans were not merely flexible. Rather, they swayed whichever way the partisan wind blew.

It must be noted that House members were not the only Republicans casting originalism overboard. Senate Majority Leader Lott presents another clear example of that conduct. In 1974, then a member of the House, Lott was one of ten Republicans to sign a “Minority Views” portion of the report on the Nixon impeachment inquiry; it summarized the impeachment standard as follows:

the Framers of the United States Constitution intended that the President should be removable by the legislative branch only for serious misconduct dangerous to the system of government established by the Constitution. Absent the element of danger to the State, we believe the Delegates to the Federal Convention of 1787, in providing that the President should serve for a fixed elective term rather than during good behavior or popularity, struck the balance in favor of stability in the executive branch.⁷³

Then-Representative Lott’s emphasis on the Framers’ intent was admirable, but not steadfast. In September 1998, after the President’s grand jury testimony had been broadcast on television and the House Republicans were advocating a broad impeachment inquiry, now-Senator Lott stated that “bad conduct” that brings the presidency into “disrepute” is enough, by itself, to warrant impeachment.⁷⁴ I would submit that nothing has changed from 1974 to 1999, except the sitting President’s party affiliation.

The partisanship that fueled the impeachment process was nothing more than the continuation of the other failed Republican efforts against the President—Whitewater, Travelgate, and Campaign Finance, to name a few.⁷⁵

70. “[T]he core tenet of originalism,” as one commentator has observed, “holds that the principal task of judges called upon to interpret the Constitution is to ascertain and give effect to the original intentions of the framers and ratifiers of the Constitution.” James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 3 (1991).

71. See Katyal, *supra* note 69, at 169.

72. *Id.* at 170.

73. HOUSE JUDICIARY COMMITTEE, IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 365 (1974) (“Minority Views” of ten House Members, including then-Rep. Lott).

74. Juliet Eilperin & John F. Harris, *House GOP Pushes Wide Clinton Probe; President Wants Time and Subject Limits*, WASH. POST, Sept. 30, 1998, at A1 (“In the Senate, partisan tensions flared anew after Majority Leader Trent Lott (R-Miss.) said ‘bad conduct’ that brings the presidency into ‘disrepute’ is sufficient grounds for impeachment. He declined to say whether he believes Clinton’s conduct fits that description.”).

75. Indeed, having failed in February to impeach the President, Republicans have continued those efforts. The President exercised his clemency power to release imprisoned former members of the Puerto Rican nationalist group FALN, a Spanish acronym for Armed Forces of National Liberation, who were willing to renounce violence. Congressman Burton’s Government Reform Committee responded by demanding documents and witnesses, of course. See Charles Babington & Juliet Eilperin, *No Letup in Probes of Clinton Presidency*, WASH. POST, Sept. 17, 1999, at A1 (“Rep. Dan Burton (R-

One cannot be surprised to recall that Representative Bob Barr of Georgia first introduced a House resolution calling for the President's impeachment in 1997 based on Whitewater and campaign-finance allegations, months before "Lewinsky" was a household name.⁷⁶

C. The Media

Neither Independent Counsel Starr nor the House Republicans could have brought about the impeachment of the President without the help of media outlets willing to echo every shout in the impeachment process. The news media's relentless coverage, from the beginning, of every sordid detail of the Lewinsky story culminated in—indeed, helped to bring about—the impeachment of the President. As noted First Amendment lawyer Floyd Abrams stated in a December 1998 forum sponsored by the *Columbia Journalism Review*,

[o]nce the press, all of it, treated the question of whether the [P]resident had sex with Monica Lewinsky and then sought to cover it up as an extraordinarily serious topic, a topic truly worthy of repeated coverage, the die was cast. The risk of an impeachment immediately became all the realer once that definition of the story was chosen. The press made sort of a collective judgment that the topic was not only newsworthy but earthshaking.⁷⁷

In essence, the media helped to shape the nature and meaning of events by the way in which they reported on those events. The shaping power of the media is a feature of everyday life that the Framers could not have foreseen when they set about to provide a legal standard for impeachment in the Constitution. Moreover, it is difficult to imagine how one could frame an impeachment standard that would resist this "shaping power". In any case, the media's overwhelming power to shape events now threatens to be an integral part of how impeachment, or any other high political drama, will be played out.

In one sense, it is not surprising that the media—comprised, for the most part, of profit-driven enterprises—focused so intently upon the Lewinsky matter. It had all the trappings of a great story—sex, which sells; a bare-knuckled political clash, which is good theater; and good guys and bad guys, even if the hats did keep changing mid-scene. These elements of a sensational story were an engine that a media outlet could harness to grow its fortunes.

Consider, for example, MSNBC, a 24-hour cable news network and Internet

Ind.), chairman of the House Government Reform Committee, rebuked the White House for rejecting his panel's request for documents and witnesses pertaining to Clinton's decision to grant clemency to the Puerto Ricans.").

76. See Laura Ingraham, *The Folly of Impeachment Chic*, WASH. POST, Oct. 26, 1997, at C1 (Barr "took impeachment out of quirkdom and into the halls of Congress when he requested that the House Judiciary Committee begin an impeachment investigation of both the president and vice president . . . cit[ing] Whitewater and campaign-finance allegations in accusing Clinton and Gore of 'abuse of power.'").

77. Quoted in Joan Konner, *Of Clinton, the Constitution, and the Press*, COLUM. JOURNALISM REV., Mar.-Apr. 1999, at 6; see also *id.* ("I believe the media, all of it considered together, has been complicit, often instrumental, in leading to the impeachment.") (quoting Floyd Abrams).

service that Microsoft and NBC launched together on July 15, 1996.⁷⁸ This network “boosted its ratings by striving to become the all-Monica, all-the-time network.”⁷⁹ First, “both ‘The Big Show’ and another nightly [Keith] Olberman offering, ‘The White House in Crisis,’ focused on the Clinton/Lewinsky matter relentlessly night after night, when there were major developments and when there weren’t.”⁸⁰ The strategy worked: “[T]he audience for ‘The Big Show’ was 148 percent larger in October 1998 than it was a year before . . . [and] [t]he number of households tuned in to MSNBC prime time shows that month was 137 percent higher than the year before.”⁸¹ Another MSNBC show, *Hardball*, has a similar history. “In March 1998, *Hardball* was expanded to an hour to cover the [P]resident’s debacle, and a month later started rebroadcasting at 11:00 P.M. Rarely did a day go by without the Lewinsky matter lurching front and center.”⁸² Again, this marketing strategy apparently succeeded: “After its debut on January 15, 1997, *Hardball* drew an average of 252,000 households in its first year. During 1998, however, *Hardball* averaged a 0.85 total rating, reaching some 559,000 households per show. . . . Not surprisingly, Matthews’ top-rated shows have all focused on the White House scandal.”⁸³ The market growth of MSNBC during the Lewinsky matter is not an isolated phenomenon.⁸⁴

The Lewinsky story demonstrated the inevitable shaping and driving power of the media within the first days of the story’s breaking.⁸⁵ The Lewinsky story first broke on Matt Drudge’s web site at 1:11 a.m. on Sunday, January 18, 1998.⁸⁶ Note the time—1:11 in the morning. Forget the old news cycle.⁸⁷ Foreshadowing much of the oddly self-referential reporting style that typified the weeks and months to come,⁸⁸ Drudge’s story was about another media outlet’s story—namely, *Newsweek*’s decision not to run a story by reporter Michael Isikoff about an alleged presidential affair with an intern.⁸⁹

78. See Alicia C. Shepard, *White Noise*, AM. JOURNALISM REV., Jan.-Feb. 1999, at 20, 23.

79. *Id.* at 24.

80. *Id.* at 23.

81. *Id.*

82. Gay Jerve, *Chris Matthews Won’t Shut Up*, BRILL’S CONTENT, Sept. 1999, at 79, 120.

83. *Id.* (emphasis omitted).

84. Consider, for example, the Fox News Channel. It began in October 1996. See Shepard, *supra* note 78, at 23. According to journalist Frank Houston, who worked in the Internet arm of Fox News, Fox News Online, from October 1996 to December 1998, “page views on the Fox site as a whole roughly doubled from late ‘97 to late ‘98—from 600,000 to 1.2 million. They hit an all-time high of 2.2 million on the afternoon of December 16.” Houston, *supra* note 57, at 36.

85. For comprehensive accounts of the way in which the media handled the Lewinsky story in its first few months, see Brill, *supra* note 34. See also Jules Witcover, *Where We Went Wrong*, COLUM. JOURNALISM REV., Mar.-Apr. 1998, at 18.

86. See Brill, *supra* note 34, at 129.

87. On the Internet, news coverage “is fast and nearly cycle-less, very competitive, and, at the same time, repetitive—a lot, in short, like cable television news.” Houston, *supra* note 57, at 36.

88. See Matt Zoller Seitz, *Media Coverage Burned the Scandal at Both Ends; Public Disgusted by Events*, NEW ORLEANS TIMES-PICAYUNE, Feb. 14, 1999, at 14A, available at 1999 WL 4394746 (“The 24-hour news cycle dictated by cable television has fused with the perpetual information machine of the Internet to produce a climate wherein the news—and the news about the news—cannot be slowed, much less stopped. . . . Reporters reported on the reporting of other reporters.”).

89. See Brill, *supra* note 34, at 129.

By January 21, 1998, both ABC and the *Washington Post* were reporting the story.⁹⁰ The drive to scoop the story—another natural corollary of profit-based journalism—led to sloppy sourcing:

Into the vacuum created by a scarcity of clear and credible attribution raced all manner of rumor, gossip, and, especially, hollow sourcing, making the reports of some mainstream outlets scarcely distinguishable from supermarket tabloids. The rush to be first or to be more sensational created a picture of irresponsibility seldom seen in the reporting of presidential affairs.⁹¹

This occurred, despite the journalistic principle that “sources constitute the backbone of a news story in traditional media like print and broadcast.”⁹² Indeed, the feeding frenzy led to sourcing so sloppy that, in effect, there often was no verification of the underlying facts at all. For example:

[t]wo stories . . . were published on Web sites, then hastily retracted. One was a *Wall Street Journal* report that a White House steward told the grand jury he had seen the President and Lewinsky alone. The other was a *Dallas Morning News* report that a Secret Service agent had observed the President and Lewinsky in a compromising situation.⁹³

Fundamental journalistic standards had fallen by the wayside, outstripped by the simple desire to be first: “The advent of twenty-four hour, all-news cable channels and the Internet assured the story of non-stop reportage and rumor.”⁹⁴

Political talk shows were particularly instrumental in framing the Lewinsky matter as a question of impeachment early on in the life of the story. Professional journalists have noted the rising popularity of political talk shows.⁹⁵ The reason for their popularity, from the producer’s perspective, is that they are less costly to produce: “One of the cheapest and easiest ways to fill air time is with political talk shows.”⁹⁶ In a real sense, these shows started the impeachment process virtually immediately. As one journalist noted, “[w]hereas in the Watergate case the word impeachment was unthinkable and not uttered until much later in the game, the prospect of a premature end to the

90. See *id.* at 130; Witcover, *supra* note 85, at 20.

91. Witcover, *supra* note 85, at 19.

92. B. Shyam Sundar, *Effect of Source Attribution on Perception of Online News Stories*, 75 JOURNALISM & MASS COMM. Q. 55, 55 (1998).

93. Tom Hamburger, *Impeach the Media?*, STAR TRIB., Feb. 15, 1999, at 13A, available at 1999 WL 7486242. The *Wall Street Journal* episode is described in detail in Witcover, *supra* note 85, at 23-24, and the *Dallas Morning News* episode is described in detail in the same piece, *id.* at 21, 23.

94. Witcover, *supra* note 85, at 19.

95. See, e.g., *id.*; Shepard, *supra* note 78, at 23-24. The growth in the popularity of these shows on television parallels a similar development over the last decade in radio: “Political talk radio grew in scope and clout during the past decade. The number of radio stations employing a talk format has grown dramatically, standing at more than 1,000.” Michael Pfau et al., *The Influence of Political Talk Radio on Confidence in Democratic Institutions*, 75 JOURNALISM & MASS COMM. Q. 730, 732 (1998).

96. Shepard, *supra* note 78, at 23; see also Deborah Tannen, *TV’s War of Words*, BRILL’S CONTENT, Sept. 1999, at 88:

Why are more news and public-affairs shows turning into shouting matches between left and right, liberal and conservative, Democrat and Republican? For one thing, with round-the-clock news, the airwaves have to be filled, and these shows are easy and economical to assemble: Find a conservative and a liberal and you’ve got your show. Also, with the advent of cable has come increased competition, so producers need to make shows entertaining.

Clinton presidency was heard almost at once.”⁹⁷ Steven Brill described the January 21, 1998, broadcast of ABC’s *Good Morning America* as follows:

Switching to the pundits, ABC’s Stephanopoulos, the former Clinton aide, seconds a notion brought up five minutes earlier by Sam Donaldson, saying: “There’s no question that . . . if [the allegations] are true . . . it could lead to impeachment proceedings.” It has taken less than 70 minutes from the breaking of the story of an intern talking on the phone for the discussion to escalate to talk of impeachment.⁹⁸

Perhaps appreciating the dynamics of the new twenty-four-hours-a-day, seven-days-a-week news cycle, NBC Washington Bureau Chief Tim Russert declared on January 21, 1998, and again the following day that the President would have a mere forty-eight to seventy-two whole hours to give the country a full explanation or face impeachment.⁹⁹ The political talk shows also included talk of resignation within those first few days.¹⁰⁰ Many reporters and commentators—a distinction that became increasingly blurred during the course of the impeachment drive¹⁰¹—became wedded to these hastily adopted positions and probably felt a natural urge to advance them for the remainder of the controversy to save their own personal credibility. The risk of biased news coverage is obvious.

The media did not lose their appetite for covering the Lewinsky story from January 1998 throughout the Senate trial. Consider the output of the Associated Press (“AP”), a wire service that “serves 1,550 newspapers in the United States.”¹⁰² The AP devoted enormous resources to covering the Lewinsky matter and produced a staggering number of stories on it: “The Washington bureau of the [AP] moved 4,109 stories on the scandal in the one year after it broke on January 21, 1998 [an average of more than eleven stories per day]. It had twenty-five reporters working regularly on the story.”¹⁰³ Similarly, the “three traditional networks devoted 1,931 minutes to the Clinton scandal story on their evening news shows in 1998—more than the next seven most-aired subjects combined.”¹⁰⁴

97. Witcover, *supra* note 85, at 19.

98. Brill, *supra* note 34, at 130-31.

99. *Id.* at 134, 135.

100. See Witcover, *supra* note 85, at 19:

ABC News’s White House correspondent Sam Donaldson speculated on *This Week With Sam and Cokie* on January 25, 1998, that Clinton could resign before the next week was out. “If he’s not telling the truth,” Donaldson said, “I think his presidency is numbered in days. This isn’t going to drag out . . . Mr. Clinton, if he’s not telling the truth and the evidence shows that, will resign, perhaps this week.”

101. See Neil Hickey, *The Perils of Punditry*, COLUM. JOURNALISM REV., Jan.-Feb. 1999, at 42 (“Many print journalists appear on broadcast and cable channels, national and local, to engage in punditry—some of it enormously speculative, unsourced, and, at times, emotional—that they would never attempt in their customary roles as reporters on a beat.”); Shepard, *supra* note 78, at 23 (“[J]ournalists are valued as voices of reason, talk show producers say. But once the cameras start rolling, many of them can’t help revealing their opinions rather than sticking to the facts.”).

102. Michael Gartner, *How the Monica Story Played in Mid-America*, COLUM. JOURNALISM REV., May-June 1999, at 34.

103. *Id.* at 35.

104. *Id.*

Importantly, this Lewinsky-story coverage crowded out serious news about public policy matters. For example, in March 1998, President Clinton proposed his “Patients’ Bill of Rights,” and Republicans also proposed legislation on the same topic.¹⁰⁵ Elected officials thus clearly believed that the issue was of substantial importance to the American people. This issue, however, was virtually lost in the media’s obsession with the Lewinsky scandal: “The *New York Times* carried only five stories about the proposed legislation in March, a month in which it ran 220 articles about the Clinton-Lewinsky scandal.”¹⁰⁶ The media clearly had lost their perspective.

Why was the media sensationalizing this sad chapter in American history? This was not the investigative reporting that had occurred in Watergate. What had happened to the media as envisioned in the First Amendment? It “careened from one badly sourced scoop to another in an ever more desperate need to fill its multimedia, 24-hour appetite, . . . abandon[ing] its treasured role as a skeptical ‘fourth estate.’”¹⁰⁷ Indeed, it is lamentable that, because media “[c]ompetition has become more brutal than ever,”¹⁰⁸ the nation’s “network and newspapers and new cable channels . . . tend to emphasize entertainment values over traditional journalistic values.”¹⁰⁹ Like it or not, this new media world is the forum within which partisan political attacks, like those against the President by both Starr and the House Republicans, are now waged. This forum urges the combatants on to the finish, giving them virtually no chance to pause and reflect.

IV

CONCLUSION

What are the lasting results of the 1998-99 impeachment process? I, for one, fear that the spectacle of bitter partisan politics broadcast across the country on a continuous basis will discourage others from engaging in public service. The House vote to impeach the President, and the now-prevalent “scorched earth” politics that it typifies, can only deepen the cynicism about and contempt for government that is already widespread. Can anyone doubt that many young people and others who were considering public service in government, who would have made important contributions to our shared public life, have changed their plans? Why, after all, would they want to make the sacrifices that government service can demand when one result—more likely now than ever—is public humiliation over private foibles before a national audience?

It also seems plain that the House has, as a practical matter, lowered the standard for presidential impeachment by failing to observe the high bar set by the Framers. Although Professor Bloch has argued that the Senate’s rejection

105. See Hamburger, *supra* note 93, at 13A.

106. *Id.*

107. Brill, *supra* note 34, at 124.

108. Editors, *What We Do Now*, COLUM. JOURNALISM REV., Mar.-Apr. 1998, at 25, 25.

109. Hamburger, *supra* note 93, at 13A.

of the House Manager's case restored or raised the standard,¹¹⁰ I think it more likely that the acquittal exacerbated the problem. The House can now impeach on a purely partisan basis to score points against the opposing party and let the Senate sort out the mess. Anyone who doubts this prospect need only look to the four House Republicans who voted to impeach the President and, in a letter to the Senate three days later, urged the Senate not to remove him.¹¹¹ They used impeachment not as a last-ditch measure to fend off a direct attack on our very form of government, which was its intended function. Instead, they used impeachment as a fodder for the next fundraising letter or stump speech.

In sum, the impeachment process failed and, in the process, did a great deal of damage along the way. All the same, the solution is not to attempt to improve on the delicate balance that the Framers struck between the President and Congress, including the role that impeachment, properly understood, should play in maintaining that balance. They selected an appropriately high standard to govern the awesome decision of whether to set aside the election of a sitting President—high crimes and misdemeanors against the United States. Instead of tinkering with the Constitution, we should elect congressional representatives who will uphold the laws and not allow partisan politics and media hype to control their decisions in casting votes. As media consumers, we should demand more from journalism and investigative reporting, refusing to consume the paparazzi and tabloid-style journalism that increasingly threatens to become the norm.

110. See Bloch, *supra* note 1, at 162-65.

111. See [cnn.com, Republican House Moderates Endorse Censure](http://www.cnn.com/ALLPOLITICS/stories/1998/12/22/impeachment) (last modified Dec. 22, 1998) <<http://www.cnn.com/ALLPOLITICS/stories/1998/12/22/impeachment>>.

[F]our moderate House Republicans who voted to impeach President Bill Clinton sent a letter Tuesday to Senate Majority Leader Trent Lott (R-Mississippi) calling for a “strong censure” of the [P]resident “We are not convinced and do not want our votes interpreted to mean that we view removal from office as the only conclusion of this case,” their letter reads.