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THE SPECIAL CONSTITUTIONAL STRUCTURE OF THE FEDERAL IMPEACHMENT PROCESS

MICHAEL J. GERHARDT*

In commenting on a congressional debate, the late Mo Udall is reputed to have remarked, "Everything that needs to be said has been said, but everybody hasn't said it."¹ It is tempting to think this sentiment aptly characterizes the state of discourse on President Clinton's impeachment proceedings. Throughout the Clinton impeachment proceedings, dozens of commentators in various fora opined on the central question of whether the President's misconduct constituted an impeachable offense. In offering their opinions on this issue, commentators squeezed as much meaning as they possibly could from the meager sources of authority. Such sources included the framers' and ratifiers' sparse debates about the standard for impeachment and removal (including no explicit consideration of whether misconduct without a direct link to a President's official duties may constitute an impeachable offense);² the limited range of reasonable inferences from the constitutional structure about the relationship among the electoral process, impeachment, and the President's misconduct (particularly in the aftermath of changes wrought by the Twelfth and Seventeenth Amendments and subsequent electoral reforms);³ and precedent (consisting of only three serious impeachment efforts previously undertaken against Presidents and a total of only sixteen impeachments ever formally initiated by the House).⁴ The hearings uncovered no new evidence from conventional sources on the constitutional standard for presidential

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I am very grateful for the constructive comments and suggestions of my fellow participants on the panel examining the significance of President Clinton's impeachment and trial.

1. *The Cost Implications and Benefits to the United States of the Proposed First Round of NATO Expansion, Hearing Before the Senate Appropriations Committee*, FED. NEWS SERV., Oct. 21, 1997 (statement of Senator Dale Bumpers) (quoting Mo Udall).

2. For a general discussion of the framers' and ratifiers' debates about the scope of impeachable offenses, see MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 3-21 (2d ed. 2000).

3. See *infra* note 44.

4. The three previous Presidents who were the subjects of impeachment attempts were John Tyler (subjected more than once to unsuccessful impeachment inquiries directed against his exuberant exercises of his veto and appointments authority); Andrew Johnson (impeached, but not removed, for firing his Secretary of War in arguable violation of the Tenure in Office Act, which required Senate approval for a President to remove an officer who had been previously confirmed by the Senate); and Richard Nixon (forced to resign from office after the House Judiciary Committee approved three impeachment articles against him).

impeachment, though the evidence adduced was twisted in just about every conceivable way.

Nevertheless, the present symposium features some creative and constructive thinking about President Clinton's impeachment and trial. At the very least, each participant recognizes that in the aftermath of the President's acquittal, a whole new battle is being waged to shape subsequent generations' understanding of the significance of his impeachment and trial. Each participant has a different perspective on the ramifications of the acquittal, especially on the lessons that one can derive from the proceedings.

My concern is with the implications of several distinctive features of the constitutional structure for Professors Katyal's and Bloch's articles,⁵ as well as for general understanding of the federal impeachment process. The first such feature of the constitutional allocation of power for impeachment and removal is that it facilitates and rewards a pragmatic or flexible analysis and impedes a formalistic analysis of the fundamental question at the core of President Clinton's impeachment proceedings—whether his misconduct constituted a “high Crime or Misdemeanor.”⁶ A pragmatic analysis of this issue entails balancing various practical considerations or factors, including the magnitude of harm that an impeachable official's misconduct has caused society or the constitutional order, the nexus between an official's duties and his misconduct, public opinion, and other possible avenues for redress, such as the electoral process or legal proceedings. In contrast, a formalist analysis employs rigid criteria for, or extremely well-defined elements of, impeachable offenses, such as treating every violation of the federal criminal law or every breach of the public trust as justifying removal.

By vesting the impeachment authority in the politically accountable authorities of the House and the Senate, the framers of the Constitution deliberately chose to leave the difficult questions of impeachment and removal in the hands of officials well versed in pragmatic decisionmaking. Members of Congress are pragmatists who can be expected to decide or resolve issues, including the appropriate tests, by recourse to practical, rather than formalist, calculations. In fact, members of Congress decide almost everything pragmatically, and decisions about impeachment and removal are no exception. The vesting of impeachment authority in political branches necessarily implies the discretion to take various factors, including possible consequences, into consideration in the course of exercising such authority.⁷

5. Neal Kumar Katyal, *Impeachment as Congressional Constitutional Interpretation*, 63 LAW & CONTEMP. PROBS. 169 (Winter/Spring 2000); Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions that Judged President Clinton*, 63 LAW & CONTEMP. PROBS. 143 (Winter/Spring 2000).

6. U.S. CONST. art. II, § 4.

7. Cf. Impeachment Staff Inquiry, House Comm. on the Judiciary, Memorandum: Constitutional Grounds for Presidential Impeachment 4 (Feb. 20, 1974); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 780, at 252 (rev. ed. 1991); *id.* § 744, at 218; *see also* ALEX. SIMPSON, JR., A TREATISE ON FEDERAL IMPEACHMENTS 651, 676-77, 803 (1916); Albert Broderick, *Citizens' Guide to Impeachment of a President: Problem Areas*, 23 CATH. U. L. REV. 205, 229-34 (1973);

No doubt, one relevant consideration to take into account is original understanding, but it is only a pertinent, rather than a determinative, factor. The political accountability of members of Congress confirms the aptness of Professor Katyal's insight that original understanding is less binding on members of Congress than on courts.⁸ The political accountability of representatives and senators ensures that in formulating pragmatic judgments on the impeachability of the President's misconduct, the members of Congress discount or defer to the original understanding to the extent that their political circumstances and calculations allow them to do so. Because original understanding hardly pointed to any clear answer on the impeachability of President Clinton's misconduct, several other factors, such as public sentiment, outweighed this consideration.

It is, however, easy to see why a formalist rather than pragmatic analysis of the critical constitutional question attracted both those fighting for and against President Clinton's removal. The reason is that formalist analysis is designed to restrict or constrain the discretion of members of Congress. The constitutional standard for impeachment—"treason, bribery, and other high Crimes and Misdemeanors"—is hardly self-defining. Like other vague standards, it invites decisionmakers to rely on their own personal values or political preferences in interpreting the meaning of the relevant constitutional language.⁹ Generally, standards do not constrain the discretion of decisionmakers nearly to the same extent as rules, and the more vague the standard, the less constraint. A vague standard, such as "other high Crimes and Misdemeanors," is certainly prone to this problem, and neither side in the impeachment controversy was inclined to allow members of Congress much latitude in determining the impeachability of the President's misconduct. Instead, the contending sides advocated strategies for interpreting the Constitution's impeachment standard designed to facilitate their preferred outcomes.

For example, most of those arguing for the removal of the President essentially posited a strict liability notion of impeachment.¹⁰ In their view, every

Keith E. Whittington, "High Crimes" After Clinton: *Deciding What's Impeachable*, POL'Y REV. 32-33 (Feb. & Mar. 2000).

8. See Katyal, *supra* note 5, at 170.

9. See generally RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 118, 174 (1999).

10. See, e.g., *Background and History of Impeachment, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 105th Cong., 2d Sess. 4 (Nov. 9, 1998) (statement of Rep. Charles Canady) [hereinafter *Hearings*] ("[I]f the President is guilty of the offenses charged against him, he must be called to account under the Constitution for the commission of 'high crimes and misdemeanors.'"); *id.* at 22 (statement of Rep. Asa Hutchinson) ("If we conclude that perjury was committed but we take no action, what will a future jury do when asked to uphold a law and find someone guilty of lying under oath?"); *id.* at 125 (statement of Professor Stephen Presser) ("While [the Constitution] gives you discretion to determine whether a particular act or series of acts amounts to grounds for impeachment, [it] requires you to move forward to impeach if you determine there are such acts." (emphasis in original)); *id.* at 253 (statement of Professor Jonathan Turley) ("The only thing that you can't do in a Madisonian system is grant an exception. . . . [Y]our function is to define conduct which we cannot tolerate under the Constitution. Conduct which is incompatible with the President's office. . . . Before this case I thought there was a bright line for Presidents. You can't commit crimes in

breach of trust constituted an impeachable offense, and the commission of an impeachment offense necessarily dictated removal, especially if committed by a President.

Similarly, many of those defending President Clinton, particularly those who drafted the letter signed by more than 400 law professors,¹¹ argued that a requisite or indispensable element of an impeachable offense was a nexus between an official's misconduct and his formal duties. They argued that only something as horrid as murder would constitute an exception to this basic standard.¹²

We now know that both of these formalistic approaches were rejected in the Clinton impeachment proceedings. On the one hand, the strict liability notion of impeachment advocated by the President's critics was problematic for several reasons. First, strict liability has never driven the federal impeachment process. Though it has sometimes explained particular votes cast for the impeachment and removal of some officials (for example, in each of the three judicial impeachment proceedings in the 1980s¹³), it fails to explain the relative dearth of impeachment attempts or removals. If this approach had, in fact, guided the impeachment process, the nation would have had many more impeachments and removals than it has had. Moreover, if formalist reasoning were the norm in impeachment proceedings, many questions posed by the President's misconduct would not have been nearly as heart-wrenching or politically divisive as they were. Removal would have been remarkably easy and straightforward. In addition, the American people flatly rejected the strict liability notion of impeachment; most Americans acknowledged that the President had broken the law, but still did not regard his misconduct as constituting an impeachable offense or as justifying his removal.¹⁴ Most

office."); see also POSNER, *supra* note 9, at 171 (arguing that the "fanaticism" of President Clinton's attackers blinded them to the practical consequences of their "mantra" that "no man is above the law, no felony should go unpunished, prosecutorial excess should not mitigate a defendant's punishment, but instead should result in two punishments (of the defendant and the prosecutor), and expediency should have no weight in the decision" whether to impeach the President).

11. See *Hearings*, *supra* note 10, at 374-83 (reprinting letter dated November 6, 1998, signed by more than 400 law professors).

12. See *id.* at 375.

13. For a thorough discussion of the successful impeachments of Harry Claiborne, Alcee Hastings, and Walter Nixon in the 1980s, see ELEANORE BUSHNELL, *CRIMES, FOLLIES AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS* 289-333 (1992); MARY L. VOLCANSEK, *JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE* (1993). It is noteworthy that even though Claiborne had been convicted and imprisoned for income-tax fraud before his impeachment, the Senate explicitly rejected giving preclusive effect to prior felony convictions or to the evidentiary or factual findings underlying such judgments. See GERHARDT, *supra* note 2, at 42-43. Though the Senate later convicted and removed Claiborne for the same offense for which he had been criminally convicted, most senators recognized the necessity for the Senate to undertake its own separate fact-finding and formulate its own judgments about the burden of proof and the facts to maintain the integrity, independence, and credibility of the Senate removal process. Such independence derived, in effect, from the recognition that the ultimate judgment on removal is driven not by the rigid application of strict liability, but rather the exercise of discretion based on senators' individual judgment about facts, applicable burdens of proof, national welfare, and removal standards.

14. See Josh Getlin, *The Truce Behind the Culture Wars; Values: Shrill Clinton Debate Drowns Out*

Americans favored a less rigid approach that balanced the harm and wrongfulness of the President's misconduct against the public interest or welfare.¹⁵

On the other hand, the formalist arguments of the President's defenders fared no better. A good example of the futility of such arguments is reflected in the reasoning of the law professors' letter.¹⁶ The gist of its argument was that removal almost invariably required a nexus between an official's misconduct and his duties. Because there was no such clear nexus in the President's case, removal was not justified.¹⁷ The problem is, however, that several sources of decision indicate that the nexus requirement is not as absolute as the law professors maintained. To begin with, the nexus arguably was abandoned or loosened in the case of at least one federal judge, Harry Claiborne, whom the House impeached and the Senate removed from a federal district judgeship because he committed tax fraud.¹⁸ One of the defenders of the professors' letter tried to sidestep this problem in his testimony before the House Subcommittee on the Constitution by maintaining that Presidents are entitled to a higher or different standard for removal than are federal judges.¹⁹ That argument, however, has never been formally or widely accepted in past proceedings, and it was not accepted in this proceeding.²⁰

In any event, the central argument of the law professors' letter began to lose force once its signatories conceded, as Professor Sunstein did in his testimony, that murder and rape were examples of unofficial conduct on which the House may impeach and the Senate may remove an official.²¹ It is not entirely clear why rape, while horrific, justifies impeachment and removal more so than the serious felony of perjury, unless the physical violence and depravity associated with the former crime demonstrate much more clearly unfitness for office than the latter. It is also not clear whether or how many signatories to the law professors' letter would reject sexual harassment—in contrast with lying under oath about it—as another possible basis for impeachment and removal. If sexual harassment, along with murder and rape, constitutes an impeachable offense, it is no longer clear that a nexus between a President's duties and his misconduct is an indispensable element of an impeachable offense. Indeed, there is no bright line that separates perjury or obstruction of justice in a private

Broad American Consensus on Most Issues, L. A. TIMES, Feb. 7, 1999, at A1; Kenneth T. Wald et al., *The Price of Victory*, U.S. NEWS & WORLD REPORT, Feb. 22, 1999, at 26.

15. See Getlin, *supra* note 14; Wald, *supra* note 14.

16. See *Hearings*, *supra* note 10, at 83-91 (written statement of Professor Cass R. Sunstein).

17. See *id.* at 375.

18. One could, however, argue, as some commentators did, that there was a nexus between Claiborne's misconduct and his duties as a federal district judge. The link was provided by the necessity that a federal trial judge have unquestioned integrity in order to do his job. Otherwise, he lacks the requisite moral authority to oversee criminal proceedings for others charged with the same or similar offenses. See *id.* at 55 (written statement of Professor Michael J. Gerhardt).

19. See *id.* at 83-91 (written statement of Professor Cass R. Sunstein); see also Cass R. Sunstein, *Impeaching the President*, 142 U. PA. L. REV. 279 (1998).

20. See GERHARDT, *supra* note 2, at 184.

21. See *Hearings*, *supra* note 10, at 82.

matter from rape or sexual harassment as a basis for removing a President. The distinction that clarifies some of these misdeeds as impeachable and others as not is the product of a pragmatic balancing of relevant factors.

A second distinctive feature of the constitutional structure that clearly has consequences for the quality and nature of congressional decisionmaking on impeachment is the unique nature of the impeachment procedure itself. Impeachment is the only realm of authority in which Congress is empowered to exercise power without any formal opportunity for another branch to check its actions or otherwise provide input formally, or ensure that Congress will take seriously its substantive views, including those on interpretative matters.²² The usual checks on congressional action—judicial review and presidential veto—are unavailable in the impeachment context. Nor is impeachment like a treaty ratification or confirmation proceeding, in which some presidential participation or action is mandatory.

One might imagine that the likely absence of judicial review or opportunity for presidential veto or participation might liberate members of Congress to do as they please in the impeachment context, but all available data is to the contrary. The data, including anecdotal evidence and the published statements of members of Congress, indicate that discretion, unbounded by the actions or feedback of other branches, inhibits, rather than liberates, members of Congress.²³ The knowledge that there is no other branch with which to share responsibility or blame is sobering, to say the least.

The weight of the responsibility entrusted to Congress in a presidential impeachment proceeding is made all the heavier because the Constitution requires a supermajority for removal.²⁴ As a practical matter, the supermajority requirement ensures that only in the most egregious cases will there be removals. Normally, one can expect partisanship to play a significant role in congressional deliberations, as it did in the Clinton impeachment proceedings. However, convincing more than two-thirds of the Senate to remove an official, particularly a President, requires a showing of misconduct that is so egregious and so clearly linked to his public duties—even of the official's exemplary moral duties—that the normal influence of partisanship is overcome. That the Constitution requires an extremely compelling case to overcome partisanship is

22. See generally U.S. CONST. art. I (Bicameral and Presentment Clauses requiring both chambers of Congress and the President to participate in the lawmaking process); U.S. CONST. art. II (Appointments Clause requiring the President to nominate, with the advice and consent of the Senate, officers of the United States); *id.* (treaty ratification implicitly requiring presidential involvement in the drafting and execution of treaties and explicitly requiring supermajority approval by the Senate for ratification).

23. See GERHARDT, *supra* note 2, at 173 (reviewing all of the statements entered by senators into the Congressional Record in the aftermath of President Clinton's trial); see also WILLIAM H. REHNQUIST, GRAND INQUESTS: THE IMPEACHMENT TRIALS OF JUSTICE CHASE AND PRESIDENT JOHNSON 240-47 (1992) (reviewing the statements entered by senators into the Congressional Record in the aftermath of President Johnson's impeachment trial).

24. U.S. CONST. art. I, § 3, cl. 6.

not a new insight.²⁵ That the House Managers in President Clinton's case failed to make the requisite showing is beyond question.

The fact that bipartisan support for President Clinton's removal was not achieved in his trial was not surprising. It had at least one significant variable that the seven cases in which the Senate has convicted and removed officials did not—a popularly elected President who was still popular during his impeachment.²⁶ It also lacked other variables present in those cases, including a clearly severe injury to the constitutional order, a clear link between the offense alleged to that injury and to an official's formal duties, and a showing that the linkage among those three factors was so close that the official was left unable to continue to perform his duties.²⁷ With these many distinguishing features, it is easy to explain an acquittal without having to conclude that the system is broken.

The unique nature of the impeachment procedure provides further support for Professor Katyal's perception that members of Congress are not bound in the same manner or to the same degree as judges to adhere to original understanding.²⁸ The absence of judicial review ensures, for example, that members of Congress are less concerned with how courts would second-guess congressional judgments on the critical questions, including methodological ones, than with the necessity of determining a scale on which members of Congress could agree that the President's misconduct could be legitimately measured (such as original understanding, public sentiment, or the likely judgment of history).

The uniqueness of the impeachment context also raises questions about the appropriate basis on which to render normative judgment as to how well Congress performed or how well the system works. Professor Bloch offers some possible answers, including popular opinion and the consistency between the House's performance in President Clinton's impeachment proceedings and other impeachments triggered by external referrals.²⁹ Her appraisal turns on a recognition of the critical distinction between political and constitutional legitimacy.³⁰ She does not claim that the House acted unconstitutionally in the course of impeaching the President but that it acted unwisely and without an adequate political warrant that subsequent generations are likely to accept as

25. See THE FEDERALIST NO. 65, at 380-81 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Alexander Hamilton warned that impeachments would likely draw on, and perhaps even be motivated by, partisan feelings; hence, the supermajority requirement exists, in part, to prevent partisanship from being the sole or primary reason for removing a high-ranking official. The odds are that securing a supermajority to convict requires some members of the impeached official's party to cross over. In the absence of such cross-over, the odds favor acquittal.

26. See *Hearings*, *supra* note 10, at 54-56 (testimony of Professor Michael Gerhardt) (reviewing the factual circumstances distinguishing all seven officials convicted and removed by the Senate from President Clinton).

27. See *id.*

28. See Katyal, *supra* note 5, at 170.

29. See generally Bloch, *supra* note 5, at 148-54.

30. See *id.* at 161-65.

legitimate.³¹

There is little doubt that Professor Bloch is correct that the political legitimacy of an impeachment effort turns, in large part, on the quality and nature of the procedural choices made by the House and the Senate in the course of conducting impeachment proceedings. The more these choices appear to be expedient, partisan, or unfair, the greater the likelihood the proceedings will be tainted as biased or illegitimate. The critical questions are who will judge—and how will they judge—the ultimate political legitimacy of President Clinton's impeachment proceedings. The answer is that subsequent generations, including present and future members of Congress, will judge the political legitimacy of the proceedings by various means.

One obvious basis on which subsequent generations can evaluate the Clinton impeachment proceedings is by the proceeding's consequences. To begin with, it is clear that the office of the presidency saved Andrew Johnson from removal in spite of his widespread unpopularity. In the end, Johnson was acquitted, at least in part, because enough senators feared the repercussions that a conviction would have had on the presidency.³² On the contrary, the office did not save Richard Nixon, partly because his conduct was widely regarded, both then and now, as constituting serious abuses of uniquely presidential trusts.³³ In contrast, most senators who voted to acquit President Clinton explained that they did not perceive his misconduct as having a sufficiently public dimension or injury to warrant his removal from office.³⁴ As such, his misconduct is similar to the income-tax fraud claim that most members of the House Judiciary Committee refused to make the basis of an impeachment article against Richard Nixon because it lacked a sufficiently public dimension or harm.³⁵ That latter decision, coupled with Clinton's

31. See *id* at 154.

32. See generally REHNQUIST, *supra* note 23.

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

Id at 248 (quoting letter from Senator James Dixon to Senator Fessenden) (citation omitted in original).

33. No member of Congress during the Clinton impeachment proceedings questioned the propriety of the impeachment attempt against President Nixon. It has come to stand as a paradigm of legitimate presidential impeachment. See, e.g., *Hearings, supra* note 10, at 54-55 (testimony of Professor Michael Gerhardt).

34. Of the 38 senators who published statements on their reasons for voting not guilty on both articles, more than half—28—explained that they did not regard the misconduct alleged in either article of impeachment approved by the House as constituting an impeachable offense. See Published Statements of Senators Akaka, Boxer, Biden, Breaux, Bryan, Cleland, Collins, Dorgan, Durbin, Graham, Harkin, Hollings, Jeffords, Johnson, Kennedy, Kerry, Kohl, Lincoln, Leahy, Levin, Lieberman, Mikulski, Moynihan, Reid, Sarbanes, Snowe, Wellstone, and Wyden (all released into the Congressional Record on February 12, 1999).

35. See *Hearings on the Impeachment of President Clinton Before the House Judiciary Comm*, 105th Cong. (1998), available in 1998 WL 846820 (statements of former Reps. Elizabeth Holzman and

acquittal, likely signals that there is a zone of a President's private life that is largely immune to scrutiny in the federal impeachment process.

President Clinton's acquittal raises the question whether Congress will ever have the resolve to investigate the misconduct of a President with high approval ratings.³⁶ The congressional investigation into Watergate took more than two years before the "smoking gun"—the tapes of certain conversations in the White House—that led to President Nixon's resignation was discovered.³⁷ The Clinton impeachment proceedings took roughly six months. As such, they were among the shortest in American history, with the shortest having been the impeachment proceedings against Andrew Johnson, which lasted roughly three months from start to finish.³⁸ Even so, the relative shortness of President Clinton's impeachment proceedings was too long for most people. While it is true that most people did not believe President Clinton's case merited his removal,³⁹ some investigations might not uncover seriously problematic misconduct insofar as the public is concerned for some time. Future members of Congress might think twice before engaging in a relatively prolonged investigation of a President's misconduct, for fear that it might alienate the public. Consequently, it is possible that impeachment will be effective only for the kinds of misconduct that can galvanize the public to set aside its approval of a President's performance to support resignation or formal removal. Future senators might support removal only if they have direct evidence of very serious wrongdoing and unambiguous consensus in Congress and among the public on the gravity of such wrongdoing.

Moreover, future members of Congress could well construe President Clinton's acquittal as casting doubt upon the House's initial judgment to impeach the President. Indeed, there have been similar failures in the past, most notably in the impeachment attempts against Associate Justice Samuel Chase and President Andrew Johnson. The majority votes cast in favor of convicting both officials did not preclude either one's impeachment from being viewed as lacking political legitimacy by subsequent generations and members of Congress. The acquittals of Johnson and Chase have each had the effect of dissuading subsequent members of Congress from initiating impeachments based on similar misconduct.⁴⁰ These members have taken such postures partly because the outcomes in the trials of Chase and Johnson did not turn on disputes about the underlying facts.⁴¹ Virtually everyone at the times of those

Robert Drinan) (noting that because it was personal rather than official misconduct, President Nixon's tax evasion was not impeachable).

36. See generally POSNER, *supra* note 9, at 177, 183.

37. See STANLEY KUTLER, *THE WARS OF WATERGATE: THE CRISIS OF RICHARD NIXON* 464, 468, 470, 513-15, 534-38, 543, 555, 619 (1990).

38. See BUSHNELL, *supra* note 13, at 293-301.

39. See POSNER, *supra* note 9, at 185.

40. See Michael J. Gerhardt, *Impeachments: The Grand Tour*, 16 CONST. COMMENTARY 433, 449-51 (1999) (reviewing WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE IMPEACHMENT TRIALS OF JUSTICE CHASE AND PRESIDENT JOHNSON* (1992)).

41. See *id.*

impeachments agreed on the facts, but they disagreed over their significance. Unencumbered with the need to resolve factual disputes, subsequent members of Congress have been free to make their own assessments of the legal and constitutional significance of the facts, and thus of Johnson's and Chase's misconduct. They have concluded that the misconduct targeted in each impeachment did not warrant removal from office.

By similar reasoning, the Clinton acquittal could be construed by subsequent representatives and senators as rejecting the House's judgment on the impeachability of the President's misconduct. First, the vote to impeach the President was, as it had been in Johnson's and Chase's cases, largely cast along party lines.⁴² There has been widespread subsequent perception that the proceedings generally were conducted and resolved largely on partisan grounds.⁴³ Moreover, most people, including most members of Congress, do not disagree much about the underlying facts in President Clinton's case; they disagree largely over the legal significance of the facts. Subsequent members of Congress might conclude that if such misconduct did not merit a conviction in Clinton's case, it would be inconsistent or unfair to allow it to support a conviction in another case. In addition, subsequent members of Congress could conclude that if a majority vote by the Senate to convict Chase and Johnson could not save either official's impeachment from being regarded as illegitimate, the absence of a majority vote in the Senate for either impeachment article against President Clinton, coupled with other criticisms of it, could be viewed as a rounder rejection of the legitimacy of the House's case than were the Senate votes in the trials of Johnson and Chase.⁴⁴

42. See POSNER, *supra* note 9, at 111.

43. See *World News Tonight* (ABC television broadcast, Feb 12, 1999) (indicating that 71% of those polled by ABC believed the Senate voted on the basis of partisan politics rather than the facts); *Nightline* (ABC television broadcast, Feb. 8, 1999) (indicating that 74% of Americans expected senators not to vote their consciences, but rather on the basis of partisan politics).

44. This rejection could be construed consistently with the framers' expectation of the Senate's performing a unique balancing function. See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 513 (1969) (suggesting the framers expected that the Senate "would function with more coolness, with more system, and more wisdom, than the popular branch," because its members would be drawn from the elite of society and because of its longer term and insulation from direct public pressure). One might respond to this assertion in at least two ways. One could argue that the balancing was achieved in President Clinton's trial only because of the uniform partisanship of the Democrats in opposing removal. It is, however, always possible in an impeachment trial that the Senators from a President's political party might be inclined to oppose his removal. This possibility, coupled with the constitutional requirement of supermajority support among the Senators for removal, makes it incumbent upon those seeking a President's removal to bring charges and otherwise make a case against him that could draw bipartisan support. In President Clinton's trial, the President's critics failed to do so.

Another possible response to the claim that Senators performed a checking function in President Clinton's trial is that the framers' expectations regarding such a checking function might no longer be valid in light of the Twelfth and Seventeenth Amendments. By reducing the importance of the electoral college to the election of a President, the Twelfth Amendment and other election reforms have helped transform the presidency into a popularly elected office. Moreover, the Seventeenth Amendment changed the system for selecting senators from election by their respective state legislatures to popular election in their respective states. The alterations effected by the Twelfth and Seventeenth Amendments, at the very least, have increased sensitivity in the impeachment process to

Whereas President Clinton's acquittal might make it more difficult for Congress to use impeachment against a popular President, it does underscore the greater vulnerability to impeachment and removal of those officials who lack a President's resources, such as recourse to the bully pulpit or public support. It is not inconceivable that an unpopular President, such as Andrew Johnson, might meet a different fate in an age in which the media constantly applies pressure to investigate a President's misconduct or actions that have made him unpopular, and in which daily polls dramatize a loss of popularity and increase in support for removal. In this circumstance, removal or resignation might be extremely likely. To date, the only instance like this occurred during the final days of Richard Nixon's presidency, when the public, for the first and only time during the Watergate investigation, expressed support for President Nixon's ouster based on information revealed in the Watergate tapes.⁴⁵ The dynamic is likely to be even more problematic for a federal judge, perhaps a Supreme Court justice, whose hearings are not likely to receive anything near the widespread media coverage that President Clinton's proceedings received, the outpouring of public support, or the opposition to the prolongation of hearings. In the absence of these factors, a federal judge or other low-profile official lacks the resources available to a President, particularly a popular one, in defending against political retaliation in the form of an impeachment.

Lastly, one cannot evaluate the legitimacy of the Clinton impeachment proceedings without taking into account Niccolo Machiavelli's basic admonition that if one wants to be successful, all one has to do is to lower one's sights.⁴⁶ Many prominent commentators have denounced the President's impeachment as driven by the purely partisan desire of the House Republican leadership to remove the President from office.⁴⁷ If that were the case, they obviously failed to achieve their objective. What if the Republican leadership or some of its leaders had a different objective? It is possible, for example, that their objective could have been to embarrass President Clinton or tarnish his legacy, to cultivate so-called "Clinton fatigue," and thereby increase the chances of a Republican's election to the presidency in the year 2000. If any of these were

the electorate's opinions regarding the necessity for removal, the targeted President, and the representatives or senators who sit in judgment of him.

The fact that the electoral process serves as a check against executive abuse of power is, however, not a strong argument for treating Presidents differently from judges. The problem with the argument is that there is no electoral check against a second-term President's misconduct because the Constitution does not allow a reelected President to serve a subsequent term. It is telling that the impeachment efforts undertaken against Presidents Nixon and Clinton arose in their second terms, when neither was any longer subject to being held accountable in an election. Under such circumstances, it is pointless to consider the electoral process as a check against abuse of power. Its only relevance, then, has to do with the extent to which the public might have ratified the President's misconduct in an intervening election.

45. See KUTLER, *supra* note 37, at 531-32.

46. See generally NICCOLO MACHIAVELLI, *THE PRINCE* (Harvey C. Mansfield trans., Univ. of Chicago Press 2d ed. 1998) (1515).

47. See, e.g., Whittington, *supra* note 7, at 29-32 (reviewing and criticizing arguments of some of President Clinton's most prominent defenders, including Professors Ronald Dworkin and Cass Sunstein).

the objective of at least some Republican leaders, their effort cannot yet be declared a failure. Indeed, if a Republican prevails in the next presidential election, one can expect that he, as well as other Republican leaders, will argue that his election vindicates the impeachment effort. They will argue that the election of a Republican to succeed President Clinton reflects not the public's reluctance to punish the Republicans for trying to remove President Clinton, but rather the opposite. This argument will have even more force if many or most House Republicans who voted to impeach the President win reelection.

Consequently, it is too soon to say whether the House or Senate deserves a failing grade for its performance in the President's impeachment proceedings. The final grade will be rendered in the form of the judgment of history, but it behooves us to remember that the judgment of history tends to be pragmatic, rather than formalist, based on historians' and subsequent generations' (and Congresses') balancing of a wide variety of factors. Perhaps most importantly, we should not forget that, whether we like it or not, the balancing will be done, as it always is in the writing of the history of any given political or constitutional contest, by the victors rather than the losers. President Clinton no doubt won the battle, for he was acquitted (under circumstances in which his popularity remained steadily high), but the war between the forces that gave rise to the President's impeachment goes on. We do not know how or when (or, for that matter, if) the war will end. But only when it does will it be possible to identify the winners and for them to cast the Clinton impeachment proceedings into meaningful historical perspective.