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## ESSAY

### THE CONSTITUTIONALITY OF CENSURE

*Michael J. Gerhardt\**

It has become commonplace for commentators to suggest that, in the aftermath of the Senate's acquittal of President William Jefferson Clinton, there have been only losers and no real winners. Whether this is true generally is a difficult question to which I will not hazard an answer. It is beyond question, however, that one device that lost ground as a result of the storm of impeachment was censure. That censure has taken a severe beating is unfortunate because so much of the beating was based on misguided interpretations of, or arguments about, the Constitution.

The truth is that censure—understood as a resolution critical of the President passed by one or both houses of Congress—is plainly constitutional.<sup>1</sup> There might be good policy reasons to argue against the use of censure, such as censure is not partic-

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1. It is noteworthy that, prior to the House's vote to impeach President Clinton, Representative William Delahunt (D-Mass.) sought opinions regarding the constitutionality of censure from the 19 constitutional scholars and historians who testified on November 9, 1998, before the House Subcommittee on the Constitution. See Letter from Representative William D. Delahunt to Representative Henry J. Hyde, Chairman, House Committee on the Judiciary (Dec. 4, 1998) (on file with author). Fourteen of the scholars indicated that they thought censure was constitutional. See Letter from Representatives William D. Delahunt and Frederick C. Boucher to Members of the U.S. House of Representatives (Dec. 15, 1998) (on file with authors).

ularly effective or might be overused; however, the debates in both the House and the Senate over censure blurred the line between constitutionally legitimate and politically acceptable. It is, however, important to separate the political from the constitutional arguments regarding censure, as I attempt to do below. In doing so, I hope to clarify at the very least the constitutionality of a censure of a president—or, for that matter, any other official—for misconduct, particularly of the sort that does not rise to the level of an impeachable offense.

In my opinion, every conceivable source of constitutional authority—text, structure, original understanding, and historical practices—supports the legitimacy of the House's and/or the Senate's passage of a resolution expressing disapproval of the President's conduct. First, there are several textual provisions of the Constitution confirming the House's or the Senate's authority to memorialize its opinions on public matters. The Constitution authorizes the House of Representatives and the Senate each to "keep a Journal of its Proceedings,"<sup>2</sup> and provides that "for any Speech or Debate in either House, [members] shall not be questioned in any other Place."<sup>3</sup> Moreover, the First Amendment<sup>4</sup> presumably protects, individually or collectively, members' expressions of opinion about an official's misconduct. One may plainly infer from these various textual provisions the authority of the House, the Senate, or both to pass a non-binding resolution expressing an opinion—pro or con—on some public matter, such as that a president's conduct has been reprehensible or worthy of condemnation.

Second, the passage of resolutions critical of a president is quite compatible with the constitutional structure. Contrary to the assertions of some censure opponents during the impeachment proceedings against President Clinton, the Constitution does not establish impeachment as the only constitutionally authorized means by which the House or the Senate may "censure" the President. Instead, impeachment is the only means by which the House may formally charge and thereby obligate the Senate to consider removing a president for certain kinds of

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2. U.S. CONST. art. I, § 5, cl. 3.

3. *Id.* art. I, § 6, cl. 1.

4. *Id.* amend. I.

misconduct.<sup>5</sup> Removal and disqualification are the only sanctions that the Senate may impose if it were to convict an impeached official at the end of an impeachment trial.<sup>6</sup> Otherwise, the constitutional structure leaves several fora besides impeachment available to secure the accountability of an impeachable official for misconduct, including but not limited to that which does not rise to the level of an impeachable offense. These fora include civil proceedings (such as in *Clinton v. Jones*<sup>7</sup>), criminal process, the court of public opinion, the electoral process, the political process—broadly understood, and, of course, the judgment of history.

Moreover, it is nonsensical to think that if a resolution has no legal effect, it somehow still might violate the law. By definition, a resolution has no effect on the law (or legal arrangements) in any way.<sup>8</sup> To think that a resolution might have little or no practical effect is not a reason to think that it is unconstitutional; it is a reason to think perhaps that a resolution critical of the President might be a futile act politically. The calculation of whether a resolution is a worthwhile endeavor politically is separate and distinct from whether it is constitutional.

In addition, the House and the Senate each have passed more than a dozen resolutions condemning or criticizing the misconduct of presidents and other high-ranking officials. Indeed, on at least two occasions, the House has memorialized its disapproval of presidential misconduct.<sup>9</sup> Moreover, though the House decided not to impeach President John Tyler for his exuberant exercises of his veto authority, the House did adopt a Committee report that was highly critical of President Tyler's construction and use of his veto authority.<sup>10</sup> In addition, the Senate censured President Andrew Jackson for firing his Trea-

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5. *See id.* art. II, § 4.

6. *See id.* art. I, § 3, cl. 7.

7. 117 S. Ct. 1636 (1997).

8. *See* BLACK'S LAW DICTIONARY, 1310-11 (6th ed. 1990).

9. The subjects of these latter resolutions were Presidents James Polk and James Buchanan.

10. *See* JACK MASKELL, 98-843: CENSURE OF THE PRESIDENT BY THE CONGRESS (Cong. Res. Serv. Dec. 8, 1998).

sury Secretary for refusing to implement President Jackson's instructions to withdraw national bank funds and to deposit them in state banks.<sup>11</sup>

Such resolutions provide historical precedents for the House and the Senate to do something similar with respect to a president (or any other official). For that matter, the thousands of resolutions that the House and the Senate each have passed over the years expressing opinions on a wide variety of public matters constitute other relevant precedents supporting the House's or the Senate's passage of a resolution expressing its condemnation or disapproval of a president's conduct.<sup>12</sup>

Last but not least, the consideration of the constitutionality of censure raises questions about the legitimacy of another mechanism—what came to be known as a “finding of fact”—the feasibility of which arose in the midst of the Senate's consideration of the impeachment charges against President Clinton. The proposal was initially suggested by, among others, Senator Susan Collins (R-Me.), who early in the proceedings professed to be intrigued by a proposal suggested years ago by University of Chicago Law School Professor Joseph Isenbergh.

Professor Isenbergh recently amended his earlier proposal in light of the current political situation and suggested that the Constitution allowed the House to impeach, and the Senate to convict, certain kinds of officials for misconduct that did not rise to the level of impeachable offenses.<sup>13</sup> According to Professor Isenbergh, only removal, as opposed to conviction, constitutionally required a two-thirds vote of the Senate and proof or evidence of impeachable offenses.<sup>14</sup> Professor Isenbergh based this reading of the Constitution on the fact that the textual provisions setting forth the House's and Senate's respective authorities regarding impeachment do not contain within them

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11. *See id.*

12. Indeed, the House has also passed at least three resolutions expressing its disapproval of conduct by high-ranking executive officials other than the President, while the Senate passed two such resolutions in the nineteenth century. *See id.*

13. *See* Joseph Isenbergh, *Impeachment and President Immunity from Judicial Process* 14, University of Chicago School of Law Occasional Paper No. 39 (Dec. 31, 1998).

14. *Cf. id.* at 41-43 (discussing the conviction-removal dichotomy in the context of the impeachment trial of Judge John Pickens in 1803).

any express limitations, such as that the powers must be confined to the scope of impeachable offenses or, in the case of the Senate, to removal.<sup>15</sup>

In addition, Professor Isenbergh relied on the fact that in a couple of early impeachment proceedings, such as the impeachment trial of Judge John Pickering, the Senate took separate votes on guilt and on removal.<sup>16</sup> Professor Isenbergh's analysis led several senators, particularly Republican Susan Collins of Maine, to believe it would have been possible for senators to find the President guilty of some misconduct without having to remove him from office. This vote would have occurred before and would have been separate from a formal vote of conviction or removal. Moreover, some senators regarded a finding of fact to have been indistinguishable from censure. In the latter's opinion, the finding of fact would have embodied or represented nothing more than an expression of opinion about whether an official had done something. As such, a finding of fact conceivably would have been constitutional for many of the same reasons as censure would have been.

The proposed finding of fact, to the extent it relies on Professor Isenbergh's textual analysis, rests on a flawed reading of the impeachment clauses. It is mistaken to read the impeachment clauses in a disjointed or disconnected fashion. Instead, they should be read together, as a coordinated and coherent whole. When read in this fashion, it is clear that the impeachment clauses all have in common the obvious—impeachment—and impeachment is necessarily defined by its scope. The point of enumerated powers is that powers have limitations, and impeachment has its limits in the constitutional language, "Treason, Bribery, or other high Crimes and Misdemeanors."<sup>17</sup>

To disconnect either the House's or the Senate's impeachment power from the scope of impeachable offenses not only does damage to the coherence of the constitutional text and constitutional structure, but also opens the door to extraordinary abuse on the part of either the House or the Senate, for each would then be completely unchecked and unbounded—constitu-

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15. See U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cls. 6-7.

16. See Isenbergh, *supra* note 13, at 42.

17. U.S. CONST. art. II, § 4.

tionally—from impeaching or convicting on whatever basis struck its fancy. Nothing confirms more dramatically that no such door was ever meant to be opened than the debates on impeachment in the constitutional and ratifying conventions. Throughout these debates, it was always clear that one of the framers' most important objectives in designing the impeachment process was to define narrowly—certainly, much more narrowly than Great Britain had ever done—the scope of the impeachment power.<sup>18</sup>

Another major problem with the finding of fact had to do with the uncertainty over whether it was meant only to be an expression of negative opinion about the President. Indeed, its timing—prior to the adjournment of the impeachment trial—made its status as an expression of opinion or something else dangerously ambiguous. As long as the Senate's vote on the finding of fact occurred as part of the impeachment trial, it could easily have been confused with a vote of conviction, and no doubt some senators understood it as tantamount to the latter. Undoubtedly, many senators who supported the finding of fact were motivated in part by their desire to prevent the President from claiming vindication or acquittal if the Senate failed to convict him for perjury or obstruction of justice. The finding of fact would have allowed these senators to suggest that the President had in fact been found guilty of certain misconduct (as defined in the finding of fact) by whatever number of senators had voted in favor of the finding of fact. Consequently, the finding of fact seemed to have represented for some senators a device to bring about a conviction (or the like) without the requisite vote.

If the finding of fact were the same as or tantamount to a vote of conviction, then at least two-thirds of the senators would have had to vote in favor of it in order for it to have had the effect of a conviction. If at least two-thirds of the senators had voted in favor of it, it almost certainly would have served as a conviction, and its subject—the President—would have been removed from office. If two-thirds of the senators had not voted in favor of the finding of fact, then the President almost

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18. See generally MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 3-21 (1996).

certainly would have been entitled to claim that the vote should have counted as an acquittal.

Indeed, if senators had been required to take another vote on whether to convict or remove the President after having voted on the finding of fact, the President would probably have had good reason to claim a violation of fundamental fairness. For a vote on conviction following a vote on the finding of fact would have appeared to allow some senators the chance to try to convict the President on more than one vote—through the vote on the finding of fact and through the subsequent vote on conviction or removal. Subjecting the President to a vote of conviction more than once would have subjected him to a dubious and arguably spiteful process, and the result surely would have been perceived to have been unfair.

In the end, it is far from clear the extent to which censure might arise as an option in some future proceedings in which the members of Congress are considering the appropriate response to evidence or proof of presidential (or some other high-ranking official's) misconduct. Congress in the nineteenth century did not doubt that censure—or rebuke or condemnation by means of resolution—was available as an option for condemning official misconduct, particularly in the circumstance in which members believed that the misconduct did not rise to the level of an impeachable offense. In the latter part of the twentieth century, the House and the Senate each failed to take formal votes on censure; but censure itself failed for political, not constitutional, reasons.

Parliamentary maneuvering prevented a vote on censure in both the House and the Senate. Those who opposed a formal vote on censure based their opposition on the desire to have the formal record reflect that impeachment was the only viable option or, alternatively, to deny the President's democratic supporters the "political cover"<sup>19</sup> to denounce without having to convict or remove the President for his misconduct. The final maneuvering underscored the extent to which impeachment is a political process, one in which all of the critical choices are as

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19. Senator Phil Gramm (R-Tex.) used this terminology during the discussion of censure in the Senate. See Wladyslaw Pleszczyński, *About This Month*, AM. SPECTATOR, Mar. 1999, at 4, 4.



much political as they are constitutional. Such is the case as well with censure, for it too is as much a political as a constitutional choice. Consequently, the important thing in the future is to remember in a debate on censure or impeachment that not everything that is constitutional is politically feasible or desirable, while not everything that is politically popular or expedient is unconstitutional.