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## The Clinton Impeachment and the Constitution: Introduction to the Federalist Society Panel

*Thomas R. Lee\**

On February 12, 1999, the United States Senate voted not to convict President William Jefferson Clinton of two articles of impeachment passed against him in the House of Representatives.<sup>1</sup> The first article alleged that President Clinton was guilty of perjury before a federal grand jury convened as part of the independent counsel's investigation of the President's conduct.<sup>2</sup> The second alleged that President Clinton was guilty of obstruction of justice.<sup>3</sup> The impeachment proceedings in the House and Senate sparked a national dialogue about the Constitution, the use of legalisms,<sup>4</sup> and the role of the media and of personal investigation of public figures. While the Senate's vote effectively concluded those proceedings, it did not bring closure to the national debate about these important issues.<sup>5</sup>

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1. See 145 CONG. REC. S1458 (daily ed. Feb. 12, 1999) (Article I: 45 guilty, 55 not guilty); *id.* at S1459 (Article II: 50 guilty, 50 not guilty).

2. See H.R. Res. 611, 105th Cong. (1998).

3. See *id.* Two other articles, alleging perjury in a civil deposition and misleading statements to Congress, were defeated in the House. See 144 CONG. REC. H12,040-42 (daily ed. Dec. 19, 1998).

4. See, e.g., Robert F. Nagel, *Lies and Law*, 22 HARV. J.L. & PUB. POL'Y 605, 606, 616-17 (1999) (asking whether "legalistic meanings, when used outside of the lawyer's professional roles, [are] descriptively different from lies" and concluding that "President Clinton's lies can be viewed as threatening to the system precisely because the system relies so heavily on legalistic deceptions").

5. Compare, e.g., Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666, 666 (1999) ("I conclude that if the charges . . . are true, then the impeachment and removal of President Clinton is called for by the original understanding of those who framed the impeachment provisions of

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In an attempt to facilitate a further airing of the public debate of the issues presented by the Clinton impeachment proceedings and Senate trial, the Brigham Young University Chapter of the Federalist Society sponsored a discussion by a panel of four of the prominent players in the proceedings. The panel, convened at Brigham Young University's J. Reuben Clark Law School on April 2, 1999, consisted of four individuals who performed frontline roles in the Clinton trial: Senator Robert Bennett of Utah, who sat in judgment of the President during the Senate trial; Congressman Chris Cannon of Utah, who prosecuted the President as one of the House Managers in the Senate trial; Attorney Gregory Craig, who was retained as Special White House Impeachment Counsel shortly before the House impeached the President and who headed up the President's defense team during the Senate trial; and Senate Legal Counsel Thomas Griffith, who helped moderate and establish the trial procedures used by the Senate in the trial.

The transcript of the panel discussion follows in its original form in Part II below, with only minor editing and revisions. The transcript includes discussion of several issues that divided legal scholars throughout the impeachment trial and continue to do so today, including the following: (1) the proper scope of the impeachable offenses set forth in the Constitution; (2) whether the standard for impeachable offenses by the President should be parallel to the standard for impeachable offenses by federal judges; (3) the constitutionality of alternatives to impeachment, such as censure; and (4) the role that partisanship should play in the impeachment process. As an introduction to the legal issues addressed by the panel, Part I offers a brief description of the state of current legal scholarship on these issues with an eye toward providing context for evaluating the contribution of the panel discussion.

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the Constitution.") with Laurence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 725 (1999) ("Applying the principles set forth in this statement, therefore, I would be hard pressed to find in anything that has been alleged against President Clinton thus far a defensible basis to impeach and remove a President from office."); see also Mark R. Slusar, Comment, *The Confusion Defined: Questions and Problems of Process in the Aftermath of the Clinton Impeachment*, 49 CASE W. RES. L. REV. 869, 869 (1999) ("Senators rejoiced in self-congratulation as this year-long national embarrassment finally reached its inevitable conclusion. Yet, it was particularly unnerving that while nearly every senator and representative called these the most important votes of their careers, in debate they were often talking past each other, applying very different standards, and speaking of the basic purpose and functioning of the impeachment process in markedly different terms.").

## I. INTRODUCTION

*A. Impeachable Offenses*

Article II, Section 4 of the Constitution provides that “[t]he 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.”<sup>6</sup> Much of the debate surrounding the Clinton impeachment centered on the proper scope of the offenses described in this provision, particularly on the intent of the phrase “other high Crimes and Misdemeanors.”<sup>7</sup> Various interpretive approaches were expressed during the course of the Clinton impeachment proceedings. Some constitutional scholars relied primarily on original intent and history as a guide to interpreting impeachment clause language,<sup>8</sup> while others cited pragmatic political concerns<sup>9</sup> or relied on the plain language of

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6. U.S. CONST. art. II, § 4.

7. See, e.g., Presser, *supra* note 5, at 675-76 (“Gerald Ford’s famous suggestion that ‘high Crimes and Misdemeanors’ means anything the House of Representatives wants it to mean, reflects the essential notion that the Constitution confers broad discretion on the House of Representatives to make up its own mind about what kinds of conduct should lead to an impeachment proceeding. . . . [W]hile giving members of Congress discretion to determine whether a particular act or series of acts amounts to grounds for impeachment, [however, the Constitution] requires them to move forward to impeach if they determine there are such acts.”); Gary L. McDowell, “*High Crimes and Misdemeanors*”: Recovering the Intentions of the Founders, 67 GEO. WASH. L. REV. 626, 649 (1999) (“In the end, the determination of whether presidential misconduct rises to the level of ‘high Crimes and Misdemeanors,’ as used by the Framers, is left to the discretion and deliberation of the House of Representatives. No small part of that deliberation . . . must address what effect the exercise of this extraordinary constitutional sanction would have on the health of the Republic . . . .”); Cass R. Sunstein, *Impeachment and Stability*, 67 GEO WASH. L. REV. 699, 711 (1999) (“Text, history, and longstanding practice suggest that the notion of ‘high Crimes and Misdemeanors’ should generally be understood to refer to large-scale abuses that involve the authority that comes from occupying a particular public office.”); Tribe, *supra* note 5, at 725 (“The Constitution . . . leaves ample room for judgment, even for wisdom, in the deployment of power. What it leaves *no* room for is the impeachment of a President who has not committed ‘Treason, Bribery, or other high Crimes and Misdemeanors.’”).

8. See, e.g., RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 5 (1973) (suggesting the use of original intent as a methodology for interpreting the impeachment clause).

9. See Arthur M. Schlesinger, Jr., *Reflections on Impeachment*, 67 GEO. WASH. L. REV. 693, 695 (1999) (“[The framers believed] that members of both parties [must] agree on the necessity of considering the drastic remedy of removal from office. [They] were deeply fearful of partisan manipulation of the impeachment process.”); Tribe, *supra* note 5, at 729 (“To impeach [President Clinton] on the novel basis suggested here . . . would lower the bar dramatically, and would trivialize a vital check on execu-

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the Constitution.<sup>10</sup>

1. *The Impeachment Clause and the Convention debates*

Some of those who looked to the Constitutional Convention for guidance suggested that the Convention debates indicated a sharply limited notion of impeachment—one that was limited to abuses of “public trust” or of the “executive power,” such as procuring office by unlawful means or using presidential authority for ends that are treasonous.<sup>11</sup> Under this view, the language of Article II, Section 4 struck a “compromise” between two competing extremes: one that would have permitted impeachment for any conduct amounting to “mal-practice, or neglect of duty,”<sup>12</sup> and another that would have provided that the President “ought not to be impeachable whilst in office.”<sup>13</sup> In Cass R. Sunstein’s words, the “clear trend of the discussion [at the Convention] was toward allowing a narrow impeachment power by which the President could be removed only for gross abuses of public authority.”<sup>14</sup>

This view seemed to garner a great deal of support during the Clinton impeachment proceedings. Thirteen constitutional law scholars<sup>15</sup> asserted in a House Committee hearing that because President Clinton’s alleged conduct did not violate public trust, his actions did not rise to the level of “high Crimes and Misdemeanors.”<sup>16</sup> These scholars acknowledged that perjury

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tive abuse.”)

10. Daniel H. Pollitt, *Sex in the Oval Office and Cover-Up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259, 280 (1998) (“[I]n a larger sense, the allegations against Clinton do not fit the language, spirit, or history of our Impeachment Clause.”); cf. Tribe, *supra* note 5, at 715 (“Getting it right means taking seriously exactly what the Constitution says on the subject, as well as the context in which the Constitution says it.”).

11. See Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 285-89 (1998).

12. *Id.* at 286 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 226 (Max Farrand ed., 1966)).

13. *Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 64 (Max Farrand ed., 1966)).

14. *Id.* at 287.

15. A total of 20 constitutional scholars were invited to address the question whether perjury or obstruction of justice would constitute high crimes or misdemeanors for which a president could be impeached. Their testimony is reprinted in *Background and History of Impeachment: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 105th Cong. (1998) [hereinafter *Background and History of Impeachment*].

16. See, e.g., Sunstein, *supra* note 7, at 711 (“The current allegations against

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and obstruction of justice might rise to that level but argued that President Clinton's did not because his actions did not involve the "derelict exercise of executive powers."<sup>17</sup>

Similarly, during the time that the Committee was deliberating over the report of the independent counsel, four hundred historians issued a public statement in which they argued that President Clinton's conduct did not rise to the level of an impeachable offense because the Constitution contemplates impeachment only "for high crimes and misdemeanors in the exercise of executive power."<sup>18</sup> In the view of these historians, President Clinton's conduct was not impeachable because it involved merely private conduct, not the exercise of executive power. The "grave and momentous step" of impeachment, under this view, requires proof of abuse of executive power, lest the President be permitted to serve only "during pleasure of the Senate."<sup>19</sup>

Others looking at the Constitutional Convention concluded that "as finally adopted, the standard of 'high Crimes and Misdemeanors' seems to have a broader, less restricted meaning than merely a narrow interpretation of crimes against the government."<sup>20</sup> In support of this view, Gary McDowell noted that an earlier draft of the Impeachment Clause providing for impeachment for "high crimes and misdemeanors *against the United States*" was dropped in favor of what would become the version that today appears in the Constitution—a version that

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President Clinton do not justify a departure from our traditional practices."); Tribe, *supra* note 5, at 718 ("[H]igh crimes and misdemeanors, as terms of art, must refer to major offenses against our very system of government, or serious abuses of the governmental power with which a public official has been entrusted . . . , or grave wrongs in pursuit of governmental power . . .").

17. Charles J. Cooper, *A Perjurer in the White House?: The Constitutional Case for Perjury and Obstruction of Justice as High Crimes and Misdemeanors*, 22 HARV. J.L. & PUB. POL'Y 619, 629 (1999) (quoting Letter from Jed Rubinfeld et al., to Newt Gingrich, Speaker of the House of Representatives (Oct. 2, 1998), available in *Background and History of Impeachment*, *supra* note 15, at 383).

18. *Historians in Defense of the Constitution*, N.Y. TIMES, Oct. 30, 1998, at A17 [hereinafter *Historians in Defense*]; see also Cooper, *supra* note 167, at 629-30.

19. *Historians in Defense of the Constituion*, *supra* note 18, at A17 (quoting James Madison). But see McDowell, *supra* note 7, at 627 n.5 (arguing that Madison's comments "derived from the fact that he thought George Mason's suggested term 'mal-administration' was too 'vague' [and that] Madison 'never spoke' to the question of whether 'he sought to limit impeachment to merely abuses in the exercise of executive power'").

20. McDowell, *supra* note 7, at 634.

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omits the italicized qualifying language.<sup>21</sup> In McDowell's view, this change in the language of the Impeachment Clause indicated "the general sense of the Convention that impeachment was intended to reach political abuses, such as maladministration or malversation, as well as indictable crimes," and it also "undermine[d] the claim that impeachment is limited only to what one might call official duties and does not reach what Joseph Story would later call simply 'personal misconduct.'"<sup>22</sup>

John McGinnis reached a similar conclusion. He argued that the decision to strike the language permitting impeachment for " 'maladministration' . . . simply shows that the Framers recognized that performance in office admits of so much subjective judgment that it inevitably would allow disagreements over public policy to generate impeachment proceedings."<sup>23</sup> In McGinnis's view, however, "[t]he decision not to permit impeachment on the basis of maladministration is wholly consistent with authorizing it on the basis of serious objective misconduct that bears on the official's fitness for office."<sup>24</sup>

## 2. *Impeachment under English law*

Proponents of the view that "high Crimes and Misdemeanors" implied some abuse of executive power also relied on the understanding of that phrase in founding-era England. Although warning of the hazard of the inference that the framers "meant to transport [English practice] unreformed into their new republic,"<sup>25</sup> Sunstein asserted that "the term 'high Crimes and Misdemeanors' " under English law was generally understood to represent "a category of *political* crimes against the

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21. *See id.* at 633.

22. *Id.* at 634 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 764 (Melville M. Bigelow ed., 1891)). *Cf.* Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 GEO. WASH. L. REV. 682, 687 & n.25 (1999) (concluding that the Committee of Style deleted the phrase "against the United States" because it "deemed the qualifying words redundant" and asserting that the Committee of Style would not "have felt empowered to make a substantive change in the meaning of the Impeachment Clause").

23. John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 653 (1999).

24. *Id.*

25. Sunstein, *supra* note 11, at 290-91 (citing PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 266-68 (1984)).

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state.”<sup>26</sup> Put differently, the English practice of impeachment leading up to the founding era suggests that impeachable conduct included “the kind of misconduct that someone could engage in only by virtue of holding public office,” such as unlawful use of public funds, “preventing a political enemy from standing for election,” or “stopping writs of appeal.”<sup>27</sup>

Joseph Isenbergh reached a similar conclusion, asserting that “[i]n the 18th Century the word ‘high,’ when attached to the word ‘crime’ or ‘misdemeanor,’ describes a crime aiming at the state or the sovereign rather than a private person.”<sup>28</sup> In support of this view, Isenbergh asserted that Coke distinguished “high” treason from “petit” treason in that the former was “against the sovereign,” and that Blackstone defined other “high” offenses as those committed “*against the king and government*.”<sup>29</sup>

Other commentators challenged this narrow depiction of English practice. In John McGinnis’s view, “English history shows that the phrase ‘high Crimes and Misdemeanors’ was a term of art that was not limited to a fixed set of crimes under positive law or the common law of general criminal offenses.”<sup>30</sup> Rather, English practice preserved “a wide discretion to indict officials for bad acts that made them no longer fit to serve and thus a potential danger to the kingdom.”<sup>31</sup>

Jack Rakove described the English practice of impeachment more specifically. He asserted that “English impeachment was essentially a political weapon used by the House of Commons in its bitter struggles with the untrustworthy kings, ministers, royal advisors, and officials of Stuart England.”<sup>32</sup> Rakove cautioned, however, that application of the lessons from this “violent history . . . we have followed since our own revolution is

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26. *Id.* at 291 (quoting BERGER, *supra* note 8, at 61).

27. *Id.* at 292 (citations omitted) (noting that there were “some exceptions” in the history).

28. Joseph Isenbergh, *Impeachment and Presidential Immunity From Judicial Process*, No. 39 OCCASIONAL PAPERS FROM THE L. SCH., UNIV. CHI. 14 (1998); see also Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 610 (1999) (arguing that “[i]n the English experience prior to the drafting and ratification of the Constitution, . . . impeachable offenses were regarded as ‘political crimes’ ” against the state).

29. Isenbergh, *supra* note 28, at 15.

30. McGinnis, *supra* note 23, at 652 (citing BERGER, *supra* note 8, at 62).

31. *Id.*

32. Rakove, *supra* note 22, at 684.

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problematic,” given that “the reluctance of the House of Lords to convict most of those whom the Commons impeached suggests the difficulty of fixing an objective standard of impeachment.”<sup>33</sup>

### 3. Impeachment and “plain language”

Although the text of the Impeachment Clause itself “does not answer every question” regarding the nature and extent of constitutionally impeachable offenses, proponents of a restrictive standard argued that the constitutional language was at least “highly suggestive.”<sup>34</sup> The “plain language” argument offered by several commentators stemmed from the *ejusdem generis* canon of construction, which dictates that terms in a list should be construed to be “of the same kind” as the other terms whose company they keep. Because “the terms ‘treason’ and ‘bribery’ commonly implicate the misuse of office, and would be unmistakable references to misuse of office,” Sunstein concluded that “it would be reasonable to think that ‘other high Crimes and Misdemeanors’ must amount to a kind of egregious misuse of public office.”<sup>35</sup> Jack Rakove similarly argued that “the examples . . . used to describe acts warranting impeachment . . . confirm that they were thinking primarily, indeed exclusively, about failure to perform the duties of office or a misuse of its powers, in ways that manifestly endangered the general public good.”<sup>36</sup>

While accepting the *ejusdem generis* premise of this argument, opponents of the restrictive standard of impeachable offenses argued that “the very language of ‘Treason, Bribery and other high Crimes and Misdemeanors’ shows that it cannot be limited to official conduct.”<sup>37</sup> John McGinnis argued that because “[a]n executive branch official could bribe a judge in or-

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33. *Id.*

34. Sunstein, *supra* note 11, at 282-83.

35. *Id.* at 283 (arguing that “[t]he opening references to treason and bribery seem to limit the kinds of offenses for which a president may be removed from office”). *But see* Isenbergh, *supra* note 28, at 10 (asserting that although the Constitution “enumerates several impeachable offenses, nothing in Article II, section 4 indicates that it is an *exhaustive* listing”).

36. Rakove, *supra* note 22, at 687; *see also* Schlesinger, *supra* note 9, at 693 (“According to the legal rule of construction *ejusdem generis*, the other high crimes and misdemeanors must be on the same level and of the same quality as treason and bribery.”).

37. McGinnis, *supra* note 23, at 653.

der to receive favorable treatment in a civil case litigated in his private capacity,” and since treason “does not depend on abuse of official power,” the distinction between public and private conduct is not supported by the language of the Constitution.<sup>38</sup> Stephen Presser added that both treason and bribery involve “a betrayal of virtue and a refusal to exercise disinterested judgment in the interests of the people in order to serve the interests of someone else.”<sup>39</sup> Thus, in Presser’s view, the impeachment standard should not be limited to abuses of executive power or to offenses against the state, but should be extended by analogy from treason and bribery to any “acts that raise grave doubts about his honesty, his virtue, or his honor.”<sup>40</sup>

#### *4. Impeachment and policy*

Despite (or perhaps in light of) the countervailing arguments set forth above, commentators on both sides of the issue recognized that the evidence of the original and textual understanding of high crimes and misdemeanors could not “fix with certainty the complete enumeration of impeachable offenses.”<sup>41</sup> To some, the ambiguity in the applicable standard sustained Gerald Ford’s (in)famous capitulation that “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.”<sup>42</sup> In the words of some, “[t]he Constitution does not dictate what each senator must have in mind when voting on removal; it mandates only that at least two-thirds of the members present must vote . . . to convict in order for a removal to occur.”<sup>43</sup> Most, however, were unwilling to suspend further analysis in favor of unfettered political discretion.

Thus, while fixing a universal, objective definition may be an impossible task, many scholars asserted that it seems even more ludicrous to suggest that the phrase “high Crimes and

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38. *Id.* at 653-54.

39. Presser, *supra* note 5, at 670.

40. *Id.* at 669.

41. *Id.* at 674; *see also* Rakove, *supra* note 22, at 687 (observing that “ ‘Other high Crimes and Misdemeanors’ will always defy precise definition, but it is still less ambiguous or subjective than ‘malpractice’ or ‘maladministration’ ”).

42. 116 CONG. REC. H3113-14 (daily ed. Apr. 15, 1970) (statement of Rep. Gerald R. Ford).

43. MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 44 (1996).

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Misdemeanors” means nothing.<sup>44</sup> Indeed, Stephen Presser argued that the oath that each member of Congress takes to uphold the Constitution requires a determination of the proper interpretation of “high Crimes and Misdemeanors” “*because the maintenance of the quality of the executive that the constitutional structure demands is part of his or her job.*”<sup>45</sup>

In addition to their discussion of the textual and historical arguments noted above, commentators on the propriety of impeaching President Clinton established competing positions on questions of policy. One refrain repeatedly offered by the President’s defenders was the notion that impeachment ought to be avoided since it would overturn the will of the people expressed in the 1996 election. Others expressed the concern that conviction of the President “would threaten to convert impeachment into a legislative weapon to be used on any occasion in which a future president is involved, or said to be involved, in unlawful or scandalous conduct.”<sup>46</sup>

At a minimum, some commentators argued that these and other policy concerns ought to be balanced against the countervailing harms produced by the President’s alleged perjury and obstruction of justice. “Whatever insult the President’s conduct may have delivered to the legal system,” Jack Rakove argued, “must be weighed against the palpable stretching of the boundaries of impeachable offenses that this inquiry risks entailing,” and also against the “concern that leading Framers of the Constitution voiced about the danger of subordinating the executive to legislative control and manipulation.”<sup>47</sup>

Countervailing policy considerations were offered in support of impeachment. Some argued that “the evident purpose and structure of the impeachment clauses” was to “assure[]

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44. Cf. Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 657-58 (1999) (“Making the constitutional standard for impeachment more definite probably would render the outcome of any future impeachment proceedings less partisan. If the Constitution provided that Presidents shall be impeached and removed from office for committing particular specified offenses (in addition to treason and bribery, which already are enumerated), the clarity of the rule probably would constrain partisan disagreements. Yet it seems doubtful whether such a gain in clarity would be worth the costs. Some Presidents (and judges) who committed the specified offenses might be better left in office, and others who committed non-specified offenses possibly should be removed. Standards generally are preferable to rules for achieving outcomes sensitive to diverse factual contexts.” (footnotes omitted)).

45. Presser, *supra* note 5, at 676.

46. Sunstein, *supra* note 7, at 699 (1999).

47. Rakove, *supra* note 22, at 691.

that officials seriously unfit for office could be removed but did not make them unduly subservient to the legislature.”<sup>48</sup> From this purpose, John McGinnis argued that “‘high Crimes and Misdemeanors’ should be understood in modern lay language as something like ‘objective misconduct that seriously undermines the official’s fitness for office where fitness is measured by the risks, both practical and symbolic, that the officer poses to the republic.’”<sup>49</sup>

Other commentators refuted some of the pragmatic arguments offered in support of censure: that impeachment was “a distraction from the real business of government”<sup>50</sup> or a drastic attempt to “overturn the results of the last presidential election.”<sup>51</sup> On the first point, John McGinnis argued that the

widely held view that impeachment proceedings are a distraction from the real business of government, such as maintaining a good economy or passing beneficial legislation . . . cannot be squared with the Framers’ paramount concern for the integrity of public officials. They recognized that the prosperity and stability of the Nation ultimately rests on the people’s trust in their rulers. They designed the threat of removal from office to restrain the inevitable tendency of rulers to abuse that trust. But this constitutional restraint can work only if citizens and legislators alike have the self-restraint to allow its processes to unfold solemnly, deliberately, and without concern for their own short-term gains and losses.<sup>52</sup>

As to the second, Michael Paulsen noted that “presidential impeachment almost *always* will ‘overturn’ the results of the last presidential election.”<sup>53</sup>

### *B. Judges and Presidents: Is There a Different Standard?*

The historic vote of the House of Representatives on December 19, 1998, ensured President Clinton an infamous place

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48. McGinnis, *supra* note 23, at 652.

49. *Id.*

50. *Id.* at 665.

51. Michael Stokes Paulsen, *I’m Even Smarter than Bruce Ackerman: Why the President Can Veto His Own Impeachment*, 16 CONST. COMMENTARY 1, 5 (1999) (describing how Bruce Ackerman’s contributions to the impeachment discourse and constitutional theory would provide a basis for the claim that presidential impeachment must not be permitted to “overturn the results of the last presidential election”).

52. McGinnis, *supra* note 23, at 665.

53. Paulsen, *supra* note 51, at 5.

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in history as one of only two presidents ever impeached. Because the majority of impeachments in American history involved federal judges and other nonpresidential figures, several scholars turned to the precedent of those impeachments for guidance in the impeachment of President Clinton.<sup>54</sup> Attorney Charles Cooper, for example, explained that in the 1980s Congress “impeached and removed from office [three] federal judges on the basis of conduct that, in all relevant respects, was indistinguishable from that alleged against the President.”<sup>55</sup> He found it significant that in all three of those impeachment proceedings, “none of [the judges] argued that perjury or making false statements were not impeachable offenses.”<sup>56</sup> Another scholar reported that in every instance of judicial impeachment “Congress always has followed a broad definition of impeachment that includes non-criminal conduct and not simply abuse of judicial authority.”<sup>57</sup>

If deemed relevant, the federal judge precedent clearly seemed to mandate President Clinton’s removal from office.<sup>58</sup> President Clinton’s defenders were forced to distinguish presidential impeachment from precedents involving impeachment of federal judges. Some scholars argued that “[t]he Constitution’s structure—life tenure for judges, four year terms for presidents—[weighs] in favor of a narrower impeachment power for the President,” making “the standard for impeaching the President . . . much higher, and properly so.”<sup>59</sup> In his presentation to the Senate, Charles Ruff asserted that the test applied by the Senate for removal has always been “different depending on the office the accused holds” and that the good

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54. See Cooper, *supra* note 167, at 632-40; Jonathan Turley, *The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791, 1819-44 (1999) (reviewing 15 judicial impeachment cases and several cases that were terminated before a ruling on impeachment to conclude that “Congress has always followed a broad definition of impeachment that includes non-criminal conduct and not simply abuse of judicial authority”). *But see* Pollitt, *supra* note 10, at 277 (“These cases indicate that the Senate, when dealing with judges, has restricted the impeachment power close to the core of constitutional language . . . . Scandalous conduct in office does not trigger an impeachment.”).

55. Cooper, *supra* note 167, at 632.

56. *Id.*

57. Turley, *supra* note 54, at 1844.

58. In the most recent example of a federal judge impeachment, Judge Walter Nixon, Jr., was impeached and removed for making false statements before the grand jury and for bringing disrepute to the federal judiciary. *See id.* at 1837.

59. Sunstein, *supra* note 7, at 708.

behavior clause applicable to federal judges created a different standard for judges.<sup>60</sup> That clause, found in Article III, Section 1, provides that judges “shall hold their Offices during good Behaviour.”<sup>61</sup> While there is some disagreement as to whether the good behavior clause actually creates an alternative basis for removal, Clinton supporters argued that “our history has converged on the judgment that there is a lower threshold for judges than for presidents.”<sup>62</sup>

### C. The Censure Alternative

Over the course of the thirteen-month impeachment ordeal, members of both the House and Senate debated the propriety of a censure resolution to punish President Clinton for his conduct. A number of members believed that censure was an effective and viable alternative to impeachment. Although they were loath to convict the President, they did not “want the vote to acquit viewed as a vote to exonerate.”<sup>63</sup> Many saw it as Senator John D. Rockefeller did—an effective way “to say to myself and my people, ‘What he did was wrong.’”<sup>64</sup>

Other members opposed censure on the ground that constitutional provisions governing impeachment provide for conviction and removal as the sole remedy for presidential misconduct<sup>65</sup> and because they feared it would set a weak precedent for dealing with the delinquent conduct of future presidents. Senator Larry Craig of Idaho explained, “Most of us look at [censure] as a raw political cover. . . . It’s nothing more than a slap on the wrist . . . .”<sup>66</sup> Other senators, like Phil Gramm of

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60. See 145 CONG. REC. S487 (daily ed. Jan. 19, 1999) (statement of White House Counsel Charles Ruff).

61. U.S. CONST. art. III, § 1.

62. Sunstein, *supra* note 7, at 709; compare *id.* at 708 (arguing that the good behavior provision does not permit that judges may be removed from office for bad behavior) with Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 65-66 (1989) (arguing that the good behavior and impeachment clauses provide that federal judges may serve for life subject to removal either for an impeachable offense or for bad behavior).

63. David Broder, *Don't Hide Behind Censure*, WASH. POST, Feb. 9, 1999, at A17 (quoting Senator Susan Collins of Maine and others who supported a censure resolution in the Senate).

64. *Id.* (quoting Senator John D. Rockefeller).

65. See also Robert H. Bork, *Read the Constitution: It's Removal or Nothing*, WALL ST. J., Feb. 1, 1999, at A21.

66. James Carney & John F. Dickerson, *Waiting for the Bell*, TIME, Feb. 15, 1999, at 30; see also Wendy Koch, *Censure Effort Hinges on GOP*, USA TODAY, Feb. 9, 1999,

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Texas, expressed the concern that the precedent created by a censure resolution could come to be seen as the easy way out of any difficult political decision in the future and could eviscerate the constitutional structure of separation of powers.<sup>67</sup>

Legal scholars also offered competing views as to the constitutionality of impeachment alternatives such as censure. On one hand, some commentators noted that impeachment was the sole sanction prescribed by the Constitution. Article II provides that the president “shall be removed from Office” upon impeachment and conviction.<sup>68</sup> Article I states that “[j]udgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”<sup>69</sup> Without more, some scholars concluded that the Constitution should be read to “contemplate[] a single procedure for Congress to deal with the derelictions of a civil officer” and to rule out all others.<sup>70</sup> Others went even further, arguing that “censure would constitute an unconstitutional bill of attainder, violate the separation of powers, be used to harass presidents, or circumvent the impeachment process by permitting a condemnation by simple majority where a supermajority does not exist to remove.”<sup>71</sup>

Other scholars could not find a constitutional prohibition against censure and argued, in fact, that “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.”<sup>72</sup> Joseph Isenbergh, for example, attempted to demonstrate that the language of the Constitution could be read to allow for judgments

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at 15A (citing Senator Phil Gramm’s concerns over the censure proposals).

67. See Broder, *supra* note 63, at A17; Edward Walsh, *Senate Puts Censure Resolution on Hold—Indefinitely*, WASH. POST, Feb. 13, 1999, at A32 (“Gramm said the resolution would set a ‘very dangerous precedent’ that could easily ‘corrode the [doctrine of] separation of powers, which is the foundation of the American political system.’ ‘The motivation for it is clear,’ Gramm added. ‘People want it both ways. They want to find the president guilty and not guilty at the same time.’”).

68. U.S. CONST. art. II, § 4.

69. U.S. CONST. art. I, § 3.

70. McGinnis, *supra* note 23, at 662.

71. Randall K. Miller, *Presidential Sanctuaries after the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL’Y 647, 725 (1999) (footnotes omitted).

72. Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 34 (1999).

less than impeachment.<sup>73</sup> He argued that by providing an upper limit in the Constitution to what Congress could do in cases of impeachment—that “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States”<sup>74</sup>—but not a downward limit, the framers intended to allow for judgments that extend far less than actual removal and disqualification, namely censure.<sup>75</sup>

*D. The Role of Partisanship in the Impeachment Process*

The political implications of impeachment in America’s two-party system prompted many to question the proper role of partisanship in the impeachment and trial of President Clinton. Critics of the Clinton impeachment berated Republicans for proceeding with an impeachment that lacked bipartisan support.<sup>76</sup> The President’s supporters, for their part, called attention to the framers’ fear of “partisan manipulation of the impeachment process” in their review of impeachment history.<sup>77</sup> They pointed out that Alexander Hamilton had cautioned against the “great[] danger that the decision [of impeachment] will be regulated more by the comparative strength of the parties than by the real demonstrations of innocence or

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73. See Isenbergh, *supra* note 28, at 9, 12.

74. U.S. CONST. art I, § 3.

75. See Isenbergh, *supra* note 28, at 12; see also Gerhardt, *supra* note 72, at 34 (“[T]here 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,’ and provides that ‘for any Speech or Debate in either House, [members] shall not be questioned in any other Place.’ Moreover, the First Amendment 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.” (footnotes omitted)).

76. See, e.g., Schlesinger, *supra* note 9, at 696 (“The current impeachment proceedings, judging by the strictly partisan vote in the House of Representatives, fails the legitimacy test [the framers established in their discussions of impeachment].” (footnote omitted)); Edward J. Larson, *Of Course It’s Partisan*, WALL ST. J., Dec. 11, 1998, at A14 (“From President Clinton’s defenders we hear that the impeachment process has become too partisan, that impeachment should be above politics. As a historian, I can’t see what all the fuss is about. Of course impeachment is partisan.”).

77. Schlesinger, *supra* note 9, at 695.

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guilt.”<sup>78</sup>

Many other scholars, however, noted that in making such statements Hamilton and the other framers were merely recognizing the realities of impeachment. They argued that partisanship is unavoidable in a political proceeding like impeachment.<sup>79</sup> After all, although Hamilton acknowledged that impeachment might become so partisan as to “enlist all [the] animosities, partialities, influence, and interest on one side, or on the other,” the framers ultimately concluded that such a proceeding was still preferable to leaving a tyrant in office.<sup>80</sup> To temper the realities of the process, the framers divided impeachment responsibilities in the Constitution between the House and Senate.<sup>81</sup> Randall Miller noted that in their division “the Framers required a supermajority for conviction and removal in the Senate—an institution that was thought to be further removed from partisan influence than was the House” and thus “guard[ed] against the potential that the impeachment and removal process would be overwhelmed by partisanship.”<sup>82</sup> Constitutional safeguards were put in place to manage partisanship, not to prevent it.

Notwithstanding the safeguards, many were surprised by the amount of partisanship that persisted in the impeachment of President Clinton. Widespread reports on the results of public opinion polls seemed to contribute to the partisanship of the Clinton impeachment. In an August 1998 poll conducted by CBS and the *New York Times*, 65% of surveyed individuals approved of the President’s job performance.<sup>83</sup> In late September, a similar survey showed that only 30% of those surveyed be-

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78. See *id.* (quoting THE FEDERALIST NO. 65 (Alexander Hamilton)).

79. See Klarman, *supra* note 44, at 658 (“Setting aside cases where the President’s conduct is either so egregious or so trivial that both sides will agree on the propriety of removal, intermediate cases likely will result in partisan splits.” (footnote omitted)).

80. Pollitt, *supra* note 10, at 266 (quoting THE FEDERALIST NO. 65 (Alexander Hamilton)).

81. See U.S. CONST. art I, §§ 2-3 (giving the House of Representatives the “sole Power of Impeachment” and the Senate the “sole Power to try all Impeachments”).

82. Miller, *supra* note 71, at 701; see also Julie R. O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2225-27 (1998) (pointing out that by giving senators six-year terms as opposed to two years the framers intended the Senate to be a more deliberative body less susceptible to partisan political winds).

83. See Adam Nagourney & Michael R. Kagay, *High Marks Given to the President But Not the Man*, N.Y. TIMES, Aug. 22, 1998, at A2.

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lieved that Congress should proceed with the impeachment hearings.<sup>84</sup> Over half said that they would be satisfied if no action were taken at all.<sup>85</sup> Throughout the process, the President's approval rating remained high; during the Senate trial almost two out of every three Americans approved of President Clinton's job performance and did not want to see him removed from office.<sup>86</sup> These poll results seemed to encourage the President's defenders.<sup>87</sup> The constant barrage of positive poll numbers probably served to entrench both sides of the debate and create an "intermediate case[]" of impeachment, one in which partisan splits were more likely.<sup>88</sup>

Several senators cited the high poll numbers to explain their votes to acquit President Clinton. Senator Byrd, in particular, stated, "In the end, the people's perception of this entire matter as being driven by political agendas all around, and the resulting lack of support for the President's removal, tip the scales for allowing this President to serve out the remaining 22 months of his term, as he was elected to do."<sup>89</sup> Some legal scholars also used the President's popularity and the results of the November 1998 election to buttress their criticisms

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84. See, e.g., Bob von Sternberg, *Minnesotans Give the Man and the Job Very Different Ratings*, STAR TRIB. (Minneapolis, Minn.), Sept. 22, 1998, at 10A (reporting that in a poll of Minnesota residents "[o]nly 30 percent want Congress to initiate impeachment proceedings, while 58 percent want Congress to drop the whole matter").

85. See *id.*

86. See Jackie Calmes, *Issues Beyond Impeachment Vex GOP About Clinton*, WALL ST. J., Jan. 22, 1999, at A12 ("[Sixty-eight percent of Americans polled] approved of the job that Mr. Clinton is doing."); Bob Davis & Glenn R. Simpson, *Senate Watchers Say the Odds Favor Clinton, but a Turn of Events May Mean All Bets Are Off*, WALL ST. J., Jan. 8, 1999, at A20 ("Democrats are sticking with the president, in part, because of Mr. Clinton's astonishingly high approval ratings from the public. Roughly, two out of three Americans say they don't want him removed from office.")

87. See David S. Broder, *Should Such a President Remain?*, WASH. POST, Dec. 11, 1998, at A31 ("If you want to know why the holiday season is shadowed by controversy over impeachment, look back to last Jan. 30, nine days after the Monica Lewinsky story broke. On that date, my *Washington Post* colleague John F. Harris reported that President Clinton and his advisers were encouraged by polls showing 'the public's initial shock . . . has subsided sufficiently that they could pursue a policy of withholding information about Clinton's relationship with the former White House intern indefinitely.' They adopted what one adviser called a "hunker-down strategy" in which Clinton explains nothing publicly as long as he is under legal investigation for obstruction of justice.'").

88. Klarman, *supra* note 44, at 658.

89. 145 CONG. REC. S1636 (daily ed. Feb. 12, 1999) (statement of Senator Robert Byrd).

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of those who pushed for Clinton's impeachment.<sup>90</sup>

A few participants questioned the relevance of popularity and prosperity in an impeachment trial. In response to some of the scholars' arguments, Professor John McGinnis noted that "the Framers recognized that officials who should be impeached and convicted may not only remain popular in the face of serious charges, but even after conviction."<sup>91</sup> Senator Pete Domenici responded to Senator Byrd's comments during Senate deliberations frankly: "Popularity is not a defense in an impeachment trial."<sup>92</sup> Senator Gordon Smith of Oregon similarly stated, "I cannot will to my children and grandchildren the proposition that a president stands above the law and can systematically obstruct justice simply because both his polls and the Dow Jones index are high."<sup>93</sup>

### *E. Conclusion*

In the end, the Senate's decision not to convict President Clinton tells us very little about the legal standards applied by individual senators and even less about the standards adopted by the collective body as a whole. The record contains their statements and deliberations, and in some instances (including those noted above) those deliberations offered a window into their individual views on the important legal questions addressed above. We can probably presume that they found the arguments of the President's defense team slightly more persuasive than those of the House Managers, but every senator probably processed and weighed the issues differently. The task falls upon legal scholars to find some constitutional order in the aftermath of President Clinton's impeachment trial. The panel discussion transcript set forth below is offered with that in mind and with the hope that it will shed some light and in-

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90. See, e.g., Schlesinger, *supra* note 9, at 696 ("The results of last Tuesday's mid-term election show that the impeachment drive has failed in its quest for popular support and legitimacy." (footnote omitted)).

91. McGinnis, *supra* note 23, at 660 (responding to the claim that "the continuing popularity of a President should insulate him from impeachment"); see also *id.* at 662 ("The underlying claim that the President should be insulated from impeachment by popular sovereignty is based not only on a historical misconception but also on mistaken premises about the way politics works.").

92. 145 CONG. REC. S1502 (daily ed. Feb. 12, 1999) (statement of Senator Pete Domenici).

93. Edwin Chen et al., *Senate Jurors Begin Private Debate on Clinton Verdict*, L.A. TIMES, Feb. 10, 1999, at A1 (reviewing the statement of Senator Smith).

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sight on the important and meaningful legal questions that linger after the conclusion of the Senate's impeachment trial.

## II. IMPEACHMENT PANEL TRANSCRIPT

### *A. Opening Statements*

#### **Congressman Chris Cannon:**

It's a great pleasure to be back here in these hallowed halls, where I spent a large part of my life. I'm reluctant to say youth, I guess, at this point, but it was a long time ago. I want to thank [BYU Law School] Dean Hansen, who's been a good friend for a very long time, for having this happen. I think it will be a very interesting event today and thank you, Tom [Lee], for overseeing the process.

Tom Griffith—who is very important in the U.S. Senate. For BYU, he's a treasure. This is really a remarkable event. When I got the proposed schedule, I saw Gregory Craig on it. I thought, "There can't be two!" That is, two who were associated with the impeachment of the President. Tom [Griffith] was able to invite Greg to meet with us today. We are honored to have Greg here with us. Let me just say, by way of introduction, that I think Mr. Craig had the hardest task a lawyer could have in life. Those of you who are going to be lawyers need to be thinking about this. You can imagine, this is not defending a person from the elements of crime, although that is relevant to what's going on. This is defending a person in a totally political context. You can talk about elements and particulars; you have to do so with a straight face. Let me say that all of the White House Counsel, I think particularly Mr. Craig, did that extraordinarily well. He did that by not coming in and denying the facts that America had concluded on, but by acknowledging wrongdoing and then walking us through, at some length, the technicalities of the crime. I think that both in the House and in the Senate, he did an absolutely remarkable job of doing that.

We've all, as Americans, come through a very traumatic experience. I've just gone through a series of Town Hall meetings, mostly to the east of Park City and Oakley and out in the Uinta Basin. And in Park City, as you might guess, the crowd tended

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to be Democratic. In fact, there was one fellow there who acknowledged he had been a Republican but had torn up his card. The rest didn't say much, but they were clearly Democrats. Actually, it was the most pleasant of all the meetings we had. We had a very interesting discussion. We then went out to the Basin, and probably the least pleasant of all the town meetings was last night, where there were a bunch of people upset at the leadership of the Republican Party. They expressed it with great intensity. During all these town meetings there were a number of questions, like, "Why don't we have someone who stands up, who is the leader of the party and who will express with clarity the principles we are standing for and what we're doing as a party?" The answer to that has to be that this is America, and in America we have a president. The president is a strong office. We want the president to be the person who leads the country. When your party does not have the White House, then you don't have a leader of the party. I've also said, and I say to you all, if you're unhappy with the way people are articulating the issues of the day, you ought to get out and articulate them yourselves. When you consider 435 congressmen, 535 if you include the Senate, that's a lot of dilution. The fact that you're not a congressman or a senator probably doesn't make a difference in the kind of press any kind of individual gets other than the president.

We've now come through this really traumatic process, and let me talk for a moment what that meant in the lives of the manager and then talk about what I think happened in the Senate, or didn't happen in the Senate, and what I think that means for America today.

Personally, Congress is not a bad place to work because you get a lot of time off—four, five, six months a year. After the last election in November, you expect to come back for one week and then you're off for November and December and most of January, and I was actually looking forward to that. After the impeachment hearings in the House, I was deeply reluctant to become a manager because of the time commitment, but I felt I had something to contribute to the team. I'll say something just as a side bar, it was one of the most incredible experiences of my life to be together with a group of people who were so clear and so consistent in that there were views and principles that bound us together. In any event, what ended up happening was that I spent all of November preparing, all of December work-

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ing on hearings and preparing, and all of January and half of February. In fact, during the January and February period I was home for fifteen-and-a-half hours out of a four-week period. It took some toll. I will say that the toll on me was much less than it was on some other people, like Jim Rogan, for instance, who won by three-tenths of a percent, or Steve Chabot, who won his district by less than three percent and expects a very hard election next time.

In the course of all this, there was some incredible rhetoric, and I thought I'd give you some insight into the character of one of the managers and then as a backdrop for what he said to the Senate—that's Jim Rogan. My scheduler had wanted to meet him, so I invited her around the corner one time to go into his office. As we were leaving, she said, "You know, Rogan's mother just called you." I said, "Great, what did she say?" She said, "You're her favorite manager, except her son." I'm sure she gave that phone call to everybody else, but I walked into Rogan's office and I said, "You know, your mother just called me." His face went ashen, literally. He said, "What did she say?" So I repeated this. "Great," he said, "because she can swear like a sailor." It surprised me a little bit, but turns out his background is very similar to Bill Clinton's background, and yet, he chose at some point in his life to choose principle over gratification, and that made all the difference. His closing line when he spoke to the Senate was . . . "Dreams come and dreams go, but principles are forever." So in the face of the very difficult reelection campaign, he chose a difficult choice, and that was to push for impeachment. Thank you.

**Senator Bob Bennett:**

The most interesting part of this whole experience for me and the other senators was the amount of time we spent literally behind closed doors. The decision of the Senate to conduct its deliberations in a jury atmosphere—that is, without the press being present—was the most significant of our decisions in terms of its impact on what happened. Because for the first time in my Senate career, and the first time I can remember thinking back over my father's senate career, all senators were present through all the deliberations. Do you have any idea how unusual that is? When you give a speech on the Senate you consider yourself a great hero if you have half a dozen

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senators listening to you. Occasionally, when I give a speech, one of my colleagues will come up to me and say, "I saw you on television and thought you made some good points." We all pretend that we watch the proceedings on our television in our offices, and, in fact, none of us do. To have us all there and talking frankly, which you can do when the TV cameras are off, was, I think, the most single and significant impact on the trial.

What I'm going to do is take you through some of the things that were said in those sessions. I will not identify the senators, except by general category, but they give, for me, a general chronology of where we were.

The first comment was made by a liberal Northeastern Democrat in the session in the old Senate chamber. He said, "This case is toxic. It has destroyed the White House. It has destroyed the independent counsel's office. It has destroyed the House of Representatives, and it is about to destroy us."

I think there was a little bit of overkill there, but there's no question that the case has seriously damaged the presidency; seriously damaged the Office of Independent Counsel, if not made it probable that the statute creating that office will be repealed; seriously damaged the image of the House of Representatives; and, by his warning, in danger of damaging the Senate as well. I think that was a very wise and insightful comment by my liberal Democratic colleague. It was a sobering backdrop for the way the Senate as a whole approached this. One of the things we did, not by any kind of conspiracy or formal agreement, but just individually, senators came to a common conclusion that we must not only do impartial justice to the President, but we must do it in a way that does not do damage to American political institutions and the most precious one to us—the United States Senate. So we were going to handle this in a way that reflected well upon the Senate, and frankly, I think we did. The great tribute for the fact that that happened belongs to Trent Lott, the majority leader of the Senate, with a very heavy dose of congratulations also going to Tom Daschle, the minority leader. The majority leader was the man who was in charge, and he handled it in a way that the prediction, the prophecy, that came out of this opening statement was not fulfilled.

Next, I take you to a moderate to conservative Republican from the West, a very good lawyer, who said to us, "We must

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approach this with the understanding that there are four questions that have to be answered affirmatively before we can vote to convict. The first question, is 'did he do it?' The second question is, 'was it a crime?' The third question, 'if it was a crime, was it a high crime?' The fourth question is, 'even if it's a high crime, does it justify removal from office?'" He said, "You can come to the conclusion that the answer is yes to the first three questions and still vote not guilty." Indeed, this particular Republican did vote not guilty on one of the two charges. He took a lot of political heat from back home for his decision, but it was a very principled and carefully-arrived-at decision.

Interestingly enough, and here I will use a name because he's spoken about it publicly, Robert Byrd said essentially the same thing. And Robert Byrd came to the same Republican I've just quoted and said it publicly. "Did the President do it? Yes, no question. Was it a crime? Absolutely. Was it a high crime? You bet, but I'm not going to vote to remove him." That was Robert Byrd's publicly-stated opinion. The difference between the Republican and the Democrat on whether to vote guilty or not guilty was hair-line thin, with Byrd coming down on one side and the Republican coming down on the other, at least on the obstruction of justice charge. I found it instructive to have that kind of ladder constructed and talked about on both sides of the aisle.

The next one I will share with you was a comment by one of the most liberal members of the Senate, and I use him because he typifies the seriousness with which all senators approach this issue. He said, "There have not been two impeachment trials in our history, but three." He said, "One did not come to a decision, that's the case of Richard Nixon, but we have in fact had three impeachment proceedings." He said, "In my view, the first one was totally without merit, with Andrew Johnson. The second one was a clear slam-dunk of guilty with respect to Richard Nixon. This third one is a close case that goes in either direction." He then openly discussed with us the anguish that he was going through as to how he would vote. I found that an interesting juxtaposition of where this case would fall on the historic spectrum.

One of the better lawyers in the Senate said to us, "We have to recognize that this is not a traditional trial." He agreed with the White House lawyers. He said that if the first article had been presented in any court in the land it would have been

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thrown out, but the House chose to put it in the language of the Nixon precedent, and, therefore, it is not to be viewed as something to be dealt with in a courtroom trial, but rather something to be dealt with in the context of an impeachment charge. Interestingly enough, this particular senator also voted not guilty on the first issue and guilty on the second.

Time has been called so I will let you read my own speech as to where I came down on this one. I assure you that every senator approached this with tremendous seriousness, and none of us went at it with any sense of relish or satisfaction at the challenge that we faced.

**Tom Griffith:**

I have a wonderful job, and it's also a very easy job. The wonderful job is to be Senate Legal Counsel. The easy part of it is, whatever the Senate does is right, and I find the explanations for it. I think you saw in Senator Bennett's comments a reflection of the seriousness with which senators approached this. If you'll indulge me, I've actually prepared remarks so that I can keep within the seven minutes, and I hope I will. So I'm going to read it to you if you don't mind. I don't normally like doing that, but I had some thoughts I want to share with you, so let's see if it works this way.

Most of the criticisms I've heard directed at the Senate's conduct of the impeachment trial comes from what I believe to be a fundamental misperception of what the Senate is supposed to be doing when it exercises its sole power to try on impeachments. The primary debate over impeachment during the Constitutional Convention was, who should have the power to try impeachments. The Virginia and New Jersey Plans each provided that a court try impeached officers. Madison strongly urges the Convention to give that power to the Supreme Court. Hamilton argued for the creation of a special court. In late July, the Committee on Detail proposed trial before the Senate and the judges of the Federal Judicial Court. Over Madison's strenuous objections, the Convention expressly rejected these proposals and determined that no court should try impeachments, only the Senate could do so. Many of the criticisms directed at the Senate, I believe, have failed to take account of this fundamental decision in 1787.

Throughout the trial, critics, commentators, and even

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members often relied on a judicial model to undergird their arguments for why the Senate should proceed in this manner or that. At points I thought I was going to scream if I heard Greta Van Susteren and Roger Cossack say one more time, "Gee, this isn't like any trial I've ever seen." The framers rejected an exclusively judicial model for impeachment trials. The values that informed judicial proceedings and the processes designed to protect those values would not necessarily be those used in impeachment trials. Unlike courts, which are forums for contests over life, liberty or property, an impeachment trial is designed to protect our political structure. The framers consciously chose a political forum for the trial of impeached officials. James Wilson, a delegate at the Philadelphia Convention who later served as one of the first justices on the Supreme Court, and who his contemporaries regarded as second only to Madison in his knowledge of the design of the Constitution, wrote that "impeachments are proceedings of a political nature confined to political characters to political crimes and misdemeanors and to political punishments. Impeachment and offenses and offenders impeachable do not come within the sphere of ordinary jurisprudence. They are founded on different principles, are governed by different maxims, and are directed to different objects

Hamilton knew that placing the sole power to try impeachments in the Senate meant that the forms and processes of the courts would not be required in the Senate. In the now-famous Federalist No. 65, he wrote, "This can never be tied down by such strict rules. Either in the delineation of the offense by the prosecutors or in the construction of it by the judges as in common cases served to limit the discretion of courts in favor of personal security."

The Senate has recognized the limited value of the judicial model in the impeachment setting. For example, in anticipation of the trial of Andrew Johnson, the Senate determined that it sat for impeachment trials as the Senate rather than as a court. Accordingly, the Senate struck from its rules all references to itself as a high court of impeachment. Furthermore, the Senate has consistently rejected efforts to make its impeachment proceedings more like a court. It has refused to adopt rules of evidence. It has rebuffed motions to establish a standard of proof, leaving to each member the determination what quality of evidence is needed to convict. To be sure, the

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framers created safeguards to cabin the political motivations they feared could overtake an impeachment trial, but it is interesting how few in number those safeguards are. Jurisdiction was limited to allegations of treason, bribery, or other high crimes and misdemeanors against the president, vice president, or civil officers. The sole remedies upon conviction are removal from office, which is an automatic and unavoidable sanction, and disqualification from holding future office, which requires a separate majority vote to impose. The only procedures required by the framers in the impeachment trial are one, a two-thirds vote to convict; two, the taking of an oath by the senators and their presiding officers; and three, the Chief Justice [of the Supreme Court] presides over a trial of the president. There are significant consequences from the first two of these requirements. The requirement of a two-thirds vote to convict, which was a departure from the British practice which only required a majority vote, virtually guarantees that removal from office cannot occur unless there's near consensus. Hamilton warned in *Federalist No. 66* about "the danger of persecution from the prevalence of a factious spirit."

In today's policy, that means that a partisan impeachment is doomed to failure. In hindsight, I think this means as a practical matter that if removal from office is the goal, the groundwork must be carefully laid for bipartisan impeachment in the House. It seems to me that such groundwork must involve a bipartisan investigation of the alleged facts by the House itself, and not by an independent counsel. In my view, the oath is the most critical safeguard the framers created. It was the oath that was to lift these politically accountable senators above faction and allow them to see clearly to do impartial justice. Beyond these few procedures, the framers said nothing about how the Senate should structure an impeachment trial. The framers did speak of the power to try and that must mean that whatever process is chosen, fundamental concepts of due process apply for notice and an opportunity to be heard.

But beyond these safeguards and those values, the framers gave the Senate free reign. What is fundamental is that not only did the framers reject the proposal that impeachments be tried in courts, but that they did not impose on the Senate "sit in an impeachment procedures" that were designed to protect judicial values. In my view, modern efforts to do so may violate that understanding. This insight that the Senate is not a judi-

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cial proceeding helps resolve in my mind a number of the issues that arose in the trial of President Clinton.

Since my time is out, I will just identify the four issues that I think it resolves, and we can talk more about them later. Senator Harkin made a motion early on in response to a statement made by Manager Barr, where Manager Barr said the senators were jurors and if they found certain facts to be the case they had to remove him from office. Senator Harkin objected to that. The Chief Justice, I think, rightly ruled. Senators are not jurors, they are senators. Some of the things they do in impeachment trial is like what a juror does. Some of the things they do in an impeachment trial is like what a judge does, but they are neither a judge nor the jury—they are senators.

A second issue was the proposal for the findings of fact. That proposal didn't get a lot of traction. I don't think there was anything unconstitutional about the Senate voting on findings of fact, but had they done so it certainly would have been a departure from the way the Senate has viewed impeachments in the past. Findings of fact are created in the judicial world. They're to impose rationality on judges and juries. We've never thought that the Senate needed to be constrained in that fashion.

Finally, almost finally, I'm glad that Senator Bennett mentioned Senator Byrd's speech. Senator Byrd has come under attack for his reasoning in saying, "Yes, the facts were proven. Yes, it was a high crime, but no, I'm not going to vote to remove." Without passing judgement on the merits of his reasoning, I want to let you know that his thinking is well within the mainstream of how the Senate has viewed the discretion the senators have in impeachment proceedings.

And finally, the President's lawyers' argument that this impeachment was flawed because the articles were written in the way they were written. That argument borrows from an argument that works very well in criminal proceedings, but I don't think it works well in Senate impeachment proceedings because of the discretion the Senate has historically given to senators. Thank you.

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**Gregory Craig:**

Let me first congratulate the organizers of this event. I think it's a great contribution of the wisdom that is already out there and that we have acquired and hopefully will be passed on to future generations. Let me also add that it's a little therapeutic for those of us who have gone through this experience to be able to talk about it to people who are still interested in it. Let me also thank you, Congressman Cannon. I wish we had been more persuasive in our ability to move you in your votes, but, nonetheless, I'm grateful for your comments, and Senator, any time you want a unanimous consent to revise and extend your remarks, you have my support.

Lawyers like to make lists, and so, in preparing for this, I've made three quick lists. If anybody wants to elaborate more on any of the topics on these lists or any of the items on these lists, I'd be happy to do that, but I thought what you might be interested in is my view of what the key events were—if you have to pick five or six events in the House and five or six events in the Senate—and what the framers might conclude if they had participated or watched this event, coming back from 235 ago, and what their reactions might have been had they looked at this process.

First, I would say there were five key events in the House and decisions made in the House, that if done differently, they might have changed the outcome. I first of all say this is Greg Craig's judgment and guesswork based on my own experience. I was a latecomer to this process. I sort-of parachuted in on September 15, went through the process until the vote on February 12, and left and returned to the private sector thereafter—about the best way I think you can do this, because it had a beginning and a middle and an end.

The key events in the House, I think: One was the decision by the House Judiciary leadership not to accept or to join together with the Rick Hauscher/Howard Burman plan for the proposed impeachment inquiry, which if the Republican leadership had done so would not have diluted the inquiry any bit as far as I can tell, but would have, in fact, created a very powerful bipartisan consensus behind an ongoing impeachment inquiry. That's point one. That decision had ramifications throughout the rest of the process. I have to tell you, Griffith and I have not pooled our knowledge or our thoughts before we

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did this, but, in fact, they feed together very well.

The second issue was the decision to rely exclusively on the work of Kenneth Starr as the basis for the findings and the recommendations for the Judiciary Committee and not to conduct any independent investigating to hold evidentiary hearings to co-witnesses or to gather their own documents, so that the Judiciary Committee's recommendations and the articles that were reported were based entirely on the investigatory work of Kenneth Starr and the Office of Independent Counsel. There are consequences for that.

The third decision was not to allow the vote in the House for or against a resolution of censure. This was the last opportunity and a real lost opportunity, I think, to have a genuinely bipartisan consensus as to what a result should be. This was something that the White House could not participate in because any time the White House started drafting its resolution of censure or proposed that kind of result it would have been the kiss of death. It had to come from the House of Representatives' members themselves. It didn't happen and then the leadership not only precluded it, but prevented the possibility of such a vote being taken from the floor. There were consequences for that as well, because I think it would have passed and would have ended the whole process there.

The fourth was during the debate on the floor of the House as the articles were being considered, the use of the evidence by some of the Floor Managers, some of the members of the Judiciary Committee, that had not been the subject of discussion or debate in the hearings, had not been disclosed to White House counsel, had not been revealed to the public, but obviously had an impact on changing votes in some members of the House of Representatives. We don't know how many, but it was a procedure and a process and an event that many people thought was unfair and represented a low blow.

The fifth, I think, had significance for the Senate trial, and that was the House rejection of the second proposed article, which alleged that the President had committed perjury in the Jones deposition. This liberated the lawyers to launch a much, much more fact-intensive defense, because it was much more difficult to defend the testimony in the Jones deposition than it was in the grand jury. In fact, after the decision that the House made after this debate and its deliberations not to send that article over to the Senate for its consideration, we ran a much

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more successful, fact-based defense in front of the Senate.

In terms of my list in the Senate, I think the Republican decision to reject the Gordon/Lieberman proposal had consequences for us that didn't play out the way we feared; but it was a great moment of concern for us, because, obviously, the majority leader had floated or had blessed Senator Gordon's effort to arrive at a bipartisan procedural solution to the impeachment trial in the Senate that got rejected by the members of the Senate Republican conference. That decision to reject it, I think, put us in a world of uncertainty, to the point where the speech that Senator Bennett referred to in the old Senate chamber was made at a moment of great crisis as to what was going to happen to the institution and to the impeachment process itself. We had no role. We were just the subjects of the activity in that debate, but we were very concerned because we thought we were going to lose the partisanship that we thought would protect us. Low and behold, we did. We had 100 to 0 vote coming out of that old Senate chamber session, which reestablished, at least for a while, a bipartisan approach to the impeachment proceeding that was in fact a great threat to the future of the President because it rehabilitated the entire process. It legitimated what had been done in the House, in our view. It gave the House Managers four days of uninterrupted presentation of the facts and arguments in support of removal where we had no chance to respond or rebut those arguments.

The third serious implication—and I'd be happy to discuss this with the Congressman—is that I think the House Managers systematically overreached in their presentations on both the articles. You may have seen my arguments that we were discussing trivialities here about which the House of Representatives never would have voted to impeach or remove a president of the United States. The same was true with overreaching in the arguments about obstruction of justice, where I think that the heart of the argument was that there was, in fact, efforts to conceal this relationship, then these court proceedings proceeded, the efforts didn't stop, and those efforts then became criminalized. So the obstruction of justice argument really depended upon establishing an intent on the part of the President to persuade, to coerce Ms. Lewinsky to participate in a process of concealing that she'd signed on completely to preceding any kind of court proceeding.

The fourth key event I think in the Senate was Dale Bump-

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ers's presentation. I don't know, Senator, if you agree with me, but when Dale Bumpers told his joke it was like a release of psychic energy. We had gone through an incredibly intense, emotional five days, and there had been no jokes, there had been no light touch, there had been no effort to put this into some kind of human perspective, and when Senator Bumpers made his presentation he humanized it in such a fashion. I think he also humanized the President and the President's family situation in a way that was very important to at least the President's defense.

I think the key moment in the Senate was Senator Byrd's announcement that he would sponsor the motion to dismiss, because Senator Byrd was the key Senator both for the Republicans as well as for the Democrats throughout the process. When he announced at the conclusion of our case and during the first day of questioning that he was going to sponsor, for whatever reason, Senator, I'm not sure I agree with his reasoning throughout, but whatever reason he agreed that he would sponsor and speak for and move the motion to dismiss. It seemed then, at that point, that the Democrats were going to stick together, and the effort to dismiss the President would be defeated.

Finally, the key moment was the fifty-five to forty-five vote on witnesses. I think that was the one significant party-line vote, prior to the votes on the articles, that sent a message that carrying on the trial any longer would be futile and would be a waste of time and would disrupt the business of the country.

I had a list also of three or four surprises that I thought the framers would have found in the process, which I'd be happy to discuss in the course of the questions and answers; but it does seem to me that if the framers had come back, whether it was Alexander Hamilton or James Madison or George Mason, they would have found the process that we went through to be nothing compared to what they had predicted or thought was going to happen back in 1789. Thank you very much.

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*B. Federalist Society Questions and Answers**Question***Professor Lee:**

Mr. Craig, my first question is for you. As law students and lawyers, one of the things that we do for a living is interpret text, and one of the principal issues in the impeachment proceeding was how to interpret Article 2, Section 4 of the Constitution, which provides that the president shall be removed from office on impeachment for and conviction of treason, bribery or other high crimes and misdemeanors. How do we interpret the provision? You've mentioned something about original intent and looking at what the framers would think. Talk about your interpretive methodology for coming up with a construction of this provision and talk also, if you would, about the precedent that is added by the Clinton impeachment proceedings to interpretation of the provision.

*Answer***Mr. Craig:**

Do I have seven minutes? Let me just say briefly before I get into that—and I'll try to be brief in answering it—it's not a new question. Between the time of the House vote and the time the Senate took up this issue, we met with Tom Griffith and his team, and I have to tell you it was a sigh of relief among the lawyers in the White House that we were in the hands of an even-handed, fair-minded, intelligent, well-trained lawyer who was going to do justice and make this process fair. I think on behalf of the White House team, I want to pay tribute to Tom Griffith's contribution to the process in the Senate and the fairness that the process really experiences, as I agree with Senator Bennett that the Senate did itself proud, and we were in need of that at the time.

**Senator Bennett:**

Thank you. I'm not certain I want that praise in front of this group! I think I just lost a friend in the audience.

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**Mr. Craig:**

I know. I thought half way through this that I just killed you!

To me, this was one of the genuinely most interesting intellectual and historical and legal and constitutional issues was taking this set of facts and these allegations about this President and his conduct and, assuming that it's true, which you do in a summary judgment motion kind of proceeding or a demurrer kind of proceeding, doesn't rise to the level of an impeachable offense. We had historians testify. We had constitutional scholars, and I know that the House Judiciary Committee was up to here with opinions, expert and nonexpert, legal, historical on this issue. But to me it was genuinely interesting debate and largely because the consequences to the future were great, if in fact, as I view the case, this conduct, as blameworthy and as wrong and as disappointing as it was, became the basis for removing a president of the United States. In my view, it would have spelled a remarkable lowering of the threshold for an impeachment, and make it possible to contemplate the use of impeachment as a political tool—a normal political tool—and weapon in normal political debate in the future, which would have significant consequences for the strength of the presidency.

One of the reasons I took this job and went to work for the President in connection with this case is because I did believe that the presidency and the strength of the presidency as an institution is one of the great things about the history of this country. To undermine it and destroy it in any way, shape, or form would be disastrous. It would have happened with future Presidents from other parties had we not had the outcome. As it is, I think the outcome was the right outcome, obviously, and I don't think the damage to the presidency constitutionally had occurred that I worry about. There has been other damage that I readily acknowledge, particularly in connection with the privilege and with the President's ability to work with his associates and have the trust of his employees and Cabinet.

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*Question*

**Professor Lee:**

What's the standard? What does it mean? In particular, can you focus on what was sometimes focused on by the President's lawyers, which was "This is purely private conduct. This doesn't involve the powers of the President."

*Answer*

**Mr. Craig:**

Let me give you a one sentence answer. I agree with Senator Bumpers's view on this that the impeachment power was intended to address abuses of official power and threats to the system of government, assaults on our system of government, on our constitutional framework. If you did not have a president abusing his powers as president—directing the FBI to do this, directing the CIA to do that, or the IRS to do that, or bribing officials, or using his people to bribe officials—then I don't think you have the kind of conduct that was intended to be addressed by the impeachment power.

**Mr. Bennett:**

Let me just respond to that. Interestingly enough, it was Senator Bumpers's speech that ultimately nailed down my decision to vote to convict on obstruction of justice. It demonstrates you are focusing on the President's conduct, as the White House lawyers did primarily, with respect to Monica Lewinsky. I put that aside very quickly and focused on his conduct as President and his actions as President. Senator Bumpers used a phrase that I used in my speech that struck me very vigorously. He said, "The Constitution was written to keep bullies from running over weak people." I asked myself, "who is the bully and who are the weak people?" Of course, the President structured it that he was the victim and that Kenneth Starr was the bully. Our constitutional duty was to protect him from the bully of the independent counsel.

As I viewed it, looking at the case in its total context, in the way that Tom Griffith has described, as a senator, not as a ju-

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ror—jurors are restricted to judging the evidence presented in the court. The founding fathers recognized that the impeachment process is a safety valve whereby the four-year term given to a president can be abrogated if in fact you get a president who is, in Charles Ruff's phrase, "threatening the liberties of the people." The President did not misuse the FBI. The President did not misuse the CIA. He did not do the kind of things Richard Nixon was accused of, but he misused Sidney Blumenthal. He misused James Carville. He misused the enormous public relations that the modern presidency has to deny one of the weak people her day in court, or her right to accurate testimony in a case. The systematic demonizing of Paula Jones over her hair and her nose and her choice of attorneys that went on relentlessly was, for me, ultimately a major part of this case. And the fact that he lied under oath in an effort to accomplish this, and he did some of the other things he did, and the House Managers talked about—by the way, I agree that the House Managers overreached and damaged their case with some of the facts they tried to get us to swallow—nonetheless, the totality of the whole thing, at the end of Dale Bumpers's speech, I said "Dale has framed it very well." The Constitution is to keep bullies from running over weak people, and in this case, Bill Clinton, James Carville, and all the other people associated with him, using the enormous powers of the modern presidency, were the bullies, and in my view, that threatens the liberties of the people, and that's why I voted to convict.

**Congressman Cannon:**

As is usual my friend and colleague in Congress, Senator Bennett, has spoken eloquently to the point of what this is all about. Let me add just a couple of things to that. In the first place, it was not just Paula Jones who was discredited. It was Kathleen Willey. And I think Sidney Blumenthal is likely to go to jail over the testimony he gave under a sentence subpoena and under question of House Managers, as it related to the intention of the White House and the use of White House resources and machinery to discredit Kathleen Willey. But in addition, today more poignantly difficult for us as Americans is that you had a secretary of state stand on the portico of the White House and proclaim the innocence of the President.

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Then after three threats of bombing Serbia left us no position, I think that Senator Hatch with his statements today, that we need to send in ground troops. If that becomes necessary, that's something we ought to do because the credibility of America is at stake here. It really comes back to how this President has used his staff around him and how their role has changed from defense of a president doing things that even Mr. Craig has said were improper and wrong to an invasion of another country and war, where credibility is terrifically important.

Let me just make one other comment. You see this panel is really an interesting panel. You just saw between Senator Bennett and Mr. Craig a difference in view of facts, and I share Senator Bennett's view of those facts. So we have a polarization that way. On the other hand, I think it's fair to say, Mr. Craig, that you won this case. Therefore, he will have the same incentive to deal with what happened between the House and the Senate the way that the Senator and the counsel for the Senate have in defending the Senate as an institution. There is a very different view of what we did and why we did it as a House and what ought to have happened in the Senate.

And, on the other hand, I think it's very important that we move in some fashion that we're directing. Tom [Lee], so is it your intention that we all have an opportunity to respond to each of the questions, or are you going to give a question and one person will respond, with others responding a little bit?

**Professor Lee:**

It's the latter that I have in mind.

**Congressman Cannon:**

I shall try to accommodate you.

**Mr. Griffith:**

I'll be quick. I couldn't resist. I want to return the favor that Mr. Craig paid me by saying those nice things, and then I want to disagree with him. So the favor I will return is that I want to let you know, and for this community in particular, that in every dealing that I had with the President's lawyers, his private counsel, and his official counsel in the White House, I

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want you to know that these are good, honorable, honest people to the extent that I can judge character. I judge them to be good people who care deeply about process, because the law is all about process. It really was, for me, one of the thrills that I had from this procedure—being able to work with people like Greg and other folks in the White House counsel office, as well as the President’s personal lawyers.

Okay, I’ve got that out of the way. But, you didn’t answer Professor Lee’s question. I think that the most honest answer—I’m not saying you gave a dishonest answer—I think an honest answer is that we cannot define from the text of the Constitution what “high crimes and misdemeanors” mean. The debate went on during the Nixon impeachment. It was continued here at a very high level, but I think the fair answer is we don’t know what it meant. You could look at the history of the debate to the extent that we have it from Madison’s notes from the summer of 1787, it isn’t clear. The original proposal was that impeachment be for treason and bribery. There was a sense that that was too narrow; it didn’t include enough.

The next proposal was that it be expanded to include maladministration. Madison pointed out that if you can remove a president from office from maladministration, he’ll serve only during the tenure of the pleasure of the Senate. That was too broad. So in response to that proposal, George Mason came up with the language “other high crimes and misdemeanors,” and everyone said, “Oh yeah, that solves it.” Well, it didn’t solve it.

The next step in the process was a term of art borrowed from British Parliamentary procedure, so the game is you go back to British Parliamentary procedure and the answer is it’s all over the board as to what it means. But we do have, in the two hundred years since the Constitution, seven instances since the Senate has determined what it thinks “high Crimes and Misdemeanors” mean. The Senate has not made the distinction that Mr. Craig and the President’s lawyers tried to impress upon the Senate between private and public conduct. What that means, that’s for the Senate to decide—remember, it’s an easy job—they get to decide who is right.

I think it is instructive that in the seven convictions that took place in the last two hundred years, that distinction was not made. Now, here is a distinction; however, those were judges. Does it make a difference when you’re talking about removing the president from office? I think it’s a close call. I

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think it's interesting to note that the Constitution does not, in Article 2, distinguish between judges and presidents in terms of high crimes and misdemeanors.

On the other hand, the Senate has distinguished between that. Not clearly, but in all removal of judges, language was used that leads you to reserve that perhaps the senators were relying on the something other than "high crimes and misdemeanors" and removal from office. I think the point is, the text isn't clear. The precedent is more helpful to the President's detractors than it was to his defenders.

*Question***Professor Lee:**

Senator Bennett, this question is directed specifically to you, and then we'll allow for some rebuttal and further response. To the extent there is ambiguity in what the framers mean or what Article 2 means about high crimes and misdemeanors, there was certainly a lot of discussion about the degree to which public polls or the sentiment of the public ought to come in to play. Let me read you two quotes. One of them is from a man nearly everybody on the panel has mentioned today, so I didn't want to be left out. It's Senator Byrd. Here's what he said about polls. "The lack of support for impeaching the President tips the scales for allowing this President to serve out the remaining twenty-two months of his term." Here's the other quote. It's from Senator Gordon Smith. "I refuse to say that high political polls and soaring Wall Street indexes give license to those in high places to act in low and illegal ways." My question for you is, who is right?

*Answer***Senator Bennett:**

The removal of a president is a political act of the very highest stature, and you do not remove a president unless there is broad-spread support for that removal. If you as a senator are convinced that this President in Charles Ruff's phrase represents a "threat to the liberties of the people," you have an oath to do duty and vote to remove him, regardless of

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what the polls say. In Senator Smith's case, that's clearly the situation. The polls in Oregon were overwhelmingly in support of the President. Senator Smith defied those polls and voted to remove the President because he became convinced that he did indeed represent a threat to the liberties of the people. I will not disclose my conversations with Gordon, but he and I talked about this quite often. He and I are fairly close. I wavered, as I publicly announced, between voting for an acquittal and conviction, certainly on the first article. Without disclosing anything about Gordon, we had a sympathetic conversation on those issues. So Senator Byrd is right, however, in that even though a senator may vote his convictions, you cannot remove a president solely on the basis of a political atmosphere in the Senate. You have to have for removal an overwhelming public support for it. You can create that support by virtue of the trial.

I think if it had been a different circumstance, and by the way, I agree with most of the things that are on the lists that Mr. Craig has given us for the events in both the House and the Senate, particularly in the Senate, I think he's got them all right, but the thing the House Managers were hoping for was that the trial itself would galvanize public opinion and thereby change the polls and create the kind of atmosphere that surrounded Richard Nixon when he finally left the presidency. I lived through the Nixon experience. I was in Washington at the time and was close to many of the people who were involved. I remember Richard Nixon's being just as high as Bill Clinton's approval ratings, and then things started to happen in the economy. The oil embargo hit. People began to blame the President for that and the change of public opinion was driven by Peter Rodino and what happened in the House, and Henry Hyde and others were hoping that that would happen at the Senate trial, and it didn't. I think if it had, the outcome would have been very different. I know a number of Democrats who, if they had felt that the public wanted the President removed, would have voted to remove him. I'm not saying they're being craven and driven by the polls. I think they just decided in this atmosphere that to remove this President at this time would set a terrible constitutional precedent, even though we believe in the ladder that I described. He did it. It was a crime, and it was a high crime and misdemeanor, but we just decide we're not going to vote to remove him. I think there is substance to both positions.

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*Question***Professor Lee:**

Senator, a quick follow-up question: you mentioned that one of your colleagues, in listing the four questions, had suggested that there was perhaps discretion—even if a senator decided that a high crime or misdemeanor had been committed—discretion not to vote to remove from office. Do you agree with that? Do you think that there is discretion? The Constitution says “shall be removed from office on impeachment for and conviction of.” Is there discretion in that language?

*Answer***Senator Bennett:**

Yes, there is discretion in that language. That language does not mean the senator can't make up his or her mind any way he pleases. That simply says if the Senate votes, the President shall be removed, but that doesn't dictate how a senator should think. I think Tom Griffith put it very well in his presentation, that the founding fathers understood completely what they were doing here. Those who argued—and this goes contrary to what some of the House Managers argued with us—those who argued, well if you find that he's guilty of this crime, you have to vote to remove him. I disagreed with the House Managers. I think a senator has to . . . that's why they gave it to the Senate. That's why the founding fathers said, “We're not going to put this in a court situation, because this is a political decision.” This is a safety valve, as I say, to deal with the president who otherwise has a constitutional guarantee of four years, but if we get someone who threatens the liberties of the people we have to have some kind of safety valve. This is a judgement call above all judgment calls. So clearly, I think, by giving it to the Senate, the founding fathers intended that each one of us would make our own decision.

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**Professor Lee:**

Congressman, I have a suspicion you want to respond to that.

**Congressman Cannon:**

Frankly, we agreed overwhelmingly on these issues. It's really complicated when you're dealing with polls and politics and the will of the people versus duty and oath. I will point out without suggesting any ethical problem on the part of Senator Bennett, who I think struggled with this thing and with whom I have a narrow legal distinction, but I will point out that this horrible legal precedent that he has suggested does not mean that the House Managers wanted to do a whole [] presidential thing. We have a different view as you approach that, and I think as you look at what the Senate did, you might note that we came out of this whole process from the Republican point of view with the benefit of a weakened incumbent and a tainted future presidential candidate. A lot of facts play into this thing, not just polls and the will of the people, but what we view as the best thing . . . .

**Senator Bennett:**

You agree, though, that was not anybody's purpose, to create a weakened incumbent.

**Congressman Cannon:**

The Senate is a body of 100 people, and it acts as a group with lots of different individual variations. In fact, let me just go back to one of the things Tom [Griffith] said. He talked about the Senate is right. Let me just expand on that. It is right because it is the Senate that decides. It's nonjusticiable. You can't appeal it. It is the way we create finality and closure in times of political unrest.

One of the elements of the polls that you have to deal with in America is that you have a huge number of people. Some polls show twenty-seven percent, others up to forty-three percent, of the American people who don't like this President, don't like what he did, whether it was the sex or whether it was

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the obstruction of justice and perjury and who are deeply disturbed by what happened in America. I thought this issue was important enough that my closing argument was to say to the Senate, "You have a burden of going forward."

Now, if I might put that in perspective, let me talk about what I think the constraints are. We're talking about polls and how polls are relevant. There's no question they're relevant. I agree entirely with Mr. Craig that one of the problems in this process is that it was precipitated by a report from the independent counsel, which meant we didn't develop the facts in public. Unfortunately, we spewed the facts into the public without any protection or preparation, so we started this process historically in an awkward position. But if you view the process as not a matter of partisanship or bipartisanship, but as a way of arriving at closure, then it is the fact that the Senate's actions create closure because it's the end of the act that makes what the Senate does so significant.

There are some limits on what the Senate can do. They're not hard limits, they're not the bright red line, but among other things the Constitution requires an oath. Now the oath is not set forth in the Constitution, but that oath is the second clear constraint. That is the oath the senators took. It said, among other things, that they swore to do justice impartially according to the Constitution and the law. Here's where Senator Bennett, who is not a lawyer, and I disagree a little bit. [] We will develop our disagreement over what you have to do based upon what the law constrains. Because you're not dealing with unfettered political discretion by a very wise senator, and I will even stipulate that all senators are wise . . .

**Senator Bennett:**

I won't.

**Congressman Cannon:**

. . . for the purpose of this argument only. The laws that senators are swearing to uphold—that is not a tone that we refer to in isolation. It includes the laws of the land, the precedents of the Senate, the rules of the Senate, and our adversarial context in America. Now, for the first time in the history of the Senate, the Senate usurped the authority and the right of

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the Managers from the House to present a case. Every case that had been presented before the Senate up until this case proceeded along roughly the same lines, and those are the same lines that happened if you're in an administrative proceeding or in a criminal proceeding or in a civil proceeding. It's an adversarial process. That means you have an opening; you present evidence. The other side can have an opening, but it can also have rebuttal evidence. Then you have closings and you have rebuttal by the moving body. That did not happen in this case, and the effect of that not happening was that the senators were left unfettered in their discretion because all they had was about thirty-four hours of lawyers yammering back and forth at each other.

If you guys will think back for a moment over the course of the trial, you'll recognize that in the forty-five minutes or so of videotaped deposition that was shown in the trial, more was done to make people say, "Ah-ha, this really was obstruction of justice," than in all thirty-four hours of the talking that went back and forth. In fact, you might ask yourself, there was an opportunity to present and then there was an opportunity for the White House to present, but there was no rebuttal of the White House's position.

What the House Managers had was the opportunity through questions from the Senate to respond, and that was done awkwardly. I personally believe that the Senate did something that was wrong. They went out of their way to create a context, not through a change of the rules, which would require a two-thirds vote, but through a calendaring process. They precluded the Managers from presenting the case as the Managers saw the case. In fact, I think that is what gives Mr. Craig the ability to say today that the Managers made mistakes. Precluded, there were things that might have been done better historically, but it was the Senate's determination to usurp to itself the right to decide how the case would proceed that precluded the case from being made to the American public.

That gets us down to what happens when, after you've had the evidence, how do you deal with that? Well, you have lots and lots of latitude. One of the really interesting historical facts about Senate trials is that in the first couple of trials they actually voted to convict on the charges, and then had a separate vote on removal. So you could have had a case, which I think would have been highly consistent with what Senator Bennett

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has said, where you vote “Yes, this is a ‘high crime and misdemeanor’ ” and then you have a separate vote in which you exercise your discretion and say, “But it is not removable.” So in that sense, we’re highly consistent. You can’t do it, I think, the way Senator Byrd did it and draw the conclusion that it’s [a] high crime and misdemeanor and then have the latitude under our system of law and say, “I will not vote for removal.” It has to be done in a different fashion.

**Mr. Craig:**

I just want to briefly say that, Congressman, we were very against it. As one of the lawyers for the President, we were very grateful for your willingness to criticize the leadership in the Senate while they were deliberating. We thought that was a great contribution to . . .

**Congressman Cannon:**

I might just point out that one of the really nice things that happened in this whole process is that we haven’t been shooting at each other; at least as Republican majorities. But on the other hand, I’m highly certain that shooting at the leadership had no effect on the ultimate vote.

**Mr. Griffith:**

The position I hold is a statutory position and it gives me responsibilities. One of my responsibilities is that I need to defend, when called into question, the actions of the Senate. Representative Cannon used the word “usurping” the managers’ authority. The fact is that it’s a proceeding that the Senate directs and there are plenty of examples in the fifteen Senate impeachment trials of the Senate going to the House Managers or going to the defendant’s lawyers and saying, “No, you’re not going to get these witnesses.”

Back in the 1980s one of the respondents asked for forty witnesses and the Senate said, “No.” The Senate controls its docket. It doesn’t allow the House Managers or the respondent’s counsel to come in and do whatever they want. In that way, it’s not unlike any court throughout the nation. Those of you who practice in court, you make a proposal to the judge for

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what witnesses you want, you may get them, you may not get them. What was different here from the other trials that came over was the narrow margin of the vote that came over from the House. In that way, this was completely unprecedented. The Senate had never had an impeachment trial before where you had such a narrow vote in the House to send the articles over. In fact, most of them were unanimous or overwhelming. Here it was party line and very narrow. That, I think, puts it in a completely different setting for how the Senate should respond.

*Question*

**Professor Lee:**

I want to ask one other question. One reason why I want to ask it is that it's a multiple choice question, and our law students love multiple choice questions. It's for you Congressman Cannon: The impeachment proceedings, it seems to me, have renewed a long-standing debate about how do you draw the line between legitimate investigation of public officials on the one hand and the politics of scandal or personal destruction on the other. I'd like you to address how to draw that line. Here's the multiple choice part: To the extent we have crossed it, and maybe your answer is that we haven't, but to the extent we have, who's to blame? Here are my three multiple choice answers: (a) the liberal media, (b) the vast right-wing conservative conspiracy, (c) the independent counsel statute. I suppose we've got either (a) or (b), (b) or (c), (a) or (c), or none of the above, but you don't have to address those.

*Answer*

**Congressman Cannon:**

I personally think that the President created many of these problems by his own behavior. He's not one of the choices here. Certainly, George Stephanopoulos would agree with that. The short of it is that I think the President made some mistakes. Beyond those mistakes, I personally was stunned by the tidal wave of media involvement that happened the day of this revelation and that continued virtually for a year. I think that it

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distorted the public discourse. I think it offended people, and it was a juggernaut that nobody controlled. I don't think it's liberal media, I think it's a story that's so juicy that it couldn't be passed up. On the other hand, the politics of the short destruction goes beyond the attack on the President. I will tell you that knowing the thirteen [House] Managers, not one of those men wanted to hurt the President and used his sexual problems to do so. These are all people who are maybe not senators, but highly educated and concerned about politics and worried about the precedents they were setting. There were some dramatic differences.

The Independent Counsel Law has serious problems. Republicans have historically always opposed it. I suspect at this point we'll be looking at it in the Judiciary Committee. I suspect that I will oppose it. On the other hand, you have to have the ability to investigate the president on the part of the House of Representatives and the Senate, and that is a hard thing to do. We've proved that's a hard thing to do. How we balance that in the future is difficult.

Let me just say one thing: I apologize about the use of the word "usurp." That was purely a political word. On the other hand, in our political system we have two houses that have equal dignity, and the only serious debate that happened between the Managers was whether or not we would go forward and present a case under the Senate rules or whether we would say your rules don't allow us to present a case and therefore we'll back off. Here we fall into that gray area between the Senate as a body and individual senators and what they were telling us. I think that as a group we felt beguiled by senators who promised us things that the group itself would not perform. Therefore, we ended up doing what was essentially a lawyer presentation instead of a trial; whereas, as a group, thirteen to zero, we told the Senate at one point in time that we would not proceed under the rules that ultimately we did work under.

**Mr. Craig:**

Multiple Choice question. Have we crossed it? We have crossed it. Who is responsible? The liberal media? Yes. Read Michael Isikoff's book. He's obsessed with the woman issue in the President's life long before he was president of the United

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States. The vast right wing conspiracy? Yes. That is the way that they attack a vulnerable president. The Office of Independent Counsel? Yes. They used extreme investigatory techniques, as if they were investigating serial killers or members of the mob, to investigate allegations involving an extra-marital affair. So in my view, very strongly I believe that the politics of personal destruction began in 1993-94 when the investigation of the President began and investigators began combing the hills of Arkansas for women who would talk about their activities with the President. It caught on with other people and other individuals. Larry Flint is not to be defended at all, but he's not a creature of the White House or the White House politics.

I think it's a terrible thing to have happen. It'll keep great people out of public service in this country. If we disqualified everybody who'd had some kind of difficulty in their past, we'd lose half the great Americans in our history. I think this is a terrible consequence that we've got to move beyond. Actually, I don't see any evidence that we're moving beyond that since the impeachment trial. It's gotten just as bad. It continues to get worse. The real question is going to be, "What's going to happen in the year 2000 in the presidential election?" Are we as a people going to rise above it and insist that candidates will not engage in this kind of activity or allegation, and that the media must do the same thing? Or are we going to continue to be interested in it, pay for it, tune in on it, and listen to it the way we have wall-to-wall throughout the last two years.

**Senator Bennett:**

I agree with what's been said, but there's, I'm sorry, something missing. In your multiple choice you did not put down—I will personalize it—James Carville. I had the experience of someone coming up to me, and he said, "I went to law school with Ken Starr." He said, "Ken Starr is the most moral, upright, fair, intelligent—pick whatever other laudatory adjective that you can think of—that we've ever met." He said, "All of us in law school decided that Ken Starr would someday either be Chief Justice of the Supreme Court or President of the United States, or maybe like William Howard Taft."

I will agree that the tactics of some of the career prosecutors in Ken Starr's office crossed a line that I would not want to

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see crossed. I would not want to be hounded, attacked and vilified as some of them did. The thing that disturbs me the most about all of this is that I no longer have any confidence in the Justice Department of the United States, with respect to malfeasance on the part of a member of the Clinton Administration. I come back now to my comment which I made in my speech that the founding fathers expected that I would not "check at the door" my understanding of what went on in this administration.

I have been in all three investigative panels that have occurred in the Clinton Presidency: Whitewater I, headed by Donald Regal; Whitewater II, headed by Al D'Amato; and Campaign Finance, headed by Fred Thompson. I don't know why I got to be lucky Pierre, but I was on all three committees. I have seen members of this administration lie repeatedly, convincingly, and continually in every one of those. The first one, under Don Regal, we had a member of the administration say he lied to his diary. We quoted his diary as a contemporary event of what happened and he said, "No, I wasn't being accurate when I was recording the day's events. That's not really what happened. You have to believe the President's version."

In Whitewater II, I had the experience of sitting there while we played a tape recording of a conversation to a witness and had her say "I don't know that that's my voice." I said, "I can assure you, ma'am that's your voice." This, to me, is the most distressing consequence that brought us to where we are. I agree that we should not worry about what George W. Bush did while he was in college or before he got married. I don't think that has anything to do with his qualifications to be president, but I assure you we're going to hear every word of that in this upcoming election, because I hear my Democratic friends sharpening their knives. You talk about combing the hills of Arkansas, they're combing the hills of Texas and saying, "We're going to find every woman he dated prior to his marriage and we're going to proceed with this." That, I agree, is toxic in American politics and should be put behind us.

But if we're going to get the list of who's responsible, yeah, the media's responsible. And yeah, there is a vast right-wing conspiracy. It's terribly inept, and I don't know how vast it is. Getting close to my military language, some people would say that it is half-vast. I think future historians will look back on this administration and say that the war-room mentality of the

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Clintons that they brought with them from their political culture in Arkansas contributed mightily to the mess we find ourselves in.

*C. Audience Questions and Answers*

*Question*

**Audience Member:**

My question has to do with precedent in terms of what a high crime used to be. It seems to me that the Senate's impeachment and removal of Judge Nixon established the precedent that perjury is an impeachable offense. Has the Clinton impeachment overturned that precedent?

*Answer*

**Mr. Griffith:**

I don't think you can read precedent into an acquittal. That's part of the vagaries of the Senate impeachment proceeding. I mean, you really can't tell why the Senate did what it did when it voted to acquit. When you vote to convict, you know what it did. So precedential value, I'm not certain what it has. I think there is an argument, I'm certain I agree with it, that judges ought to be considered differently than presidents in impeachment. It is not an argument that comes from the text of the Constitution. It's an argument that perhaps comes from some of the structure, but no express language. The argument is that an unelected—judges are obviously appointed for life during good behavior—that we are so distrustful of giving that sort of power to unelected officials that the Senate, the only control that we have over judges is the impeachment process. So therefore, we will be a little more demanding of judges than we would of an elected official who, in the case of the president, is term limited to two terms and stands for election after his first term, where the people have an ability to come in and put a check on him. That is the argument. Mr. Craig might be able to expand on it.

That's the argument. I'll let you decide which is most true. It is an argument that has some resonance with the Senate. When you go through the impeachment convictions of the Sen-

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ate, and they've all been of judges, they rely an awful lot on the good behavior language of the Constitution that the judges serve for life during good behavior. It's a matter of historical exegesis. It is a little bit difficult to know how much the Good Behavior Clause meant to prior sentence.

**Mr. Craig:**

I'll just make two quick comments. One is the function of judges is different; the terms of judges are different. There's nothing in the Constitution's text that says that the standard should be different for judges as opposed to presidents, but in fact the way in which presidents have been treated throughout our history is different from the way we've treated judges. We've had many judges that have been impeached and not one president has been removed from office.

The second thing I'd say is fifty-five senators voted to acquit the President on Article I having to do with perjury. I don't know how to interpret that vote of fifty-five. Whether fifty-five believed there was insufficient evidence to establish a case that [the President] perjured himself in front of the grand jury or whether they found that there was a case of perjury but they didn't think it was a high crime or misdemeanor or they went down the Byrd logic and said, "Yes, he did it. Yes, it was a crime. Yes, it was a high crime, but no, we shouldn't remove him." I agree with Tom [Griffith] in that the vote to acquit on the perjury count you can't really parse it successfully and use it to establish a precedent for the future. In my own view, a president of the United States, elected for a four-year term by the only political action that all the people of the country do together, is different from a judge who has a life-term and who terms during good behavior.

**Congressman Cannon:**

I think this is the most interesting historical art of the trial myself because it's a new argument that came up partly because we haven't had other impeachments other than Nixon resigning, so we never got to this issue in modern times. Personally, as I read the Constitution, it seems to me that the impeachment process is unified, and I think that's consistent with history, but I think we're in a changed time and we've had a

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change. Historically, you'll recall that when we were selling the Constitution to the states there were a lot of discussions.

One of the things that the states really hated was a powerful president. On the other hand, the founding fathers went through a debate and came up with a position and a context for the presidency. When the Constitution was sold to the states, it was sold on the issue of a president that is subject to impeachment. When they said that, they meant the same standards as a judge. The reason they thought that is since you're vesting so much authority and power in one man, the ability to remove him should be at least as easy as it is to remove a judge who would otherwise serve for life.

On the other hand, we are now in a big transition in society. This is a debate I don't think would have been had forty or fifty years ago. It became part of the debate, and part of the reason for that is because we now have a term limit of two terms. I think the back side of that debate is one that we need to be thinking about as Americans, because today a president of the United States can do more by 9:15 with e-mail than George Washington could do in six weeks. The world is a different place, and the ability to exercise power is much greater. I've said in a way of hoping and by suggestion that this President in his final two years could still leave the greatest legislative legacy in modern history. Why? Because we have some serious and very clear legislative initiatives where if he took the initiative we could come to consensus in America and move forward. John Breaux's committee did not come to consensus on what ought to happen to Medicare, but if the President stepped forward and said we need competition, we would solve that problem, and that would be a great solution, a great problem that we're relieved of.

We now have to say to ourselves, if a president can serve for eight years given the enormous power of the incumbency, do we follow the logic that this is not a lifetime appointment, and therefore he should be held to a higher standard for impeachment, or do we say because he has all that power and that power increases as our ability to communicate increases and therefore we should impeach him at even a lower standard than judges. I think that's a fair debate.

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**Senator Bennett:**

One of the issues that we heard over and over again was exactly what has been articulated. The president is elected and therefore he is different. I think it's safe to say of all the speeches that were made during our deliberation period on the Democratic side, the constant theme was "Do not overturn a popular election." We were told, "This is the only popularly-elected president in history." They find a fine distinction between Andrew Johnson, who was elected vice president, so they're saying, "this was the only popularly-elected president in history and DO NOT overturn an election."

We heard lectures about the sanctity of the vote and so on. The Senate voted as it voted, but the Senate has a clear history of overturning popular elections with its power when they feel there is sufficient violation of the public trust. The most recent example being Bob Packwood. He was popularly elected. He resigned because the votes were clearly there overwhelmingly to remove him, to evict him. The House of Representatives evicted Adam Clayton Powell after he had won an election. He went back to his district, won the election to fill the vacancy created by his expulsion and came back to the House, where upon the House said, we will not expel you a second time, but we will deny you your Committee chairmanship, your seniority and everything else that is within the power of the House to give you. The people have elected a criminal whom we have expelled, and the people have the right to do that, but we have the right to withhold the emoluments of office, whereupon he went down to [] and pretty much drank himself to death and ended an otherwise promising career. So, I think the Senate has the right to say, we will overturn the election if the evidence is strong enough.

*Question***Audience Member:**

Thanks for the lists, Mr. Craig. My question is in number two. You mentioned the significance of the articles of censure. I've been curious ever since those were brought up about their basis within the Constitution. I wonder if you could articulate that for us.

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*Answer*

**Mr. Craig:**

They seemed to be highly debated in the House, and I didn't understand why it was highly debated in the House, because there were those who argued and I think actually one of the congressmen from Connecticut, Chris Shays, who actually voted not to impeach the President, was most intensely opposed to the idea of passing a resolution of censure because there's no provision in the Constitution that seems to apply to it.

There was the concern that it might be viewed as a violation of the prohibition against the articles of attainders that specify punishment for a specific individual. Under the rules of both the House and the Senate, both bodies, whether acting alone or together through joint resolutions or concurrent resolutions or Senate resolutions or House resolutions, can express their views on any subject, whether it's the fitness of Joe McCarthy to carry out his duties as the chairman or the senator from Wisconsin, or whether it's to wish Harry Truman a happy birthday after he's retired. There is nothing to prevent the House or the Senate, working together or acting alone, from formally expressing its views as to the President's conduct. That was what we thought a resolution of censure meant.

In fact, as I understand it, three or four members of the House Democratic Judiciary Committee had drafted a very, very tough resolution of censure that was used heavily against the President in favor of his removal on the floor of the Senate. It seems to me that if there was a public rebuke that was required, given our view of the evidence and our view of the Constitution, the public rebuke that was most appropriate was something along these lines—a statement of condemnation—and a moral rebuke of the President. It could have been negotiated if there was anything that was going to be requested of the President in terms of his action. If he had to pay a fine, that could have been discussed. If he had to sign it, that could have been also negotiated. As it was, the proposed resolution of censure that was offered in the House and voted on in the Judiciary Committee and rejected by a party-line vote and the proposed resolution of censure that Senator Bennett and Senator Feinstein had worked on relentlessly, and I think with good in-

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tentions, didn't have an opportunity in either the Senate or the House to find a vote and give the members of both bodies an opportunity to express their views on this.

I think that was the appropriate way of resolving this. I still do not believe that the conduct, as blameworthy and wrong and as disappointing as I've gone all through that and the President himself has acknowledged his misconduct and apologized for it and asked for forgiveness for it. He has acknowledged that some kind of formal condemnation or rebuke would be appropriate. He's not ever fought that. But there was never an opportunity to carry that to pass, and I regret that. I think it was a failure of leadership, not attributable to any individual, but a failure of leadership of the Republican majority in the House.

I think what happened was that Speaker Gingrich left, Speaker-elect Livingston hadn't arrived. There was no decision-making at a leadership level among the Republican majority in the House and so it was left to Hyde, and Gingrich and Livingston themselves to orchestrate a decision on this. I think that was a bad decision for the nation that brought us to a situation where the President was impeached on a party-line vote and essentially acquitted on a party-line vote where not one Democratic senator, if this case were so close why was it that not one Democratic senator voted to convict?

**Senator Bennett:**

It's a question I've asked as well.

*Question***Audience Member:**

Senator, how do you feel about the censure issue? Do you regret that there wasn't a vote?

*Answer***Senator Bennett:**

Well, on a constitutional basis I agree. I think it's within the powers of the Senate and the House, and if I had been in

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the House—and Chris [Cannon] and I would probably have had words on this—I would have voted to allow a censure motion in the House. I disagree that any such motion could carry with it any kind of penalty. If there had been a fine connected with it, in my opinion that's a bill of attainder, and so I would have fought the purely political cover kind of censure motion that was coming in. I kept saying to my colleagues when I was working on censure in the Senate, do not misunderstand. In my view, this is not an alternative to voting on conviction.

We have a constitutional duty to hold this trial and to bring it to closure, as Chris has said, one way or the other. We have to have a vote up or down, and I will not support any kind of effort to give us an alternative to that vote. If that vote is not sufficient to remove the President, my motivation is that I do not want history to look back on this and say, "This was Andrew Johnson. This was a purely partisan situation, and therefore it can be ignored." While nobody pays any attention to me, I take opportunities like this to point out this fact. There were fifty votes to remove the President. There were thirty-three co-sponsors on the censure motion that Senator Feinstein and I crafted of those who did not vote to remove the President. If you add those who were willing to condemn his behavior in very strong terms to those who thought that behavior rose to the level of removal, you have formally on the record eighty-three senators who, one way or the other, have said that this President's activities have been despicable. That's what I hope my grandchildren get taught when they read the history of this case. That's what I was interested in establishing as a historical record, after the fact, with respect to what this was all about.

**Mr. Griffith:**

One of the things that was most surprising to me in working with Democratic senators during the impeachment proceeding was to find out how badly they wanted a censure motion. It was very genuine. Some people would say that's for political cover, but I think it was a lot more than that. It was genuine outrage at the President's conduct and a real desire to go on record to condemn it. I think we understand the political reasons why that didn't happen. I think we just ran out of time. I think if February 12 was the drop-dead deadline and everyone would

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be over it by then.

**Senator Bennett:**

No, there were several factors. Number one, once the vote was over, everybody was sick of this and they wanted it over. I was besieged with reporters, and I said, "It's over. Go home. Get a life."

**All:**

And here we are!

**Senator Bennett:**

That was the only time I've been picked up in *Time* magazine and they listed it with the week's top quotes. Bob Bennett, and the identifying line strip said, "The President's lawyer." My fifteen minutes of fame was stolen from me. There were several factors. That was the overwhelming one. People wanted it over. There were senators, led by Phil Gramm of Texas, who earnestly and fervently believed that this was unconstitutional, and Phil used all of his abilities and rights as a senator to block it ever coming to a vote. As long as he had forty votes, which he did, that would guarantee that it would never come to a vote. I kept telling Diane, "Look, this is inevitable. Let's not try to fight Phil on this. Let's just gather as many cosponsors as we can, so that it's a matter of historical record with the cosponsors," and we filed it with those cosponsors on it. The other factor there, and I must be honest about it, as it became clear that the White House was going to win the trial, Democratic senators who had previously been very enthusiastic about our efforts for a meaningful censure resolution suddenly began to find reasons to drop off. The White House no longer felt they needed this for political cover, and those senators who were responsive to the White House on political reasons then disappeared. Many of the original people who had told me absolutely they would cosponsor and fight for the resolution were not there when the time finally came.

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**Congressman Cannon:**

Let me just say that it's possible to have a negotiated agreement and censure for the president where you have what's essentially a bill of attainder. I only believe that would have been a very bad precedent for American history. So that's where we had a slight disagreement as to that. Senator Bennett and I, of course, may have argued over the appropriateness of impeachment versus censure, but what he has said is correct. We could have censured the President. My argument was that impeachment was more appropriate.

Let me just add one personal note. You have some institutional imperatives here. The House of Representatives is often called the "People's House" and we do things differently than they do them in the Senate. I would hope that anything that I've said here would not be construed here as being personally offensive because Senator Bennett is one of my good friends. He's a man of integrity and honor. While I have had the occasion to laugh a little bit about how the Senate and its outcomes, I don't mean that to be personal, by any means, to Senator Bennett or any one else. It ought to be a matter of great instruction to all of us in America about our system of government.

*Question*

**Audience Member:**

This question is for you, Mr. Craig. I think that the chief concern for the average American is whether or not we can trust this man. Having represented the President and at the same time acknowledging the wrong things that he has done, please share with us your feelings of whether or not you can sit before us or any body of American people and say that you will personally be able to trust everything that comes out of our President's mouth for his final two years of office.

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*Answer*

**Mr Craig:**

Well, you know, that's a fair question. I saw President Clinton in the six months that I was in the White House, and I'd never been in the White House before serving a president. But in the six months that I was there, I worked very closely with him, and I think I saw him at his very best, and I must say, I think I saw him on occasion at his worst.

One of the reasons he did prevail—and Senator Bennett, I'd be interested in your reaction to this—is that if you go back and look at the calendar of events that was going along in September, October, November, December, as the impeachment calendar was going on. Every now and then they joined, and suddenly we found the day we were going to have a vote on the floor of the House, we were bombing Iraq. We got there sort of independently. But if you look at the days leading up to the bombing, we did that totally independently. That date had been set many, many weeks before, and people had been briefed about it, and Saddam Hussein had been given that date as a fate of compliance with UNSCOM's access, and if he didn't comply by then, he was going to be hit. It was quite clear and when that deadline was set, we did not know that the House of Representatives was going to vote on impeachment that day.

In fact, when that was explained to the members of the Senate and the House, I think people accepted it. The point I'm trying to make is a different point, and that is, if you look at President Clinton's performance as president between September 15 and December 15, which is about hundred days, it's absolutely extraordinary. On the international basis, it begins with a speech to the General Assembly, which received a standing ovation. Now, I assure you that that standing ovation at the General Assembly was not for the United States of America, that doesn't happen at the General Assembly. It was for Bill Clinton's leadership in the international world.

It was followed by meetings with Vaclav Havel. In public, Vaclav Havel painfully spoke English to express his view of President Clinton's moral leadership on these issues internationally. Nelson Mandela was receiving an award on the Hill, and he spoke. He took occasion to speak about President Clinton. The [] negotiations, which were very, very difficult, and

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would not have been completed successfully. The second stage of the peace process was completed successfully only because of President Clinton's personal participation.

King Hussein came from his hospital bed to make that statement. So we had three of the great moral leaders of the world talking about President Clinton's capacity to lead the world morally.

Then you had domestically the showdown between the Congress and the continuing resolution, and Senator Bennett can speak with much greater authority than I can, but the President stuck up for his agenda, declined to agree to the continuing resolution priorities, and in the face-off with the Republican leadership in the Senate and the House, he emerged victorious domestically as President of the United States qua President, with his agenda very much intact going into an election as a very, very strong domestic political leader, winning essentially the election in such a fashion as never has been seen in the second term of a sitting president in an off-year election, picking up five seats in the House, holding his own in the Senate.

So, all I'm saying is that in the hundred days of this period of time when he was at his lowest—and I can tell you it was very low—Kent Conrad told me when I first talked with him two or three days after I got there that we were about forty-eight hours away from receiving a delegation of Senate Democrats asking for his resignation. It was very, very low. The President performed as president magnificently. The historians will go back and notice that. I think that contributed ultimately to the success of his trial, in his own defense.

I think that his capacity to work with the House and the Senate has been damaged. I don't doubt that one bit. It had already been damaged before the impeachment process had begun because of something I've told Tom [Griffith]. As I arrived in the White House and started working with the members of the House Judiciary Committee and the Democrats in the Congress, I realized that there was no great love for the President—personal love, loyalty or affection for him. They were not defending him because they liked him or they agreed with him or that they admired him. They were defending him for other reasons. I think this was also true in the Senate. Senator Bennett can confirm that. This was not a labor of love for the Democrats. There was something else going on here. So, yeah, I think that his capacity to work with the House and the Senate

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has been damaged, but his abilities, his political abilities, are really extraordinary. His capacity to identify objectives and use the energy and the leadership of the White House to achieve those objectives is quite extraordinary. That's where I agree with the Congressman that there is still the potential in this administration to have some significant legislative achievements with the Congress that almost impeached him and almost removed him from office. So, it's a fair question to ask.

You know, I think one of the things you don't want to do is to carry on inquisitions into people's personal lives and ask questions that are embarrassing to families, embarrassing to spouses, embarrassing to people who work. That is the politics of personal destruction, and I would hope we can move beyond that.