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. 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. The second alleged that President Clinton was guilty of obstruction of justice. The impeachment proceedings in the House and Senate sparked a national dialogue about the Constitution, the use of legalisms, 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.*

BY THOMAS R. LEE[1]

photography by john snyder

HIGH CRIMES & MISDEMEANORS?

THE CLINTON IMPEACHMENT AND THE CONSTITUTION

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 impeachment trial.

Excerpts from a transcript of the panel discussion accompany this article (see sidebar). The full transcript is published in the December 1999 issue of *BYU Law Review.* 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.

This article introduces the legal issues addressed by the panel and offers a brief description of the state of current legal scholarship on these questions with an eye toward providing context for evaluation of the contribution of the panel discussion.

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." 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." 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, while others cited pragmatic political concerns or relied on the plain language of the Constitution.

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 confined 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.[2] Under this view, the language of Article II, Section 4, is seen as a "compromise" between two competing extremes: one that would have permitted impeachment for any conduct amounting to "'mal-practice, or neglect of duty,'"[3] and another that would have provided that the president "'ought not to be impeachable whilst in office.'"[4]

This view seemed to garner a great deal of support during the Clinton impeachment proceedings. Thirteen constitutional law scholars asserted in a House committee hearing that because President Clinton's conduct did not violate public trust, his actions did not rise to the level of "high crimes and misdemeanors." These scholars acknowledged that perjury 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."[5]

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 the president'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."[6] 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.'"[7]

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."[8] In support of this view, one scholar 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 omits the italicized qualifying language.[9] This change in the language of the impeachment clause was seen as indicating "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 as also "undermining 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.'"[10]

In other words, in the view of some scholars, the decision to strike the language permitting impeachment for "maladministration" clearly revealed the Framers' discomfort with a subjective standard that would invite the use of impeachment as an expression of disagreement over public policy matters. It did not, however, rule out the possibility that the Framers had authorized impeachment "on the basis of serious objective misconduct that bears on the official's fitness for office,"[11] even where that misconduct did not stem from a misuse of executive power.

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. Several scholars concluded that the term "high crimes and misdemeanors" under English law was generally understood to represent "'a category of political crimes against the state.'"[12] Under this view, 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.[13] Put differently, the 18th-century use of the word "high" describes a crime aimed at the sovereign, not at a private person.[14] Thus, Coke distinguished "high" treason from "petit" treason in that the former was "against the sovereign," and Blackstone defined other "high" offenses as those committed "against the king and government."[15]

Other commentators challenged this narrow depiction of English practice. In one scholar's view, English history demonstrates 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."[16] 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."[17] Although warning of the hazard of the inference that the Framers intended a wholesale constitutionalization of the entire history English impeachment, at least one of the president's defenders acknowledged that the sword of impeachment was frequently treated as a "political weapon" in the hands of the House of Commons in its battles with kings and other officials.[18]

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."[19] The "plain language" argument offered by several commentators stemmed from the *ejusdem generis* canon of construction, which dictates that terms in a

Selected Excerpts from a Transcript* of a Panel Discussion Sponsored by the Federalist Society

PROFESSOR LEE: Mr. Craig, my first question is for you. How should we interpret Article II, 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? 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.

MR. CRAIG: [This is] not a new question. . . . To me this was one of the genuinely most interesting intellectual, historical, legal, and constitutional issues. Taking this set of facts and these allegations about this president and his conduct, and assuming that [they're] true (which you do in a summary judgment motion kind of proceeding or a demurrer kind of proceeding), [it just] 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, 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 made 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.

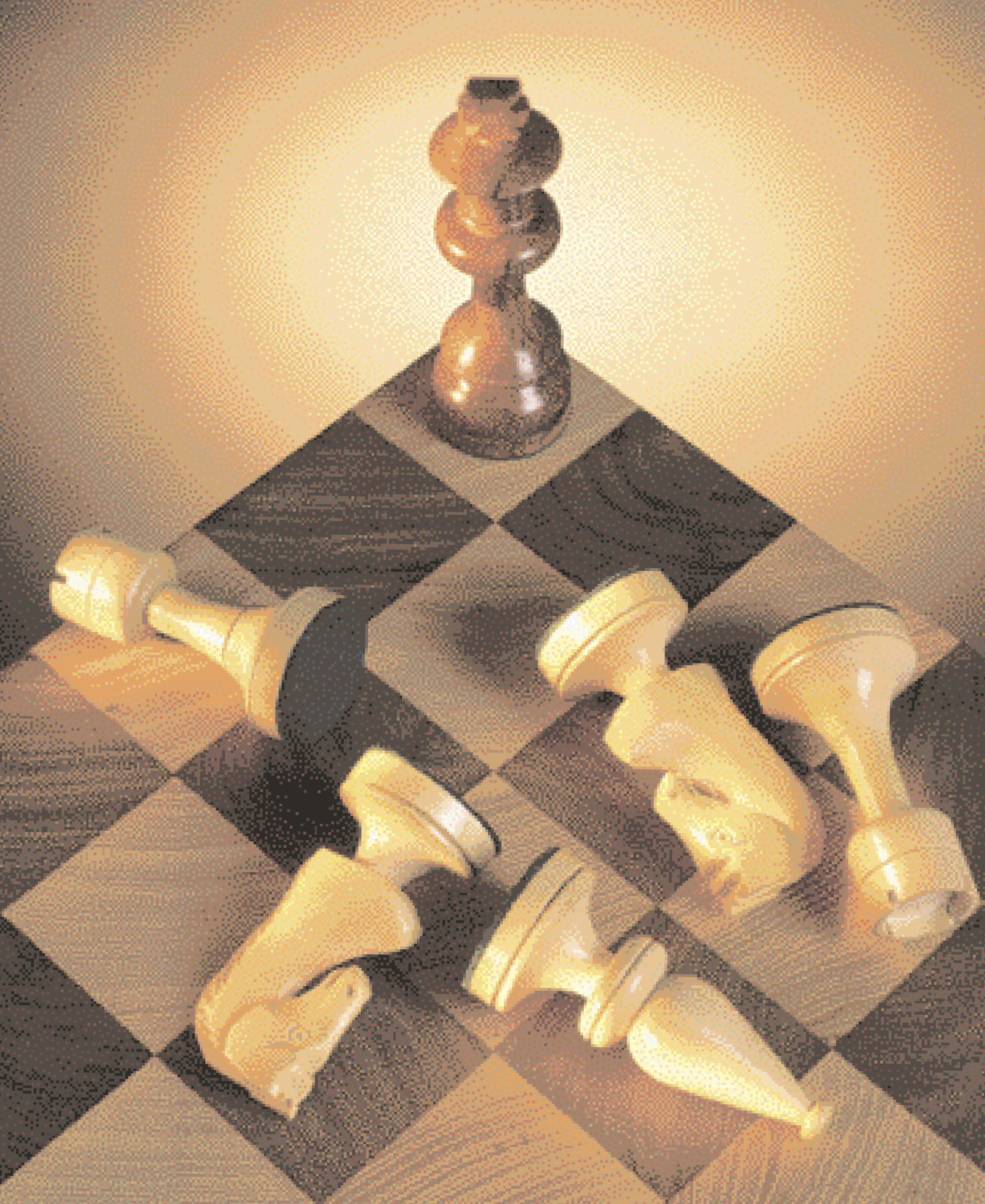
One of the reasons I took this job and went to work for the president in connection with this case is because I did believe that the presidency and the strength of the presidency as an institution is one of the great things about the history of this country. To undermine it and destroy it in any way, 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.

PROFESSOR LEE: What's the standard? 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."

MR. CRAIG: I agree with Senator Bumpers' 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.

SENATOR BENNETT: Let me just respond to that. Interestingly enough, it was Senator Bumpers' 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 . . . as a senator, not as a juror. 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 it—by the way,



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, these scholars contended that the Framers must have contemplated the abuse of public power as a predicate to impeachment—that the "other high crimes and misdemeanors" sustaining impeachment must amount to a misuse of public office.[20]

While accepting the *ejusdem generis* premise of this argument, opponents of the restrictive construction of the impeachment clause argued that treason and bribery are not necessarily limited to official misconduct.[21] Because a president could attempt to bribe a federal judge in seeking biased treatment in a private, civil case and could commit treason outside the scope of his official power, the distinction between public and private conduct arguably is not supported by the language of the Constitution.[22] A parallel argument noted that both treason and bribery involve "a betrayal of virtue and a refusal to exercise disinterested judgment" in advancing the public interest and asserted that the impeachment standard should extend by analogy to any acts that raise "grave doubts" about the president's "honesty, his virtue, or his honor."[23]

Impeachment and Policy

Despite (or perhaps in light of) the competing 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 provide a definitive, objective list of all impeachable offenses. 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."[24] 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 misdemeanors" means nothing. Indeed, one commentator went even further in concluding that the oath

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' 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: Let me add just a couple of things to that. . . . [T]oday 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. Then after three threats of bombing Serbia left us no position, . . . 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. . . .

MR. GRIFFITH: You [Mr. Craig] didn't answer Professor Lee's question. I think that the most honest answer . . . is that we cannot define from the text of the Constitution what "high crimes and misdemeanors" means. 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 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 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 FROM THE AUDIENCE: 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.

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, Christopher 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 intentions, 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.

SENATOR BENNETT: [O]n a constitutional basis I agree. I think it's within the powers of the Senate and the House, and if I had been in the House—and Chris 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 50 votes to remove the president. There were 33 cosponsors 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 83 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, everyone would 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." . . . 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 15 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 40 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.

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.

* The full transcript of the panel discussion is published in the December 1999 issue of *BYU Law Review*.

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"*[25]

In addition to their discussion of the textual and historical arguments noted above, commentators offered 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 presidential election. Others expressed the concern that conviction of the president would convert impeachment into a "legislative weapon" to be used any time any future president is involved in any scandalous conduct.[26]

Other commentators refuted some of the pragmatic arguments offered in support of impeachment: that impeachment was a distraction from the "real business of government" or a drastic attempt to overturn the results of the last presidential election. On the first point, one scholar argued that the focus on the "real business" of government was a straw man—that the Framers' "paramount concern" was "for the integrity of public officials," and that the "prosperity and stability of the Nation ultimately rests on the people's trust in their rulers."[27] As to the second, another commentator noted that "presidential impeachment almost always will 'overturn' the results of the last presidential election."[28]

JUDGES AND PRESIDENTS: IS THERE A DIFFERENT STANDARD?

The historic vote of the House of Representatives ensured President Clinton an infamous place 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. If applicable, those precedents seemed to undermine the narrow impeachment standard offered by the president's defenders:

none of the judges impeached on charges of perjury ever argued that perjury did not rise to the level of an impeachable offense, and neither house of Congress seemed to have required that the conduct stem from an abuse of public (judicial) power.

President Clinton's defenders made a number of attempts to distinguish the judicial impeachments. Some argued that the Constitution's provision of life tenure for judges should require a correspondingly more liberal standard of impeachment for judges. Others pointed to the "good behavior" clause, which assures that federal judges "shall hold their Offices during good Behavior," in support of the conclusion that "there is a lower threshold for judges than for presidents."[29]

THE CENSURE ALTERNATIVE

Over the course of the 13-month impeachment ordeal, members of both the House and Senate debated the propriety of a censure resolution to punish President Clinton for his conduct. Some members believed that censure was an effective and more politically palatable 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."[30] Many saw it as Senator John D. Rockefeller did—as an effective way "to say to myself and my people, 'What he did was wrong.'"[31]

Other members opposed censure on the ground that the impeachment clause provides for conviction and removal as the sole remedy for presidential misconduct[32] 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."[33] Other senators, like Phil Gramm of 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 weaken the constitutional separation of powers.[34]

Legal scholars also offered competing views as to the constitutionality of 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. Article I states 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." 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.[35] Others went even further in arguing that censure would constitute an unconstitutional "bill of attainder" and violate the constitutional separation of powers.[36]

Others commentators found no constitutional prohibition against censure, arguing, 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."[37] Specifically, one scholar asserted that by providing an upper limit in the Constitution to what Congress may do in cases of impeachment—that "Judgment in Cases of Impeachment shall not extend further than to removal from Office and disqualification to hold or enjoy an Office of honor, Trust, or Profit under the United States"—but not a lower limit, the Framers intended to allow for judgments that fall short of actual removal and disqualification, including censure.[38]

THE ROLE OF PARTISANSHIP IN THE IMPEACHMENT PROCESS

Critics of the Clinton impeachment berated Republicans for proceeding with an impeachment that lacked bipartisan support. In asserting that a partisan impeachment lacks constitutional legitimacy, some called attention to the Framers' fear of "partisan manipulation of the impeachment process" in their review of impeachment history.[39] Others noted 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 guilt."[40]

In response, some scholars contended that the above statements were not intended as a broad condemnation of impeachments lacking bipartisan support; they merely indicate the Framers' recognition of the inevitable realities of impeachment. 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 preferable to leaving a tyrant in office.[41] Instead of running away from the partisan realities of impeachment, the Framers adopted important constitutional safeguards that were designed to manage them. They divided impeachment responsibilities between the House and Senate. The assignment of the power of conviction and removal to the Senate seemed doubly designed to manage partisanship—in that the Senate is thought to be the body of Congress furthest removed from partisan influence and in that removal requires a supermajority.[42]

Notwithstanding these safeguards, many were surprised by the degree of partisanship that persisted in the impeachment of President Clinton. In an August 1998 poll conducted by CBS and the *New York Times*, 65 percent of surveyed individuals approved of the president's job performance.[43] In late September, a similar survey showed that only 31 percent of those surveyed believed that Congress should proceed with the impeachment hearings.[44] 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.[45] These poll results seemed to encourage the president's defenders.[46]

Several senators cited the high poll numbers to explain their votes to acquit President Clinton. Senator Robert 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."[48] Some legal scholars also used the president's popularity and the results of the November 1998 election to buttress their criticisms of those who pushed for Clinton's impeachment.[49]

A few participants questioned the relevance of popularity and prosperity in an impeachment trial. One scholar 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."[50] Senator Pete Domenici responded to Senator Byrd's comments during Senate deliberations frankly: "Popularity is not a defense in an impeachment trial."[51] Senator Gordon Smith of Washington 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 are high."[52]

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, much 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. Perhaps we can presume that they found one or more of 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. Excerpts from a transcript of the panel discussion are offered here with that in mind and with the hope that they will shed some light and insight on the important and meaningful legal questions that linger after the conclusion of the Senate's impeachment trial.

NOTES

1 Associate Professor of law, J. Reuben Clark Law School, Brigham Young University. Thanks to Marcus Mumford and Melissa Rawlinson for their helpful assistance in preparing the introduction to the transcript of the panel discussion and to Michael Lee and Ryan Nelson for their comments on earlier drafts.

2 *See* Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 278, 284 (1998).

3 Id. at 286 (quoting 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 226 [1966]).

4 Id. (quoting 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64 [1966]).

5 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).

6 *Historians in Defense of the Constitution*, N.Y. TIMES, Oct. 30, 1998, at A17; *see also* Cooper, *supra* note 5, at 630.

7 Id. (quoting James Madison).

8 Gary L. McDowell, *High Crimes and Misdemeanors: Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 634 (1999).

9 Id. at 633.

10 Id. at 634 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 764 [Melville M. Bigelow ed., 1891]).

11 Id.

12 Sunstein, *supra* note 2, at 290–91.

13 Id. at 292 (noting that there were "some exceptions" in the history).

14 Joseph Isenbergh, Impeachment and Presidential Immunity from Judicial Process, IN 39 OCCASIONAL PAPERS FROM THE LAW SCHOOL, The University of Chicago, at 14 (1998).

15 Id. at 14–15.

16 John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 652 (1999).

17 Id.

18 Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 GEO. WASH. L. REV. 682, 684 (1999).

19 Sunstein, *supra* note 2, at 282.

20 Id. at 283.

21 McGinnis, *supra* note 16, at 653.

22 Id. at 653–54.

23 Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666, 670 (1999).

24 116 Cong. Rec. H3113-14 (daily ed. April 15, 1970) (statement of Rep. Gerald R. Ford).

25 Presser, *supra* note 23, at 676.

26 Cass R. Sunstein, *Impeachment and Stability*, 67 GEO. WASH. L. REV. 626, 699 (1999).

27 McGinnis, *supra* note 16, at 665.

28 Michael Stokes Paulsen, *I'm Even Smarter than Bruce Ackerman: Why the President Can Veto His Own Impeachment*, 16 CONST. COMMENT. 1,5 (1999).

29 Sunstein, *supra* note 16, 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 Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 34 (1999) (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).

30 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).

31 *Id.* (quoting Senator Rockefeller).

32 *Cf.* Robert Bork, *Read the Constitution: It's Removal or Nothing*, WALL ST. J., Feb. 1, 1999, at A21.

33 James Carney & John Dickerson, *Waiting for the Bell with the Trial Nearly Over, Senators Look to the Door. But Will They Censure Clinton Before They Bolt?*, TIME, February 15, 1999, at 30.

34 *See* Broder, *supra* note 30, at A17; Edward Walsh, *Senate Puts Censure Resolution on Hold*, WASH. POST, Feb. 13, 1999, at A32.

35 McGinnis, *supra* note 16, 67 GEO. WASH. L. REV. at 662.

36 Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 724–25 (1999) (footnotes omitted).

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

38 *See* Isenburgh, *supra* note 14, at 12.

39 Arthur M. Schlesinger, Jr., *Reflections on Impeachment*, 67 GEO. WASH. L. REV. 693, 695 (1999).

40 *See id.* (quoting *The Federalist* No. 65 [Alexander Hamilton]).

41 Daniel H. Pollitt, *Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense?* 77 N.C. L. REV. 259, 266 (1998) (quoting *The Federalist* No. 65 [Alexander Hamilton]).

42 Miller, *supra* note 36, at 701.

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

44 *See, e.g.*, Bob von Sternberg, *Minnesotans Give the Man and the Job Very Different Ratings*, STAR-TRIB. (Minneapolis–St. Paul), 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").

45 *See* Jackie Calmes, *Issues Beyond Impeachment Vex GOP About Clinton*, WALL ST. J., Jan. 22, 199, at A12 ("[Sixty-eight percent of Americans polled] approved of the job that Mr. Clinton is doing."); Bob Davis and 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.").

46 *See* David S. Broder, *Should Such a President Remain?*, WASH. POST, Dec. 11, 1998, at A31.

47 Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 658 (1999).

48 *See* 145 CONG. REC. S1462-02, 1636 (daily ed., Feb. 12, 1999) (statement of Senator Robert Byrd).

49 *See, e.g.*, Schlesinger, *supra* note 39, at 696 ("The results of last Tuesday's midterm election show that the impeachment drive has failed in its quest for popular support and legitimacy.").

50 McGinnis, *supra* note 16, 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.").

51 145 CONG. REC. S1462-02, 1502 (daily ed., Feb. 12, 1999) (statement of Senator Pete Domenici).

52 *See* Edwin Chen, et al., *Senate Jurors Begin Private Debate on Clinton Verdict Impeachment: Lawmakers Express Their Views out of the Public Eye*, L.A. TIMES, Feb. 10, 1999, at A1 (reviewing the statement of Senator Smith).