"High Crimes" After Clinton

Deciding What's Impeachable

By KEITH E. WHITTINGTON

NO ONE IS PARTICULARLY HAPPY with the impeachment of President Clinton. For many liberals, the impeachment was a dreadful mistake. The eventual acquittal of the president by the Senate could only partly compensate for the disquieting and dangerous actions of the House. For many conservatives, it is the outcome of the impeachment trial that is problematic. For them, the frustration that built as the Senate ground toward an acquittal was captured in William Bennett's famous question, "Where's the outrage?" The standard media narrative, reinforced by the allies of the White House, that cast the impeachment in terms of partisan electoral calculation further eroded faith in the process.

In the long run, such varied disappointments are likely to fuel a reevaluation of the impeachment power itself. The impeachment has already produced some legislative fallout, notably the unlamented expiration of the independent counsel statute. The constitutional text is not so easily changed. But post-impeachment evaluations will be crucial in determining how future generations of politicians and citizens interpret the Constitution's vague standard of impeachable offenses. The outcome of the impeachment and trial had one immediate and clear consequence: Bill Clinton was able to

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retain the presidency. The longer-term consequences of the impeachment, however, will depend on what constitutional and political lessons are drawn from it.

Unsettled constitutional law

IMPEACHMENTS DO NOT FORM clear precedents, as court cases do. Congress does not respect the judicial doctrine of stare decisis. Congressmen and senators are not obliged to agree upon a single opinion elaborating the principles underlying the impeachment that might guide future impeachment inquiries. The outcome of the trial itself does not provide decisive evidence of the rules governing the decision. Was Clinton's acquittal evidence that the charges made by the House did not rise to the level of impeachable offenses, or does it merely mean that recognizable impeachable offenses were not adequately proven? The constitutional law of impeachment remains as unsettled after the Clinton episode as it was before.

The constitutional and political implications of the impeachment are still up for grabs, however. The case of the only previous president to be impeached, Andrew Johnson, is instructive. Generations of scholars, journalists, and politicians have fought over the significance of the Johnson impeachment and acquittal, and these arguments were driven by contemporary concerns. How the Johnson impeachment was remembered was understood to have important implications for ongoing political debates.

In the postbellum period, Northern elites were unapologetic about the impeachment of the Southern-sympathizing Johnson, and in the era of "congressional government" the impeachment threat was implicit. When "waving the bloody shirt" was a winning political strategy, Republicans had much to gain by portraying Johnson as a reactionary Southerner and the impeachment of 1868 as a success. At the end of the nineteenth century and in the early decades of the twentieth, as Jim Crow was being constructed and defended, a dominant group of historians took a dim view of Reconstruction and the Radical Republicans who supported it. In books with titles such as *The Tragic Era*, these historians led a scholarly and popular reevaluation of Andrew Johnson and his impeachment. They tended to portray Johnson as a lonely defender of the Constitution and social order and the impeachment as part of a revolutionary putsch by wild-eyed radicals.

Beginning with the New Deal and the Roosevelt administration, scholars found a new reason to denounce the impeachment, as a threat to presidential power and the separation of powers. Louis Brownlow, the virtual architect of the post-New Deal modern presidency, denounced the Johnson impeachment as an effort to overthrow the executive branch and establish a parliamentary government. This spin on impeachment became an object of faith and was repeated by writers and politicians, from Harry Truman to

John F. Kennedy. Johnson may have made tactical political mistakes, but the impeachment of a president was unthinkable and constitutionally dangerous. Unsurprisingly, allies of the Clinton White House resurrected this version of the Johnson episode, and old copies of *Profiles in Courage* were dusted off to encourage Democratic congressmen to rally around the presidency.

Academic commentary on the impeachment since the 1960s has been distinctly less critical, however, as the racial egalitarianism of the First Reconstruction was embraced and enchantment with presidential power waned. The presidential impeachment became an unfortunate but necessary aspect of the postbellum struggle to secure black civil rights. By the early 1970s, a new scholarly consensus had formed: Presidential impeachments could be a good thing, if the cause was just.

A politically influential consensus view of the meaning of the Clinton impeachment is also likely to develop. But that is likely to take time, and as in the Johnson case, is likely to be subject to change over time. In the meantime, the passions that fueled the debate as it unfolded will probably guide the early exercises in interpretation. For those who attacked the president, the bitter conclusion is that he got away scot-free with conduct that should have resulted in his removal from office. For his defenders, the conclusion is that the impeachment should never have gone forward. Because of the acquittal, the latter will surely be the dominant view.

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Over the next few years, legal scholars and others will likely attempt to reinforce their original judgments of the Clinton impeachment. In this case, academics made their preferences known in the highly publicized "letter of the 400 law professors" and "letter of the 400 historians," which came down strongly in favor of a narrow interpretation of the impeachment clause. In congressional testimony, CUNY historian Arthur Schlesinger Jr. warned against a creeping parliamentarianism and Princeton historian Sean Wilentz threatened Republican congressmen with historical infamy if they cast their votes in favor of impeachment.

Leading liberal constitutional theorists like Cass Sunstein and Ronald Dworkin have been explicit on the need for a new political and cultural consensus that would prevent anything like the impeachment of Bill Clinton from happening again. In the midst of the impeachment inquiry, Sunstein fretted that the "impeachment of President Clinton may signal more frequent resort to the impeachment mechanism," which he found particularly serious given the "central modern role of the American President."

To resist that possibility, Sunstein insisted that impeachments be limited to "a narrow category of egregious or large-scale abuses of authority that

comes from the exercise of distinctly presidential powers. . . . In the current period, it is more, not less, important to insist on this particular understanding of the Impeachment Clause." More heatedly, Dworkin called the impeachment "a constitutional disaster" and contended that the "only check on Congress's impeachment power . . . would be a broad understanding" that the power can "be used only in an emergency." What is needed is a "consensus that impeaching a president on the kinds of grounds the House cited is a crime against the Constitution; otherwise we cannot be confident that a president less popular or less successful than Clinton will not be impeached by partisan zealots, on equally improper charges, in years to come."

But it seems unlikely that over time, as the passions of the moment cool, the basic lesson of the Clinton impeachment will be one of constitutional failure. Although there were aspects of the process that could clearly have worked better — from the House's handling of the Starr referral to the Senate's truncation of the impeachment trial — the impeachment and trial neither stretched the boundaries of traditional constitutional understandings nor exposed dangerous weaknesses in our understanding of the meaning of impeachable offenses. The course of the Clinton impeachment does not suggest the need for a serious reevaluation of the impeachment power.

Although it is always tempting to refight the old battles over again, we would be better off avoiding the temptation to gerrymander the definition of impeachable offenses to either include or exclude Clinton's actions. A key virtue of our historical practice under the impeachment clause is that we have maintained its flexibility for the future. Our next impeachment is unlikely to be any more analogous to Clinton's than Clinton's was to Nixon's or Johnson's. We would be better off thinking about the underlying purposes of the impeachment clause than attempting to draw up new lists of impeachable offenses.

Three misunderstandings

In thinking specifically about the Clinton case, it is worth putting to rest three basic misunderstandings. First, the acquittal of the president in the Senate trial does not necessarily mean that the impeachment failed or was misguided from its inception. The winner-take-all perspective of ordinary legal trials or political elections is misplaced in the context of an impeachment. The retention of office does not mean that you "won," though losing your office is, of course, pretty definite evidence that you "lost." In many cases, removal is the entire point of an impeachment. There is no larger meaning to the process; the goal is simply to remove an individual from a position of authority who has become incapacitated or proven himself corrupt. In the most interesting cases, however, the impeachment of an individual is intended to send a message and not only to the tar-

geted individual. That message can be clearly delivered even without a conviction.

More is at stake in high-profile impeachments than a single individual's career. In British history, the House of Commons often used the impeachment device as part of its power struggle with the monarchy. Executive officials, unaccountable through electoral means, could be checked by the threat of impeachment. Often in such cases, the impeachment itself was sufficient to effect the desired change of behavior and the Commons did not even bother prosecuting the case in the House of Lords, where conviction would be uncertain in any case. In the American context, impeachments have also been used as a deterrent to executive and judicial misconduct. The mere fact that a majority of the members of the House of Representatives regards an official's behavior as sufficiently egregious to forfeit his claim to office sends a powerful message that the specified conduct is politically costly and constitutionally questionable. In such cases, the ultimate success and lessons of the impeachment can be seen in the behavior of government officials, not in the verdict of the trial or the subsequent frequency of impeachments. A successful deterrent need not be used often.

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Second, the impeachment of Clinton was not an abuse of the process. The motives of politicians are rarely pure, but no federal impeachment in American history has been wholly unjustified. Contested impeachments, such as those of President Clinton, occur at the margins of consensus opinion, where reasonable people can differ. Outside the heat of the moment, it is clear that the president's conduct was both serious and wrong. It is less certain whether those are the types of actions that justify the removal of a sitting president from office. The members of Congress who voted for the president's impeachment and removal could reasonably believe that they did justify his removal, and there is little reason to believe the president's critics acted without regard for basic constitutional values. The impeachment was neither a "kind of coup," as Ronald Dworkin asserted at the time, nor an act of constitutional infidelity by an embittered legislative majority. It was a debatable, but reasonable, effort to reaffirm basic assumptions about how presidents should conduct themselves in office.

Finally, the Clinton impeachment did not represent a crisis of partisanship. It is understandably disquieting to witness a bitter break between the two parties and a strongly partisan vote on a measure as momentous as a presidential impeachment. Nonetheless, there is no reason to expect impeachments to be bipartisan affairs, and there are many reasons partisanship should not be regarded as debilitating. Of course, the Founders did not foresee the growth of political parties and how they would come to structure

national politics. Nonetheless, they had no illusions about the divisiveness of politics. Parties reflect both fairly mundane divisions of interest and fundamental divisions of principle. The Founders expected that divergent interests would tear their new republic. They hoped that there would be little disagreement about basic principles. They were wrong. American politics has been periodically torn over basic disagreements about political principles, both small and large.

Impeachments are one mechanism for establishing and enforcing political principles in government. At times, impeachments reaffirm consensus values. The bipartisan removal of jailed federal judges simply reaffirms what we all knew already. The bipartisan denunciation of Richard Nixon in the waning days of the Watergate scandal expressed a new appreciation of the need for limits on what presidents may do in the name of national security. At other times, impeachments establish new operating values about which there was no previous consensus. Partisan divisions reflect both lingering disagreements about weighty substantive issues and transitory calculations of political interest. It is not uncommon for congressional members of the party of the defendant to vote against an impeachment even as they verbally distance themselves from the behavior in question. Even as the Jeffersonians split their votes over the impeachments of Justice Samuel Chase and Judge John Pickering, the Federalists were united in voting for acquittals for fear of whom the president would nominate to replace them. Likewise, Democrats were unanimous in voting against the impeachment of Johnson, even as Republicans divided in both the House and the Senate. And Republicans did not defect en masse from the Nixon presidency until the last days of the crisis, when the final lies were exposed and Nixon had become a political liability to the party. Partisan divisions at the time of the vote need not lessen the substantive lessons about appropriate political conduct that emerge out of impeachments.

Impeachable in what context?

In the debates preceding the Clinton impeachment, and in its aftermath, a number of efforts have been made to more closely define the Constitution's specification of impeachable offenses as treason, bribery, and high crimes and misdemeanors. The vagueness of the "high crimes and misdemeanors" standard almost tempts us to try to codify a list of impeachable offenses or a standard of official conduct that could guide and constrain future impeachment inquiries, perhaps modeled on the standards of judicial conduct that many states have adopted to discipline their judges. In their struggle with Andrew Johnson, the Republicans included a clause in legislation directed at the president that its violation would constitute a "high misdemeanor." Of course, such legislative language hardly made the Johnson impeachment less controversial. Formal efforts to speci-

fy constitutionally appropriate conduct are likely to seem trite in the new context of an emergent scandal and impeachment debate.

Such exertions also tend to underestimate the historical variability of political misconduct. Supreme Court Justice Samuel Chase was impeached in 1804 primarily for delivering partisan harangues from the bench and for his earlier questionable handling of a set of politically charged treason and sedition trials just prior to the 1800 elections. Although modern commentators generally condemn his conduct, it is hard to imagine a modern federal judge being impeached for taking similar actions. Outside the context of a large-scale dispute over the role of the judiciary in American politics, Chase-like misbehavior on the part of an isolated judge is unlikely to provoke serious impeachment efforts. Although Andrew Johnson's actions were widely reviled at the time, they would be unremarkable, or at most subject to mild censure, in the twentieth century context. "Obstruction of justice" has a different political resonance outside the context of the Nixon presidency and Watergate. Even Hillary Clinton once thought the charges against the president "would be a very serious offense" if they proved to be true. Context matters. Offenses that seem either impeachable or benign in the abstract, or in a different period in American history, can take on a very different cast within a particular political setting. By refusing to write a comprehensive list of impeachable offenses into the Constitution, the Founders preserved a vital flexibility in the constitutional scheme.

The effort to transform the Constitution's requirement of high crimes and misdemeanors into a finite list of impeachable offenses tends to misdirect the constitutional and political inquiry away from what is most important: the justification for removing an officer of the federal government of the United States. The constitutional text does not establish a clear trigger for the impeachment and removal of the president. In the end, congressmen will not be able to return to their constituents and point at an undisputed constitutional code of impeachable offenses. In order to build public support for an impeachment and faith in the process, they will have to be able to offer substantive explanations for why particular actions were constitutionally wrong and a given official should be removed from office before the natural expiration of his term.

Reasons to impeach

IN IDENTIFYING IMPEACHABLE OFFENSES, the focus ought to be on why we would want to impeach. The answer to that question is necessarily rooted in specific cases. Nonetheless, we can identify a few general principles that can justify an impeachment. The clearest reason for making use of the impeachment power is in the case of an immediate danger to the republic. The problem is raised by the Founders' decision to adopt fixed terms of office for the principal government officials. An inde-

pendent executive and judiciary mean that the president does not have to face a parliamentary vote of confidence and the chief executive cannot be fired. We are stuck with the president for four years and with judges for their natural lives, regardless of how bad or even dangerous they turn out to be. The impeachment power provides a safety valve in case presidential incompetence or malevolence becomes so great that we cannot as a nation afford to wait until the next election to remove him.

The two impeachable offenses that the Founders did identify in the text, treason and bribery, tend to fall into this category. If the commander in chief refused to call the army into the field to resist an invasion by a foreign power, he would have to be removed at once. If the president absconded to a foreign shore and refused to perform the duties of his office, an impeachment would be necessary to provide a new head of state.

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It is harder to identify actual cases in which government officials pose such an immediate danger to the nation as a consequence of their continuing to hold office. A few judges may have fallen into this category. The Federalist judge John Pickering was slowly descending into madness and alcoholism, resulting in increasingly incoherent decisions on the bench, forcing the Jeffersonians to remove him. Justice Samuel Chase's intemperate and partisan rant in seating a grand jury could plausibly have been interpreted as a precursor to more vigorous efforts by the justice to frustrate federal policy or even disrupt the workings of the government. Judge West Humphreys of Tennessee refused to resign from the bench even though he had joined the Confederate government at the outbreak of the Civil War and was no longer carrying out his judicial duties — at least not for the Union. He was removed from office by a unanimous vote in 1862. President Johnson's executive efforts to block congressional Reconstruction and his vocal encouragement to Southerners disposed to resist Reconstruction could have been construed as posing an immediate threat to the continued well-being of the nation, especially in a capital filled with rumors of a renewed outbreak of hostilities or even a coup d'etat. In most of these cases, the judgment that these particular individuals were a clear and present danger to national security would be at best controversial. But a basis for such a judgment did exist in these cases, and impeachment advocates could have justified their actions in those terms. The goal of such an impeachment would be specific and limited — to remove a particular individual from office before he can do any further damage to the nation.

Fortunately, few government officials and few individual actions can really pose that kind of threat to the nation. The nation is strong enough to survive most acts of misconduct and incompetence until the next election (and

most officials have had the good sense to resign when their continued presence in office threatens to paralyze the government).

Lesser offenses, different purposes

IMPEACHMENTS ARE JUSTIFIED not only in such cases of immediate and continuing threats to the nation, however. The more common justification for an impeachment turns on rather lesser acts of misconduct. As the individual offenses become less severe, however, the purpose of the impeachment also begins to change. In such lesser cases, impeachments serve important deterrent and educative purposes. The goal of the impeachment is to send a message to other and future officeholders and the American public, as much as it is to incapacitate a particular government official before he does more irreparable harm. Such impeachments are forward-looking and focused on the operation of the political system as a whole. The actions of a particular individual become impeachable as a consequence of these broader, systemic considerations.

Two types of justifications for impeachments fall into this category. First, impeachments can be warranted by the abuse of office. One goal of such an impeachment is, of course, to stop the abuse itself. Removing the individual in question from government office will accomplish that goal, but often the mere impeachment is itself sufficient to check individual misbehavior. Once official misconduct has been exposed and censured through House impeachment, abusive officials have generally either altered their behavior or resigned their posts.

Judge Mark Delahay resigned in 1873 rather than face a Senate trial on charges including regular intoxication on the bench. Secretary of War William Belknap rushed to the White House to resign before his impeachment for accepting bribes in 1876. In 1926, Judge George English resigned during his Senate trial on corruption charges. Many other judges resigned in the midst of House impeachment inquiries, as did President Nixon. Other officials, including Chase and Johnson, who were acquitted in their Senate trials, nonetheless came to recognize the inappropriateness of their behavior and mended their ways. Such abusive officials may not present an immediate danger to the survival of the republic, but they nonetheless have misused their offices, and congressional impeachment has been an effective mechanism for checking those abuses.

More significant than the immediate problem of a single abusive official, however, is the possibility of similar abuses by others. From the individual perspective, impeachments have sometimes served to "punish" officials for actions that they have taken in the past. The abusive behavior may have already stopped, and an impeachment is hardly necessary to stop ongoing abuses. Most of the charges against Chase focused on his actions before the election of 1800. Judge James Peck was impeached in 1826 over a single

questionable contempt citation. Robert Archbald's 1912 impeachment stemmed from his misconduct in a prior judicial post. Likewise, the judicial impeachments of the 1980s all involved isolated events that had long since been exposed and resolved in legal proceedings. If punishment is the only issue, then Clinton-like claims that officials can be held accountable through ordinary legal proceedings without the need for an impeachment have resonance.

The value of these impeachments was not that they stopped ongoing abuses of office or punished individual officials for past misconduct, but that they sent a message to other officeholders and to citizens that such behavior is unacceptable. The impeachments emphasized the availability of mechanisms to punish misconduct by high government officials, notably including judges. The fact that a judge might lose his office, even if he can escape criminal indictment and conviction, serves as a deterrent to such misconduct.

Equally important, impeachments can help clarify what the appropriate standards of conduct are.

Equally important, impeachments can help clarify what the appropriate standards of conduct are and symbolically cleanse the government of wrongdoing. Justice Chase, for example, was impeached by the Jeffersonians primarily for his aggressive partisanship both on the bench and off. Chase was among the most persistent and notorious in his actions, but he was hardly alone. Many in the Federalist Party regarded Chase's actions as not only appropriate for a federal judge but laudatory. Chase's impeachment forced an explicit discussion of the appropriate role of an unelected judiciary in a republican system of government. The Jeffersonians made it clear that the courts were not to be used as weapons in partisan conflicts. Chase kept his office, but no one thought he had been vindicated. Federal judges gave up the practice of using their powers to influence elections, and the justice's remaining years on the bench were unremarkable.

Similarly, President Andrew Johnson was impeached in 1868 after a lengthy struggle with Congress over the proper course of Reconstruction and the president's role in the determination of federal policy. Lincoln's successor aggressively used his powers to resist and subvert congressional policy, while taking to the stump to try to rally the voters to his side. Some of his actions were unprecedented. Others were aggressive extensions of what previous presidents had done. In the aftermath of a civil war and in a period in which democracy was equated with legislative parties, Johnson's actions were seen as threatening the very roots of republican government and the continuation of the national peace. Johnson's firing of his holdover secretary of war, in violation of procedures laid out in a recent federal statute, brought the conflict between the president and the Congress to a head. Johnson's

actions as president were unremarkable by twentieth century standards, when presidents are expected to be popular and policy leaders, and modern critics of his impeachment have found it hard to credit the constitutional vision set forth by congressional Republicans at his trial. But in the nineteenth century context, his impeachment sent an unmistakable message that the presidency was to return to its prewar dimensions and Congress was to remain the center of policy making and party building in the national government. Individuals such as Chase or Johnson are sometimes caught in the transition — though there were ample warnings that the climate of opinion was shifting. Their impeachments were political events designed to influence a larger political audience.

Bad conduct

A FINAL JUSTIFICATION for impeachment is the inconsistency between the actions of an individual and the expectations of the office that individual holds. Like cases of abuse of office, these impeachments are concerned both with stopping an ongoing harm to the nation and with sending a message to other political actors. Unlike cases of abuse of office, however, the concern of these impeachments is with how an individual conducts himself in office rather than with how the individual uses his office. Officeholders can abuse their position of trust and authority not only by turning the government powers with which they have been entrusted to improper ends, but also by subverting the stature of the office itself. "Private" behavior can cause very public harms when it calls into question the symbolic meaning of the office that the individual occupies and affects his and others' ability to conduct public business.

A wide range of behavior can create a basic inconsistency between the actions of a government official and the expectations of the office. Moreover, the expectations of the office depend on the particular post that an individual holds. Judges Pickering and Delahay were not using their office for private gain when they regularly appeared drunk on and off the bench. Their legal decisions may even have been correct on the merits. Their public intoxication, however, created an overwhelming appearance of impropriety that necessarily led individual citizens to question whether justice was being done in cases before the bench. It is not the outcome of the judicial proceedings that was in question in these cases, but the basic dignity of the office that helped sustain its effectiveness and the legitimacy of the government as a whole.

Similarly, one of the charges against Justice Chase focused on his "stooping to the level of an informer" in encouraging a grand jury investigation of a newspaper publisher who had criticized Chase's own behavior. The grand jury did not indict the publisher, and given the legal environment of the time, such charges could have had merit. But Chase's actions raised questions

about his judicial temperament and character and raised public doubts about his handling of other cases.

The unofficial conduct of a government officer can be just as damaging to the integrity of the office as his official conduct. In the very first impeachment, Sen. William Blount was tried for conspiring with Great Britain to take over Spanish territory in Florida and Louisiana. Blount perhaps traded on his status as a United States senator, but he did not abuse any of his official powers as a member of Congress. Nonetheless, his actions undermined the Senate, and he was promptly expelled from Congress and subsequently impeached in order to bar him from holding future federal office. More recently, Judge Harry Claiborne and Judge Walter Nixon were impeached and removed from office for income tax evasion and lying to a federal grand jury, respectively. Neither charge stemmed from their official duties as judges, but both offenses were seen as rendering these individuals unfit to continue acting in the role of a federal judge. An official charged with sitting in judgment of the illegal behavior of his fellow citizens could not himself be guilty of serious criminal infractions.

Judgments about what types of activity might be inconsistent with wielding public authority are likely to vary over time.

More tendentiously, one of the charges against President Johnson referred to his various public speeches attacking Congress, the Republican Party, and government policy. In responding to the charge, Johnson asserted that his actions were unimpeachable. The president had the same free speech rights as every other American citizen. Congressional Republicans correctly noted that the president was not in the same position as any other American citizen. A demagogic and rabble-rousing president raised unique dangers to the stability of the government. Johnson's "private" actions on the stump had serious public consequences, including implications for the stature of the presidency as a constitutional office. Presidential conduct was always public conduct, even if it did not make use of the resources of the executive office.

Recognizing a legitimate concern with the stature and dignity of office provides a larger principle that makes sense of our intuition that "heinous" criminal activity by a sitting judge or president must be impeachable, even if it does not involve an abuse of their public functions. Unfortunately for the defenders of the current president, such concerns cannot be easily limited to a handful of particularly egregious felonies such as rape or murder. They cannot even be limited to violations of the criminal code. Even unindictable behavior by a sitting president may render him unfit to continue to hold such a high office.

Judgments about what types of activity might be inconsistent with wielding public authority, however, are likely to vary over time. In an era in which

sitting presidents were expected to remain scrupulously above the partisan fray, Johnson's emotional speeches urging voters to throw his congressional foes out of office were scandalous and seemingly dangerous. In the modern era of explicit presidential partisanship and permanent campaign fundraising, even renting out the Lincoln Bedroom in exchange for campaign contributions may seem merely distasteful. On the other hand, public expressions of virulent racism would call into question a contemporary president's fitness and ability to govern. The conduct appropriate to an office is a function of malleable, contemporary social customs. Impeachments are one mechanism for defining and enforcing those social customs.

The Clinton impeachment

THE IMPEACHMENT of President Clinton was almost exclusively concerned with this category of impeachable offenses. The president's defenders themselves were forced to recognize the existence of such a justification for an impeachment, even as they tried to put off the president's activities as private and of concern only to his family. The explicit arguments in the impeachment trial itself tended to focus on whether or not the president had committed felonies in trying to cover up his sexual affair with Monica Lewinsky. These are serious issues, and there is an obvious tension between a president willing to flagrantly violate the law when it conflicts with his own self-interest and the chief executive's duty to take care that the laws are faithfully enforced. But they do not exhaust the constitutional difficulties raised by the president's behavior. As Judge Richard Posner has recently concluded in his book on the Clinton impeachment, *An Affair of State*, the president's most serious constitutional offense may be "on the ground of disrespect for his office and for decency in the conduct of government." This disrespect extended far beyond Clinton's possible perjuries to his repeated, clear, and highly public lies directly to the American people and to his willingness to embark on a veritable guerilla war against the independent counsel and the judiciary in an effort to preserve his own power. The real lessons of the Clinton impeachment will lie in the historical assessment of this conduct. Was it bad enough to legitimate a serious impeachment effort?

The prosecution and defense of impeachment charges advance across three levels of inquiry. At the most basic level are debates over the facts. Did the president lie in his grand jury testimony? Did Nixon know about the Watergate burglary? At a second level are debates over the legal and political significance of these facts. Were Clinton's prevarications perjurious? Was Johnson's secretary of war covered by the Tenure of Office Act and legally protected from unilateral removal by the president? These are important debates, and impeachment trials can turn on them, but they are of little long-term consequence.

The most important debates are over the scope of the impeachment power itself. Is the commission of perjury an impeachable offense? Is tax evasion? These are constitutional debates of the first moment, and not only because they will help shape future uses of the impeachment power. They are particularly important because they establish whether the impeachment effort was justified and whether those who engaged in it acted appropriately. Members of Congress can be forgiven if they make factual or legal mistakes in attacking a president or a judge. They are much less likely to be excused for misunderstanding the scope of the impeachment power.

The Constitution empowered Congress to remove government officials before the expiration of their natural terms. The Constitution also imposed two constraints on that power: a structural constraint that requires that advocates of removal obtain majority support in the House of Representatives and a two-thirds majority in the Senate, and a substantive constraint that impeachments can only proceed on the commission of "high crimes and misdemeanors." We are used to thinking of the Constitution as a kind of law, setting up rules and legal barriers to what government officials can do and charging the courts with enforcing those rules. The Constitution also limits government power by creating a complicated structure of governance in which power checks power and by fostering a particular constitutional culture that is committed to certain principles such as individual rights and democratic government.

Thus the search for a final answer to the question of what constitutes an impeachable offense is both misguided and unnecessary. We would be better served by trying to clarify the open-ended principles that should guide any future impeachment inquiries rather than trying to convert the impeachment power into a matter of constitutional law. We should put our trust in constitutional structures rather than in legal definitions.

In hindsight, Congress seems to have come to the right outcome in the Clinton case with an impeachment and acquittal. Congressmen responded to a public debate — not just opinion polls — over the propriety and seriousness of the president's conduct. Important constitutional values were reaffirmed by congressional action, even as the drastic step of presidential removal was averted. Moral principle, legal judgment, constitutional consideration, political calculation, and sheer inertia all played a part in this impeachment, as they have in earlier ones and will again in future ones. The impeachment power will remain available as a response to unforeseeable abuses of the public trust in the future, as it should.