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The Culture of an Empire; The Structure of a Republic

James Wilson

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Whatever the Clinton-Lewinsky scandal's constitutional implications, implications that this piece shall soon explore in some depth, the episode will endure as an excessively graphic metaphor for the squalid nature of America's political culture at the end of the Twentieth Century. Clinton is certainly neither the first nor the last American politician to use the status and power of his office to satisfy his sexual lust. Nor is Kenneth Starr the only prosecutor who attempted to grind someone to bits for political glory, even though he did turn out to be quite a crybaby when he wanted to impeach Clinton for conducting an overly zealous defense against his overly zealous prosecution. The Democratic Party has been as willing to compromise its moral integrity by standing by its shameless President as it had been eager to desert its ideological legitimacy by betraying American workers to NAFTA/GATT. Alan Greenspan is permitted to...
fight "wage inflation" among regular workers but never needs to worry about the disproportionate wage increases that have accrued to the well to do over the past two decades. Or perhaps the postmodern Democrats, besotted with notions of "consent," merely have decided that business and political leaders can turn their operations into harems so long as everyone is agreeable.

The Republican Party, which includes Big Business as its true constituency, has created its own alienating brew of pious sadism. If the Republicans had any real political courage, they would impeach Attorney General Janet Reno for failing to initiate legal proceedings against President Clinton and Vice President Gore for flagrantly violating fundraising laws during the last Presidential election. But that, of course, would be far too substantive, too close to the real political scandal of subordinating every public norm (including national security) to wealth and power.

Many Americans expressed their contempt—for Clinton, the Washington political establishment, and the media servants of corporate power—by not caring very much about the scandal. The ruling class periodically offers up a politician as a sacrificial lamb to perpetuate the imagery of popular sovereignty. This time the public did not take the bait. They knew Clinton was no worse substantively or morally than most of his peers. They had already twice voted for him, knowing he was a liar and a philanderer. Perhaps they are getting sick of the media's perpetual campaign to denigrate every politician, to make us feel there can be no hope, no virtue in politics, making us believe our only salvation is the private market and the media's corporate owners. Anyway, the Republicans served up Gingrich, which pleased

J. EMP. & LAB. L. 1, 8 (1998) (stating "according to Alan Greenspan, chairperson of the Federal Reserve Board, workers have refrained from seeking pay raises out of fear of losing their jobs even when the labor market has shown signs of improvement").

4 See Michael J. Broyde & Robert A. Schapiro, Impeachment and Accountability: The Case of the First Lady, 15 CONST. COMMENT. 479, 480 (1998) (noting Attorney General Janet Reno's rejection of independent counsel to investigate White House fundraising led to requests for her impeachment); see also Brett M. Kavanaugh, The President and the Independent Counsel, 86 GEO. L.J. 2133, 2136 (1998) (concluding "the Attorney General has refused to appoint an independent counsel for the campaign fund-raising matter based on a narrow analysis of the independent counsel's statute's triggering mechanism). See, e.g., Donald C. Smaltz, The Independent Counsel: A View From Inside, 86 GEO. L.J. 2307, 2370 (1998) (describing Janet Reno's dissatisfaction with performance of independent counsel was responsible for her failing to appoint independent counsel to investigate alleged criminal fundraising activities by President Clinton and Vice President Gore).

5 See W. John Thomas, The Presentation of Bill Clinton Revisited: The Case for Con-
quite a few people across the political spectrum. But that burnt offering may not keep the discontented voters and alienated nonvoters from throwing most of these politicians out of office, demanding a more basic reordering of our political society.

As the reader has probably already garnered by now, the author can claim a fair degree of nonpartisanship but certainly not "objectivity," whatever that word could possibly mean in this context, due to his abiding contempt for both parties' leaders. Already the benefits of the scandal, aside from its essentially farcical nature, have far exceeded his expectations. Clinton's historical reputation will be perpetually tarnished with bathroom humor. Gingrich took a sudden fall, temporarily replaced by an even harder, colder man. The Republican Party, which always manages to appear more cruel and greedy than Clinton and the Democrats, lost ground in the 1998 congressional elections. African-Americans reasserted themselves at the polls, preferring Clinton, the sleazy womanizer who enjoys playing golf with Vernon Jordan, to the racists who set the tone for the Re-

textual Analysis of Political Performance, 8 STAN. L. & POL'Y REV. 127, 129 (1997) (describing Gingrich's flirtation with public adulation as ending in fall of 1995 when he directed Republican effort in budget battle with White House, further commenting on how loss of budget battle left Republican Party weakened which resulted in Gingrich's approval rating beginning to plummet, bottoming out in January of 1997 at 15%, 9 points lower than President's Nixon's when he resigned); see also Richard L. Berke, Democrats Mourn Loss of Ideal Foil, N.Y.TIMES, Nov. 8, 1998, at 1 (quoting Democratic Media Consultant as stating, "In the way the Republic party spent years using Ted Kennedy as their punching bags—and made millions in direct mail off him—I don't think we've ever had a better villain than Newt"). See generally Allison R. Myerson, From One Fallen Speaker to Another, N.Y. TIMES, Nov. 12, 1998, at A1 (noting that former speaker Jim Wright was not gloating from Gingrich's resignation).


7 See Adam Nagourney, A Party so Happy it Could Burst, N.Y. TIMES, Nov. 15, 1998, at D4 (noting Democrats wrest five seats from House Republicans); The 106th Congress: What to expect In 1999, Taxcuts: There Will Be Some, But..., 20 JUD/LEGIS.WATCH REP., 1, 3 (1999) (illustrating how Republicans believe that lack of political and legislative agenda caused them to lose a small number of seats in election in which they could have expected to pick up several seats); see also Karen Hansen, Democrats Eke Out Slim Wins. (Democratic Party's Performance In The November 1998 Legislative Elections), STATE LEGISLATURES, Dec. 1, 1998, available in, 1998 WL 12872101, at *1 (stating Democrats bucked conventional wisdom and won seats in state legislative races when history indicated that they should have lost big in off year election).
publican Party. Only a fool forgets Willie Horton. And we can now periodically make a sexual allusion at work or in class without being branded sexual harassers. For instance, it is now very hard to teach the impeachment material in a constitutional law class without making a double entendre, whether one wants to or not. But there have been costs as well. Hillary Clinton has apparently regained favor with the media elite and perhaps with much of the public. She probably took a poll to determine whether staying with him or leaving him would best advance her political career. Children of every age now know all about oral sex and the permissibility, or at least the lack of importance, of deception, lying, and perjury. Concerned, humane people have more reasons to turn away from contemporary politics, which is nauseatingly voyeuristic, self-absorbed, and self-righteous. Many bosses will feel less restraint in searching out compliant sexual partners among their subordinates. So what if the employee gets special access, inside information, and enhanced career opportunities? So what if other employees must facilitate the sexual encounters, turn their heads, or suppress their moral indignation? They should get with the Nineties. Consensual sexual power is not only "private," but it also is cool. Just don't be crassly ineffective and insensitive, like Clarence Thomas.

8 See Robert S. Blanco, Mixing Politics and Crime, FED. PROBATION, Dec. 1995, at 91 (reviewing David C. Anderson, Crime and the Politics of Hysteria (1995)) (discussing Willie Horton, a black male, who committed a heinous crime while on furlough from prison; the victims were a young and upcoming white couple, picked at random; further noting that the fact that this crime could have been prevented infuriated the public and captured fear of middle class); see also Peter J. Benekos & Alida V. Merlo, Three Strikes and You're Out! The Political Sentencing Game, FED. PROBATION, Mar. 1995, at 4 (discussing series of events that led Willie Horton to become poster child of Republicans and reminded Democrats that appearing to be soft on criminals and crimes was politically incorrect). See, e.g., Gerald F. Velmen, Victim's Rights in California, 8 ST. JOHN'S J. LEGAL COMMENT. 197, 202 (1992) (referring to moral bankruptcy of national political leadership as "Willie Horton Syndrome" meaning "where political leaders with ambitions for higher office become so obsessed with maintaining a 'tough on crime' image they measure every decision in terms of media labels that might be hung around their necks).

9 See Sen. Dennis DeConcini, Examining the Judicial Nomination Process: The Politics of Advice and Consent, 34 ARIZ. L. REV. 1, 27 (1992) (discussing surrounding circumstances around sexual harassment allegations of Professor Anita Hill against Supreme Court Justice Clarence Thomas, which resulted in Senate postponing its vote on Thomas' nomination and directing judiciary committee to investigate and conduct hearings on allegations); see also Erwin Chemerinsky, Gender, Race, and the Anita Hill / Clarence Thomas Hearings, the View From and to Congress, 65 S. CAL. L. REV. 1497, 1497 (1992) (referring to scandal as compelling story specifically with "[p]louise, articulate Anita Hill describing sexual harassment in graphic detail" and "proud and angry Clarence Thomas vehemently calling Hill liar and charging his accuser with racism"). See generally Richard Davis, The Supreme Court Nominations and the News Media, 57 ALB. L. REV. 1061, 1068 (1994) (noting three major television networks devoted sixty six hours of coverage.
But enough ranting, at least for the moment. The white heat of outrage can inspire and focus legal/political analysis, but at some point it becomes tiresome, almost as self-indulgent as the ruling class it despises. On another level of abstraction, this article is an exercise in transforming partisan passion into legal analysis. This constitutional controversy has raised interesting technical questions across the constitutional law and politics spectrum that are worth reconsidering through the light of this enduring anger. The main thesis I offer, with only a dash of irony, is that the Supreme Court saved Bill Clinton's presidency. What would have happened if the Court had not already upheld the constitutionality of independent counsels in *Morrison v. Olsen*,\(^{10}\) permitted Paula Jones to pursue her sexual harassment lawsuit against the President while he was still in office in *Clinton v. Jones*,\(^{11}\) and apparently determined that all impeachment issues are nonjusticiable "political questions" in *Nixon v. United States*?\(^{12}\) Linda Tripp still would have taped the conversations; Monica Lewinsky would have stalked after Clinton while saving the stained dress and the phone messages; and the Clinton Administration would have launched its usual to second round of Clarence Thomas hearings after Anita Hill's sexual harassment charges surfaced.


\(^{11}\) 520 U.S. 681, 683 (1997) (holding that subjecting sitting President to civil suit does not violate separation of powers); see also L. Darnell Weeden, *The President and Mrs. Jones Were in Federal Court: The Litigation Established No Constitutional Immunity for President Clinton*, 7 GEO. MASON. L. REV. 361, 364 (1999) (summarizing Court's rejection of President Clinton's argument that Constitution required federal courts to defer civil litigation based on conduct that allegedly took place before he assumed office as President). See generally Howard Kurtz, *Paula Jones Speaks To National Media About Clinton Suit*, WASH POST, June 17, 1994, at A11 (commenting on Jones's sexual harassment suit against President Clinton).

\(^{12}\) 506 U.S. 224, 228-33 (1993) (ruling that impeachment trials are to be conducted by Senate); see also Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125, 126 (1993) (criticizing Nixon decision for not respecting judicial review as integral part of meaningful separation of powers doctrine in order to protect judicial independence as well as individual rights). See generally Michael J. Gerhardt, *Rediscovering Non-Justifiability: Judicial Review of Impeachment's After Nixon*, 44 DUKE L.J. 231, 232 (1994) (concluding "Nixon raised the issue of whether, without judicial review, Congress is able to make constitutional decisions in a reasonably principled fashion").
vendetta against any woman sexually linked to the President. But there would have not have been a preexisting, hectoring, prudish Independent Counsel, appointed by a partisan Judge with partisan support. Clinton wouldn't have gotten bogged down in a politically motivated lawsuit with Paula Jones; he just would have been seen for the vicious, lying scoundrel that he is. Maybe he wouldn't have committed the impeachable offenses of civil perjury and obstruction of justice, but he would not have been able to hide behind his clumsy enemies.

Without *Nixon v. United States*, the impeachment process would have been even more polluted by lawyers and law professors' claims of privileged wisdom; the citizens might have felt less need to think for themselves because the legal system was allegedly taking care of the problem. Who knows: The initial polls may have come out against Clinton when the evidence had caught up with him just two months before the congressional elections. The Democratic Party might have forced him to do what he should have done anyway if he truly had the country's best interests at heart: RESIGN. Assuming there probably is some truth to this hypothesis, what does it say about the role of those three important Supreme Court decisions in the future?

One could say that the Court should never revisit prior constitutional holdings because of subsequent events. But one of the core doctrines of constitutional law is the limited influence of precedent. With the notable exception of Constitutional Amendments, only the Supreme Court can alter constitutional legal doctrine in most cases. Thus it can correct for its earlier "mistakes." Because it is often difficult to determine what is the "right answer" in the first place, how is the Court to ascertain its errors? Changes in public opinion and court personnel obviously matter. But so does reality. What if the crime rate had rapidly

dropped after the Warren Court implemented its reforms in criminal procedure? What if affirmative action had worked so well that few minorities continued to need any special preferences? Or, in our situation, what damage, if any, has Kenneth Starr and Paula Jones done to our country? These recent events have confirmed my initial reaction that laws establishing independent counsels are unconstitutional. Quite simply, a politically unaccountable criminal prosecutor is a shocking, untraditional procedure that violates the criminal defendant’s right to due process. All defendants have a right to have their case considered in the context of the administration’s overall experience, mission, and political accountability.

The current system also drags the federal courts into virulently partisan politics. Judge Sentelle, a very conservative jurist with close connections to rabid politicians like Senator Jesse Helms and Lauch Faircloth, rejected the first choice for independent counsel, the well-respected Robert B. Fiske, Jr. Instead he chose Kenneth Starr, who had well-known political ambitions. Furthermore, the Court has periodically had to revise, expand, and revive Starr’s floating jurisdiction. This confirms Justice Scalia’s warning in Morrison:

An independent counsel is selected, and the scope of his or

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15 See James G. Wilson, Altered States: A Comparison of Separation of Powers in the United States and in the United Kingdom, 18 HASTINGS CONST. L. Q. 125 (1990) (agreeing with Scalia’s dissenting opinion that laws establishing independent counsels are unconstitutional).

16 See David Johnston, Three Judges Spurn Protest on Whitewater Prosecutor, N.Y. TIMES, Aug. 19, 1994, at A16 (noting that request for investigation into Starr’s partisan activities was rebuffed by court); David Johnston, Appointment in Whitewater Turns Into a Partisan Battle, N.Y. TIMES, Aug. 13, 1994, at A4 (noting Democratic members’ uproar over appointment of Republican Kenneth Starr as independent prosecutor); Phil Kuntz & Edward Felsenthal, For Starr the Impact of the Jones Ruling is Mainly Political, WALL ST. J., Apr. 2, 1998, at A24 (noting that Starr was branded partisan politico from inception of investigation).

17 See Order, In re Madison Guaranty Savings & Loan Ass’n, Div. No. 94-1, at 1-2 (D.C. Cir. Spec. Div. Jan. 16, 1998) (expanding independent prosecutor, Kenneth Starr’s jurisdiction, specifically to investigate “whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses, attorneys or others concerning civil case Jones v. Clinton”); see also Ken Gormley, An Original Model of the Independent Counsel Statute, 97 MICH. L. REV. 601, 662 (1998) (discussing how rapid expansion of Starr’s probe into Monica Lewinsky scandal provides useful case study of how independent counsels can expand their jurisdiction almost at will); Joshua M. Perttula, The Political Price of the Independent Counsel Law, 25 HASTINGS CONST. L. Q. 257, 271 (1998) (finding that since initial allegations stemming from Whitewater, Starr’s jurisdiction has expanded to three unrelated issues including travel office matter, missing F.B.I. files and Monica Lewinsky sex scandal).
her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the [administration]? There is no remedy for that, not even a political one.\(^\text{18}\)

Although there can never be a clear line between law and politics, the Court should interpret the Constitution to keep the Federal judiciary out of the most virulent acts of partisanship.

But there is an alternative to the Court's reconsidering \textit{Morrison}. The Act will soon expire,\(^\text{19}\) and Congress need not pass any variant in the future. It is also quite likely that the next President, of whatever party, will veto any such law. After all, special prosecutors also attacked Presidents Bush and Reagan.\(^\text{20}\) Thus, on a practical level, Kenneth Starr may have effectively overruled \textit{Morrison} for the foreseeable future. Many supporters of \textit{Morrison} may find that solution palatable.

It is consistent to argue that independent counsels are a bad idea, but Congress should have the constitutional power to create them as a powerful check against Executive abuses. An alternative that worked very well in the past, is for Congress and

\(^{18}\) \textit{Morrison v. Olson}, 487 U.S. 654, 729 (1998) (Scalia, J., dissenting) (illustrating inherent dangers in appointing an independent counsel). \textit{See Julie O'Sullivan, The Independent Counsel Statute: Bad Law, Bad Policy}, 33 AM. CRIM. L. REV. 463, 506 (1996) (stating that political independence of special division judges is intended to ensure that they will choose truly "independent" independent counsels but it also means that if they do not, there is no accountability and equally important, no politically feasible remedy). \textit{See generally Peter M. Shane, Independent Policy Making and Presidential Power}, 57 GEO. WASH. L. REV. 596, 624 (1989) (examining Justice Scalia's argument "that the independent counsel offends the constitutional commitment to due process because the judicial appointment of a prosecutor to investigate a single potential defendant undermines the values of prosecutorial detachment, impartiality, and accountability").


the public to pressure the President to appoint a Special Prosecutor, partially protected by repealable regulations, within the Executive Branch. No recent President was as devious and ruthless as Nixon, yet even he could not prevent that system from driving him out of office.\textsuperscript{21} Admittedly, that system will generally require more bipartisanship to begin any presidential investigation, much less to conclude it, but that restraint may be a virtue.

As much as I distrust our past and future Presidents, I am wary of the ever-increasing legalization and criminalization of politics. The President should be protected by a strong presumption of legal innocence, so he or she can do her job and we can judge that performance. In addition, the current system requires the President to raise even more money for legal protection against his omnipresent prosecutor and plaintiff[s], to become even more beholden to the "special interests" that really run this country. Although there is a tension, there is no paradox in wanting a strong government even though one believes the current political regime has been dangerously corrupted by money. The solution is to remove the corrupt politicians, not to strangle the formal political system.

Relying upon the doctrine of sovereign immunity, Congress probably could modify the Supreme Court's holding that Paula Jones' civil sexual harassment suit can take place during the Clinton presidency.\textsuperscript{22} Nevertheless, some of the Court's reasoning was hardly reassuring. It relied on the fact that only three civil lawsuits have been filed against sitting Presidents to predict that there would not be many such suits in the future. It concluded there would be little risk of politically motivated litigation. But the very success of Jones' case, both politically and financially,\textsuperscript{23} may encourage many more such actions in the fu-

\textsuperscript{21} See U.S. v. Nixon, 418 U.S. 683, 697 (1974) (holding that dispute between special prosecutor and President relating to tape recordings and documentation of President's conversations with aides was justifiable even though both parties were officers of executive branch); see also O'Sullivan, supra note 18, at 509 (reasoning "system" subsequently worked as it should, despite President Nixon's orders to remove initial Watergate special counsel Archibald Cox, second Watergate special prosecutor was named and inevitably President Nixon underwent criminal prosecutions, impeachment proceedings and finally resigned).

\textsuperscript{22} See Clinton v. Jones, 520 U.S. 681, 697 (1997) (noting if Congress deems it appropriate to afford President with stronger protection, it may respond with appropriate legislation).

\textsuperscript{23} See Daniel H. Pollitt, Sex in the Oval Office and Cover up Under Oath: Impeach-
ture. Because cases like sexual harassment swing on disputed material facts, the President will rarely prevail under summary judgment. Given these foreseeable problems, Congress could probably defer all civil trials and discovery until the President leaves office. Thus, as in *Morrison*, there is no pressing need for the Court to reevaluate the *Jones* decision, even assuming it was wrongly decided. Whether Congress should change the *Jones* doctrine or not will largely depend upon how much one enjoys seeing Presidents in political trouble. Although Clinton may or may not have lied more than most Presidents, he broke ground by lying under oath in the *Jones* case. Perhaps the real lesson is that it is dangerous to require Presidents to testify under oath because they are so used to lying and getting away with it. The old system, having lower level officials risk their careers and reputations by dissembling to congressional committees, may be the best one.

*Morrison v. United States* is the most important case in this field, because it defines the basic process for resolving presidential impeachments. The Supreme Court rejected as a "political question" Judge Nixon's claim that he was did not receive a constitutional trial because only a committee heard the entire evidence. Because the claim focused on process and the word "try" in the Constitution; the case does not technically prohibit the

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*Jones v. United States*, 245 U.S. 224 (1993). The Senate shall have the sole power to try all impeachment. The case does not technically prohibit the

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claim that the Court can interpret the substantive meaning of “misconduct” and “High Crimes and Misdemeanors.” The Court’s reasoning, supported by very rigid doctrine, makes it unlikely that it would make such a distinction between impeachment process and substance. The underlying textual argument remains the same: The Constitution committed the impeachment process to the House and the Senate. Furthermore, the Court would invariably interject itself into what would invariably by an extremely heated political controversy by reversing the elected branches’ decision that a Judge or President should be impeached. Particularly in Presidential cases, which have so many domestic and foreign policy implications, there is a great need for promptness and finality.

So how should the American public and Congress think about these issues? A few years ago, I argued that constitutional power in the United States is significantly regulated by “conventions,” not just legal doctrine. For example, past practice has established the convention that there should be nine Justices on the Supreme Court. Any attempt to “pack” the Court would be presumptively unconstitutional, even if the Supreme Court cannot prevent an increase in the number of Justices. The same analysis applies to impeachment issues, which should be more political than legal. Relying upon precedent, constitutional theory, and public opinion, the country is developing a set of conventions about presidential impeachment. Advocates propose their own sub-categories. Clinton’s opponents argued that perjury is a per se impeachable offense that warrants impeachment. Clinton’s advocates distinguished between sin, personal miscon-

26 For a discussion of the differences between Chief Justice Rehnquist’s choice of a rigid rule and the slightly more flexible approaches recommended in the two concur-
rence, see James G. Wilson, Surveying the Forms of Doctrine on the Bright Line-
Balancing Test Continuum, 27 ARIZ. ST. L.J. 773, 788 (1995) (comparing Chief Justice Rehnquist’s reaffirmation of most formal conception of non-justifiability, by holding that all claims surrounding impeachment were non-justifiable with Justice Souter’s concur-
rence in which he contended that at some outrageous point, court would be able and should review certain impeachment procedures, such as deciding on impeachment by flipping coin); see also Louis Henkin, Is There a “Political Question” Doctrine?, 85 YALE L.J. 597, 598 (1976) (indicating that “as long as the political branches act within their constitutional powers, whether they have done wisely or well is a ‘political question’ which is not for the courts to consider”).

27 James G. Wilson, American Constitutional Conventions: The Judicially Unenforce-
duct, breach of public confidence, and threats to the constitutional system. At the Senate trial, Clinton's defense conceded that "high crimes and misdemeanors" extends to some "private offenses," such as murder, but not to perjury over a sexual affair. Just like legal cases, there will be no clear consensus about the meaning of the Clinton impeachment process, whatever its ultimate outcome.

Recent impeachment precedents and arguments on both sides of the Clinton dispute demonstrate that "High Crimes and Misdemeanors" is and should be a totality of the circumstances standard. Although Nixon technically had to resign because he orchestrated an elaborate cover-up, he also lost power because the initial crime, Watergate, was a threat to the domestic electoral system. Whether he knew about Watergate or not beforehand, he is constitutionally responsible for all White House actions. Both these offenses reinforced a preexisting belief among many Americans that Nixon had an excessive lust for dominion. In addition, the economy was very weak. Finally, the Vietnam War had polarized the country, making Nixon an appropriate sacrifice. Ronald Reagan and George Bush's creation of a shadow government, receiving funds that had not been appropriated by Congress, was another serious threat to the Constitution. But impeachment efforts got nowhere because Reagan

28 See Sean Wilentz, High Crimes; It Depends on How You Define 'Murder,' L.A. TIMES, Nov. 22, 1998, at M2 (noting that "high crimes and misdemeanors" include private offenses such as murder).

29 See Julie R. O'Sullivan, The Interaction Between Impeachment and the Independent Counsel Statute, 86 GEO. L.J. 2193, 2224-25 (1998) (concluding that despite fact that Congress is not limited by any express definition of impeachable offenses including high crimes and misdemeanors, and its impeachment decisions are not subject to judicial review, congressional precedents indicate that structural safeguards constructed by Framers supplemented by practical political constraints have been sufficient to prevent Congressional abuse); see also Bob Barr, High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment, 2 TEX. REV. L. & POL. 1, 11 (1997) (illustrating how it is misconception to assume that because "crimes and misdemeanors" are terms of criminal law that "high crimes and misdemeanors are similarly just ordinary crimes and misdemeanors committed by high government officials). 


31 See Harold Hongju Koh, Why the President (Almost) Always Wins in Foreign Af-
was quite popular, the economy was thriving, and many people believed his errors were a good faith effort to rescue hostages and to ensure foreign policy objectives. In other words, unlike Nixon, Reagan violated the Constitution, but he did not do so for immediate political gain. George Bush hid his own set of lies about his involvement in the affair under the benign shadow of Ronald Reagan.32

Clinton’s case resembles Nixon’s self-seeking in terms of lies and obstruction of justice. Unlike the foreign policy lies of Reagan (and Franklin D. Roosevelt, Eisenhower, and Kennedy, Nixon, and so on), there is nothing even arguably “noble” about Clinton’s destruction of the English language. But Nixon was trying to subvert the political process. On the other hand, Nixon never committed perjury, thereby betraying his constitutional obligation to faithfully execute the laws. Just before the House took its impeachment vote in December 1998, a poll indicated that a large majority of Americans believe Clinton acted illegally, but he should not be impeached.33 In other words, they did not accept the Democrats’ argument that Clinton did not lie or commit perjury. But neither did they adopt the Republicans’ conclusion that Clinton should be impeached for these acts. They made

fairs: Lessons of the Iran-Contra Affair, 97 YALE L.J. 1255, 1288 (1998) (discussing how before Iran-Contra affair President Reagan made two deals with Congress reaching substantive policy agreements not to negotiate with terrorists over hostages and vowing not to fund military activities with Contras, yet during Iran-Contra affair President Reagan endorsed release of Lebanon hostages by any means, and private support for Contras); Peter M. Shane, Focus On: Restoring Faith in Government, Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers, 11 YALE L. & POLY REV. 361, 395 (1993) (demonstrating that Reagan administration during Iran-Contra affair exemplified dangers posed to democracy when governments circumvent congressional initiatives and carry out foreign affair agendas employing covert and deceptive strategies); see also David Hoffman, Iran Arms Profits Were Diverted to Contras; Pointdexter Resigns, NSC Aide is Fired, WASH. POST., Nov. 26, 1986, at A1 (describing how American public was outraged as President Reagan revealed on national television that up to $30 million received from covert sales of U.S. arms by Israel to Iran had been diverted by American agents to rebels fighting against Sandinista government in Nicaragua).

32 See Harold Hongju Koh, Begging Bush’s Pardon, 29 HOUS. L. REV. 889, 889 (1992) (reasoning that by pardoning last Iran-Contra defendants, President Bush “violated a central norm of our National Security Constitution: that foreign policy exigencies do not authorize President to nullify rule of law for his own administration”); Lawrence E. Walsh, Political Oversight, the Rule of Law, and Iran-Contra, 42 CLEV. ST. L. REV. 587, 596 (1992) (concluding that President Bush’s pardon of Secretary of Defense Caspar Weinberger, ten days before his trial, not only prevented punishment but also prevented trial which would have exposed truth about Iran-Contra).

33 See Richard L. Berke, Impeachment: The Public, N.Y. TIMES, Dec. 15, 1998, at A24 (indicating that “53 percent said they thought it was probably true that Mr. Clinton committed perjury before a Federal grand jury; 19 percent said its was probably not true; and the rest had no opinion”).
a legal judgment that Clinton is a criminal along with a political judgment that he should not be impeached. This analysis is quite rational. Just because a President commits a felony, even a felony that is presumptively an impeachable offense, it does not follow that he should be convicted of that felony or be impeached. First, the American public appears to be exercising the power of jury nullification. Clinton may be technically guilty, but he should not be found guilty for such an understandable unwillingness to lie about his consensual affairs. Second, an offense can be impeachable without warranting impeachment, just as an act can be criminal without warranting punishment. If Clinton gets off, the controversy may only stand for the principle that perjury is an impeachable offense, but is not always sufficient grounds for actual impeachment, particularly when the perjury involves consensual sexual activity. I certainly would never advise any Presidents to perjure themselves, hoping to escape political and legal trouble under the Clinton precedent. Thus, on one level, many Americans are accepting an aspect of Clinton's "privacy" argument; he should not be driven from office because of perjury related to his sexual conduct. But they are not necessarily accepting the broadest implications of his privacy claim. First, his acts were not "private" in the sense that perjury and obstruction of justice are not private. Nor is sexual contact with an office subordinate purely private. It is one thing to be a libertine, it is another to turn one's workplace into a sexual hot-house. Third, it is hard to argue that someone has a complete right to sexual privacy after a sexual harassment claim has been brought. Under such a theory, defendants could lie about consensual sexual matters at the workplace that did not involve the


35 See Robert Pear, Founding Fathers are Used to Build a Case for Clinton, N.Y. TIMES, Nov. 14, 1998, at A1 (discussing how Clinton's lawyers argued that founding fathers never intended to include sexual misconduct as impeachable offenses); David Rosenbaum, Law's Scope of Perjury is Pivotal in House Vote, N.Y. TIMES, Dec. 12, 1998, at A5 (stating the Democrats do not believe President's sexual history is grounds for impeachment).
plaintiff. It should be relevant that an employer had had sex with other employees and given them special treatment unrelated to the quality of their job performance before he propositioned the plaintiff. It is worth remembering that Lewinsky got a fine job at the Pentagon before Clinton's allies tried to find her something even better. Finally, the President should be held to higher moral, legal, ethical, and constitutional standards.

Any exoneration of Clinton should not be interpreted as an acceptance of his advocates' related arguments that Presidents can only be impeached for "official misconduct" or "crimes against the State." It is not hard to recharacterize presidential perjury as official misconduct, a betrayal of public trust, and a serious threat to the rule of law and the Republic. The distinction, however, also fails because it does not make any sense. Under that approach, a President could commit rape or murder without raising any impeachment issues. Some will say that perjury is not such a serious matter, that the Framers did not have such personal crimes in mind when they passed the Constitution. This argument has its own set of flaws. When crafting constitutional conventions, the American public need not and should not be bound by the Framers' intentions, assuming they can be reasonably ascertained. Second, the Framers took oaths very seriously. Oaths are an essential part of the transition from the Articles of Confederation to the Constitution. As Chief Justice Marshall explained in *Marbury v. Madison*, he was obliged to interpret and enforce the Constitution because he took an oath. William Penn's colonial constitution for Pennsylvania set forth an entire section condemning perjury. The Framers saw them-

36 *Excerpts From Testimony About Gifts to Lewinsky and Her Search for a Job*, N.Y. Times, Oct. 4, 1998, at A1 (discussing President's attempt to find job for Lewinsky); see also William Safire, *Enter 'Mother Wit'*, N.Y. Times, Feb. 8, 1999, at A5 (discussing President Clinton's attempt to find job for Lewinsky, with assistance from Vernon Jordan).


38 5 U.S. (1 Cranch) 137 (1803).

39 See id. at 179 (stating that if oaths were not to be taken seriously they would be solemn mockery).

40 *Charter of Liberties and Frame of Government of the Province of Pennsylvania in America*, reprinted in COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION (1998): XXVI. That all witnesses, coming, or called, to testify their knowledge in or to any
selves as gentleman, bound by honor and dignity. The entire theory of social contract is premised upon people keeping their commitments. Obviously, many Framers did not have pure sexual mores, but they were aware of more severe public standards. This country has never been eager to adopt aristocratic conceptions of sexuality. At least in the North and Mid-Atlantic, rigid Puritan and Quaker views predominated. Alexander Hamilton paid a huge political price when he confessed to adultery. Jefferson lied about his sexual relations with Sally Hemmings when the issue emerged during a presidential campaign.

Whether one agrees with the American public and Congress or not about Clinton (for what it's worth, I would have voted for impeachment if only to reassert the venality of perjury and to condemn his use of military violence abroad to shore up his miserable Presidency), the Constitution has processed this tawdry issue in reasonable fashion. It is too much to ask for an elegant ending to what has been an inherently degrading political experience caused both by Clinton's reckless behavior and the equally hypocritical actions of his opponents. There is no reason for the Court to revisit Nixon v. United States, except to extend its

matter or thing, in any court, or before any lawful authority, within the said province, shall there give or delivery in their evidence, or testimony, by solemnly promising to speak the truth, the whole truth, and nothing but the truth, to the matter, or thing in question. And in case any person so called to evidence, shall be convicted of willful falsehood, such person shall suffer and undergo such damage or penalty, as the person, or persons, against whom he or she bore false witness, did, or should, undergo; and shall also make satisfaction to the party wronged, and be publicly exposed as a false witness, never to be credited in any court, or before any Magistrate, in the said province.

Id.

41 See Gordon Wood, The Radicalism of the American Revolution (1992) (discussing ruling class' belief that they were "gentlemen").

42 See, e.g., Thomas Hobbes, The Leviathan 189-201 (C.B. MacPherson, intro., 1985) (1651). Hobbes, however, did not feel that an oath was relevant to the basic formation of the contract. Id. at 201.

43 See David Hackett Fischer, Albion's Seed: Four British Folkways in America (1989) (discussing Puritan and Quaker mores).


holding to virtually all issues arising under impeachment controversies. Nor should Congress attempt to delegate any of these points to the Courts. This is one of those constitutional issues where the Court had the last word in saying who has the last word in particular cases, namely Congress. Imagine the process if Nixon had gone the other way. We probably already would be in litigation. The airwaves would abound with legalistic complaints about process and substance. Clinton's defenders would really be saying something significant when they assert there is no "legal case" against the President. Constitutional scholars would be cooking up all kinds of clever arguments. Even this event has not been immune to such creativity. Professor Bruce Ackerman asserted that the Court might (or perhaps should) enjoin the impeachment proceedings if they are not resolved before the current Congress adjourns. Admittedly, this argument is not completely precluded by Nixon v. United States, which only dealt with the procedures used in impeachment trials. One can reasonably hope, however, that the Court would dismiss this clever argument as yet another procedural challenge to impeachment that is precluded by the political question doctrine. It also is a bad idea. The country needs to be able to get this process over with very quickly. Imagine a truly dangerous or even insane President. Are we going to restart the prosecutorial process because we only discover these problems toward the end of a congressional term? The next Congress has a variety of ways to change its mind, should it do so. A new set of House of Representatives could pass a resolution recommending that the Senate drop the trial. The Senate could also terminate proceedings, concluding either that President did not commit an impeachable offense or that his impeachable offense did not warrant impeachment.

So where is the good news, the hope, amidst this mess? On the level of constitutional theory and practice, the Clinton scandal demonstrates that Presidents, even Presidents in their second term, need the continuing support of a majority of the American people. Although the Senate apparently did not adopt

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48 See David E. Rosenbaum, Come January, House Vote May Not Matter, N.Y. TIMES, Dec. 9, 1998, at A23 (discussing Ackerman's suggestion that another vote by new house may be necessary).

the convention that lying and perjury is a per se offense, there is no doubt that Clinton has paid a heavy price, in terms of reputation, effectiveness, and historical stature, for his indiscretions. Clinton's stumbling and Gingrich's fall are a welcome reminder to America's political elite that they are ultimately accountable to the American electorate. It is also reassuring to see that the American constitutional system—a weird mix of text, legal doctrine, conventions, public opinion, and systems of representation—has handled this farce so well. The House will have "tarred" Clinton by impeaching him for perjury, obstruction of justice, and abuse of power by refusing to cooperate with the House Judiciary Committee. But, the Senate, which contains forty-five Democratic Senators, did not "feather" Clinton and "run him out of town" by fully impeaching him. Thus the Constitutional system has weathered this political/legal storm far better than the two political parties that currently operate under its restraining influences.

Unfortunately, this farce quickly degenerated into tragedy. The most immediate effect of President Clinton's being caught at his sexual escapades has been his sudden eagerness to use force abroad. In the eight months since Lewinsky's infamous dress proved he had sexual relations with her, Clinton authorized American bombing of four countries: Sudan, Afghanistan, Iraq, and Serbia. Until then, he generally resisted the War Party, led by Secretary of State Madeline Albright. Except for the damage and killings, the attacks in the first three countries was largely symbolic. But Clinton's fear of the political backlash that would be caused by American deaths joined Albright's confidence in the efficacy of bombing to accelerate the misery of hundreds of thousands of ethnic Albanians in Kosovo. Although we can hope that there will be some eventual compromise, the bombings did not deter Serbia, dramatically increased ethnic cleansing and genocide, violated international law by violating the basic concept of sovereignty without obtaining United Nations authorization, angered such potential rivals as Russia and China, and solidified Serbian support for Milosevich's evil actions. Thus, at least when this article was written, the United States and NATO have used questionable, inadequate means to achieve a desirable end. Meanwhile the United States must wrestle with this difficult problem under the leadership of a President who changed him-
self from a “lame duck” into a “crippled duck,” unable to command much moral authority, respect, or confidence.

The really good news is that we retain the structure of a republic, even if we often have the political culture of an empire. Clinton, like emperors of old, thought he was above the law and that one of the primary perks of his job was sexual conquest. Washington, D.C. remains an imperial city filled with courtiers, now known as congressional members, lobbyists, public relations experts, and lawyers. Conspicuous consumption and barely legal corruption have become basic operating principles. So how does a single citizen fight back? Stop watching television. You will feel a lot safer, enjoy the company of the average American a lot more because you will not see them constantly represented by the egomaniacs who populate national television; and you will have more time to read and think for yourself. Finally, do not support any candidate who is beholden to big money.