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THE CONTROVERSIAL TRANSITION PROCESS FROM INVESTIGATING THE PRESIDENT TO IMPEACHING HIM

CHARLES TIEFER *

I. INTRODUCTION

Proceeding from investigation to impeachment of President Clinton marked a major development in national legal affairs, particularly by establishing precedents and procedures for the future.¹ During the preceding decade, the process of specially investigating the President, from Iran-Contra through Whitewater, took on a life of its own.² During that time, the newly intensified combination of parallel investigations of the President by Congressional committees and independent counsels reshaped national legal affairs by producing a new political-legal status: the "specially investigated President."³ In 1998, that new status advanced further, by the transition from investigating the President to impeaching him. That transition warrants its own analysis.

The goal of this article is not to factually assess the allegations against the President, or the appropriateness *vel non* of im-

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1 See Boucher: History Will Recall the Process, ROANOKE TIMES & WORLD NEWS, Oct. 6, 1998 at A3 (noting that the current impeachment process will serve as basis for future impeachment analysis).


peachment on its merits. Rather, this article focuses on the legal-political\textsuperscript{4} precedents and procedures of the transition to the impeachment process itself.\textsuperscript{5} This article analyzes the transition process from the polar viewpoints of idealized proponents of impeachment, and defenders of Presidents.\textsuperscript{6}

The process from investigation to impeachment consists of three basic elements. First, an investigation of the President reaches \textit{investigative closure}, that is, the investigation reaches interim completion with a view toward supporting impeachment of the President. In the instant process, Independent Counsel Kenneth Starr reached the point of investigative closure insofar as he concluded that President Clinton had committed perjury and obstruction of justice in the Lewinsky matter for which to recommend impeachment.\textsuperscript{7} The Independent Counsel statute contains a provision that the Independent Counsel "shall advise" the House of Representatives of any "substantial and credible evidence" which may constitute grounds for impeachment of the President.\textsuperscript{8}


\textsuperscript{6} These two viewpoints are discussed more generally in Tiefer, supra note 3. It should be understood that what is attributed to these viewpoints only occasionally coincides with the actual statements and justifications of Presidential accusers and defenders. On either side, the actual statements are more closely rooted in the particular facts and politics of the Iran-Contra, Whitewater, Lewinsky, or other dispute than in abstract theories applicable to any possible dispute. To make an analogy, if this were an article about celebrity criminal trials, what would be attributed to the viewpoints of accusers and defenders would be abstract and generalizable, and only occasionally coincide with what was said by those accusing or defending any particular defendant (e.g., O. J. Simpson).

\textsuperscript{7} See \textit{The Starr Report}, Parts VI-XI, Sept. 9, 1998. Independent Counsel Starr concluded that there is "substantial and credible" information that President Clinton lied under oath, obstructed justice, and abused his authority in a manner inconsistent with the President's constitutional duty to faithfully execute the laws, which he supported by eleven possible grounds for impeachment. \textit{Id}.

Second, transfer occurs, in which the Independent Counsel presents his evidence, and, optionally, a set of charging conclusions, to the House of Representatives. In this instance, the House received Starr's report and evidence and, through the House Judiciary Committee, swiftly decided to publicize the key videotape of the President's questioning as the decisive action toward the third element. Third and finally, impeachment consideration formally begins, with the House's adoption of a Resolution of Inquiry on the recommendation of the House Judiciary Committee.

This article will analyze these three basic sequential elements of the transition process from the two polar viewpoints of "accusers" and "defenders." Each of three Parts will start with a brief description of the procedural steps in the proceedings on the Lewinsky matter, followed by examples of how the two polar viewpoints might argue about those steps. From the viewpoint of the President's accusers, most of whom favor impeachment, together the three elements amount to the necessary unfolding, of a procedure anticipated by the Constitution's Impeachment

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Clause. The Independent Counsel and the House, led as necessary by its majority party, must go through the constitutional process to determine whether the President committed "high crimes and misdemeanors." Given the President's ability to commit offenses and then cover them up, the accusers believed the process must move swiftly and resolutely forward and present the case to the public and formalize the inquiry, lest the President be seen as "above the law."

By contrast, from the viewpoint of presidential defenders, allegations of this kind about the President should be resolved through public debate and censure of the President, if necessary. These steps followed years of serious displacement of democratic processes by excessive partisan "special investigation."


14 See John B. Mitchell, Another Chat With the Lady in the Grocery Line: Clinton v. Jones, 15 CONST. COMMENT. 441, 441 (1998) (noting that no American is beyond reach of law); Jerome J. Slestack, The Independent Counsel Act Revisited, 86 GEO. L. J. 2011, 2014 (1998) (stating Watergate reflected belief that not even President is above law); The People's Trust Has Been Betrayed; Excerpts From the House Debate on Resolution to Impeach President Clinton, WASH. POST, Dec. 19, 1998, at A32 (quoting House Judiciary Committee Chairman Henry Hyde who proclaimed real issue was not lying about sex); see also O'Sullivan, supra note 13, at 2201 (interpreting Framers' intent of ensuring presidential accountability via Impeachment Clause).


16 See Wilkinson & Ellis, supra note 9, at 1570 (noting how Whitewater has been umbrella under which Kenneth Starr has brought his investigation); see also A Roundtu-
and for the wrong reasons broke through the previous taboo in national life against seeking partisan advantage by threatening to undo the people's choice, by election, of the President. 17

The Conclusion seeks not to approve one viewpoint or the other, but simply to make a suggestion for refining the transition process from investigation of the President to impeachment. That suggestion is to incorporate the Attorney General into the process by which an independent counsel's (or other prosecutor's) investigation makes the transition from investigation to impeachment. An Attorney General could give such recommendations of impeachment a needed stage of legal review in a democratically accountable way, without providing the Attorney General absolute control to unduly protect a President.

II. INVESTIGATIVE CLOSURE: STARR'S CHARGES

In 1997-98, the sexual harassment suit against the President, Jones v. Clinton, 18 proceeded through discovery pursuant to the Supreme Court's remand order. 19 Jones' lawyers deposed President Clinton and elicited his denial that he had had a sexual re-

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17 See Abner J. Mikva, Congress Should Approach Impeachment With Respect for the People's Choice, LEGAL TIMES, Sept. 7, 1998, at 23. For a discussion of current literature on how formal Presidential powers and burdens affect the President's ability to accomplish the goals for which he is elected, see also Michael A. Fitts, The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership, 144 U. PA. L. REV. 827, 835 (1996) (discussing how formal Presidential powers and burdens affect President's ability to accomplish his goals).


relationship with former White House intern, Monica Lewinsky.\textsuperscript{20} Simultaneously, Independent Counsel Starr was told by Linda Tripp, a partisan Republican posing as Lewinsky's friend, that the President was concealing such a relationship. Independent Counsel Starr determined this concealment was done in ways that constituted obstruction of justice and, once Clinton had denied it, perjury as well.\textsuperscript{21} The Independent Counsel statute necessitated that Starr obtain an expansion order before he would have jurisdiction to investigate the matter.\textsuperscript{22} Starr asked Attorney General Janet Reno to apply for one based on Tripp's tapes of Lewinsky; Reno complied and an expansion order was issued by the special judicial panel for Independent Counsel matters.\textsuperscript{23} This immediately became public and a media firestorm ensued over the charges against the President.\textsuperscript{24}

During early 1998, President Clinton made efforts to limit the damage to his public image by continued focus on his efforts to conduct presidential duties. He succeeded in maintaining his public approval rating, although he also worsened his position by continuing denials of the Lewinsky relationship.\textsuperscript{25}

\begin{thebibliography}{9}
\bibitem{20}See James Bennett, \textit{The President; Clinton Marks a 'Vindication' With a Guitar}, N.Y. TIMES, Apr. 2, 1998, at A1 (reporting denial of sexual relationship by President Clinton with Monica Lewinsky in deposition in Paula Jones suit); \textit{Testing of a President; Excerpts From Deposition Given by Clinton in January}, N.Y. TIMES, July 29, 1998, at A15 (containing excerpts from Clinton deposition).
\bibitem{22}Expansion occurs pursuant to 28 U.S.C. § 593(c). Expansion is discussed in Tiefer, supra note 3. For an elaboration on Kenneth Starr's allegations as reported to Congress, see also Daniel H. Politt, \textit{Sex in the Oval Office and Cover-Up Under Oath: Impeachment Offense?}, 77 N.C. L. REV. 259, 260 (1998) (alleging perjury and obstruction of justice).
\bibitem{23}See Roberto Suro, \textit{Jordan Was Justification to Widen Starr Probe}, WASH. POST, Jan. 28, 1998, at A22 (noting the approval of Attorney General Reno and judicial panel with regard to expansion of Starr investigation); \textit{The President Under Fire; Excerpts From Reno Request on Expansion of Whitewater Inquiry}, N.Y. TIMES, Jan. 30, 1998 (highlighting Janet Reno's comments to special judicial panel with regard to expansion of Independent Counsel's jurisdiction).
\bibitem{24}See Richard L. Berke, \textit{Republicans See Jones Case as Double-Edged Sword}, N.Y. TIMES, Mar. 15, 1998, at S1 (analyzing extensive media coverage of Lewinsky scandal).
pendent Counsel pressed his inquiry, successfully obtaining judicial rulings overcoming invocations by White House lawyers of executive and attorney-client privilege, and by the Secret Service of its own privilege. Ultimately, the Independent Counsel obtained Lewinsky’s testimony and physical evidence by a grant of transactional immunity.

During the spring of 1998, Starr repeatedly but unsuccessfully sought to question the President by negotiated request. Ultimately, Starr served him with a grand jury subpoena, and President Clinton submitted to videotaped questioning in the White House by Starr’s prosecutors, on August 17. That evening, on national television, the President acknowledged that in the past he had an inappropriate relationship with Lewinsky. This did not slow the movement toward impeachment. His testimony

sexual relationship with Monica Lewinsky); Francis X. Clines, Jones Lawyers Issue Files Alleging Clinton Pattern of Harassment of Women, N.Y. TIMES, March 14, 1998, at A6 (referring to Clinton’s express denials of impropriety).


29 See John M. Broder, Clinton Refuses to Discuss Independent Counsel’s Request that he Testify Before Grand Jury, N.Y. TIMES, Mar. 12, 1998, at A1 (demonstrating President’s refusal to comply with Independent Counsel’s requests); William Neikirk, Hill Democrats Feel Clinton Must Testify, CHI. TRIB., July 28, 1998, at A10 (indicating points of debate on whether President should comply with Independent Counsel’s request).


31 See ATLANTA J. & CONST., Aug. 18, 1998, at A01 (discussing political impressions and possible implications of Clinton’s admissions).

that day, nonpublic because of the grand jury secrecy rule, combined admissions on his part of the Lewinsky relationship, with the denial that he had lied in his Jones deposition, thus subjecting himself to allegations not only for what had occurred previously but also for alleged lack of truth in his August 17th testimony as well.\textsuperscript{33} Starr concluded that the President had committed perjury and obstruction of justice warranting impeachment;\textsuperscript{34} hence this stage may be termed investigative closure.

\textbf{A. Impeachers' Perspective}

From the impeachers' perspective, this stage amounted to the necessary commencement, for a President who commits a grave crime, of the process anticipated by the Independent Counsel statute and the Constitution's Impeachment Clause. With an order in hand expanding his jurisdiction to cover the crime, the Independent Counsel had the responsibility to investigate and make meritorious charges.\textsuperscript{35} Judicial orders overruling the privilege claims of witnesses such as presidential advisers and the Secret Service vindicated the Independent Counsel's quest.\textsuperscript{36} The President himself had to be questioned, both as to communications and actions where he was among the only witnesses, and also as to matters touching on his state of mind during his alleged crimes - for example, why he thought his testimony in the civil deposition not to be perjurious. To refrain from investigating, questioning, and charging him would place him "above the law."

From this perspective, it was the President, not the Independent Counsel, who had chosen to prolong the matter and to heighten the legal stakes, by misleading the nation and the grand jury through public and private denial of a sexual relationship and months of other dragged-out proceedings in place of a simple early confession.\textsuperscript{37} Once the Independent Counsel de-


\textsuperscript{35} See Suro, \textit{supra} note 23 at A22 (discussing implications of special judicial panel).

\textsuperscript{36} See Simpson, \textit{supra} note 26 (highlighting use of presidential executive privilege).

\textsuperscript{37} See Jonathan Turley, \textit{Clinton's Nullification Strategy of Last Resort}, NAT'L L.J.,
cides that he has strong evidence of alleged perjury by the President, he must choose among a limited array of options. There is a substantial body of opinion suggesting that the Independent Counsel could not indict and try the President while he is in office. Only a recommendation of impeachment to the House would avoid placing the President “above the law.” The President’s wrongful methods of resistance, such as the claims of privilege and the circulation of denials by statements to aides, obstructed Starr’s investigation and thus warranted their own charges.

B. Presidential Defenders’ Perspective

From the “Presidential defense” viewpoint, Starr’s investigative and conclusion-drawing steps aggravated the already serious displacement of democratic processes by excessive and partisan investigation. For four years, Starr overinflated and overextended an initial mandate to look into the Arkansas land deal of Whitewater, blowing it up into his apparent mission to take down the President. By working with Tripp and indirectly with the lawyers for Paula Jones, Starr had himself created and criminalized a matter that other prosecutors might well not have considered worthy of such treatment, namely, a married person’s predictable unwillingness to confess adultery. Starr’s pursuit of the matter as though it were a serious threat to the nation when


38 See Deirdre Shesgreen, Perjury’s The Strong Count. Or is It?, LEGAL TIMES, Sept. 21, 1998, at 16 (evaluating evidence concerning perjury charge).


it was not,\textsuperscript{42} overlooked that the President's actions occurred during a mere civil case on an issue not material to that case, simply as an effort not to be set up by ideological opponents to make a case of his private life.\textsuperscript{43} The President's resistance fit into the pattern of legitimate resistance, spanning the previous decade, by three successive Presidents who all attempted to impose upon them the status of "specially investigated President," rather than amounting to felonious abuse of power.\textsuperscript{44}

If it were not for the overzealous use of the machinery for conducting special investigations, this alleged scandal would have been sorted out by political debate and, if warranted, criticism and even opprobrium in the press, Congress, and other channels of commentary. A sense of proportion by the public would have left it there.\textsuperscript{45} Starr could have skipped the active role of trying to push President Clinton out of office; his resort to the hitherto taboo tactic of impeachment fostered by ideological opponents of the President to try pushing him from office, represented Starr's own misjudgment from which a more neutral figure would have shied away.\textsuperscript{46}


\textsuperscript{43} See Marcia Coyle & Harvey Berhman, Will He Escape This Time?, NAT'L L. J., Feb. 9, 1998, at A1 (evaluating merits of Starr's charges); David E. Rovella, Will He Escape This Time? Perjury Charge a Stretch, Say Nation's DAs, NAT'L L. J., Feb. 9, 1998, at A1 (arguing President Clinton is attempting to avoid spectacle made of his life).

\textsuperscript{44} See Karen Alexander, Abuse of Power: The Weak Link, LEGAL TIMES, Sept. 21, 1998, at 16. All three recent Presidents in that status, Presidents Reagan, Bush, and Clinton, sought to keep the operation of the Washington scandal machinery, from preoccupying public life. This was to allow the President to continue his own efforts to fulfill his constitutional duty and focus on substantive national issues and needs.

Clinton's public and private self-defense, his invocations of privileges, and his negotiations over the terms of Presidential testimony, amounted to legitimately vigorous defense of the Presidential office. Starr's efforts to criminalize these, by terming them acts of obstruction in themselves, reflected the inquisitorial nature of the special investigation machinery. Recall that Independent Counsel Walsh's indictment of former Secretary of Defense Caspar Weinberger on the eve of the 1992 election elicited a wave of pardons by President Bush just before he left office. To a zealous prosecutor or Presidential opponents, what Presidents do, looks like obstruction, to others it does not.

\textsuperscript{45} Even Independent Counsel Walsh had not gone farther; Walsh presented his results in the tempered form of a final report closing out his investigation. He had, in 1987-88, a substantial amount of evidence about President Reagan's Iran-contra indifference to legal restraint, and, by 1992, quite an amount of negative evidence about President Bush's truthfulness in the efforts to obstruct Iran-contra investigations.

\textsuperscript{46} He could have made a neutral factual report without recommendations in that regard, leaving the House to take on itself the weight of an unprecedented political challenge to the President's continuation in office. See Bruce Ackerman, What Ken Starr Neglected to Tell Us, N.Y. TIMES, Sept. 14, 1998. Nowhere in Kenneth Starr's report are the constitutional requirements for impeachment enumerated. Id. at A33.
III. TRANSFER: THE RECEPTION OF STARR’S CHARGING REPORT

Once the prosecutor decides to take his investigation of the President to a further step, transfer occurs. Assuming at least potential receptiveness by the House of Representatives, the prosecutor takes the steps to furnish the House with evidence, and, optionally, a set of charging conclusions. Starr needed a court order to furnish material cloaked with grand jury secrecy to the House for potential, and, as it turned out, actual release. During Watergate, Independent Counsel Jaworski turned over to the House evidence regarding President Nixon with an outline known as the “roadmap.” The Jaworski referral preceded the Independent Counsel statute and presumably shaped the thoughts of those who wrote the referral provision. Using that provision to obtain the necessary court order, Starr turned over to the House an indictment-like report that effectively charged the President with eleven counts of perjury and obstruction, accompanied by the videotaped testimony of the President and extensive documentation, including much about the sexual relationship of the President and Lewinsky.

In the spring and summer of 1998, as it became generally known that Starr leaned toward using this provision, the House majority party led by Speaker Gingrich made preparations to receive the Starr submission. When the referral occurred two months before the 1998 congressional election, the House adopted a short-term resolution, House Resolution 525, governing its processes en route to consideration of a Resolution of In-

48 See, e.g. Excerpts: The Starr Report, supra note 34 (detailing findings of Independent Counsel).
49 See FED. R. CRIM. PRO. 6(e)(2) (indicating that some material discovered in Independent Counsel investigation may be shut off from general public via secrecy order).
50 See generally Clines supra note 25, at A6 (referencing specific portions of President Clinton’s recorded deposition testimony).
51 See David S. Broder & Susan Schmidt, House Group Would View Starr Evidence, WASH. POST, Mar. 19, 1998, at A1. Special House funds were made available for the House Judiciary Committee to hire staff to prepare. Politically, extensive internal strategizing went into how the House majority party would handle the matter. Though no statute or other formal authoritative constraint necessitates that only if the House is receptive can a prosecutor make a referral. However, a prosecutor in an adversary relationship with the President would think twice before making a referral absent such receptiveness, for an adverse reception would give the President’s defenders a definitive edge.
quiry.\textsuperscript{52} House Resolution 525 made a fundamental political decision expected to be to the disadvantage of the President.\textsuperscript{53} Namely, the resolution anticipated making public the evidence underlying the Starr report.\textsuperscript{54} This was implemented by the House Judiciary Committee’s release of the videotape of the President’s questioning session by prosecutors to be nationally televised.\textsuperscript{55}

\textbf{A. Impeachers’ Perspective}

From the impeacher’s perspective, once the Independent Counsel had concluded that the President had committed perjury and obstruction, Starr and the House had few choices other than to proceed with their actions against the President. Anything short of this would be considered allowing him to be “above the law.” In Watergate, Jaworski only furnished evidence after Congress and the public had had extensive opportunity to understand the possible charges through its proceedings, particularly the 1973-1974 hearings.\textsuperscript{56} Accordingly, Jaworski had no need to report any pointed conclusions, and the 1974 House had no need to publicize most of Jaworski’s evidence.\textsuperscript{57} The Constitution and the Framers’ intent make potential impeachment a public matter, requiring public awareness and public judgment. There had been no Congressional hearings of any kind on the Lewinsky matter. Hence, Starr from the impeacher’s viewpoint, could properly decide his role was to furnish Congress and the public with the benefit of his own investigative insights in the form of conclusions,\textsuperscript{58} and the House could consider its proper role was

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  \item \textsuperscript{52} See H.R. REP. NO. 105-703, at 1 (1998); 144 CONG. REC. D956-01 (daily ed. Sept. 10, 1998) (providing for deliberative review by House Judiciary Committee of communication from Independent Counsel).
  \item \textsuperscript{53} See 144 CONG. REC. D956 (explaining review process).
  \item \textsuperscript{54} See id. (making review process information open to public).
  \item \textsuperscript{55} See Dan Carney & Jeffrey L. Katz, Panel Votes to Release Clinton Video After "Vigorously Partisan" Debate, CONG. Q. WEEK. REP., Sept. 19, 1998, at 246 (discussing House Committee debates on public release of deposition videos).
  \item \textsuperscript{56} These included the lengthy and thorough hearings by the Senate Watergate Committee and the initial work of the House Judiciary Committee something of a framework for understanding evidence about what charges might be made. See generally HOFFER & HALL, supra note 12, at 170 (examining impeachment process).
  \item \textsuperscript{57} See generally BERGER, supra note 12, at 195 (providing closer look at history and constitutionality of impeachment process).
  \item \textsuperscript{58} See id. Moreover, the nature of the alleged crime in Watergate gave the prosecutors there a large role apart from charging the President, from taking pleas to trying the President’s conspirators. \textit{Id.} In contrast, the nature of the alleged crime in the Lewinsky
\end{itemize}
to furnish the public with the vital evidence of the alleged offense.

As for the House's reception, the resolution for release of the evidence, House Resolution 525, passed with strong bipartisan support. Subsequent partisanship and Presidential gains in the polls said nothing about the continued need to respond to serious allegations of "high crimes and misdemeanors."

B. Presidential Defenders' Perspective

From the perspective of the President's defenders, the transfer of the matter to the House, the one-sided Starr report and the circus-like release of the videotape of the President, under color of considering impeachment, worked a radical and unwelcome historic shift in the conduct of national affairs. In 1974, the Jaworski referral occurred without any such usurpation. Further, in 1974 the House majority party leadership attempted to keep the matter from being, or appearing, partisan. The avoidance of partisanship is essential to confer legitimacy on the House in a serious consideration of impeachment. By contrast, in 1998, in allowing the matter to be and to appear partisan in strategy and tactics, the House majority party headed by

matter meant that virtually the entirety of the Independent Counsel's role consisted of the preparation for charging the President: no one else pled and no major trial of charges seemed imminent. Id.


60 Shortly after the adoption of House Resolution 525, such bipartisanship ended with a sharp partisan division in the House Judiciary Committee, but to the President's accusers simply reflected the forces of partisan loyalty by House Judiciary Democrats, an ideologically polarized group, rallying around their President. That the President's public support ceased eroding at this time did not diminish the seriousness of the allegations of "high crimes and misdemeanors," but merely showed the tactical skills of the President at the videotaped questioning session.


62 See Francis X. Clines, Bitter Struggle Behind Closed Doors, N.Y. TIMES, Sept. 19, 1998, at 9 (quoting unnamed Democrats as saying that committee meeting that voted for release of videotape was mere voyeurism).

63 Special Prosecutor Jaworski submitted evidence, without charges, to an ongoing impeachment process in the House. Moreover, he did so with the fair expectation, as turned out, that the House would treat what he submitted as evidence to be studied carefully and coolly, in a bipartisan way, behind closed doors, not as the raw material for public partisan tactics by the opposition party against the President.

64 The limited minority party support for H. Res. 525 did not represent a genuine
Speaker Gingrich delegitimized their own processes.

The *transfer* process lacked the elements that would justify so great an alteration in the status of the duly chosen President, from merely being specially investigated, to the very real threat of impeachment, Senate trial, and pressure to leave or to face an ultimate Senate vote on removal from office. That the President's popular support increased after the release of the videotaped evidence, and that the public lost patience with the quest to unseat the President, reflected a sound national antagonism to the unwelcome innovation of the House majority using impeachment for partisan advantage.65

III. IMPEACHMENT CONSIDERATION: PASSAGE OF THE RESOLUTION OF INQUIRY

For all the murkiness of the impeachment process,66 House procedure has crystallized the step that formally commences proceedings. In September of 1998, the House Judiciary Committee moved on after making public the evidence from the Independent Counsel regarding the President. Based on a staff report taking the Starr report's eleven suggested counts of perjury and obstruction and reformulating them as fifteen, the Committee reported to the House in favor of a Resolution of Inquiry.

A Resolution of Inquiry chiefly determines whether the majority of the House stands behind a possible report of impeachment charges. This contrasts with ordinary legislation, which a committee reports to the floor without the House previously adopting any particular resolution.67 In effect, the gravity of impeachment warrants a preliminary House vote before a committee even con-

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65 See Michael Kranish, *Clinton Acting in His Own Defense; Election-style Battle Being Waged Against Impeachment*, BOSTON GLOBE, Sept. 27, 1998, at A1 (explaining that in spite of controversy, Clinton approval ratings are up).


siders the matter. Additionally, a Resolution of Inquiry, by its terms, shapes the committee inquiry.  

Following up House Resolution 525, the majority party put forth in the House Judiciary Committee, and then, on the floor, a proposed resolution that paralleled the 1973 Resolution of Inquiry regarding President Nixon. That Resolution of Inquiry did not confine the inquiry to particular subject matters or a particular duration. The minority party, in opposition, shaped an alternative that focused attention on the lack of a deadline, reflecting the popular desire to get past the Lewinsky matter. After the House defeated that alternative, the final vote to adopt the Resolution of Inquiry, the last step in the transition process that this article will analyze, reflected unanimous support within the majority party, plus the support of 31 Democrats, approximately one out of seven Democrats.

A. Impeachers' Perspective

From the viewpoint of the President's accusers, the initiation of impeachment consideration followed a fair and proper process. The House observed precedent both in the content of the Resolution of Inquiry, and in the process of considering it. By modeling the content of the Resolution of Inquiry on the 1973 one, the House majority threw away every tactical advantage from manipulative redrafting, in favor of standing by precedent. In particular, it quietly discarded the internal propos-

68 See T. R. Goldman, *House Procedural Vote Will Shape Landscape of Impeachment Inquiry*, LEGAL TIMES, Sept., 28, 1998, at A7. It can confine the inquiry to particular subject matters or limited time periods. Id. Additionally, it arms the committee with necessary investigative tools not possessed by standing committees, such as the power to compel witnesses to submit to staff depositions. Id.


71 For concessions made to the minority, see *Impeachment*, CONGRESS DAILY, Oct. 1, 1998 (explaining that House Judiciary Committee modeled inquiry resolution after 1974 Watergate investigation).
als for a much tougher set of investigative procedures.

Similarly, as to the process of consideration, the House gave the minority party the opportunity, both in committee and on the floor, to offer alternatives and to freely debate. The House majority party could take satisfaction that none of its members voted against the Resolution of Inquiry, even some members from pro-Presidental districts. Moreover, it could claim vindication from the 31 Democratic votes in support, enough to call the result "bipartisan."

There may have been few precedents for impeaching the President, but there were just as few precedents for overlooking serious allegations of presidential crimes on the level of perjury and obstruction. That Congress rarely impeaches does not make a conclusive argument for never impeaching. Furthermore, adoption of a Resolution of Inquiry, although a grave step, merely meant going forward with an inquiry. It did not encompass even House impeachment, let alone Senate conviction and removal from office, unless the inquiry developed a case warranting this. Adopting such a Resolution simply was the proper thing to do with such serious allegations.

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73 For concessions to the minority, see Alison Mitchell, Hyde Bows to Democrats on Some Inquiry Issues, N.Y. TIMES, Sept. 29, 1998, at 1. It would be contradictory to blame it for not moving fast enough, and for moving too fast; the possibility of both criticisms suggests that it walked a fine line as to timing, giving enough time for debate without dragging the matter out. Id. See also Jeffrey Taylor, Panel Democrats Try to Set Limits on Clinton Probe, WALL ST. J. Oct. 2, 1998, at 16. The inquiry resolution is almost entirely drawn from the Nixon inquiry, but needs limits not set in that instance in order to prevent the Clinton investigation from dragging on. Id. at A16.


75 See Francis X. Clines, Partisan Rancor: Not Always So Bad for the National Soul, N.Y. TIMES, Oct. 11, 1998, at 3 (noting that even if number "31" was quibbled about, partisan division does not exonerate President); see also Asa Hutchinson, Congressman Asa Hutchinson's Floor Statement Regarding the House Vote on Resolution of Inquiry, Government Press releases, 10/8/98 (noting that in bipartisan vote, House voted to initiate impeachment proceedings).

76 See Robert Scott, Remarks of Congressman Robert Scott Regarding Impeachment Consideration, Government Press Release, Nov. 11, 1998 (stating that several comparatively recent examples of judicial impeachments furnished some precedent, for instance, "high crimes and misdemeanors" might include non-official conduct like tax evasion).

77 See Hutchinson, supra note 75 (urging Congress that vote for resolution is necessary in order to find truth).

78 See U.S. Vote '98: Election May Change Impeachment Dynamic, DOW JONES INT'L NEWS SERV., Nov. 4, 1998, at 9:00 (indicating that decision on impeachment is uncertain until last vote is cast).
B. Presidential Defenders

From the perspective of the presidential defenders, the initiation of impeachment consideration represented a grievous display of partisanship. In contrast to Watergate, or even Iran-contra, this was not a matter where White House misconduct had a largely unknown dimension, necessitating deep and lengthy further investigation before the House made even preliminary judgments. The public felt confident it knew the basic facts of the Lewinsky matter, probably much more than it wanted to know; what remained was judgment. Accordingly, the House process should have focused on whether the President's conduct warranted removal from office. House proceedings should have concerned the issue of what to do with the President, i.e., censure or removal. Members of the House should have taken heed of the public's strong opposition to removing the President from office. Indeed a partisan House vote approving the Resolution of Inquiry laid the groundwork, as, in fact, occurred, for the House majority party to cheapen impeachment by using it in television advertising for partisan advantage by making the President's personal life a basis for negative spots against Members of his party.


80 See David Lauter, Clinton Job Rating Hits 63%, Best Showing Ever Times Poll, L.A. TIMES, Feb. 1, 1998, at A1 (offering that President's private life should not be public and does not affect is job).

81 See Excerpts from Comments by Members of the Judiciary Committee, N.Y. TIMES, Oct. 6, 1998, at A22 (recounting Representative Zoe Lofgren's illuminating comments - she worked with counsel regarding impeachment). See generally Marc Lacey & Richard A. Serrano, Law, Facts Prove Case Against Clinton, Prosecutors Contend at trial, L.A.TIMES, Jan. 16, 1999, at A1 (proposing that all facts of Lewinsky scandal are known and all that remains to be seen is whether those facts support removal of President from office).

82 See Lloyd N. Cutler, James Hamilton, Nicholas B. Katzenbach & Abner J. Mikva, No Time for Partisans, N.Y. TIMES, Sept. 25, 1998, at 27 (noting that there was great partisanship in decision to proceed with impeachment hearings).

83 See Richard L. Berke, With 31 Exceptions, A Partisan Vote, N.Y. TIMES, Oct. 9, 1998, at 21 (suggesting that "bipartisan" Resolution of Inquiry really was not bipartisan).

84 See Congress, Legal Scholars Debate Impeachment Question, CHI. DAILY L. BULL., Feb. 7, 1998, at 219. A letter from over 400 scholars, addressed to Speaker Gingrich is quoted. Id. The authors of the letter stated "members of Congress would violate their constitutional responsibilities if they sought to impeach and remove the President for misconduct, even criminal misconduct, that fell short of the high constitutional standard for impeachment." Id.
Only twice before had Congress considered presidential impeachment. The lack of impeachment proceedings indicates former Congress' attempt to conform with the intent of the Framers, and only employ impeachment in situations which both parties and the public agreed objectively threaten the Constitution. Independent Counsel Starr had previously forfeited public trust, as reflected in his low poll ratings amid professional criticism. For the House majority party to push ahead in this way similarly forfeited public trust. This injured not just the conduct of national affairs for that year and that President, but undermined the Presidency thereafter, by making that office, as it had never been intended by the Framers and (other than in 1868) had never been rendered in two centuries in practice, vulnerable henceforth to a partisanly-driven Congressional opposition.

IV. A MODEST PROPOSAL: A ROLE FOR THE ATTORNEY GENERAL

This proposal does not seek to argue for broad conclusions about the merits of impeachment of Presidents in general or the merits of this impeachment in particular. Rather, it seeks to

85 See Daniel H. Pollitt, Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense? 77 N.C. L. REV. 259, 277-279 (1998). Only two other Presidents have been considered for impeachment, Andrew Johnson, and Richard Nixon. Id. Johnson was ultimately acquitted by the Senate, and Nixon formally resigned before the completion of impeachment proceedings. Id. See also THE IMPEACHMENT REPORT: A GUIDE TO THE CONGRESSIONAL PROCEEDINGS IN THE CASE OF RICHARD M. NIXON, 1-3, 55-57, 243-244 (U.P.I. & World Almanac eds. 1974).

86 See Peter C. Hoffer, No Case for Clinton's Impeachment, NAT'L L.J., Feb. 9, 1998, at A19 (stating that Constitution's Framers intended impeachment to reach only offenses that occur when accused is in office, or are directly related to office); see also Records of the Federal Convention of 1787, at 66 (Madison's notes) (stating that impeachment is necessary when President's acts might impact on nation).

87 See Akhil Reed Amar, Disassembling the Impeachment Train, N.Y. L.J., Dec. 28, 1998, at 2 (positing that relationship between Kenneth Starr and Chief Justice Rehnquist has appearance of impropriety that Framers were seeking to avoid in that Rehnquist appointed Starr to investigate, and now presides over proceedings); see also Richard Ben-Veniste, Comparisons Can be Odious, Mr. Starr, NAT'L L.J., Dec. 21, 1998, at 21 (stating Starr is first Independent Counsel to himself be investigated for possible illegal conduct).

88 See Michael Tuckett & William Neikirk, GOP Facing its Own Trial, CHI. TRIB. Dec. 23, 1998, at 1 (noting Republican party received its lowest approval rating in over one decade due to House impeachment of President Clinton).

89 See O’Sullivan, supra note 13 at 2220 (suggesting that Framers did not intend impeachment as device to accomplish partisan political objectives); see also THE FEDERALIST NO. 65 at 396-397 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (noting decision regarding impeachment is more likely to depend on partisan politics than evidence as to guilt or innocence).
propose a mechanism that will act as another safety check within the three stages of impeachment already discussed.

The proposal concerns an additional role for the Attorney General. Under current law, the Attorney General plays a key role in the system of special investigation of the President, by deciding whether to initiate an Independent Counsel and whether to expand the Independent Counsel investigation. Attorney General Reno decided in 1994 to initiate a Whitewater Independent Counsel. In 1998, she agreed to expand his jurisdiction to the Lewinsky matter. An Attorney General can, by contrast, use her powers to slow down any headlong push toward even more use of the machinery of "special investigation." All through 1997 and 1998, Presidential critics made demands for an Independent Counsel on the matter of campaign finance in the 1996 election. Attorney General Reno turned these demands aside, again and again, even when threatened by the House Committee on Government Reform and Oversight with contempt of Congress.

90 See 28 U.S.C. §§ 592(c), 593(c) (1998); see also Jack Maskell, The Independent Counsel Law, 45-JUL FED. LAW. 28, 32 (1998) (noting that in deciding whether appointment of Independent Counsel was warranted, Attorney General must conduct review of initial allegations to determine whether reasonable grounds for further investigation exist, and then submit findings to three-judge panel of U.S. Court of Appeals); see also Brett M. Kavanaugh, The President and the Independent Counsel, 86 GEO. L.J. 2133, 2154 (1998) (explaining that current Independent Counsel statute authorizes Attorney General to define and delineate Independent Counsel jurisdiction).

91 See Bruce Fein, Whitewater, Appointment Untarnished, WASH. TIMES, Nov. 23, 1994, at A21 (detailing how Attorney General Janet Reno appointed Robert Fiske to head Whitewater investigation, but three-judge panel voted against his reappointment in favor of Kenneth Starr); Investigating the President, Report of the Independent Counsel to Congress, BOSTON GLOBE, Sept. 12, 1998, at C3 (stating that Attorney General Reno applied to expand Kenneth Starr's jurisdiction upon receipt of information from Independent Counsel office that Monica Lewinsky was prepared to offer false testimony in Paula Jones investigation).

92 See 28 U.S.C. § 596(b)(2) (1994); see also Niles L. Godes & Ty E. Howard, Independent Counsel Investigations, 35 AM. CRIM L. REV. 875, 887 (1998) (noting that Attorney General can request Independent Counsel investigation be terminated on grounds that all matters have been resolved); see generally John Q. Barrett, All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct and Judgment in Relation to the Work of an Independent Counsel, 49 MERCER L. REV. 519, 529 (1998) (stating that Attorney General has flexibility in approving or denying expansion of inquiry).

93 See Report to Reno May Fuel Debate on Campaign Finance Probe, WASH. POST, July 23, 1998, at A7 (explaining how Republican members of Senate Judiciary Committee tried to convince Reno that enough evidence of campaign finance abuses existed to warrant Independent Counsel to inquire into 1996 Presidential election).

94 See Reno Set to Brief Senators, FIN. TIMES (London), Aug. 21, 1998, at 4 (stating that Reno had been threatened with contempt of Congress for refusing to reveal contents of memo which made argument for reversal of her refusal to appoint special prosecutor to investigate campaign finance abuses); David Johnston, Lawmaker Seeks Vote on Con-
Under the current process, when an Independent Counsel considers making a submission to the House of Representatives regarding impeachment of the President, the Attorney General has no role. It is suggested that the unsifted forwarding of Starr's recommendation to the House of Representatives, where the process quickly sank to partisanship, represents the aspect of the transition process most in need of some kind of improvement. Those favoring impeachment considered that Starr had solid evidence of "high crimes and misdemeanors." However, Presidential defenders did not consider the evidence to meet the historically high standard for removing a President. There is a need for something to separate the many occasions of partisan or ideological charges against a President from those which might warrant removal. Historically, the taboo against impeachment accomplished that separation. What would be the unhappiest precedent to result would be for the historic restraint on impeachment charges to lose its efficacy for sorting out such charges, without any replacement in sight. That would leave the prospect of easier resort to impeachment charges without the expectation anything will come of such charges but partisan maneuver, a cheapening of the impeachment procedure and a coarsening of national legal affairs.

In order to preclude the diminution of the historic restraint on impeachment charges, and yet to allow serious consideration of meritorious charges, an Independent Counsel (or other prosecutor) making such charges should be obliged first to lay the matter before the Attorney General. The Attorney General would be considering the same issue that the Independent Counsel does - not whether the President is guilty, but merely whether there is "substantial and credible evidence" to go to the House for consid-


\[96\] See Michael Tackett & Roger Simon, Clinton Attorneys Say Case Too Vague, CHI. TRIB., Jan. 12, 1999, at 1 (stating that House managers' trial brief argued that President subverted Constitution and his office); see also Alan Stone, Common Law Shows us the Way, HOUSTON CHRON., Jan. 10, 1999, at 1 (arguing that perjury and obstruction of justice are within definition of "high crimes and misdemeanors").

\[97\] See Louis Freedberg, Clinton Denies All Charges in Senate Trial, SAN FRANCISCO CHRON., Jan. 12, 1999, at A1 (stating President's lawyer's submitted that charges brought against Bill Clinton do not constitute high crimes and misdemeanors).
eration of impeachment. The Attorney General would go through a process similar to the one she followed with Starr's (granted) requests for expansion of jurisdiction and with the (denied) requests for application for appointment of an Independent Counsel on campaign finance.

That is, when the Independent Counsel suggested submitting to Congress a recommendation of impeachment to the Justice Department, review of the evidence by the career Criminal Division of the Justice Department would be expedited. The results would be further reviewed by the senior officials such as the Assistant Attorney General for the Criminal Division and the Deputy Attorney General. Ultimately, the Attorney General would make her own judgment, either approving a submission to the House of Representatives, or, reporting her adverse judgment and submitting to hearings regarding that adverse judgment before Congress.

A time limit, such as 30 or 45 days, would govern the Attorney General's review. More importantly, a further refinement would be an explicit statutory provision that the Attorney General's decision was not final. As a proper fallback, if the House, by majority vote, itself called for consideration of impeachment, a court would properly issue a Rule 6(e) order. Upon its issuance, the evidence from the Independent Counsel would be furnished to the House. In other words, a determined House could still work its will in obtaining evidence, as the Impeachment Clause of the Constitution anticipates, even over Attorney General opposition. This proposed process would merely interpose a stage of Justice Department analysis, and allow the Attorney General to shift the weight of initiation of impeachment from the Independent Counsel to the House, without preventing a deter-

99 See 28 U.S.C. § 593(c) (1994) (defining procedures for jurisdictional expansion of Independent Counsel's power); see also United States v. Tucker, 78 F.3d 1313, 1322 (8th Cir. 1996) (deciding that when Attorney General determines matter warrant further investigation, jurisdiction must be expanded or new Independent Counsel appointed).
100 See 28 U.S.C. § 594(i) (1994) (allowing Independent Counsel power to appoint his own, separate investigative team); see also Barrett, supra note 92, at 528 (noting that Independent Counsel may obtain assistance directly from Department of Justice).
101 See Fed. R. Crim. Pro. 6(e) (setting forth guidelines for disclosure of grand jury testimony).
102 See U.S. Const. art I, § 2, cl.5 (giving House of Representatives sole power over impeachment); see also 28 U.S.C. § 595(c) (1994) (mandating Independent Counsel give full report to House of Representatives).
minded House from proceeding.

Some may wonder whether this would have any effect, with a determined House usually, perhaps invariably, overriding any Attorney General. Alternatively, the proposed process might have several adverse affects: impeding a proper Independent Counsel referral, causing delay at critical times, and hurting the Justice Department's appearance of nonpartisan integrity by dragging it into an inevitably controversial and often supremely partisan decision.\textsuperscript{103}

These counterarguments have much force. However, plausible alternatives are lacking. A court cannot issue an order to go from investigation to impeachment.\textsuperscript{104} It is a prosecutorial judgment in a political context, not a judicial one.\textsuperscript{105} All things considered, the placing of decisions on initiating and expanding independent counsels on the Attorney General has been one of the better-working aspects of the Independent Counsel statute.\textsuperscript{106} It combines a recognition that the Justice Department has recovered from the depths of Watergate,\textsuperscript{107} with giving it a limited and scrutinized, not absolute or secret, role. The role suggested here would be fenced with several checks, with an excessively partisan and Presidential-defending Attorney General doing neither herself nor the President much good, and an Attorney General who kept public confidence by her objectivity and

\textsuperscript{103} See THE FEDERALIST, NO. 65, at 407 (Alexander Hamilton) (stating that impeachment of President will invoke partisanship and animosity); see also Kavanaugh, supra note 90, at 2148 (noting that Department of Justice has fallen under attack for refusing to investigate Vice President Gore's campaign fund-raising).

\textsuperscript{104} See 28 U.S.C. § 595(c) (1994); see also Hon. Peter W. Rodino, The Case for the Independent Counsel, 19 SETON HALL LEGIS. J. 5, 13-14 (1994) (identifying that judiciary appoints Independent Counsel and is responsible for reporting any information that supports impeachment to House of Representatives).


\textsuperscript{106} See 28 U.S.C. § 592(c)(1) (1994) (establishing initiation of Independent Counsel); see also Sharon Lafruniere, Barr Urges 'Fundamental Changes' in Independent Counsel Statute, WASH. POST, Apr. 8, 1992, at A5 (quoting Rep. Barney Frank as saying he is "pleased" with process by which Independent Counsel is chosen); but see Ken Gormley, Starr's Three Silent Chaperones, N.Y. TIMES, Mar. 7, 1998, at A13 (stating that extending Kenneth Starr's jurisdiction from Whitewater to Monica Lewinsky has put Independent Counsel law validity in jeopardy).

fairness having the greatest chance of positive effect.

Moreover, an Attorney General might sometimes make a useful compromise step, moderating the excesses of an Independent Counsel without overplaying her hand and trying to squash him altogether. For example, in the Lewinsky matter itself, the Attorney General might have approved a submission to the House, but canceled out the most controversial parts of the submission: the heavy reliance upon sexually explicit aspects ill-suited for Congressional proceedings; the timing of the referral on the eve of the 1998 election; and the sharp recommendations about impeachment by the Independent Counsel in place, as in 1974, of letting the evidence do the talking. An Attorney General might well seek, not to block the transition from investigation to impeachment, but to channel it (e.g., by removing the more incendiary elements, and smoothing the timing, while focusing on any hard evidence) in ways that benefit all sides. She might establish some public trust that the process was going forward predominantly for objective, not anti-President, reasons.

In any event, the analysis in this article points less to the inexorability of this particular proposal, than to the existence of a new subject. A new political-legal process exists in national affairs, that reorients the relationship of the branches of government, and of the interaction between the system of criminal justice and the political process. This analysis is not the end, but the beginning, of trying to understand, and of discussing how to improve, the process of the controversial transition from investi-


109 See Alison Mitchell, Testing of a President: The Impact; Parties Look to November in Weighing Starr Inquiry, N.Y. TIMES, Aug. 16, 1998, at 1 (warning that Clinton's problems could keep disillusioned Democrats from voting in next election, while energizing Conservatives); see also Alison Mitchell, With Lines Drawn, House Panel Near Impeachment Vote, N.Y. TIMES, Oct. 15, 1998, at A1 (reporting that House vote on impeachment will be among last acts this Congress takes before midterm election recess).

110 See Bill Press, Starr and Impeachment, Take a Hike; Issues are Welcome, But Old News of Scandals Just Doesn't Cut it With Voters, L.A. TIMES, Nov. 5, 1998, at B9 (noting public distrust of Kenneth Starr); see also Nancy Dunne, Polls Show Clinton Job Rating Unimpaired, FIN. TIMES (London), Sept. 15, 1998, at A8 (quoting Walter Burnham, professor at University of Texas who proposes that Starr is out to get President Clinton).
gation to impeachment of the President.